

THE YALE LAW JOURNAL

WILLIAM RANNEY LEVI

Interrogation's Law

ABSTRACT. Conventional wisdom states that recent U.S. authorization of coercive interrogation techniques, and the legal decisions that sanctioned them, constitute a dramatic break with the past. This is false. U.S. interrogation policy well prior to 9/11 has allowed a great deal more flexibility than the high-minded legal prohibitions of coercive tactics would suggest: all interrogation methods allegedly authorized since 9/11, with the possible exception of waterboarding, have been authorized before. The conventional wisdom thus elides an intrinsic characteristic of all former and current laws on interrogation: they are vague and contestable, and thus, when context so demands, manipulable.

AUTHOR. Yale Law School, J.D. expected 2010; Stanford University, B.A. 2006. Three individuals were central to the development of this project. Jack L. Goldsmith offered invaluable guidance from the beginning; I could not ask for a better mentor. Owen M. Fiss graciously supported this project, providing thoughtful comments and helpful criticism. Harold H. Koh consulted and advised throughout; I am immensely grateful for his encouragement. I am thankful to Mariano-Florentino Cuéllar, Jeremy M. Licht, Martin S. Lederman, David F. Levi, and Benjamin Wittes. This Note was completed before the Justice Department released four additional memoranda on April 16, 2009.



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INTRODUCTION

The acquisition of information through interrogation traditionally has been a central component of military and intelligence operations.¹ The need to extract actionable intelligence has, if anything, become more salient since September 11, 2001. A dispersed and “different kind” of enemy with no flag or uniform, an inadequate understanding of this new foe’s organization and operations, and pressure to disrupt future surprise attacks have made interrogation fundamental to the War on Terror.²

Unlike ordinary police interrogation, interrogation undertaken to acquire intelligence information is not designed primarily to elicit admissions or information that may be used in a conventional prosecution. As noted by Central Intelligence Agency (CIA) interrogation manuals, “Admissions of complicity are not . . . ends in themselves but merely preludes to the acquisition of more information.”³ The interrogation goal, as reflected in U.S. Army interrogation manuals, is to “obtain the maximum amount of usable information. . . in a lawful manner, in a minimum amount of time.”⁴ This simply stated objective expresses well the tension inherent to interrogation between obtaining timely intelligence and observing the legal constraints that are understood to apply.

In 2002, the Bush Administration approved the CIA’s use of certain coercive interrogation techniques, reportedly including temperature extremes, shackling, stress positions, sleep and sensory deprivation, loud noises, bright lights, nudity, isolation, shaking, head and stomach slaps, and waterboarding—a technique designed to simulate the sensation of drowning.⁵

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1. See A.J. BARKER, PRISONERS OF WAR 59 (1975).
 2. See THE INDEP. PANEL TO REVIEW DoD DET. OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS 63-64 (2004), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 938-39 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.
 3. CENT. INTELLIGENCE AGENCY, KUBARK COUNTERINTELLIGENCE INTERROGATION 5 (1963) [hereinafter CIA, KUBARK], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Kubark%201-60.pdf>.
 4. DEP’T OF THE ARMY, U.S. ARMY INTELLIGENCE AND INTERROGATION HANDBOOK: THE OFFICIAL GUIDE ON PRISONER INTERROGATION 8 (2005).
 5. See Scott Shane, *Book Reveals Red Cross Report on C.I.A. Torture of Qaeda Prisoners*, N.Y. TIMES, July 11, 2008, at A9; Scott Shane, *Inside the Interrogation of a 9/11 Mastermind*, N.Y. TIMES, June 22, 2008, at A1 [hereinafter Shane, *Interrogation*]; Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 [hereinafter Shane et al., *Secret*]; Dahlia Lithwick, *The Birth of a Torture Program*: Jane

The CIA was not alone in its use of coercive interrogation. A Department of Defense (DoD) "Special Interrogation Plan" authorized eighteen to twenty hours of questioning per day for forty-eight out of fifty-four days, removal of clothing, and exposure to dogs, cold, strobe lights, and loud music.⁶

The use of such pressure techniques and the various legal and policy decisions that authorized them have been variously described as "uncharted,"⁷ "long condemned,"⁸ "new and aggressive,"⁹ and as a fundamental transformation constituting a "New Paradigm."¹⁰ The *New York Times* reported that "[f]or decades before 2002, the United States had considered several of the methods [ultimately approved for use by the CIA] to be illegal torture."¹¹ One author, whose works prompted both the Senate and House Judiciary Committees to hold hearings, claimed that the "U.S. military's long-established constraints on cruelty and torture, dating back to President Lincoln in 1863, were . . . circumvented"¹² and "discarded,"¹³ and that the newly authorized interrogation program "turned its back on this tradition."¹⁴ Some take a different approach in characterizing the Bush Administration's legal framework, but these voices also assume a dramatic break with the past—a

Mayer Reveals How Government Torture Programs Come To Be, SLATE, Aug. 6, 2007, <http://www.slate.com/id/2171773>.

6. See U.S. DEP'T OF DEF., ARMY REGULATION 15-6: FINAL REPORT: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 13-18 (2005) [hereinafter SCHMIDT REPORT] (containing the report of Lieutenant General Randall M. Schmidt, U.S. Southern Command Air Forces Commander, who was the senior investigating officer); Memorandum from William J. Haynes II, Gen. Counsel, on Counter-Resistance Techniques to Sec'y of Def. (Nov. 27, 2002) [hereinafter Haynes Counter-Resistance Memo], in THE TORTURE PAPERS, *supra* note 2, at 236; Memorandum from Jerald Phifer, LTC, U.S. Army, Dir. J2, on Request for Approval of Counter-Resistance Strategies to Commander, Joint Task Force 170 (Oct. 11, 2002) [hereinafter Phifer Memo], in THE TORTURE PAPERS, *supra* note 2, at 227, 227-28; Memorandum from Donald Rumsfeld, Sec'y of Def., on Counter-Resistance Techniques in the War on Terrorism to the Commander, U.S. S. Command (Apr. 16, 2003), in THE TORTURE PAPERS, *supra* note 2, at 360, 360-65.
7. Shane et al., *Secret*, *supra* note 5.
8. Shane, *Interrogation*, *supra* note 5.
9. PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 2 (2008).
10. Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, 107.
11. Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. TIMES, July 25, 2008, at A19.
12. SANDS, *supra* note 9, at 22-23.
13. *Id.* at 2.
14. Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, at 218, 279.

break justified by exigency. Former Attorney General John Ashcroft posed and answered the question of interrogation policy change: “[W]e made it through the Second World War with one set of rules and we made it through the Cold War with another set of rules; shouldn’t we just lock in on all those things and pretend the world’s the same? It’s not.”¹⁵

A prominent public television series said that these methods are the “harshest techniques ever authorized for use by American soldiers.”¹⁶ The *Washington Post* reports that the Department of Justice “rejected a decades-old U.S. ban on the use of ‘mind-altering substances’ on prisoners.”¹⁷ A *New York Times* retrospective on the creation of the Bush Administration’s interrogation policy pronounced conclusively that “[n]ever in history had the United States authorized such tactics.”¹⁸ Policymakers, elected officials, legal scholars, and opinion leaders have been no less certain in their pronouncements about departures from legal tradition and unprecedented aggressiveness in the interrogation context.¹⁹

The widespread assumption²⁰ that the Bush administration’s interrogation policies represent a dramatic repudiation of and stark departure from American traditions is a central premise of both sides of the extensive and heated debate

15. *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part V: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2008) (on file with author) [hereinafter *House Guantanamo Bay Hearing*] (statement of John Ashcroft, former Att’y Gen. of the United States).
16. *Frontline: Bush’s War* (PBS television broadcast Mar. 24, 2008), available at <http://www.pbs.org/wgbh/pages/frontline/bushswar/>.
17. Joby Warrick, *Detainees Allege Being Drugged, Questioned: U.S. Denies Using Injections for Coercion*, WASH. POST, Apr. 22, 2008, at A1.
18. Shane et al., *Secret*, *supra* note 5.
19. See, e.g., *Coercive Interrogation Techniques: Do They Work, Are They Reliable and What Did the FBI Know About Them?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (on file with author) [hereinafter *Coercive Interrogation Hearing*] (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary); *id.* (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary); *id.* (prepared statement of Sen. Russell D. Feingold, Member, S. Comm. on the Judiciary); THE TORTURE PAPERS, *supra* note 2, at xvii; David Luban, *Torture, American-Style: This Debate Comes Down to Words vs. Deeds*, WASH. POST, Nov. 27, 2005, at B1; American Civil Liberties Union, *Torture Is Wrong, Illegal and Un-American*, <http://www.aclu.org/safefree/torture/index.html> (last visited July 28, 2008).
20. One dissonant voice has argued that “CIA torture methods . . . have metastasized like an undetected cancer inside the U.S. intelligence community over the past half century.” ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* 5 (2006). McCoy purports to document the history of CIA involvement in interrogation. His book does not seek to determine, however, what methods of coercive interrogation were officially authorized. Rather, it collects anecdotal examples of alleged practice (without regard to whether such practice reflected official policy).

about the justifiability, efficacy, and legality of coercive means of interrogation.²¹ But as this Note will show, this widespread assumption is simply wrong. There has been a remarkable continuity between interrogation policies that prevailed after 9/11 and those employed in previous eras of heightened security threats. For the fifty years prior to 9/11, the United States consistently professed high ideals about its interrogation policies but at the same time authorized aggressive interrogation policies when the security threat seemed (to the President and intelligence and military officers) to warrant them. Just as happened after 9/11, for decades before 9/11 CIA and military officials crafted interrogation policies with a great deal more flexibility than the high-minded legal prohibitions of coercive tactics appeared to many to permit. In fact, as this Note will show, every interrogation method allegedly authorized since 9/11, with the possible exception of waterboarding,²² was authorized at times before 9/11 and was considered to be consistent with the reigning legal framework.²³ Furthermore, and almost without exception, the techniques approved after 9/11 for military interrogations of unlawful combatants would

21. Commentators often employ an unstated assumption that coercive interrogation post-9/11 represents a departure from historical practice, approaching the problem as if it were a totally new legal conundrum for the United States. See, e.g., PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 1-2 (2005); Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 863-64 (2004); Alan Dershowitz, *Tortured Reasoning*, in *TORTURE: A COLLECTION* 257, 264-65 (Sanford Levinson ed., 2004); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1233-34 (2005); Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 672 (2006); Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra*, at 291; Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005 (Magazine), at 67.
22. That waterboarding may have never been authorized specifically does not indicate that it was considered illegal. Darius Rejali told ABC News that a soldier who participated in waterboarding in "January 1968 was court-martialed . . . and he was drummed out of the Army." *History of an Interrogation Technique: Water Boarding*, ABC NEWS, Nov. 29, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1356870>. Rejali says that the reference to the court-martial is in Guenter Lewy's book *America in Vietnam*. E-mail from Darius Rejali to author (Aug. 1, 2008) (on file with author). This is true, though Lewy does not indicate what the outcome of the court-martial was, much less whether the soldier was "drummed out of the army," as Rejali claims. See GUENTER LEWY, *AMERICA IN VIETNAM* 329 (1978); see also Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 472 (2007) (arguing that waterboarding has been considered illegal when used in the past).
23. Formerly classified CIA publications discuss the use of sound waves and light. See Stanley B. Farndon, *The Interrogation of Defectors*, *STUD. INTELLIGENCE*, Summer 1960, at 9, 27. This author was unable to find an official directive authorizing the same; as such, these are possible, although highly unlikely, exceptions.

have been understood to fall within the legal constraints of the Geneva Protections for protected prisoners of war at one point or another pre-9/11. Several techniques (for example, sleep deprivation, and standing as a stress position) that were understood at times before 9/11 as lawful by the military for use on protected prisoners of war were more coercive by degree than the same techniques authorized for use on unlawful combatants post-9/11. Other techniques previously authorized (such as threats of violence) were considered techniques of uncertain legality and specifically ruled out as too coercive after 9/11 for use by the military on unlawful combatants. With the possible exception of waterboarding, the CIA techniques reportedly authorized post-9/11—such as sleep and sensory deprivation, stress positions, and some direct physical duress—had been authorized at points before 9/11 and understood to fit within the then-relevant legal architecture.

In short, the post-9/11 approach to coercive interrogation, contrary to conventional wisdom, is not new. And there are other aspects of the United States's post-9/11 interrogation regime that have precursors dating to World War II. First, both before and after 9/11, the institutions that promulgated various interrogation policies questioned or resisted the use of some coercive measures. They did so less as a reaction to evidence of inefficacy than because of a combination of independent instrumental considerations concerning the security threat as well as a sense of what constituted ethical or legally permissible behavior. Both before and after 9/11 these concerns led the government to avoid certain types of coercive interrogation and to develop novel yet highly coercive methods that appeared at the time more obviously legal and palatable.

Second, both before and after 9/11, applicable proscriptive language in the various legal instruments governing interrogation was opaque and open to interpretational latitude. This meant that context became an important factor in dictating the ultimate interpretations that guided policy. Even if the relevant legal terms remained constant over the course of different conflicts and periods, to assume an unchanging interpretation of the legal rules is to make possible the erroneous conclusion that the law, prior to 9/11, had constricted permissible interrogation methods in the same way regardless of place and time. This quite clearly was not the case for U.S. interrogation policy, which has varied greatly in response to context despite unchanging legal language. Absolute bans on vaguely defined abuse have provided, and continue to provide, great interpretative latitude. But the conventional wisdom—assuming unprecedented change post-9/11 in what the legal rules were interpreted to allow—has gone unchallenged.

This is, at least in part, a consequence of the Bush Administration's flawed and careless legal work²⁴—such as the conclusion that the legal definition of torture was limited only to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” and the argument that the President's Commander-in-Chief power allows him complete discretion to authorize interrogation by torture despite a federal criminal statute to the contrary.²⁵ This type of legal reasoning has made it appear that for coercive interrogation to be considered lawful, the existing legal regimes had to be eviscerated through an unprecedentedly crabbed interpretation and outrageous assertions of executive prerogative to ignore the law. This, again, is false. Such extreme legal claims have tended to conceal an intrinsic characteristic of all former and present laws on interrogation: they are vague and contestable, and thus, when context so demands, manipulable. And context so demanded well before September 11, 2001.

This Note proceeds in three parts. Part I discusses how, post-9/11, government officials interpreted elastic legal instruments to allow techniques of coercive interrogation that the CIA and military nevertheless resisted due to concerns regarding morality, instrumentality, and retroactive discipline. Part II considers how this very same dynamic characterizes interrogation law and policy at points during the period 1949-1973, wherein the aforementioned concerns led the government both to avoid certain types of coercive interrogation and to design new and yet highly coercive techniques that appeared then more obviously legal and morally justifiable. Part III continues this inquiry for the period 1973-2001, and addresses how the simplest solution to avoid the most difficult legal questions and explicit ethical qualms appears to have been the near-total cession of interrogation responsibilities to non-American personnel.

To be clear, this Note does not make a normative argument about how the law should have been interpreted at any time nor about what the law should be. It defends no particular interpretation, but only describes what reasonable policymakers from both political parties have construed the law to allow at various points in history. The scope of this Note, therefore, includes only what has been authorized as consistent with the law; beyond its scope is any discussion of whether or why interrogators at any time may have transgressed

24. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* 148 (2007).

25. Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memo], in *THE TORTURE PAPERS*, *supra* note 2, at 172, 204.

official policy through confusion as to what was authorized or for any other reason. This Note seeks to upend the conventional wisdom about the novelty of coercive interrogation methods so that a more informed debate can be had about the difficulties of crafting interrogation policies to meet a severe threat. All of the various legal instruments that bear on interrogation have been interpreted not to proscribe the authorization of coercive tactics. This astonishing continuity demands that we rethink how to construct interrogation law and policy in wartime.

I. THE LAW'S LATITUDE: SEPTEMBER 11, 2001 TO THE PRESENT

The law governing interrogation underwent great change from 2001 to 2008. But one important characteristic of the law did not: all current legal restrictions still provide the requisite latitude to make available the most extreme interrogation measures reportedly approved post-9/11. In this key respect, the character of the law remains unaltered. It remains ambiguous and accommodating. It remains an essential continuation of the flexible legal strictures, dating back to World War II, that predate current interrogation law. The relationship between law and interrogation policy after September 11, 2001, mirrors previous practices in other respects as well. Confronted with threats to national security, the institutional players responsible for promulgating and executing interrogation policy were freed but also confounded by law. Elastic legal regimes allowed the authorization of techniques that ultimately both the CIA and military appeared to push back against for both virtuous and instrumental reasons: a blend of institutional resistance to "improper" or inappropriate practices and a fear of legal repercussions.

On February 7, 2002, a directive from President George W. Bush established that neither the prisoner of war (POW) protections of the Third Geneva Convention²⁶ nor the Conventions' Common Article 3—proscribing "cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment"²⁷—would apply to al Qaeda or the Taliban.²⁸ The Geneva Conventions were determined not to apply to the

26. 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 III].

27. *Id.* art. 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

28. Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memo], in THE TORTURE PAPERS, *supra* note 2, at 134, 134-35.

war against al Qaeda since, as the Justice Department advised, al Qaeda is not a nation-state, is not a signatory to the treaties, and its members do not qualify as legal combatants.²⁹ Members of the Taliban were found³⁰ to be “unlawful combatants” not meriting POW status since they did not meet the necessary requirements of Article 4 of the Third Geneva Convention which are to belong to a hierarchical command structure, to bear a distinctive sign, to carry arms openly, and to behave in accordance with the laws and customs of war.³¹ Common Article 3 was considered inapplicable purportedly because the “relevant conflicts are international in scope and Common Article 3 applies only to ‘armed conflict not of an international character.’”³² Though international humanitarian law (the law of war) was thus understood originally as largely inapplicable, the treatment of unlawful combatant detainees held outside the United States was unavoidably still subject to international human rights law which is operative at all times. It was within this general legal context that the interrogation policies of the CIA and military would develop.

A. Law and Interrogation: The Central Intelligence Agency

As in previous periods of insecurity, the 9/11 attacks established a fertile environment for the adoption of more permissive policies. Sometime in 2002, a set of “enhanced interrogation techniques”—reportedly including shaking, slapping, prolonged standing, sleep deprivation, exposure to cold, and waterboarding—were authorized for use by the CIA on high-value al Qaeda

29. Memorandum from Jay S. Bybee, Assistant Att’y Gen., on Application of Treaties and Laws to al Qaeda and Taliban Detainees to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 22, 2002), in *THE TORTURE PAPERS*, *supra* note 2, at 81, at 89.

30. Memorandum from Jay S. Bybee, Assistant Att’y Gen., on Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 to Alberto R. Gonzales, Counsel to the President (Feb. 7, 2002), in *THE TORTURE PAPERS*, *supra* note 2, at 136, 136.

31. Geneva III, *supra* note 26, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

32. Bush Memo, *supra* note 28, at 134-35. This determination was based on the belief that Common Article 3 “refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory”—not to a transnational armed conflict such as war against Afghanistan or al Qaeda. Memorandum from John Yoo, Deputy Assistant Att’y Gen., and Robert J. Delahunty, Special Counsel, on Application of Treaties and Laws to al Qaeda and Taliban Detainees to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 9, 2002), in *THE TORTURE PAPERS*, *supra* note 2, at 38, 44.

detainees held abroad.³³ Still, the CIA interrogation program was “palsied by lawyers”³⁴ and by pronounced concerns respecting the legality of interrogation techniques under U.S. law proscribing torture. U.S. law proscribing torture outside of the U.S. was passed pursuant to the Convention Against Torture.

1. *The Torture Statute*

When the United States ratified the U.N. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), the Senate committed to take effective measures to prevent acts of torture when perpetrated outside of the United States.³⁵ Under the terms of the subsequently enacted criminal statute, 18 U.S.C. §§ 2340-2340A (Torture Statute), whether a particular act is torture turns primarily upon whether it is “specifically intended to inflict severe physical or mental pain or suffering.”³⁶ The statute does not define “severe” for purposes of describing physical pain constituting torture. The statute is more forthcoming when it comes to mental pain or suffering. The statute says that here “severe” describes “prolonged mental harm” caused by the infliction or threatened infliction of severe physical pain or suffering, the use or threatened use of mind-altering drugs, and threats of imminent death or that a third party will be subjected to death, physical pain, or mind-altering substances.³⁷

The Senate also acceded to Article 16 of the CAT and committed the United States to prevent “cruel, inhumane or degrading” (CID) treatment, but “only insofar as the term [CID] means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”³⁸ The treaty did not call for state parties to implement measures pursuant to this commitment, and no law criminalizing CID treatment was passed. The Bush Administration, relying on jurisprudence suggesting that constitutional guarantees do not apply

33. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

34. Frontline: The Torture Question, Interview with Michael Scheuer, <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/scheuer.html> (last visited Feb. 11, 2009) [hereinafter Scheuer Interview].

35. See Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51 (1984), 1465 U.N.T.S. 85, 114 (June 26, 1987).

36. 18 U.S.C. § 2340(1) (2000).

37. *Id.* § 2340(2).

38. S. EXEC. REP. NO. 101-30, at 36 (1990) (internal quotation marks omitted).

extraterritorially to aliens,³⁹ contended that constitutional prohibitions of CID treatment did not extend beyond the territorial jurisdiction of the United States to aliens held in U.S. custody overseas, and for a time understood its legal obligations in light of this perceived incorporated geographic limitation.⁴⁰

The Torture Statute, then, was seen as the only applicable legal limit on interrogation of unlawful combatants. But the statute gave uncertain guidance, and skittish lawyers in the CIA general counsel's office sought assurance from the Department of Justice that the CIA interrogation program was legal under the statute.⁴¹ The resulting Office of Legal Counsel (OLC) legal memorandum concluded that the Torture Statute "proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical."⁴² The memo construed the indeterminate word "severe"—when applied to physical pain—to encompass only pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁴³ For mental pain or suffering to qualify as torture, the memo concluded, it "must result in significant psychological harm of significant duration, e.g., lasting for months or even years."⁴⁴ Thus, at least in the abstract, the memo instructs that the use of interrogation methods falling short of causing physical pain comparable to organ failure or long-term significant psychological harm would not constitute torture and consequently could not be prosecuted as criminal acts under the Torture Statute. The memo also opined that criminal liability resulting from transgression of the statute could be avoided by invoking a necessity defense or self-defense, and that the torture law *itself* violated the President's constitutional Commander-in-Chief power—because it prevented him from

39. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). This position was taken notwithstanding Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 275-78 (Kennedy, J., concurring), which appeared to suggest that such a determination is contingent upon the right at question and the particular circumstances, and without the benefit of a clear articulation of that proposition as was recently provided in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

40. Letter from William E. Moschella, Assistant Att'y Gen., to Senator Patrick J. Leahy (Apr. 4, 2005) [hereinafter Moschella Letter], available at http://www.pegc.us/archive/DOJ/moschella_letter_20050404.pdf. For a different take, see Abraham D. Sofaer, *No Exceptions*, WALL ST. J., Nov. 26, 2005, at A11.

41. See Joby Warrick, *Justice Advised CIA in '02 About Legal Waterboarding*, WASH. POST, July 25, 2008, at A8.

42. Bybee Memo, *supra* note 25, at 172.

43. *Id.*

44. *Id.*

gaining necessary intelligence to prevent future attacks—and so could not bind executive branch officials.⁴⁵ A second, still mostly classified, memorandum addressed the legality of specific techniques already in use or proposed for use,⁴⁶ reportedly providing guidance as to the approved frequency and duration of their use.⁴⁷ By virtue of the OLC memoranda, the CIA lawyers, and the policymakers and interrogators they advised, thought they had been given a legal “blank check.”⁴⁸

Still, even in the face of such expansive legal absolution, all reports suggest that CIA concerns regarding legality did not dissipate.⁴⁹ During the immediate post-9/11 period the urgency to avert another attack was great, but so too were CIA concerns involving the potential legal fallout from going too far.⁵⁰ Indeed, despite the “golden shield” that the Justice Department had provided, it has been reported that CIA Director George Tenet, fearful of overstepping lawful boundaries and exposing his agents to legal liability, regularly sought

45. *Id.* at 204-07.

46. See Memorandum from Jay S. Bybee, Assistant Att’y Gen. (Aug. 1, 2002), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJOLC000601.pdf>. The recipient of this memorandum is redacted, but the ACLU reports that it was the CIA. See American Civil Liberties Union, Documents Released by the CIA and Justice Department in Response to the ACLU’s Torture FOIA (July 24, 2008), <http://www.aclu.org/torturefoia/search/searchdetail.php?r=4558&q=>.

47. See Shane et al., *Secret*, *supra* note 5.

48. GOLDSMITH, *supra* note 24, at 151.

49. See Ross & Esposito, *supra* note 33; Warrick, *supra* note 41.

50. See *Justice Department’s Office of Legal Counsel: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 10 (2008) [hereinafter *OLC Hearing*] (statement of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice); *Worldwide Threats: Hearing Before the H. Permanent Select Comm. on Intelligence*, 110th Cong. (2008) (on file with author) (statement of General Michael Hayden, Director of Central Intelligence) [hereinafter *Hayden Testimony*, Feb. 7, 2008]; *Current and Projected National Security Threats: Hearing Before the S. Select Comm. on Intelligence* 110th Cong. (2008) (on file with author) (statement of General Michael Hayden, Director of Central Intelligence) [hereinafter *Hayden Testimony*, Feb. 5, 2008]; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. TIMES, Dec. 7, 2007, at A1; Memorandum from George Tenet, Dir. of Cent. Intelligence (Jan. 28, 2003), available at http://www.aclu.org/pdfs/safefree/cia_3684_001.pdf. Although the recipient is redacted in this memorandum, the ACLU reports that it was addressed to the Office of Legal Counsel. See American Civil Liberties Union, Documents Released by the CIA and Justice Department in Response to the ACLU’s Torture FOIA (July 24, 2008), <http://www.aclu.org/torturefoia/search/searchdetail.php?r=4558&q=>.

confirmation from the National Security Council's Principals Committee⁵¹ that the use of particular techniques was legal.⁵²

There were other concerns, as well. Some CIA officers declined training in the use of coercive techniques, resisting based on discomfort with their use and notions of propriety.⁵³ The *New York Times* has reported that the "more cerebral" interrogators left the "infliction of pain and panic" to others—to the "gung-ho paramilitary types," the derisively described "knuckledraggers."⁵⁴ Such reporting is somewhat outsized, but if generally accurate may be suggestive of attitudes and moral concerns within the Agency. Loftier considerations appear also to have animated beliefs. One officer who opted out of training said later that techniques such as waterboarding should at least give us pause "[b]ecause we are Americans, and we're better than that."⁵⁵ Interestingly, it does not appear that a belief in the inefficacy of coercion factored prominently among the concerns regarding the use of harsh methods of interrogation.⁵⁶ Rather, as the urgency of the threat declined, and as other intelligence sources and methods began providing intelligence, perceptions regarding the appropriateness⁵⁷ and instrumentality (vis-à-vis other available avenues of information acquisition) of coercive methods appear to have militated against the use of harsh interrogation techniques.⁵⁸

Still, the primary concern remained legality. The Agency, it turns out, was prescient in its skepticism—despite almost total legal absolution from the

51. This committee consists of Vice President Dick Cheney, National Security Advisor Condoleezza Rice, Defense Secretary Donald Rumsfeld, Secretary of State Colin Powell, and Attorney General John Ashcroft. See Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'* ABC NEWS, Apr. 9, 2008, <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256>.

52. *Id.*

53. See Ross & Esposito, *supra* note 33; ABC World News, Interview by Brian Ross with John Kiriakou ²⁵, http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blottero71210.pdf, at 25 (last visited Mar. 8, 2009) [hereinafter Kiriakou Interview].

54. Shane, *Interrogation*, *supra* note 5 (internal quotation marks omitted).

55. Kiriakou Interview, *supra* note 53, at 29.

56. Perhaps this was a function of the same uncertainty that characterizes the debate over efficacy in the public sphere. For an overview of this debate, see BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 191-98 (2008).

57. See Ross & Esposito, *supra* note 33; Shane, *Interrogation*, *supra* note 5.

58. See *DNI Authorities and Personnel Issues: Hearing of the S. Select Comm. on Intelligence*, 110th Cong. (2008) (on file with author) (statement of Admiral Michael McConnell, Director of National Intelligence); Hayden Testimony, Feb. 7, 2008, *supra* note 50; Hayden Testimony, Feb. 5, 2008, *supra* note 50.

Justice Department. In June 2004, the August 2002 memorandum that had so narrowly parsed the word “severe” was withdrawn by OLC. A new and less permissive memorandum provided a more modest construction of practices constituting torture. The new guidance concluded that Congress had not intended only to criminalize practices causing “excruciating and agonizing pain,”⁵⁹ but declined to disavow the earlier position on presidential power on the basis that it was unnecessary to address.⁶⁰

Whatever the proper interpretation of the replacement, the withdrawal of the original memorandum appears to have precipitated the suspension of some techniques and exacerbated preexisting CIA uncertainty and concerns regarding the continued legality of enhanced techniques.⁶¹ Indeed, earlier in the spring a CIA Inspector General report had reportedly questioned the supposed inapplicability of the ban on CID treatment to interrogations of aliens abroad, had determined that some of the techniques authorized did indeed constitute CID treatment under the Torture Convention, and expressed concern about interrogators’ legal liability.⁶² Thus, in June, by the time the previous legal guidance was repudiated, the *New York Times* reported that “[c]onfusion about the legal limits of interrogation has begun to slow government efforts to obtain information from suspected terrorists” even as counterterrorism officials feared the summer months would bring renewed attacks.⁶³

2. *The Fifth Amendment*

Two months after the rescission of the August 2002 memorandum, a worried August 4, 2004, memorandum from the CIA to the OLC described congressional and judicial developments that also appeared to question the legal foundation undergirding its interrogation program.⁶⁴ The memorandum

59. Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel on Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A to the Deputy Att’y Gen. (Dec. 30, 2004) [hereinafter Levin Memo], available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

60. *Id.*

61. See Shane, *supra* note 11.

62. See Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1.

63. David Johnston, *Uncertainty About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists*, N.Y. TIMES, June 28, 2004, at A8.

64. See Memorandum (Aug. 4, 2004), available at http://www.aclu.org/pdfs/safefree/cia_3685_001.pdf. The ACLU reports that this memorandum was sent from the CIA to the

recounts previous legal guidance to the effect that waterboarding did not violate the Torture Statute and that Article 16 of the Convention Against Torture did not apply extraterritorially. The first legal conclusion was now of course uncertain following the retraction of the August 2002 memorandum. The sustainability of the second was now under question in advance of congressional attempts⁶⁵ to extend the CAT prohibition on “cruel, inhumane or degrading” treatment to interrogations abroad and following the Supreme Court’s decision in *Rasul v. Bush*,⁶⁶ which according to the memorandum “raises possible concerns about future US judicial review.”⁶⁷

A new series of OLC memoranda, apparently issued in response to such concerns, sought to provide greater legal clarity. It was reported that a February 2005 memorandum gave legal sanction to the harshest techniques yet, endorsing the use of “combined effects” that included the simultaneous use of such techniques as head slapping and temperature extremes.⁶⁸ Then, as Congress continued to consider the extension of the CAT’s prohibition on CID treatment to detainees in U.S. custody regardless of location—a direct repudiation of the administration’s position that the prohibition on CID treatment in the CAT did not have extraterritorial reach—the OLC issued another memorandum.⁶⁹ The memorandum analyzed the impact of a proposed law that defined CID treatment as acts regardless of location committed that would be held unconstitutional under the Fifth, Eighth, or Fourteenth Amendments to the Constitution. The resulting OLC memorandum reportedly concluded that the authorized CIA interrogation techniques would still be lawful under the proposed standards.⁷⁰ The opinion found that only conduct

OLC. See American Civil Liberties Union, Documents Released by the CIA and Justice Department in Response to the ACLU’s Torture FOIA (July 24, 2008), <http://www.aclu.org/torturefoia/search/searchdetail.php?r=4558&q=>.

65. The memorandum refers to Senator Richard Durbin’s amendment to the 2005 defense authorization bill that sought to make unlawful, wherever committed, the use of cruel, inhumane, and degrading treatment. 150 CONG. REC. S6784 (daily ed. June 15, 2004) (statement of Sen. Richard Durbin). That particular amendment was ultimately unsuccessful, but the passage of the McCain Amendment (called the Detainee Treatment Act) later that year accomplished the same objective. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44. The Act is included (as Title X) in the Department of Defense Appropriations Act of 2006 and was signed into law on December 30, 2005.

66. 542 U.S. 466 (2004).

67. See Memorandum, *supra* note 64.

68. Shane et al., *Secret*, *supra* note 5.

69. See *id.*

70. See *id.*

that “shocks the conscience” is unconstitutional, and that therefore even the use of waterboarding (as used by the CIA)⁷¹ in certain dire situations would not amount to the “cruel, inhumane, and degrading” treatment proscribed under the proposed statute.⁷² OLC memoranda subsequent to the passage of the Detainee Treatment Act (DTA) are said to have confirmed this conclusion.⁷³

This line of reasoning holds that Supreme Court jurisprudence—most prominently reflected in *Ingraham v. Wright*⁷⁴—cabins the relevance of the Eighth Amendment prohibition on “cruel and unusual punishment” to post-conviction treatment in the criminal justice system.⁷⁵ Furthermore, this perhaps contestable position posits that the due process guarantees of the Fifth and Fourteenth Amendments can be understood—based on *Rochin v. California*⁷⁶—to bar only interrogation methods, when used in searches unrelated to an interest in prosecution, that “shock the conscience.”⁷⁷ *Rochin* can be understood, as then-Attorney General Michael Mukasey recently averred,⁷⁸ to suggest that such a determination depends on the circumstances of the case: a weighing of the coercion used against the value or legitimacy of the government’s objective.⁷⁹ In letters to Congress during this time⁸⁰ the Administration cited to *County of Sacramento v. Lewis* for the proposition that the “shocks the conscience” standard provides protection against “only the

71. OLC Hearing, *supra* note 50, at 18 (statement of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice).

72. Shane et al., *Secret*, *supra* note 5.

73. *See id.*

74. 430 U.S. 651, 664 (1977).

75. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 135 (2002); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 80 (2006).

76. 342 U.S. 165, 172-74 (1952).

77. ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11, at 22-23 (2008); Alan M. Dershowitz, *Torture Should Be Legalized and Regulated*, in IS TORTURE EVER JUSTIFIED? 22, 24 (Tom Head ed., 2005). This position, allegedly maintained in the OLC memoranda, was articulated later by then-Attorney General designate Michael Mukasey. *See* Letter from Att’y Gen. Michael B. Mukasey to the Democratic Members of the Senate Comm. on the Judiciary (Oct. 30, 2007), available at <http://leahy.senate.gov/press/200710/10-30-07%20Mukasey%20to%20Dems.pdf>.

78. *See Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (on file with author) (statement of Michael Mukasey, Att’y Gen. of the United States).

79. *See* POSNER, *supra* note 75, at 80-85.

80. *See, e.g.,* Moschella Letter, *supra* note 40.

most egregious official conduct,” such as “conduct intended to injure in some way unjustifiable by any government interest.”⁸¹

Despite the additional legal interpretations reportedly sanctioning the CIA's most aggressive techniques yet disclosed, nervousness and uncertainty persisted within the Agency. These concerns were echoed by then-CIA Director Porter Goss who suggested in November 2005—after Congress had voted to extend the prohibition on CID treatment to detainees wherever held⁸² but before President Bush had signed the bill into law—that some techniques said to have yielded valuable intelligence would now be restricted.⁸³ Indeed, after the passage of the bill,⁸⁴ and despite the Administration's signing statement affirming the President's prerogative as Commander in Chief to act free of any unconstitutional restraints imposed by the Act,⁸⁵ the CIA modified its policy as a consequence, and certain techniques were disallowed.⁸⁶ A former assistant general counsel at the CIA remarked during this period that the “ambiguity in the law must cause nightmares for intelligence officers who are engaged in aggressive interrogations of Al Qaeda suspects and other terrorism suspects.”⁸⁷ Whether attributable to increasing fear within the CIA of litigation over actions taken with the imprimatur of changing law, or the uncertainty of determining what was then lawful under the new legal rules, interrogations reportedly ceased.⁸⁸ Continued and expansive legal authorization was not enough to ease the uncertainty.

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81. 523 U.S. 833, 846–50 (1998). Vice President Dick Cheney endorsed the shocks-the-conscience standard in December 2005. See *Cheney Roars Back: The Nightline Interview During His Trip to Iraq*, ABC NEWS, Dec. 18, 2005, <http://abcnews.go.com/Nightline/IraqCoverage/story?id=1419206>.
 82. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44.
 83. See Joel Roberts, *CIA Chief: We Don't Torture*, CBS NEWS, Nov. 21, 2005, <http://www.cbsnews.com/stories/2005/11/21/politics/main1063381.shtml>.
 84. See Detainee Treatment Act § 1003(a), (d).
 85. See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).
 86. See *OLC Hearing*, *supra* note 50, at 7 (prepared statement of Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice); Shane et al., *Secret*, *supra* note 5.
 87. Jehl, *supra* note 62.
 88. See Andrew C. McCarthy, *Waterboarding and Torture: Jonathan Turley's Irresponsible Attack on Judge Mukasey*, NAT'L REV. ONLINE, Oct. 26, 2007, <http://article.nationalreview.com/?q=ZjhhkM2YyZmE5MThjZGNIN2lyMGI4MmE3MWMiOWQ5MjA>.

3. *Hamdan v. Rumsfeld and the Military Commissions Act*

Then the law fundamentally changed. In June 2006, in *Hamdan v. Rumsfeld*, the Supreme Court construed the Geneva Conventions' Common Article 3 as applicable to detainees in the War on Terror and applied its prohibition of irregular tribunals—incorporated through the Uniform Code of Military Justice (UCMJ)—to military commissions of unlawful combatants. As noted, however, Common Article 3 also proscribes “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁸⁹ In 1996, Congress criminalized violations of Common Article 3 in a federal war crimes statute.⁹⁰ Thus, while the DTA had made CID treatment unlawful, *Hamdan*'s application of Common Article 3 to the War on Terror had the consequence of making any violation of Common Article 3—say, committing humiliating and degrading treatment—a federal felony. Suddenly it seemed as if the gap between legal rules operating at an altitude of generality and the practical policy flexibility below was rapidly closing.

This, however, would not last long. To clarify how Common Article 3, and its vague and contestable terms, would now apply to interrogations in the War on Terror, Congress passed the Military Commissions Act (MCA). The MCA amended the War Crimes Act and delineated what conduct would constitute a “grave breach” of Common Article 3, and thus constitute a criminally prosecutable war crime. The statute limits grave breaches—violations giving rise to penal sanctions—to include, for example, torture and cruel or inhumane treatment. Torture is characterized as “severe physical or mental pain or suffering.”⁹¹ Cruel or inhuman treatment is described as constituting “serious physical or mental pain or suffering”⁹² that is defined as “extreme pain.”⁹³ The MCA, therefore, elides any real difference between the two, at least with respect to physical pain, by only differentiating the conditions based upon whether severe or extreme pain is inflicted. The Act appears to establish a lower threshold for the infliction of cruel or inhumane treatment's “serious mental pain or suffering,” which it distinguishes from torture's “severe mental pain or

89. Geneva III, *supra* note 26, art. 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

90. See War Crimes Act of 1996, Pub. L. No. 104-192, § 2, 110 Stat. 2104, 2104 (codified as amended at 18 U.S.C.A. § 2441 (West Supp. 2008)).

91. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1)(B), 120 Stat. 2600, 2633 (codified at 18 U.S.C.A. § 2441(d)(1)(A)).

92. *Id.*

93. *Id.*, 120 Stat. at 2634.

suffering” based on the former not having to constitute “prolonged mental harm” but merely “non-transitory mental harm.”⁹⁴

Indeed, after largely equating “cruel or inhumane treatment” with the legal definition of torture, the law delegates to the president the authority to identify by executive order what lesser forms of degradation and abuse—misconduct not rising to the level of a grave breach and therefore not subject to prosecution as war crimes—would still violate treaty obligations under Common Article 3.⁹⁵ Thus, by construing the threshold severity of “cruel or inhumane treatment” as nearly identical to that of torture, and by establishing “outrages upon personal dignity, in particular humiliating and degrading treatment” as a presidentially determined violation but not as a prosecutable grave breach, the Act nearly obviated the relevance of *Hamdan* to interrogation.

The resulting executive order—defining treaty violations of Common Article 3 that do not give rise to penal sanctions—accomplished much of the same.⁹⁶ The order proscribed “acts of violence”—but only those acts “serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhumane treatment” as defined by the MCA.⁹⁷ The heart of the order construed Common Article 3’s generic prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment” as “willful and outrageous acts of personal abuse committed for the purpose of humiliation 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.”⁹⁸ As such, any analysis of the prohibition would require a consideration of the circumstances of the case—exactly like the “shock the conscience” test. Under the definition provided, willful and outrageous acts of personal abuse done for the purpose of eliciting information to prevent future attacks might have been permissible.

Responding to the concerns of interrogators and Agency officials worried about the legal ramifications of their involvement, the order affirmed that it did not give rise to legally enforceable rights against the United States, but that it did offer CIA employees a possible legal defense against claims of wrongdoing. A statement accompanying the order declared that the “President has insisted

94. *Id.*, 120 Stat. at 2635. This was also suggested by Steven G. Bradbury. See *OLC Hearing*, *supra* note 50, at 24 (statement of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice).

95. See Military Commissions Act § 6(a)(3)(A)-(C).

96. See Exec. Order No. 13,440, 3 C.F.R. 229 (2008).

97. *Id.* § 3(b)(i)(C), 3 C.F.R. 230.

98. *Id.* § 3(b)(i)(E), 3 C.F.R. 230. Examples provided include “sexual or sexually indecent acts undertaken for the purpose of humiliation.” *Id.*

on clear legal standards so that CIA officers involved in this essential work are not placed in jeopardy for doing their job.”⁹⁹ CIA Director Michael Hayden echoed this sentiment, noting that the “president’s action . . . gives us the legal clarity we have sought.”¹⁰⁰ While it certainly did give greater clarity to the operative terms of Common Article 3, the terms of the order left a great deal of latitude in which more or less permissive constructions could be articulated. Like the act it partially implemented, and the treaty it interpreted, the order did not specify clearly what was permissible (or not), leaving much room for interpretation. Indeed, at least in part because of this fact, a “high level of anxiety about political retribution” and criminal prosecution for the interrogation program remained within the CIA.¹⁰¹ A number of CIA officers expected to be “thrown under the bus” and have reportedly taken out liability insurance to mitigate any future legal fees.¹⁰²

On January 22, 2009, two days into the new administration of President Barack Obama, an executive order entitled “Ensuring Lawful Interrogations” was issued.¹⁰³ The main thrust of the order is to restrict the CIA, for the present, to use of the largely innocuous and noncoercive techniques¹⁰⁴ to which the military is currently limited.¹⁰⁵ Whether this will remain the standard is as yet unclear. The order establishes a task force to consider whether the Army techniques “provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for the [CIA].”¹⁰⁶ The new order superseded¹⁰⁷

99. *Bush Alters Rules for Interrogation*, MSNBC, July 27, 2007, <http://www.msnbc.msn.com/id/19873918/>.

100. Press Release, Central Intelligence Agency, Director’s Statement on Executive Order on Detentions, Interrogations (July 20, 2007), <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/statement-on-executive-order.html>; see also David Morgan, *Bush Puts CIA Prisons Under Geneva Conventions*, REUTERS, July 20, 2007, <http://www.reuters.com/article/topNews/idUSN2029519720070720> (reporting on Hayden’s statement).

101. Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.’s Secret Interrogation Program*, NEW YORKER, Aug. 13, 2007, at 46, 49 (internal quotation marks omitted).

102. *Id.* (internal quotation marks omitted).

103. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900007.pdf>.

104. See *infra* text accompanying notes 136–142.

105. Exec. Order No. 13,491, § (3)(b), 74 Fed. Reg. at 4894.

106. *Id.* § (5)(e)(i), 74 Fed. Reg. at 4895.

107. The order also revoked any other inconsistent executive directives, orders, and regulations — “including but not limited to those issued to or by the Central Intelligence Agency (CIA)

the previously discussed executive order that construed Common Article 3's prohibition of humiliating and degrading treatment.¹⁰⁸ It did not provide a new interpretation.¹⁰⁹ The Obama Administration will, therefore, also need to determine—if it is first found desirable to establish a more flexible separate protocol of techniques for CIA intelligence interrogations—what lesser forms of degradation and abuse not constituting prosecutable crimes would nevertheless still constitute a violation of treaty obligations under Common Article 3. This determination will serve as a necessary antecedent component of any effort to establish CIA interrogation protocols that deviate materially from the mild Army Field Manual to which the CIA is now confined. The new administration may well have a more inclusive notion than the previous administration of what kinds of methods would contravene Common Article 3's proscription and therefore be precluded; but the current order does not resolve this issue.

The legal landscape in 2009 is much changed from 2001. But all of the current restrictions can be interpreted to permit coercive interrogation tactics. Absolute bans on vaguely defined abuse still provide the interpretative latitude to make possible the most extreme measures yet approved post-9/11—that is, waterboarding.¹¹⁰ Despite all the legal change, not only are the legal prohibitions that could give rise to penal sanctions nearly identical to what they were in 2001, but the essential character of the legal rules as extraordinarily

from September 11, 2001, to January 20, 2009”—concerning detention or interrogation. *Id.* § (1), 74 Fed. Reg. at 4893.

108. Exec. Order No. 13,440, § 3(b)(i)(E), 3 C.F.R. 229, 230 (2007).

109. The order only notes circuitously that “‘humiliating and degrading treatment’ refer to, and have the same meaning as, those same terms in Common Article 3.” Exec. Order No. 13,491, § (2)(f), 74 Fed. Reg. at 4893.

110. In a letter sent to Chairman Patrick J. Leahy the day before a January 30, 2008 Senate Judiciary Committee oversight hearing, Attorney General Mukasey wrote that while waterboarding was not then currently authorized for use, “[t]here are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question.” Letter from Michael B. Mukasey, Att’y Gen., to Senator Patrick J. Leahy (Jan. 29, 2008), *available at* <http://www.usdoj.gov/ag/speeches/2008/letter-leahy-013008.pdf>. As of February 2008, the Office of Legal Counsel had not opined as to the legality of waterboarding under then-current law. *See OLC Hearing, supra* note 50, at 13 (statement of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice). However, Admiral McConnell, the Director of National Intelligence, stated that “[t]he question is, is waterboarding a legal technique? And everything I know, based on the appropriate authority to make that judgment, it is a legal technique used in a specific set of circumstances. You have to know the circumstances to be able to make the judgment.” *Current and Projected National Security Threats: Open Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. (2008) (on file with author) (statement of Admiral McConnell, Director of National Intelligence).

flexible, vague, and subject to great interpretation has remained constant. Yet to a surprising extent given the legal latitude afforded, the CIA has nevertheless remained troubled by the use of coercion and “haunted by uncertainty,” greatly constrained in what they felt could be authorized without leaving open the possibility of future inquiries and criminal sanctions.¹¹¹

B. Law and Interrogation: The Department of Defense

The military’s experience mirrors in important ways that of the CIA. Confronted with pressing security threats and flexible laws read to provide expansive policy latitude, the Department of Defense (DoD) civilian leadership authorized methods of coercive interrogation that were resisted—successfully in part—by the military for reasons of institutional character and fear of legal repercussions.

The most aggressive high-level expression of policy guidance¹¹² with respect to military interrogations was provided on December 2, 2002, when Secretary of Defense Donald Rumsfeld approved the use of certain interrogation techniques for use on Mohammed Al-Qahtani—believed to have been directly involved in the September 11 plot—who had proven resistant to standard interrogation techniques.¹¹³ The techniques authorized included the use of stress positions (like standing) for a maximum of four hours, isolation for up to thirty days, interrogations lasting for up to twenty hours per day, deprivation of light and auditory stimuli, and the use of “detainee-individual phobias—such as fear of dogs—to induce stress.”¹¹⁴ “Use of mild non-injurious

111. Shane et al., *Secret*, *supra* note 5.

112. This is distinguished from policy originating at the level of the military’s regional combatant commands. The formal written authorization of December 2, 2002, was apparently preceded by a voice-command from the Secretary of Defense verbally authorizing some techniques for use on Al-Qahtani beginning on November 23, 2002, that were not included in the Field Manual. See *Coercive Interrogation Hearing*, *supra* note 19 (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary).

113. See, e.g., *Coercive Interrogation Hearing*, *supra* note 19 (statement of Philippe Sands, Professor of Law and Director of the Centre of International Courts and Tribunals, University College London); *Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Services Comm.*, 110th Cong. (2008) (on file with author) [hereinafter *Origins of Interrogation Hearing*] (statement of William Haynes II, former General Counsel, Department of Defense); *id.* at 78 (statement of Jane G. Dalton, Rear Admiral, U.S. Navy, Ret., former Advisor to Joint Chiefs of Staff).

114. Phifer Memo, *supra* note 6, at 227.

physical contact such as grabbing, poking in the chest with the finger, and light pushing” required special permission.¹¹⁵

This limited authorization was, however, rescinded after barely one month. Notwithstanding that neither the law, nor the administration’s understanding of the applicability of the law, changed during this period, concerns over illegality remained and appear at least in part to have precipitated the withdrawal.¹¹⁶ Reservations expressed by the General Counsel of the Department of the Navy, Alberto Mora, are said to have most directly prompted the withdrawal of the December 2, 2002, authorizations.¹¹⁷ Mora disagreed with the legal analysis provided to justify the use of coercive methods. He found the following notion to constitute a “serious failure[] of legal analysis”:

cruel, inhumane, or degrading treatment could be inflicted on the Guantanamo detainees with near impunity because, at least in that location, no law prohibited such action, no court would be vested with jurisdiction to entertain a complaint on such allegations, and various defenses (such as good motive or necessity) would shield any U.S. official accused of the unlawful behavior¹¹⁸

The Army, Air Force, and Marine Corps concurred, worried about the sufficiency of the legal analysis and the potential for prosecutions of servicemen.¹¹⁹

The concerns expressed, however, did not relate only to illegality and the possibility of accusations or prosecutions for criminal conduct. They also reflect apprehension regarding the instrumentality of the military performing

^{115.} *Id.*

^{116.} See *Origins of Interrogation Hearing*, *supra* note 113, at 25, 35 (statement of William Haynes II, former General Counsel, Department of Defense).

^{117.} See *id.*; Albert T. Church III, Unclassified Executive Summary 4 (Mar. 2005), *available at* <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>.

^{118.} Memorandum from Alberto J. Mora, Gen. Counsel of the Dep’t of the Navy, on Statement for the Record: Office of General Counsel Involvement in Interrogation Issues to Inspector Gen., Dep’t of the Navy (July 7, 2004) [hereinafter Mora Memo], *available at* <http://www.newyorker.com/images/pdfs/moramemo.pdf>.

^{119.} STAFF OF THE S. COMM. ON THE ARMED FORCES, 110TH CONG., ORIGINS OF AGGRESSIVE INTERROGATION TECHNIQUES: PART I OF THE COMMITTEE’S INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, at tabs 10-14 (Comm. Print 2008) (collecting documents referred to by Sen. Carl Levin, Chairman, S. Comm. on Armed Services) [hereinafter ORIGINS OF AGGRESSIVE INTERROGATION], *available at* <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf> (last visited Sept. 22, 2008).

coercive types of interrogation, and worries that the military's institutional values make it ill-suited to use coercive means of interrogation. The first concern regarded not a substantiated scientific belief in the inefficacy of coercive interrogation itself,¹²⁰ but rather the military's value added in the use of such methods. Some believed that as "military interrogators were typically young and had little or no training or experience in interrogations" there was a real question as to whether they could implement the use of such techniques successfully.¹²¹ The second consideration dealt with the appropriateness of harsh methods and whether they were "unworthy of the military services."¹²² A few days before the approval was rescinded, on January 9, 2003, the General Counsel of the Navy worried to the General Counsel of DoD that "[e]ven if one wanted to authorize the U.S. military to conduct coercive interrogations, as was the case in Guantanamo, how could one do so without profoundly altering its core values and character?"¹²³

After the withdrawal of the December techniques, the Secretary of Defense directed the DoD General Counsel to establish a working group charged with considering the legality of possible interrogation methods and to make recommendations concerning employment of particular interrogation techniques.¹²⁴ The working group was chaired by the General Counsel of the Air Force,¹²⁵ and included participation from the general counsels and Judge Advocates General from the military branches, and lawyers from the Office of the Secretary of Defense and the Joint Staff.¹²⁶ The resulting report indicated

120. See Mora Memo, *supra* note 118, at 11; see also ORIGINS OF AGGRESSIVE INTERROGATION, *supra* note 119, at tabs 10-14 (collecting documents referred to by Sen. Carl Levin, Chairman, S. Comm. on Armed Services), available at <http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf> (raising legal and policy concerns with proposed interrogation techniques). Note, however, the suggestion of uncertain utility. *Id.*

121. Mora Memo, *supra* note 118, at 4; see also DNI Authorities and Personnel Issues, *supra* note 58, (statement of Admiral Michael McConnell, Director of National Intelligence) (noting that military interrogators are "generally younger, less experienced and less trained").

122. JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 104 (2006) (quoting Alberto Mora).

123. Mora Memo, *supra* note 118, at 11.

124. Memorandum from Donald Rumsfeld, Sec'y of Def., on Detainee Interrogations to Gen. Counsel, Dep't of Def. (Jan. 15, 2003), in THE TORTURE PAPERS, *supra* note 2, at 238.

125. Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def., on Working Group To Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism to Gen. Counsel, Dep't of the Air Force (Jan. 17, 2003), in THE TORTURE PAPERS, *supra* note 2, at 240.

126. U.S. DEP'T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND

that a number of the techniques evaluated would potentially violate certain UCMJ prohibitions—including bans on assaults, threats, and cruelty or maltreatment¹²⁷—but reasoned, based upon a March 14, 2003, OLC memorandum,¹²⁸ that like the federal torture ban “any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority.”¹²⁹ Despite the expansive legal authorities that OLC had provided the military, concerns remained. Indeed, there was dissension within the working group itself, as Judge Advocates General from the Air Force, Navy, Marine Corps, and Army all expressed similar objections both to reliance on the Justice Department’s analysis and to the use of harsh interrogation techniques.¹³⁰

The concerns, again, were primarily twofold. One concern was that the Justice Department’s legal positions were controversial—that “domestic courts may well disagree with DoJ/OLC’s interpretation of the law”—and that “while the current administration [was] not likely to pursue prosecution[s], it [was] impossible to predict how future administrations will view the use of such techniques.”¹³¹ The other concern related to the propriety of such a policy: how would the use of more extreme interrogation techniques affect armed forces culture and the servicemembers trained to take the “legal and moral ‘high-road’”?¹³² Was this the “‘right thing’ for U.S. military personnel?”¹³³ Or would

OPERATIONAL CONSIDERATIONS (2003) [hereinafter WORKING GROUP REPORT], *reprinted in* THE TORTURE PAPERS, *supra* note 2, at 286.

127. *Id.* at 325-30.

128. See Memorandum from John Yoo, Deputy Assistant Att’y Gen., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States to William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Mar. 14, 2003), *available at* <http://www.aclu.org/safefree/torture/34745res20030314.html>.

129. WORKING GROUP REPORT, *supra* note 126, at 303.

130. See *infra* text accompanying notes 131-135.

131. Memorandum from Jack L. Rives, Major Gen., Deputy Judge Advocate Gen., U.S. Air Force, on Final Report and Recommendations of the Working Group To Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism to General Counsel, U.S. Air Force (Feb. 5, 2003) [hereinafter Rives Memo], *in* THE TORTURE DEBATE IN AMERICA 377 (Karen J. Greenberg ed., 2006); see Memorandum from Thomas J. Romig, Major Gen., Judge Advocate Gen., U.S. Army, on Draft Report and Recommendations of the Working Group To Assess [sic] the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism to Gen. Counsel, Dep’t of the Air Force (Mar. 3, 2003), *in* THE TORTURE DEBATE IN AMERICA, *supra*, at 386.

132. Rives Memo, *supra* note 131, at 378; see Memorandum from Kevin M. Sandkuhler, Brigadier Gen., U.S. Marine Corps, on Working Group Recommendations on Detainee

the “American people find [the military] missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values?”¹³⁴ The potential diminution of armed forces’ “[p]ride, [d]iscipline, and [s]elf-[r]espect” was a unifying concern throughout all JAG divisions of the military.¹³⁵

In late 2005 the Detainee Treatment Act (DTA) proscribed military personnel from employing “any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”¹³⁶ While of course limited by applicable laws concerning interrogations, the DTA gave the military complete discretion to establish (and change) its own rules, as long as after it did so it published them and abided by the terms of the publication. The Department of the Army promulgated a new field manual for interrogations in September of 2006.¹³⁷ Any deviation from the manual is, by definition, unlawful. The CIA is now also directed by executive order to abide by this manual.¹³⁸ Simply limiting the military (or the CIA) to what appears in the manual—without more—does not provide greater clarity on where the *legal* perimeters lie, since the Army can revise the manual whenever it sees fit.¹³⁹

As an illustration, the current Army Field Manual authorizes separation as a restricted technique for use only on unlawful enemy combatants.¹⁴⁰ Until an extension is granted, physical separation from other detainees is limited to thirty days of initial duration, during which time the detainee must not be precluded from obtaining four hours of continuous sleep every twenty-four-hour period.¹⁴¹ Because of this policy decision we know that unlawful

Interrogations to General Counsel of the Air Force (Feb. 27, 2003) [hereinafter Sandkuhler Memo], in *THE TORTURE DEBATE IN AMERICA*, *supra* note 131, at 383.

133. Memorandum from Michael F. Lohr, Rear Admiral, Judge Advocate Gen., U.S. Navy, on Working Group Recommendations Relating to Interrogation of Detainees to Gen. Counsel of the Air Force (Feb. 6, 2003) [hereinafter Lohr Memo], in *THE TORTURE DEBATE IN AMERICA*, *supra* note 131, at 382.

134. *Id.*

135. Sandkuhler Memo, *supra* note 132, at 383.

136. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1002(a), 119 Stat. 2680, 2739.

137. See DEP'T OF THE ARMY, FIELD MANUAL 2-22.3 (34-52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006) [hereinafter FM 2-22.3], available at <http://www.fas.org/irp/doddir/army/fm2-22-3.pdf>.

138. See *supra* text accompanying notes 103-109.

139. FM 2-22.3, *supra* note 137, at vi.

140. *Id.* at M-1.

141. *Id.* at M-9, M-10.

combatants will not be kept awake for longer than twenty hours each day, and that isolation from other prisoners beyond thirty days is contingent upon further approval. We do not know whether the Field Manual could be legally amended to reduce (or eliminate) the number of required continuous sleep hours for certain periods, or whether a detainee could be isolated from other prisoners for months (or years) at a time. The Field Manual itself does not answer such questions; and nor, of course, does the Detainee Treatment Act itself, which simply presumes that any techniques included in the manual are otherwise "legal."¹⁴² Confining the military (or the CIA) to the Army Field Manual only makes it less likely that the law will be contravened in light of the document's slowly evolving and public nature.

Flexible laws, then, were read to make available techniques of interrogation that were nevertheless resisted for virtuous, instrumental, and legal reasons. But this was not nearly the first time that an aggressive government interrogation policy operated within a legal architecture flexible enough to provide latitude and unpredictable enough to still impose limits through fears of its transgression.

II. NAVIGATING LEGAL STRICTURES: ABSOLUTE BANS AND VAGUELY DEFINED ABUSE, 1949 TO 1973

In the aftermath of World War II, the United States participated in efforts to create a new body of international human rights law relating to the treatment of prisoners during peacetime,¹⁴³ and new instruments of international humanitarian law relating to the treatment of prisoners during war. The U.N. General Assembly adopted the Universal Declaration of Human Rights (UDHR)¹⁴⁴ on December 10, 1948, as a declaration of international human rights principles—not a treaty legally binding upon party nations.¹⁴⁵ It provides in Article 5 that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁴⁶ The Geneva Conventions

¹⁴². Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1002(a), 119 Stat. 2680, 2739.

¹⁴³. See NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 2 (1999).

¹⁴⁴. The UDHR is one of three instruments comprising the International Bill of Rights. The others are the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocols. *Id.* at 4.

¹⁴⁵. See CHRIS INGELSE, *THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT* 44 (2001).

¹⁴⁶. Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 71, 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>.

for the Protection of War Victims of 1949 were also adopted; the United States became a signatory to the Conventions in 1949, and the Conventions entered into force with respect to the United States on February 2, 1956.¹⁴⁷ The United States is legally bound thereby. There are four Conventions. Two, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV or GC),¹⁴⁸ and the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III or GPW)¹⁴⁹ relate directly to interrogation.

A. Geneva Conventions and the Universal Declaration of Human Rights

The Geneva Conventions, applicable in instances of international armed conflict that involve a High Contracting Party, protect different classes of persons. Geneva IV governs the treatment of civilians who, during conflict or occupation, fall into the hands of the enemy. Civilians are entitled, under Article 27, to humane treatment and protection against acts of violence or threats thereof.¹⁵⁰ Articles 31 and 32 forbid, respectively, the use of “physical or moral coercion” against protected persons, and measures causing physical suffering.¹⁵¹ Geneva III addresses the treatment of prisoners of war. Article 4 establishes the prerequisites necessary for entitlement to POW status, and thus defines those lawful combatants who merit the attendant protections afforded by this status. It is a four-part test: individuals party to the conflict must belong to a hierarchical command structure; bear a distinctive sign; carry arms openly; and behave in accordance with the laws and customs of war.¹⁵² Those that qualify are entitled under Articles 13 and 130 to humane treatment, and to protection against acts of torture, inhumane treatment, violence, intimidation, and insults.¹⁵³ Article 17 states capaciously that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war”

147. See STUART HULL MCINTYRE, *LEGAL EFFECT OF WORLD WAR II ON TREATIES OF THE UNITED STATES* 96 & n.3 (1958); JOSEPH MODESTE SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 857 (3d ed. 1988).

148. 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 IV], available at <http://www.unhchr.ch/html/menu3/b/92.htm>.

149. Geneva III, *supra* note 26, 6 U.S.T. 3316, 75 U.N.T.S. 135.

150. Geneva IV, *supra* note 148, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

151. *Id.* arts. 31, 32, 6 U.S.T. at 3538, 75 U.N.T.S. at 308.

152. Geneva III, *supra* note 26, art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

153. *Id.* art. 13, 130, 6 U.S.T. at 3328, 3420, 75 U.N.T.S. at 146, 238; *id.* art. 130, 6 U.S.T. 3420, 75 U.N.T.S. at 238.

and that uncooperative prisoners may not be “threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”¹⁵⁴

Both the UDHR and the Geneva Conventions seem clear and absolute in their prohibitions on torture and other ill-treatment, and not subject to great interpretational variance. Though the provisions described provide boundaries for what might be considered permissible conduct in the interrogation of prisoners, definitional uncertainty remains with respect to central interrogation-relevant terms. Geneva emphatically proscribes torture – and yet, though it is said to be either of a “mental or physical” nature, it receives no clear definition in the language of the Conventions. Similarly, the Conventions do not define coercion; they provide no articulable basis upon which to distinguish between lawful physical discomforts and illegal coercion.¹⁵⁵ The sense in which “humane treatment” should be understood is also left unclear. The International Committee of the Red Cross (ICRC), which played an integral role in convening the Geneva Conference that gave rise to the Conventions, concedes in its definitive Commentary on the Geneva Conventions that the “definition is not an easy one,” but maintains that inhumane treatment should not be construed only to mean “treatment constituting an attack on physical integrity or health.”¹⁵⁶ The ICRC Commentary thus suggests a lower threshold in answer to the question as to exactly when maltreatment becomes inhumane,¹⁵⁷ but beyond noting that the “aim of the Convention is certainly to . . . prevent [prisoners of war from] being brought down to the level of animals,” the Commentary adds little clarity.¹⁵⁸ The language of the Convention provides no definitive explanation of when a certain interrogation technique would fall below the lowest acceptable level of humane treatment.¹⁵⁹

The Universal Declaration of Human Rights contains the same kind of ambiguities as the Geneva Conventions. Article 5 of the UDHR prohibits “torture . . . or cruel, inhumane or degrading treatment or punishment.”¹⁶⁰ Yet, though oft repeated in future human rights treaties, this increasingly important

154. *Id.* art. 17, 6 U.S.T. at 3332, 75 U.N.T.S. at 150.

155. See Stanley J. Glod & Lawrence J. Smith, Comments, *Interrogation Under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145, 153 (1963).

156. 3 JEAN DE PREUX, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 39, 627 (Jean S. Pictet ed., A.P. de Heney trans., 1960).

157. See Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT’L L. STUD. 1, 356 (1979).

158. See 3 DE PREUX, *supra* note 156, at 627.

159. See Levie, *supra* note 157, at 356–57.

160. Universal Declaration of Human Rights, *supra* note 146, art. 5, at 73.

formula offered no indication in 1948 of how its prohibition should be put into effect. Should it be understood as a totality, or should its major component parts be divided: torture—and other CID “ill-treatment”?¹⁶¹ If they are to be distinguished, criteria by which distinctions can be drawn, say, between torture and inhumane treatment, or between other ill-treatment and levels of discomfort not prohibited, must also be established.

A former Special Rapporteur on Torture of the U.N. Commission on Human Rights has noted with respect to these proscriptions that “it is in the nature of such . . . formula[s] to be elastic and capable of evolving interpretation over time.”¹⁶² Nevertheless, in a rapidly changing postwar world, what exactly was meant by such terms as torture, coercion, or inhumane treatment was not delineated clearly in international humanitarian or human rights law. Depending upon the interrogator’s historical or legal-cultural perspective, the prohibitions established could be understood to operate in strikingly varied ways. Thus, the text alone, stripped of contextual knowledge, is an inadequate explication of exactly what types of conduct are actually proscribed during interrogation. Rather, it is the text’s interaction with a set of temporally contingent understandings regarding inhumane treatment that establishes where, on the spectrum of increasingly coercive techniques, thresholds of impermissible pressure will be demarcated. It was within this incipient legal context that the Cold War interrogation policies of the CIA and military would develop.

B. Law and Interrogation: The Central Intelligence Agency

Perceptions concerning the saliency of the Soviet threat evolved from feverish anxiety in 1949 to suspicious cooperation by 1972. At the end of World War II the United States was “at the summit of the world.”¹⁶³ Americans, as W. Averell Harriman noted, just wanted to “go to the movies and drink Coke.”¹⁶⁴ Yet, by 1947, anxiety about international communism had escalated to near hysteria, and the Cold War had begun.¹⁶⁵ Washington feared that,

161. See RODLEY, *supra* note 143, at 75.

162. *Id.*

163. HAROLD EVANS, *THE AMERICAN CENTURY* 388 (1998) (internal quotation marks omitted).

164. Evan Thomas, *Sins of a Paranoid Age*, *NEWSWEEK*, Dec. 27, 1993, at 20 (internal quotation marks omitted).

165. See JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974*, at 83 (1996); JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 109 (1986); FRANZ SCHURMANN, *THE LOGIC OF WORLD POWER: AN INQUIRY INTO THE ORIGINS, CURRENTS, AND CONTRADICTIONS OF WORLD POLITICS* 100 (1974).

unless contained, Russia would soon present America with a threat as great as Nazi Germany.¹⁶⁶ Americans experienced a fear of communist subversion¹⁶⁷ of dimensions now difficult to understand.¹⁶⁸ The idea that international communism must be contained bolstered a broad foreign policy consensus that was maintained throughout the 1950s in both political parties, the press, and the public.¹⁶⁹

1. *Coercion Within the Law*

Fearful that an “interrogation gap” existed between the United States and the Soviet Union—that the USSR as well as China had developed so-called esoteric interrogation capabilities such as electroshock, hallucinogenic agents, or truth serum drugs to force prisoners to divulge anything asked of them—the CIA first investigated and then implemented chemical, biological, and other human behavioral control methods for purposes of interrogation.¹⁷⁰ An individual involved with the program from its inception testified later that the possibility that enemies “possessed capabilities in this field that we knew nothing about . . . seemed to us to pose a threat of the magnitude of national survival.”¹⁷¹ By 1951, though operational applications had started with some frequency before,¹⁷² the CIA had sanctioned for use such special interrogation

166. See SCHURMANN, *supra* note 165, at 91.

167. See EVANS, *supra* note 163, at 399, 420.

168. See *id.* at 444.

169. See RICHARD A. MELANSON, AMERICAN FOREIGN POLICY SINCE THE VIETNAM WAR 17 (2005); SCHURMANN, *supra* note 165, at 65, 105-06; EUGENE R. WITTKOPF, FACES OF INTERNATIONALISM: PUBLIC OPINION AND AMERICAN FOREIGN POLICY 191 (1992).

170. See *Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearing Before the S. Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the S. Comm. on Human Resources*, 95th Cong. 25 (1977) [hereinafter *MKULTRA Hearing*]; *Human Drug Testing by the CIA, 1977: Hearings on S. 1983 Before the Subcomm. on Health and Scientific Research of the S. Comm. on Human Resources*, 95th Cong. 207 (1977) [hereinafter *Human Drug Hearing*]; *Intelligence Activities—Unauthorized Storage of Toxic Agents: Hearings Before the S. Select Comm. To Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong. 8 (1975) [hereinafter *Church Committee Hearings*]; S. REP. NO. 94-755, bk. 1, at 392-402 (1976) [hereinafter *Church Committee Report*]; REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES 226-28 (1975) [hereinafter *ROCKEFELLER REPORT*], available at <http://www.history-matters.com/archive/church/rockcomm/contents.htm>.

171. *Human Drug Hearing*, *supra* note 170, at 176.

172. See Memorandum for the Record from Cent. Intelligence Agency on Project ARTICHOKE (Jan. 31, 1975) [hereinafter *ARTICHOKE Memo*], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB54/sto2.pdf>. The memorandum is also reprinted in ANDREW

techniques as drugs (including LSD, barbiturates, and amphetamines) and hypnosis.¹⁷³ The use of poorly understood chemicals was fraught with unpredictability: bathrooms adjoining interrogation rooms in the field were considered essential as the techniques used could induce nausea, vomiting, and other dangerous reactions.¹⁷⁴ Other special interrogation techniques investigated included truth drugs (such as sodium pentothal), heat and cold, atmospheric pressure, narco-hypnosis, and total isolation;¹⁷⁵ the use of “electric methods” was authorized by 1963.¹⁷⁶ Classified Agency publications advocate the use of temperature extremes, minimum sustenance, jostling without physical harm, heavy physical exercise, and other “hostile methods that may endanger the subject’s mental and physical health.”¹⁷⁷ The use of chemicals during interrogations was authorized with varying levels of Agency approval at least until the late 1960s.¹⁷⁸

Whatever legal concerns relating to the use of such techniques the CIA may have entertained in the first decade of its interrogation program were almost certainly mitigated not only by the extreme latitude of the law, but also by the expectation of presidential pardon and support.¹⁷⁹ Presidents Truman and Eisenhower were exceptionally aggressive advocates of procedural freedom of action for the CIA in the 1950s. President Truman reportedly provided Bedell Smith, CIA director from 1950-1953, a blanket and undated presidential pardon when concerns about legality began to trouble Smith.¹⁸⁰ A 1954 report on CIA covert activities determined that “[h]itherto acceptable norms of human conduct do not apply. If the United States is to survive, long-standing

GOLISZEK, IN THE NAME OF SCIENCE: A HISTORY OF SECRET PROGRAMS, MEDICAL RESEARCH, AND HUMAN EXPERIMENTATION app. xi, at 355-57 (2003).

173. See Church Committee Report, *supra* note 170, at 387; ARTICHOKE Memo, *supra* note 172.

174. See RANELAGH, *supra* note 165, at 213 (quoting Memorandum from the Cent. Intelligence Agency on “Artichoke,” special comments (Nov. 26, 1951)).

175. See ADVISORY COMMITTEE ON HUMAN RADIATION EXPERIMENTS (ACHRE), INTERIM REPORT OF THE ADVISORY COMMITTEE ON HUMAN RADIATION EXPERIMENTS app. E (1994), available at <http://www.gwu.edu/~nsarchiv/radiation/dir/mstreet/interim/intret.txt>; ARTICHOKE Memo, *supra* note 172.

176. CIA, KUBARK, *supra* note 3, at 8.

177. Farndon, *supra* note 23, at 9, 27-28.

178. See ARTICHOKE Memo, *supra* note 172.

179. This fact, combined with scarce documentation of the legal rationales behind the interrogation decisions of this period, might lead some to conclude that the CIA was acting with complete disregard for, and not within, the law. This seems unlikely, however, as variations of some of the same techniques remained authorized when later subjected to more exacting (or, at least, demonstrable) legal scrutiny. See *infra* Subsection II.B.2.

180. See PETER GROSE, GENTLEMAN SPY: THE LIFE OF ALLEN DULLES 327 (1994).

American concepts of 'fair play' must be reconsidered."¹⁸¹ The report was a concise summary of President Eisenhower's views.¹⁸² The security threat was acute,¹⁸³ and absolutism before the law almost total.

2. *Ethics, Efficacy, and Legal Strictures*

Three prominent concerns regarding propriety, comparative usefulness, and legality began to emerge, however, as the urgency of the security threat diminished by 1963 with the decline of the Sino-Soviet relationship¹⁸⁴ and the warming of Soviet-American relations,¹⁸⁵ and as society's sensibilities evolved. Moral and ethical considerations precipitated by the use of coercive interrogation, not prominent during the 1950s,¹⁸⁶ began to trouble Agency officials and interrogators by the early 1960s. CIA reports in this period reflect growing negative attitudes and moral objections among case-officers toward the use of esoteric means of interrogation.¹⁸⁷ A 1963 CIA Inspector General's report notes that many people found the manipulation of human behavior to be "distasteful and unethical."¹⁸⁸ Richard Helms, who served in the CIA for twenty years before he became Director in 1966, noted that while maintaining such capabilities presented a "moral problem," he had "no answer to the moral

181. REPORT OF THE SPECIAL STUDY GROUP [DOOLITTLE COMMITTEE] ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY (1954), *reprinted in* THE CENTRAL INTELLIGENCE AGENCY: HISTORY AND DOCUMENTS 143, 144 (William M. Leary ed., 1984).

182. See STEPHEN E. AMBROSE, *IKE'S SPIES: EISENHOWER AND THE ESPIONAGE ESTABLISHMENT* 197, 198 (1981).

183. JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR* 157 (2005).

184. See ANDREW SINCLAIR, *A CONCISE HISTORY OF THE UNITED STATES* 196 (1999).

185. See PATTERSON, *supra* note 165, at 508, 600.

186. See JOHN MARKS, *THE SEARCH FOR THE "MANCHURIAN CANDIDATE": THE CIA AND MIND CONTROL* 31-32 (1979).

187. INSPECTOR GENERAL, *REPORT OF INSPECTION OF MKULTRA/TSD* (1963) [hereinafter *MKULTRA REPORT*] (referencing a 1960 study on the "Scientific and Technical Problems in Covert Action Operations"), *reprinted as redacted in Human-Use Experimentation Programs of the Department of Defense and Central Intelligence Agency: Joint Hearings Before the Subcomm. on Health of the S. Comm. on Labor and Public Welfare and the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 94th Cong. 882, 900-01 (1975) [hereinafter *Human-Use Experimentation Hearings*].

188. Memorandum from John S. Earman, Inspector Gen., Cent. Intelligence Agency, to Dir. of Cent. Intelligence (July 26, 1963), in *Human-Use Experimentation Hearings*, *supra* note 187, at 879, 880.

issue.”¹⁸⁹ Nevertheless, such concerns did have an impact, and by 1963 interrogation policy promulgations expressed a “profound moral objection to applying duress past the point of irreversible psychological damage.”¹⁹⁰ Discomfort only grew as concerns became reflected more broadly in the emerging group of new senior operations officers.¹⁹¹

The development of new technologies with application to intelligence also undermined support for the use of coercion by diminishing the comparative efficiency of coercive interrogation and subverting its centrality to the intelligence mission.¹⁹² By the end of the 1950s, new intelligence reconnaissance technologies were generating more accurate information than had ever before been possible.¹⁹³ As technically acquired intelligence increased in quantity and quality,¹⁹⁴ the use of such esoteric aids as drugs for interrogation, by comparison, began to seem like “high-risk, low-yield” operations.¹⁹⁵ The new methods of acquiring information were not only more expedient tools for the collection of information concerning Soviet strategic deployments, but they also represented relatively “antiseptic” and safer intelligence practices.¹⁹⁶ The first years of the 1970s would provide an indication of what would ultimately prove to be devastating by September 11, 2001: an Agency rich in intelligence analysis, but poor in human resources and operations.¹⁹⁷

Notably, it was the concerns addressed—propriety and comparative instrumentality—that appear to have animated resistance to the use of overtly coercive methods of interrogation, not compelling scientific considerations involving the inefficacy of coercion. While the CIA ultimately determined that “no such magic brew as the popular notion of truth serum exists,”¹⁹⁸ CIA congressional testimony and inspector general reports also confirmed that

189. Church Committee Report, *supra* note 170, at 402.

190. CIA, KUBARK, *supra* note 3, at 84.

191. See MARKS, *supra* note 186, at 204.

192. See Church Committee Report, *supra* note 170, at 117-18; *MKULTRA Hearing*, *supra* note 170, at 43.

193. See Church Committee Report, *supra* note 170, at 114; WILLIAM COLBY, *HONORABLE MEN: MY LIFE IN THE CIA* 294, 295 (1978).

194. See Church Committee Report, *supra* note 170, at 26, 117.

195. *MKULTRA REPORT*, *supra* note 187, ¶ 23, reprinted in *Human-Use Experimentation Hearings*, *supra* note 187, at 898.

196. Church Committee Report, *supra* note 170, at 26; COLBY, *supra* note 193, at 295; GROSE, *supra* note 180, at 396.

197. See Church Committee Report, *supra* note 170, at 120-25.

198. *MKULTRA Hearing*, *supra* note 170, at 32.

chemicals used during interrogation had made possible major operational accomplishments¹⁹⁹ and that narcotic relaxants like barbiturates could be useful.²⁰⁰ Indeed, that no silver bullet existed—“no drug which [could] force every informant to report all the information that he ha[d]” every time²⁰¹—clearly did not present an unacceptable level of unpredictability as drugs remained authorized as interrogation aids at least until the late 1960s.²⁰²

The third source of concern was legality. Fears of legal consequences arising from possible public disclosure of hostile methods of interrogation, not salient during the 1950s, had emerged by the early 1960s, making the use of coercion increasingly undesirable, and contributing to the ethical discomfort and worries about comparative efficiency.²⁰³ As explored, the strictures of the law relating to foreign intelligence interrogations were both uncertain and flexible. Indeed, with respect to such interrogations during peacetime—given the absence of legally binding human rights law—the CIA was in theory able to operate abroad without real fear of criminal sanctions.²⁰⁴ No federal law criminalized torture or outlawed the perpetration of CID treatment outside the United States.²⁰⁵ And Supreme Court jurisprudence had not found the Constitution, of itself, to confer rights upon aliens outside the sovereign territory of the United States.²⁰⁶

Despite the great latitude afforded by relevant law, concerns regarding legal vulnerability began to materialize and are reflected in apprehension within the Agency²⁰⁷ and in the shape of interrogation policy itself. Prior to 1961, there was little public scrutiny or criticism of the CIA. The abortive Bay of Pigs invasion in 1961 was a turning point.²⁰⁸ Public awareness of the Agency increased,²⁰⁹ and fears of possible legal repercussions became more

199. See MKULTRA REPORT, *supra* note 187, ¶¶ 21-23, 29, reprinted in *Human-Use Experimentation Hearings*, *supra* note 187, at 897-98, 902.

200. MKULTRA Hearing, *supra* note 170, at 44.

201. CIA, KUBARK, *supra* note 3, at 99.

202. See ARTICHOKE Memo, *supra* note 172.

203. See CIA, KUBARK, *supra* note 3, at 2.

204. See *supra* text accompanying notes 144-145.

205. See *infra* text accompanying notes 269-271.

206. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (holding that when the United States acts against civilian-citizens abroad, it must do so in conformity with the Fifth and Sixth Amendments to the Constitution); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

207. See CIA, KUBARK, *supra* note 3, at 96.

208. See VICTOR MARCHETTI & JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 29-30 (1974).

209. *Id.*

pronounced. By 1963, the CIA took special care to warn its agents that the use of compulsion or duress during interrogation was especially likely to involve illegality, and even the risk of later lawsuits.²¹⁰ Because of this reason, policy now emphasized that coercion was not authorized for use at field discretion, and required advance approval from the CIA director if bodily harm was inflicted, or if medical or electrical methods or materials were used to induce acquiescence.²¹¹

The use of drugs also became more tightly regulated. Prior to 1958, no formalized policy process for the approval of drugs appears to have existed.²¹² Instead it seems that drug use did not require high-level Agency approval and was authorized permissively on an ad hoc basis.²¹³ Starting in 1958, the Agency likely proscribed the use of drugs “where it may reasonably be expected to cause the subject lasting mental or physical harm as contrasted to possible temporary discomfort,” and allowed the use of drugs only after certification by the chief of operations that their use “is in the national interest.”²¹⁴ By 1967, approval was required from a drug committee or from the deputy director of plans—one more institutional rung up from the Chief of Operations—who briefed the deputy director of Central Intelligence on the use of drugs at least semiannually.²¹⁵ In 1973, the use of drugs was apparently undertaken only with the Director’s approval.²¹⁶

Most dramatically, an unprecedented new interrogation policy adopted in 1963 transparently sought to navigate more perfectly between permissible coercion and coercion that might more plausibly transgress legal boundaries

210. See, e.g., CIA, KUBARK, *supra* note 3, at 8.

211. See *id.*

212. See Memorandum from Cent. Intelligence Agency to Chief of Medical Staff, Dir. of Sec., Chief of TSS, and Chief of Staff (Apr. 8, 1958) [hereinafter CIA Drugs Memo], in *Human-Use Experimentation Hearings*, *supra* note 187, at 975-76; Memorandum from Richard Helms, Acting Deputy Dir. of Plans, Cent. Intelligence Agency, to Deputy Chief of Staff, Cent. Intelligence Agency (Mar. 14, 1958), in *Human-Use Experimentation Hearings*, *supra* note 187, at 977.

213. See MKULTRA REPORT, *supra* note 187, at 901, 904; RANELAGH, *supra* note 165, at 212-13 (quoting Memorandum from the Cent. Intelligence Agency on “Artichoke,” special comments (Nov. 26, 1951)); ARTICHOKE Memo, *supra* note 172.

214. See CIA Drugs Memo, *supra* note 212, at 975.

215. See ARTICHOKE Memo, *supra* note 172; Memorandum from Richard Helms, Deputy Dir. of Plans, Cent. Intelligence Agency, to Dir. of Cent. Intelligence (June 9, 1964), in *Human-Use Experimentation Hearings*, *supra* note 187, at 970-72.

216. See Memorandum from Cent. Intelligence Agency (Aug. 29, 1973), in *Human-Use Experimentation Hearings*, *supra* note 187, at 1004.

and give rise to legal claims or sanctions.²¹⁷ The new CIA interrogation paradigm emphasized reducing a source's psychological capacity to resist as opposed to more facially severe measures designed to lower a source's physiological resistance. It consisted chiefly of more subtle psychological coercion techniques designed to disorient, and methods of indirect physical pressure premised upon self-inflicted pain and discomfort. Under the new policy, chemicals as interrogation aids were relegated to a support role.²¹⁸ The creation of debility through extreme deprivation was repudiated; rather, policy emphasized inducing disorientation through disruption. The new approach to psychological coercion relied upon isolation through solitary confinement,²¹⁹ the elimination of sensory stimuli,²²⁰ threats, relatively small degrees of homeostatic derangement, and disruption and adjustment of regular patterns such as sleep and food.²²¹ Policy counseled that indirect physical coercion such as self-inflicted pain caused by stress positions like standing and enforced "for long periods,"²²² is available for "inducing regression of the personality to whatever earlier and weaker level is required for the dissolution of resistance and the inculcation of dependence."²²³ In its apparent repudiation of direct physical pressures, and of chemicals as a principal means of psychological coercion, the CIA had fashioned a policy more chary of existing legal strictures while maintaining the freedom to apply degrees and methods of coercion as severe as those apparently made available after September 11, 2001. The CIA appears to have held a belief in the legality of this basic regime of physical and psychological pressures (though at a reduced degree of coercion) at least until 1988.²²⁴

Thus, despite the expansive legal latitude provided, flexible laws still imposed an uncertainty too great to entirely forestall fears of accusations of illegality, legal repercussions, and sanctions. These concerns, coupled with moral qualms and intelligence advances in other fields, mitigated the permissiveness of the law and the security climate, and prompted the design of

217. See CIA, KUBARK, *supra* note 3, at 6-9 (assessing legal restrictions on detention and questioning).

218. See MKULTRA REPORT, *supra* note 187, reprinted in *Human-Use Experimentation Hearings*, *supra* note 187, at 897-98.

219. See HARVEY M. WEINSTEIN, PSYCHIATRY AND THE CIA: VICTIMS OF MIND CONTROL 137 (1990).

220. CIA, KUBARK, *supra* note 3, at 86-92.

221. See *id.* at 86-87, 93.

222. *Id.* at 94.

223. *Id.* at 41.

224. See *infra* text accompanying notes 275-285.

primarily psychological rather than physical mechanisms of coercion. While ultimately accepting more limitations on coercion than the CIA adopted, the general trajectory of the U.S. military's interrogation policy mirrors that of the CIA.

C. Law and Interrogation: The Department of Defense

The armed forces, like the CIA, were fearful that sensitive security matters could be unknowingly compromised by a hitherto unidentified truth serum, and also explored and authorized the use of hallucinogenic and deliriant compounds for interrogation.²²⁵ A 1959 Army report supporting a policy of LSD use for interrogations overseas declared that "the stakes involved and the interests of national security may permit a more tolerant interpretation of moral-ethical values."²²⁶ Particularly in the period 1958-1962, LSD was used as an Army interrogation aid in Europe and the Far East.²²⁷ By April 1963, policy procedures for the approval and use of drugs during interrogation had been formalized to better regulate and limit their use.²²⁸

1. Coercion Within the Law

It is not clear, however, whether the use of narcotics as an interrogation method by the military was considered legally available with respect to persons protected by Geneva III or only for those not covered by, or whose status did not entitle them to, prisoner of war protections.²²⁹ What makes this a difficult question is that military policy consistently²³⁰—and still currently—has

225. See *Human-Use Experimentation Hearings*, *supra* note 187, at 150-52.

226. See UNITED STATES ARMY INTELLIGENCE COMMAND STAFF STUDY, MATERIAL TESTING PROGRAM EA 1729 (Oct. 15, 1959), as reprinted in *MKULTRA Hearing*, *supra* note 170, at 96 [hereinafter USAINTC STUDY].

227. See Church Committee Report, *supra* note 170, at 412; *Human-Use Experimentation Hearings*, *supra* note 187, at 163.

228. See Church Committee Report, *supra* note 170, at 419-20.

229. See, e.g., Glod & Smith, *supra* note 155, at 154 (noting that in 1961, the Judge Advocate General of the Army opined that the use of narcotics for interrogations of prisoners protected by Geneva III would violate Articles 13 and 17 of the Convention). Note, however, the article's acknowledgement of the "interpretational problems involved in deciding whether a physical discomfort or scientific method can be used at any level of interrogation without the commission of an illegal act." *Id.*

230. One exception exists. From 1987 to 1992, policy proscribed the use of drugs without any caveat. See DEP'T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION at 1-1 (May 1987) [hereinafter FM 34-52, 1987]; cf. DEP'T OF THE ARMY, FIELD MANUAL 34-52:

declined to proscribe the use of all drugs for interrogations of protected prisoners of war. Instead, policy construing and implementing the legal restrictions on coercion imposed by Geneva III has carefully left the possibility of *some* drug use open, only completely repudiating the use of “drugs that may induce lasting and permanent mental alteration and damage.”²³¹

Indeed, up until 1973, the military interpreted the legal limitations imposed by Geneva III in an exceedingly narrow fashion. The prohibition of threats in Article 17 of Geneva III was construed to nonetheless allow interrogators the latitude to “use harsh and abusive language towards the subject and threaten violence.”²³² In 2002, such threats were considered of uncertain legality even for use in interrogations of unlawful combatants—combatants *not* protected by the law of Geneva III—and were not authorized as a policy matter.²³³ Rather, discipline was recommended for interrogators who employed them.²³⁴ Before 1973, however, the military did not consider such threats to constitute impermissible coercion in the context of prisoner of war interrogations. But neither were they perceived as nonaggressive: the “acute and painful” fear to which they were thought to contribute was in some cases predicted to make an interrogation subject “retreat to earlier developmental stages in his life—in extreme cases, even to early childhood.”²³⁵ Threats simply were not deemed mental maltreatment of a severe enough nature to raise concerns of illegal inhumane treatment under the Geneva Conventions.

Physical pressure more coercive by degree than any military interrogation techniques authorized since 1973—post-9/11 included—was also made possible by the flexible strictures of the Geneva Conventions. Standing, as a stress

INTELLIGENCE INTERROGATION, at 1-8 (1992) [hereinafter FM 34-52, 1992], available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf> (prohibiting only the use of drugs that “may induce lasting and permanent mental alteration and damage”).

231. DEP’T OF THE ARMY, FIELD MANUAL 30-15: INTELLIGENCE INTERROGATION, at 4 (June 1, 1973) [hereinafter FM 30-15, 1973]; DEP’T OF THE ARMY, FIELD MANUAL 30-15: INTELLIGENCE INTERROGATION, at 1-6 (Sept. 29, 1978) [hereinafter FM 30-15, 1978]; FM 34-52, 1992, *supra* note 230, at 1-8 (1992); see FM 2-22.3, *supra* note 137, at 5-26.

232. DEP’T OF THE ARMY, FIELD MANUAL 30-15: INTELLIGENCE INTERROGATIONS 17 (1967) [hereinafter FM 30-15, 1967]; see DEP’T OF THE ARMY, FIELD MANUAL 30-15: INTELLIGENCE INTERROGATION 2-6 (1969) [hereinafter FM 30-15, 1969].

233. A memorandum from the director of intelligence at Guantanamo Bay, Cuba, sought approval for convincing the detainee that “death or severely painful consequences” might befall him or his family. Phifer Memo, *supra* note 6, at 228. The technique was not recommended to the Secretary of Defense for approval, and the Secretary did not authorize it. See Haynes Counter-Resistance Memo, *supra* note 6, at 237.

234. See SCHMIDT REPORT, *supra* note 6, at 24-26.

235. FM 30-15, 1967, *supra* note 232, at 21, 24; see FM 30-15, 1969, *supra* note 232, at 2-11, 2-13.

position, was authorized for use on prisoners of war.²³⁶ Interrogation policy promulgations advised interrogators that “[w]hen the subject refuses to cooperate, the interrogator becomes very angry. He may order the subject to stand at attention while being interrogated.”²³⁷ No time limit was placed on this technique. An additional technique identified as “harassment” was considered legally available and was authorized by policy before 1973. This technique took several forms. Sleep deprivation without limitation was included:

[a] subject may be called for interrogation at any time of the day or night, questioned for a few minutes and then released only to be recalled shortly thereafter. This treatment is continued until he realizes that the harassment will continue until he talks, and he finally decides to cooperate with the interrogator.²³⁸

Another form of acceptable psychological harassment—in the interrogation parlance of the time—was total isolation.²³⁹ The extreme intrusiveness of harassment in its various forms did not go unappreciated: policy counseled opaquely but permissively that harassment should never reach the point of physical torture.²⁴⁰

These techniques, when authorized in 2002 for use by military interrogators, were sanctioned in much more limited manifestations, and then only for use on unlawful combatants not accorded the legal protections of Geneva III—notably not for use on protected prisoners of war. Stress positions like standing were authorized, but only for a period of four hours. Harassment as sleep deprivation was authorized for military use, but its application was limited to twenty hours a day. Harassment as an isolation technique was

236. FM 30-15, 1967, *supra* note 232, at 17; *see* FM 30-15, 1969, *supra* note 232, at 2-6.

237. FM 30-15, 1967, *supra* note 232, at 17; *see* FM 30-15, 1969, *supra* note 232, at 2-6.

238. FM 30-15, 1967, *supra* note 232, at 17; *see* FM 30-15, 1969, *supra* note 232, at 2-6.

239. *See* ARTICHOKE Memo, *supra* note 172, at 355. General techniques such as harassment that are described in the Army field manual on interrogation are intended to provide a liberal degree of creative latitude to interrogators. The manuals state this explicitly. *See, e.g.*, FM 30-15, 1969, *supra* note 232, at 2-5. For a recent illustration of this practice of construction (for example, the creation of a sense of “futility” through lap dances, use of culturally offensive music, forced wearing of a bra, and the forced performance of dog tricks), *see* SCHMIDT REPORT, *supra* note 6, at 9, 15, 19.

240. *See* FM 30-15, 1967, *supra* note 232, at 17; FM 30-15, 1969, *supra* note 232, at 2-6; *see also* C.N. Geschwind, *Counterintelligence Interrogation*, *STUD. INTELLIGENCE*, Winter 1965, at 23, 33 (noting that harassment should not go “so far as to impair the functioning of the subject’s nervous system”).

limited to thirty days, with extensions made contingent upon high-level approval.²⁴¹

2. *Ethics, Efficacy, and Legal Strictures*

Despite flexible legal authorities construed to provide great latitude, as Cold War hostilities declined,²⁴² and as rights consciousness grew within the United States, concerns about propriety and fears of possible legal repercussions became more pressing. The use of drugs as interrogation aids began to trouble policymakers. Prior permission from the Army Assistant Chief of Staff for Intelligence—the primary Army officer responsible for interrogation policy—for the use of drugs was mandated in part because of the vexing legal and moral problems considered “inherent in their use.”²⁴³ The position taken by the Army—when authorizing the use of drugs as an interrogation method—that “the stakes involved and the interests of national security may permit a more tolerant interpretation of moral-ethical values,” so convincing to decisionmakers in 1959, was no longer as compelling by late 1963.²⁴⁴ As Cold War tensions abated, and uneasy détente²⁴⁵ (and later even cooperation²⁴⁶) was pursued with the Soviets, the Army rescinded at least some authorization of drug use.²⁴⁷

The legal culture was also changing. In 1966 the U.N. General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR), designed to imbed the principles of the Universal Declaration of Human Rights in the legal obligations of states. Though the United States did not ratify the treaty until 1992, by 1972 great support for further international agreements addressing detainee treatment began to coalesce.²⁴⁸ Domestically,

241. See Haynes Counter-Resistance Memo, *supra* note 6, at 236, 237 (referencing the Phifer Memo, *supra* note 6, at 227–28).

242. See PATTERSON, *supra* note 165, at 746.

243. Church Committee Report, *supra* note 170, at 419.

244. See USAINTC STUDY, *supra* note 226, at 96.

245. See PATTERSON, *supra* note 165, at 600.

246. See GADDIS, *supra* note 183, at 209.

247. See Church Committee Report, *supra* note 170, at 419.

248. See J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT 13, 33 (1988).

rights-consciousness became central to the legal culture by 1970.²⁴⁹ This extended to the protection of criminal defendants' rights. In a 1966 decision, *Miranda v. Arizona*, the Supreme Court expanded the privilege against self-incrimination and found that statements provided by suspects to police during custodial interrogation were inadmissible as trial evidence unless a prior warning of rights had been given.²⁵⁰

Of course, Geneva's language had allowed a narrow reading of the Convention's restrictions. Domestic law also did not address interrogation where admissibility of evidence at trial was irrelevant, and provided little direction for how limits on foreign intelligence interrogations should be understood. (*Miranda* had only established a trial right, not law applicable to all types of interrogation—much less intelligence interrogations of aliens in foreign territory.) Nonetheless, the legal milieu had become such that the military was now increasingly cautious and sensitive to allegations of possible illegality. Media scrutiny, which had begun in 1964, gave life to accusations of inhumane prisoner of war treatment.²⁵¹ The conflict in Vietnam, inspiring division, doubt, and a loss of public confidence in the capacity of government,²⁵² exacerbated these concerns as further accounts of brutality emerged.²⁵³ By 1972, the armed forces were demoralized²⁵⁴ and, in unprecedented fashion, vulnerable to attack in the press and the courts.²⁵⁵ In 1972, at the high water mark of détente—the atmosphere of tentative cooperation now a far-cry from the profound apprehension and paranoia of the late-1940s and 1950s²⁵⁶—the Army rescinded approval of the use of threats, stress positions, sleep deprivation, and total isolation as interrogation techniques. This would not change until 2002.

Despite apparent indications to the contrary, concerns about efficacy do not appear to have contributed to the growing anxiety over the use of coercion

249. BERNARD BAILYN ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 1225 (1977) [hereinafter *THE GREAT REPUBLIC*]; PATTERSON, *supra* note 165, at 638.

250. 384 U.S. 436 (1966).

251. See Howard S. Levie, *Maltreatment of Prisoners of War in Vietnam*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 361, 376 (Richard A. Falk ed., 1969).

252. See PATTERSON, *supra* note 165, at 600.

253. See EVANS, *supra* note 163, at 559; *THE GREAT REPUBLIC*, *supra* note 249, at 1231; PATTERSON, *supra* note 165, at 756.

254. See EVANS, *supra* note 163, at 522.

255. See DALE ANDRADÉ, *ASHES TO ASHES: THE PHOENIX PROGRAM AND THE VIETNAM WAR* 212 (1990).

256. See *THE GREAT REPUBLIC*, *supra* note 249, at 1120; SCHURMANN, *supra* note 165, at 100; Thomas, *supra* note 164 at 20.

generated by legal uncertainty and ethical considerations. A 1963 field manual establishing protocol for the use of drugs in interrogation notes incongruously—given the manual's inclusion of an order condoning the use of drugs as an interrogation method—that “[m]edical research has established that information obtained through the use of these drugs is unreliable and invalid.”²⁵⁷ Similar statements maintaining the inefficacy of violent interrogation measures appeared first in the 1967 Army Field Manual and then in every subsequent edition of the interrogation manual.²⁵⁸ A variant of this assertion was included in the most recent field manual.²⁵⁹ Such declarations that the use of force constitutes an ineffective method of obtaining accurate information—and military studies purporting to show the same²⁶⁰—were first made at a time when most American POW returnees from Korea and Vietnam admitted to succumbing to the use of physical coercion during interrogation.²⁶¹ In short, the claims did not reflect the empirical record or even accumulated experience. Rather, they appear to have been a necessary outgrowth of a military training and education program seeking to remedy deficiencies in American servicemen's ability to resist enemy interrogation through indoctrination of the American soldier in the belief that *he* could deny information and resist enemy interrogation even under pressure.²⁶²

Thus, over the course of the 1960s and early 1970s, as legal and ethical concerns grew in prominence, policy limits on the use of coercion gradually tightened, serving as protection against accusations of illegal treatment and the anxiety induced by the vexing moral imponderables occasioned through authorization of rough interrogation techniques.

III. AVOIDANCE: INTERROGATION BY OTHERS, 1973 TO 2001

Interrogation by proxy characterizes U.S. interrogation policy from 1973 until 2001. During this period, the most intractable legal questions and explicit

257. Church Committee Report, *supra* note 170, at 419.

258. See FM 30-15, 1967, *supra* note 232, at 5; FM 30-15, 1969, *supra* note 232, at 1-3; FM 30-15, 1973, *supra* note 231, at 4; FM 30-15, 1978, *supra* note 231, at 1-6; FM 34-52, 1987, *supra* note 230, at 1-1; FM 34-52, 1992, *supra* note 230, at 1-8.

259. See FM 2-22.3, *supra* note 137, at 5-21.

260. See ALBERT D. BIDERMAN, COMMUNIST TECHNIQUES OF COERCIVE INTERROGATION 5, 20 (Air Force Personnel & Training Research Ctr., Development Report No. AFPTRC-TN-56-132, 1956).

261. See VERNON E. DAVIS, THE LONG ROAD HOME: U.S. PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA 543 (2000).

262. See *id.* at 18, 20-27.

ethical qualms were ultimately avoided through the almost total cession of interrogation responsibilities to non-American personnel. This program, primarily a CIA effort, first involved advice and training—mostly independent of direct participation in interrogations²⁶³—provided to intelligence counterparts of allied foreign governments. Participation in foreign interrogations became even more attenuated during the subsequent—and lasting—permutation of the program, wherein the United States would provide the intelligence and logistical assistance necessary to detain a source of interest, and then benefit from whatever information was acquired from the subject by the cooperating foreign government. Each stage of this policy countenanced the indirect use of tactics that U.S. intelligence interrogators were by then forbidden to employ themselves.

A. Coercion and the Law

In the little under three decades prior to 2001, despite the great ambiguity of the law, the types of concerns that led the CIA and military to ultimately resist certain forms and degrees of coercion by 1973, and after 9/11, were exacerbated. These concerns, especially regarding retroactive discipline, were aggravated by intense and unprecedented public scrutiny, continuing developments in international human rights law, and a more entrenched institutional ethic of opposition to the use of coercion. Congressional investigations of CIA and DoD wrongdoing produced the most comprehensive public accounting of intelligence activities to date. The perception of the CIA as a “rogue elephant” contributed to the eventual imposition of greater restraints and regulations on Agency prerogative through enhanced oversight and reporting requirements.²⁶⁴ The CIA’s clandestine service was purged, and the human intelligence gathering capabilities of the now timid directorate of operations severely degraded.²⁶⁵ The trend toward satellite and electronic technologies accelerated at the expense of human operations.²⁶⁶ “Technical secrets” intelligence, while certainly efficacious, presented a most welcome minimalist alternative: the intelligence services could remain informed about

263. See CENT. INTELLIGENCE AGENCY, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL – 1983, slide B-17, at B-4 (1983) [hereinafter CIA EXPLOITATION MANUAL], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#southcom>.

264. JOHN PRADOS, PRESIDENTS’ SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH THE PERSIAN GULF 347 (1996).

265. See RANELAGH, *supra* note 165, at 644-45.

266. See BOB WOODWARD, VEIL: THE SECRET WARS OF THE CIA 1981-1987, at 24 (1987).

the rest of the world in a way that was comparatively safe and clean.²⁶⁷ Though during the 1980s the CIA would regain some of its diminished morale and operational capability, scrutiny of the Agency did not diminish and apprehension regarding adverse publicity and legal action remained and grew more pronounced.²⁶⁸

International human rights law also was changing. CAT was drafted in a process that began in 1977 and ended in 1984 with its adoption by the U.N. General Assembly. CAT entered into force on June 26, 1987, and was signed and ratified by the United States in 1990.²⁶⁹ The documents were deposited to the United Nations in 1994 whereby the United States committed to implement measures to prevent torture, and assumed a lesser treaty obligation to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhumane or degrading treatment or punishment which do not amount to torture.”²⁷⁰ CAT, unlike any predecessor international declarations such as the UDHR, sought to define torture and thereby inject greater legal clarity about what was proscribed. The Convention, like the later Torture Statute that in large part incorporated its language, nevertheless leaves many of its central terms undefined. As discussed previously, “severe pain” is provided no meaning. The phrase “cruel, inhumane or degrading treatment” was left uncertain and without an accepted definition.²⁷¹ Still, notwithstanding the indeterminate and contestable nature of the proposed legal regime, by 1977 an effort to establish a more exact legal definition of torture began in a forum with direct potential relevance to U.S. law, hinting at a future containing greater legal accountability and the possibility of eventual penal sanctions.

A basic resistance to employing coercive methods of interrogation also persisted. CIA memoranda from the 1980s and 1990s declare, for example, that “[a]side from the legal and policy considerations that are constant in any allegation concerning violations of human rights, we also must recognize a basic moral obligation. We are Americans and we must reflect American values

267. See RANELAGH, *supra* note 165, at 654, 655; WOODWARD, *supra* note 266, at 24.

268. See FREDERICK P. HITZ, REPORT OF INVESTIGATION: SELECTED ISSUES RELATING TO CIA ACTIVITIES IN HONDURAS IN THE 1980S, at 18-19 (1997) [hereinafter CIA HONDURAS REPORT]; JOHN RANELAGH, CIA: A HISTORY 221 (1992); RANELAGH, *supra* note 165, at 655.

269. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT]; BURGERS & DANIELIUS, *supra* note 248, at 31, 107.

270. CAT, *supra* note 269, art. 16.

271. See INGELSE, *supra* note 145, at 207.

in the conduct of our business.”²⁷² Still, this vision was circumscribed: it was not universal in scope, seemingly concerned with and including only those actions of the Agency itself.²⁷³ Indeed, the Agency was exceedingly less principled with respect to facilitating and benefiting from intelligence acquired through the less restrictive practices of others.²⁷⁴ While the Agency itself may have deplored certain levels of pressure, an essential hypocrisy characterized its moral calculus.

The interrogation policy limits for CIA officers ultimately imposed by 1973 were largely maintained thereafter, but the degree of coercion thought legally available appears to have been restricted. At least until 1988,²⁷⁵ the CIA interpreted the law to allow stress positions (“rigid positions such as standing at attention or sitting on a stool for long periods of time”²⁷⁶), disrupted sleep,²⁷⁷ solitary confinement,²⁷⁸ sensory deprivation,²⁷⁹ threats of violence,²⁸⁰ examination of body cavities,²⁸¹ and temperature manipulation.²⁸² Perhaps in light of the more nuanced legal definition of torture discussed as early as 1977 for ultimate inclusion in the CAT, by 1984, if not earlier, the CIA appears to have understood the strictures of the law to limit the severity of the coercion that could be applied through these techniques. The techniques considered did not change; only the degree of pressure applied was curtailed. Now prolonged solitary confinement and the creation of unbearable stress through extreme

272. CIA HONDURAS REPORT, *supra* note 268, at 18; *see also* *Introduction-I.B.*, in CIA EXPLOITATION MANUAL, *supra* note 263, at A-1; *Introduction-I.C.*, in CIA EXPLOITATION MANUAL, *supra* note 263, at A-2.

273. *See infra* text accompanying notes 286-298.

274. *Id.*

275. *See* MCCOY, *supra* note 20, at 97-98.

276. CIA EXPLOITATION MANUAL, *supra* note 263, slide L-12, at K-10. The edits of July 1984 were made in conformity with the newly attached “Prohibition Against the Use of Force” affirming that the “use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind as an aid to interrogation is prohibited by law, both international and domestic; it is neither authorized nor condoned.” *Id.* at A-o.

277. *See id.* slide L-3, at K-1 to K-2; *id.* slide L-17, at K-14 to K-15.

278. *See Checklist for the “Questioning”-IV.K.*, in CIA EXPLOITATION MANUAL, *supra* note 263, at L-4; CIA EXPLOITATION MANUAL, *supra* note 263, slide L-10, at K-6 to K-7; *id.* slides F-5 to F-18, at F-2 to F-4.

279. *See id.* slide L-10, at K-6 to K-7; *id.* slides E-24 to E-36, at E-3 to E-5.

280. *See id.* slide L-11, at K-8 to K-9; *id.* slide I-22, at I-8; *id.* slide K-7, at J-6 to J-7.

281. *See id.* slide F-14, at F-3.

282. *See id.* slide E-25, at E-3.

deprivation of sensory stimuli were considered prohibited by law.²⁸³ Self-inflicted discomfort was substituted for pain, and stress positions were limited to periods of time not long enough to cause physical damage.²⁸⁴ Applying duress beyond the point of irreversible psychological damage was proscribed and viewed as illegal.²⁸⁵ Yet the simplest solution to avoid difficult legal questions and explicit ethical qualms was the almost total cession of interrogation responsibilities to others. So the CIA and military pursued interrogation by proxy, which, though it had the potential to provoke anxiety over moral concerns and future claims of illegality, presented a cleaner and more risk-averse alternative to interrogations conducted directly by U.S. personnel.

B. Coercion by Proxy

By 1980, at a time of growing alarm, the United States turned to interrogation by proxy.²⁸⁶ “[D]étente was dead [and] buried.”²⁸⁷ This second major escalation of the Cold War was as tense as any moment since the early 1960s.²⁸⁸ Much of the most heated conflict of this second phase of the Cold War unfolded in Central America, where the United States resisted what it saw as widespread communist subversion. Here, at points throughout the 1980s, U.S. advisors counseled allied foreign intelligence services in methods of coercion that at times exceeded the level of coercion deemed permissible when considered for use by U.S. personnel. The CIA instructed in the use of threats of violence, self-inflicted pain, disorientation through sleep and dietary manipulation, and sensory deprivation—all without the limits and caveats that were imposed when the basic legality of American use of these techniques was assessed.²⁸⁹ Military training manuals and program materials condoned

²⁸³. See *id.* slide L-10, at K-6 to K-7.

²⁸⁴. See *id.* slide L-12, at K-9 to K-11.

²⁸⁵. See *id.* slide L-6, at K-3.

²⁸⁶. See GADDIS, *supra* note 183, at 349.

²⁸⁷. *Id.*

²⁸⁸. JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE* 110 (2005).

²⁸⁹. See CIA EXPLOITATION MANUAL, *supra* note 263, slides E-25 to E-36, at E-3 to E-5; *id.* slides F-5 to F-18, at F-2 to F-4; *id.* slide I-22, at I-8; *id.* slides L-3 to L-17, at K-1 to K-15; *id.* slide K-7, at J-6 to J-7. These citations refer to the *CIA Exploitation Manual* as it was originally published (before the July 1984 amendments). Since these amendments were made by hand, the 1983 edition cited here presents both versions.

physical abuse and beatings as interrogation methods when employed by foreigners.²⁹⁰

The program was not without risk. As the United States and the Soviet Union moved toward unprecedented accommodation,²⁹¹ and as congressional and media scrutiny of the CIA's role in training foreign intelligence services grew,²⁹² the training program was eventually discontinued.²⁹³ By 1991, the military also had discontinued the use of foreign training materials and programs that condoned coercion deemed impermissible for use by American soldiers.²⁹⁴

The challenges presented by terrorism, however, would breathe new life into a lasting iteration of the interrogation by proxy program. The new program was extraordinary rendition. As has been documented extensively elsewhere,²⁹⁵ it involved the apprehension and transfer abroad—outside the established system of legal extradition—of individuals wanted for crimes, sometimes for purposes of interrogation. Starting in 1995, the rendition of terrorists from one state to another quickly became routine activity.²⁹⁶ The Agency would assist with logistical support in the detention and transfer, and

290. See JAMES HODGE & LINDA COOPER, *DISTURBING THE PEACE: THE STORY OF FATHER ROY BOURGEOIS AND THE MOVEMENT TO CLOSE THE SCHOOL OF THE AMERICAS* 164-65 (2004); Memorandum from Thomas R. Hubbard, Major, U.S. Air Force, Assistant Deputy Dir. for CI Support, on USSOUTHCOM CI Training to Principal Deputy for Intelligence (July 31, 1991), available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/910801%20USSOUTHCOM%20CI%20Training%20\(U\).pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/910801%20USSOUTHCOM%20CI%20Training%20(U).pdf); Memorandum from Werner E. Michel, Assistant to the Sec'y of Def., on Improper Material in Spanish-Language Intelligence Training Manuals to the Sec'y of Def. (Mar. 10, 1992) [hereinafter Michel Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/920310%20Improper%20Material%20in%20Spanish-Language%20Intelligence%20Training%20Manuals.pdf>; Latin American Working Group, *Declassified Army and CIA Manuals Used in Latin America: An Analysis of Their Content*, http://www.lawg.org/misc/index.php?option=com_content&task=view&id=319&Itemid=65 (last visited Feb. 13, 2009).

291. See GADDIS, *supra* note 183, at 379.

292. See TAYACÁN, *THE CIA'S NICARAGUA MANUAL: PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE* 56-57 (1985); WOODWARD, *supra* note 266, at 389.

293. See PRISONER ABUSE: PATTERNS FROM THE PAST, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 122, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#dod1992>.

294. See Michel Memo, *supra* note 290.

295. See WITTES, *supra* note 56, at 25-28.

296. See DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR* 251, 252 (2002); RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 143-49 (2004); George J. Tenet, Dir., Cent. Intelligence Agency, Keynote Address to the Nixon Center Distinguished Service Award Banquet (Dec. 11, 2002) (transcript available at http://www.cia.gov/news-information/speech-testimony/2002/dci_speech_12112002.html).

then, in the words of the CIA inspector general from 1990 to 1998, “use the fruits”²⁹⁷ of interrogations conducted by foreign services—such as the Egyptians and Saudis—able to employ methods of coercion forbidden to the CIA.²⁹⁸

CONCLUSION

This Note has shown that in times of national insecurity since World War II, the law has been interpreted to permit the authorization of highly coercive interrogation methods. The current debate over interrogation law and policy is not served by the erroneous historical framework to which even the opposing parties to this debate have subscribed, namely, that a dramatic break with the past occurred in the aftermath of 2001. Interrogation's law—absolute bans on vaguely defined abuse—has provided the latitude that has, in turn, permitted the authorization of coercive interrogation since World War II. To declare that the law's mandates were clear before 9/11,²⁹⁹ but grossly misconstrued—even repudiated—in its aftermath, and that if only properly acknowledged will be clear yet again, is to delegate the tough questions in future interrogation dramas to the executive branch agencies discussed in this Note. This Note has shown how, prior to 9/11, responsible officials who wished to obey the law's uncertain boundaries found sufficient latitude to authorize highly coercive interrogation techniques. In light of the past, there is little reason to expect different practices in times of future fear. If this is troubling, then a rethinking of interrogation law and policy is necessary.

297. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

298. See Mayer, *supra* note 10; Scheuer Interview, *supra* note 34.

299. See, e.g., Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44, 51 (“I think the world was very simple before 9/11. We knew what the law was Now there's real uncertainty.” (quoting Sen. Richard Durbin)).