

# Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture

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INTRODUCTION.....	1255
I. EXECUTIVE POLICY AND PRACTICE: COERCIVE INTERROGATION AND TORTURE .....	1257
A. <i>Vague or Unlawful Guidance</i> .....	1259
B. <i>Inaction</i> .....	1268
C. <i>Resources, Training, and a Plan</i> .....	1271
II. EXECUTIVE LIMITS: FINDING CONSTRAINTS THAT WORK .....	1273
A. <i>The Professional Military</i> .....	1274
B. <i>The Public Oversight Organizations of Civil Society</i> .....	1279
C. <i>Activist Federal Courts</i> .....	1288
CONCLUSION.....	1295

## INTRODUCTION

While the courts continue to debate the limits of inherent executive power under the Federal Constitution, the past several years have taught us important lessons about how and to what extent constitutional and sub-constitutional constraints may effectively check the broadest assertions of executive power. Following the publication in 2004 of photographs of U.S. troops torturing captives at the U.S.-run Abu Ghraib prison in Iraq, executive branch use of torture and other forms of coercive interrogation has raised profound questions of policy and morality. Are such tactics useful in combating the terrorist threat? Is a government ever morally justified in using such techniques? What are the negative consequences for U.S. strategic security goals from the public exposure of such practices? The practice has also raised serious questions of law regarding the extraterritorial application of U.S. constitutional and treaty obligations, the scope of the ban on “cruel, inhuman and degrading treatment” under U.S. law,<sup>1</sup> and

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1. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification, and accession by resolution of the U.N. General Assembly Dec. 19, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486 (1990) (U.S. Senate reservations declaring “[t]hat the United States

the adequacy of enforcement mechanisms to hold accountable those who violate such prohibitions.

Perhaps above all, the practice has raised hard questions about what remains of meaningful constraints on executive power. The conduct revealed in the Abu Ghraib photos was immediately and widely condemned by political leaders on both sides of the aisle.<sup>2</sup> In the intense scrutiny of executive branch practice that followed, it became clear that the executive had not only contemplated the use of coercion up to and including torture, but that, arguably at least, the torture and abuse documented in an ever-widening series of incidents from Afghanistan to Iraq to the U.S. Naval Base at Guantánamo Bay was the result of a combination of direct executive authorization, and executive knowledge of wrongdoing coupled with a failure to correct and punish.<sup>3</sup> Further, executive conduct in this realm was justified, at least for a time, by a sweepingly broad assertion of presidential power according to which the federal law criminalizing torture could be found unconstitutional if interpreted to constrain the ability of the President as commander in chief to authorize coercive interrogation.<sup>4</sup>

Whatever the theoretical merits of coercive interrogation as applied in a targeted way against the most heinous of suspects, the widespread torture and abuse of scores of apparently innocent detainees was an outcome no one purported to seek. Yet there are now hundreds of officially documented incidents of torture and abuse in U.S. custody since 2002, only a fraction of which occurred at Abu Ghraib. Among the most troubling statistics is the Pentagon's documentation of more than two dozen homicides in U.S. detention facilities worldwide since 2002 (only one of which was at Abu Ghraib), including at least eight individuals who were tortured to death.<sup>5</sup> Whether or

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considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' 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."); *see also* Detainee Treatment Act of 2005, Publ. L. No. 109-148 § 1001, 119 Stat. 2739 (McCain Amendment banning cruel, inhuman or degrading treatment).

2. Secretary of Defense Donald Rumsfeld called the conduct "unacceptable" and "un-American." Donald Rumsfeld, Defense Department Operational Update Briefing (May 4, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040504-secdef1423.html>. Republican Senator John McCain emphasized that "history shows—and I know a little bit about this—that mistreatment of prisoners and torture is not productive. . . . You don't get information that's usable from people under torture, because they just tell you what you want to hear." Sheryl Gay Stolberg, *Prisoner Abuse Scandal Puts McCain in Spotlight Once Again*, N.Y. TIMES, May 10, 2004, at A19. Republican Senator John Warner agreed, noting that the abuses, if true, were "an appalling and totally unacceptable breach of military conduct that could undermine much of the courageous work and sacrifice by our forces in the war on terror." John Warner, Statement on Iraqi P.O.W. Mistreatment (May 3, 2004), <http://www.senate.gov/~warner/pressoffice/pressreleases/20040503.htm>.

3. *See infra* Part II.

4. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. [hereinafter Bybee Memo].

5. *See* HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), available at <http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf>; *Prisoner Deaths in U.S. Custody*, ASSOC. PRESS, Mar. 16, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/03/16/national>

not one believes that the executive bears direct political or legal responsibility for this conduct,<sup>6</sup> few dispute that the most egregious of these acts are unlawful, and that the consequences of their revelation for U.S. policy have been overwhelmingly adverse.<sup>7</sup>

How is it, then, that the structures of our constitutional democracy, theoretically designed to avoid outcomes in which the power of the executive branch is exercised over a period of time without check in a manifestly unlawful way, failed to do so in this case? Our Constitution and laws are replete with basic affirmative human rights; the structural separation of powers among the branches is also designed to protect individual rights; and, particularly since World War II, executive power to act in the realm of national security has been constrained by a rich canon of statutes and regulations. Were none of these tools sufficient? What lessons can we take from the example of torture for the prospects of effectively constraining executive national security power going forward?

This Article suggests some answers to each of these questions. Following a discussion of why torture and abuse in the “war on terror” became such a pervasive problem in the years after September 11, this Article argues that the most effective power-checking tools (at least at the margins) have emerged from less classically “democratic” sources: a highly professionalized military and intelligence community; the media and the organizations of non-governmental civil society; and the active engagement of the courts. While it is true that many of our core democratic structures failed to constrain executive operations in prisoner detention and treatment (particularly Congress, charged as a co-equal partner in U.S. national security and foreign affairs powers),<sup>8</sup> these other levers have seen at least modest success in changing the course of executive policy. Indeed, this Article suggests that effective constraints on executive power going forward are more likely to be found in the reinforcement and enhancement of the courts and these other arguably undemocratic institutions, than through congressional or other “hardcore” democratic checks on power.

#### I. EXECUTIVE POLICY AND PRACTICE: COERCIVE INTERROGATION AND TORTURE

Any discussion of lessons learned from recent U.S. experiences with torture and coercive interrogation must begin with a clear-eyed view of what those experiences include, namely, a startling record of widespread torture and abuse. Most well known among these incidents are the acts depicted in photographs from the U.S.-run Abu

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/w113007S95.DTL; George Gedda, *Official Report Substantiates 190 Instances of Prisoner Abuse, Defends U.S. Response*, ASSOCIATED PRESS, May 6, 2005, available at <http://www.freewmexican.com/news/13490.html>.

6. Regarding the legality of interrogation methods, see *infra* note 52.

7. Concern about the negative effects of such practices on U.S. national security policy has also been bipartisan in nature. Brigadier General Mark Kimmitt, Deputy Director for Coalition Operations, Coalition Provisional Authority Briefing (May 10, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040510-0742.html>; see also John Hendren and Elizabeth Shogren, *Shooting Spurs Iraqi Uproar, U.S. Inquiry*, L.A. TIMES, Nov. 17, 2004, available at <http://198.62.75.1/www1/news/lat-11-17-04b.html>.

8. Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006).

Ghraib prison in Iraq, showing U.S. troops subjecting prisoners to mock execution, sexual humiliation, beatings, and numerous other forms of degrading treatment.<sup>9</sup>

Yet the torture and cruel treatment of detainees in U.S. custody predated, and has postdated, the events at Abu Ghraib. According to Department of Defense documents, since 2002, at least thirty-four detainees held in connection with the U.S. “global war on terror”<sup>10</sup> have died as a result of homicide while in U.S. custody; at least eight of these men were tortured to death.<sup>11</sup> Of these deaths, only one occurred at the U.S. detention facility at Abu Ghraib.<sup>12</sup> As of November 2005, the Army alone has investigated more than 600 allegations of detainee mistreatment, and more than 230 soldiers and officers have faced courts-martial, non-judicial punishments, and administrative punishments for torture and other acts of abuse.<sup>13</sup> As one of the many Pentagon investigations conducted into the issue concluded in 2004, the problem has been systemic in nature.<sup>14</sup>

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9. Guardian Unlimited, Gallery, May 2004: The Images That Shamed America, <http://www.guardian.co.uk/gall/0,8542,1211872,00.html>.

10. The Administration’s term “global war on terror” is meant to describe U.S. government operations to target terrorist organizations “of global reach,” and includes military operations in Afghanistan and Iraq, and detention and intelligence operations worldwide since 2001. *See, e.g.*, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 129 (Jan. 29, 2002) (“Iraq continues to flaunt its hostility toward America and to support terror. . . . States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.”); President George Bush, Address to a Joint Session of the Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>; Press Release, The Coalition Information Centers, The Global War on Terrorism: The First 100 Days (Dec. 2001), <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.pdf>.

11. *See* HUMAN RIGHTS FIRST, *supra* note 5; *see also* 18 U.S.C. § 2340(1) (2000) (“[T]orture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”).

12. Since 2002, the United States has maintained on the order of six main detention facilities worldwide (three in Iraq, two in Afghanistan, and one in Guantanamo Bay) and approximately twenty-five transient facilities in Afghanistan and Iraq in connection with its operations in the “global war on terror.” HUMAN RIGHTS FIRST, BEHIND THE WIRE: AN UPDATE TO ENDING SECRET DETENTIONS 1–2 (2005), [http://www.humanrightsfirst.org/us\\_law/PDF/behind-the-wire-033005.pdf](http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (describing secret detention facilities operated by the United States in Europe and Southeast Asia). Among publicly known detention facilities, the newest is set to open in northern Iraq by the end of 2005. *See* Elaine Eliah, *Team Quickly Turns Old Fort into Detention Facility*, AM. FORCES PRESS SERV., Oct. 21, 2005, [http://www.defenselink.mil/news/Oct2005/20051021\\_3122.html](http://www.defenselink.mil/news/Oct2005/20051021_3122.html).

13. Josh White, *5 Soldiers Charged with Abuse of Detainees*, WASH. POST, Nov. 8, 2005, at A12.

14. MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 8 (2004), *available at* <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter FAY REPORT] (marked unclassified, with sections redacted) (finding that “leader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred”).

On the critical questions how and why torture and abuse became so widespread, a collection of Pentagon investigations and leaked documents on post-September 11 U.S. detention and interrogation operations now help point to a set of explanations:<sup>15</sup> vague or unlawful executive guidance; inaction by civilian executive authority in the face of a broadly apparent problem of unlawful activity; and badly underdeveloped resources, training, and planning for detention and interrogation operations. In an effort to help identify where executive power failed—and what constraints on power may have been lacking—this Part briefly canvasses the role each of these factors appears to have played.

#### A. Vague or Unlawful Guidance

Central to understanding the high incidence of torture and abuse in U.S. detention facilities since 2002 is the broad policy guidance from executive authorities as to what rules apply in such operations. This guidance, coupled with direct orders authorizing certain interrogation techniques that appear to violate the Constitution and laws of the United States, resulted in two significant problems.

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15. See VICE ADM. ALBERT T. CHURCH, REVIEW OF DEPARTMENT OF DEFENSE INTERROGATION OPERATIONS (2005), [http://www.defenselink.mil/news/Mar2005/d20050310\\_exe.pdf](http://www.defenselink.mil/news/Mar2005/d20050310_exe.pdf) [hereinafter CHURCH REPORT]; LT. GEN. ANTHONY R. JONES, AR. 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE 6–33 (2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter JONES REPORT] (marked unclassified); LT. GEN. PAUL T. MIKOLASHEK, DEPARTMENT OF THE ARMY DETAINEE OPERATIONS INSPECTION (2004) [hereinafter DAIG REPORT] (unmarked, unclassified); MAJ. GEN. GEOFFREY MILLER, ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ (2003), available at <http://www.publicintegrity.org/docs/AbuGhreib/Abu3.pdf> [hereinafter MILLER REPORT]; MAJ. GEN. DONALD J. RYDER, REPORT ON DETENTION AND CORRECTIONS IN IRAQ 9–12 (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) (marked secret); JAMES R. SCHLESINGER, FORMER SECRETARY OF DEFENSE, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (2004), available at <http://www.isn.ethz.ch/pubs/ph/details.cfm?id=10157> (scroll down and download full text version) [hereinafter SCHLESINGER REPORT] (unmarked, unclassified); LT. GEN. MARK SCHMIDT & BRIG. GEN. JOHN FURLOW, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY (2005), available at [http://www.humanrightsfirst.org/us\\_law/detainees/schmidt-army-reg-150605.pdf](http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf) [hereinafter SCHMIDT REPORT]; MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) [hereinafter TAGUBA REPORT] (marked secret); FAY REPORT, *supra* note 14; Brig. Gen. Richard P. Formica, Commander III Corps Artillery, Report on Allegations of Abuse by Special Operations Forces in Iraq (Dec. 2004) (never made public) (on file with Human Rights First); Brig. Gen. Charles H. Jacoby, Investigation on U.S.-run Detention Facilities in Afghanistan (July 2004) (never made public) (on file with Human Rights First). Despite the many investigations conducted to date, the official inquiry into what happened and why—particularly the role of the CIA and Special Forces in these events, as well as the role of command authority—remains fundamentally incomplete. See HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH 14–22 (2004), available at [http://www.humanrightsfirst.org/us\\_law/PDF/Getting\\_to\\_Ground\\_Truth\\_090804.pdf](http://www.humanrightsfirst.org/us_law/PDF/Getting_to_Ground_Truth_090804.pdf).

First, broad policy decisions changed what had been for decades settled U.S. law—embodied in military doctrine, field manuals, and training—that detention operations in a “war” context were invariably controlled by the set of Geneva Conventions governing the treatment of both captured foreign troops and all those caught up in the course of armed conflict. These conventions together afford all such individuals a right to basic humane treatment—whether or not they are also entitled to the special status of “prisoner of war.”<sup>16</sup> In its place, as discussed below, the administration offered no comprehensive or consistent policy understanding of what rules did apply. According to post hoc Pentagon investigations, this left military and intelligence officials confused, at the least, as to how to instruct or correct those under their command.

Second, compounding this confusion, senior military command officials promulgated a harsh and rapidly shifting set of field orders in an attempt to implement the new policy regime—orders that, among other things, lifted restrictions on certain interrogation techniques that had been previously out-of-bounds. Although troops and command moved seamlessly from Afghanistan to Guantánamo Bay to Iraq (as a result of transfers and shifting troop deployments), the operative detention and interrogation orders in each of these theaters differed from each of the others. And the orders differed further *within* each detention center depending on the month, the agency affiliation of the interrogator, and the assigned legal status (again, a shifting set of designations) of the prisoner himself. These policies and orders, and the confusion they engendered, unquestionably played a role in facilitating abuse.

### 1. A New Direction in Policy

In the months following September 11, the White House promulgated guidance that the Geneva Conventions—treaties signed and ratified by the United States and governing U.S. conduct in circumstances of armed conflict—would not apply to broad categories of individuals arrested in the course of the “global war on terror.”<sup>17</sup> In

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16. See DEP’T OF THE ARMY, FIELD MANUAL 34-52 INTELLIGENCE INTERROGATION (1992), <http://www.fas.org/irp/doddir/army/fm34-52.pdf> [hereinafter FM 34-52]; DEP’T OF THE ARMY, ARMY REGULATION 190-8 ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997), <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. FM 34-52 states that “[t]hese principles and techniques of interrogation are to be used within the constraints established by,” among other things, the Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of August 12, 1949; Geneva Convention [III] Relative to the Treatment of Prisoners of War of August 12, 1949; and Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. FM 34-52, *supra*, at iv–v. The International Committee of the Red Cross, the body designated by the Geneva treaties as primarily responsible for treaty interpretation, has long held that all those caught up in the course of armed conflict are governed by one of the Geneva Conventions—either as lawful combatants under Geneva III, or as civilians (whether engaged unlawfully in combat or not) under Geneva IV. See Int’l Comm. of the Red Cross, International Humanitarian Law and Terrorism: Questions and Answers (May 5, 2004), <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/0F32B7E3BB38DD26C1256E8A0055F83E>.

17. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded,

particular, in a reversal of more than fifty years of U.S. policy and over the vigorous objections of the Secretary of State at the time, the White House concluded that the Geneva Convention regarding the treatment of prisoners of war, apparently including its prohibition of cruel treatment, would not apply to suspected members of al Qaeda.<sup>18</sup> While the President and Secretary of Defense issued statements in early 2002 that the United States would—as a matter of policy (as distinct from legal obligation)—treat detainees in a manner “reasonably consistent with the Geneva Conventions,” these statements were limited by caveats that treatment would depend on the extent to which such treatment was appropriate and consistent with military necessity, and on determinations about whether detainees were “unlawful combatants” or “high value detainees” or other designations unknown in existing military doctrine.<sup>19</sup>

Later that year, in August 2002, the Office of Legal Counsel in the Department of Justice (OLC) also produced policy guidance on the treatment of detainees in the custody of the United States. Most famously, OLC concluded with respect to the use of coercive interrogation that for physical pain inflicted by an interrogator to amount to torture, the “victim must experience intense pain and suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result.”<sup>20</sup> (Among other things, this definition went into detail well beyond the definition in the federal criminal law banning torture, which defined torture simply as including any act “specifically intended to inflict severe physical or mental pain or suffering.”<sup>21</sup>) On the question of presidential authority, OLC lawyers advised, *inter alia*, that the President not only had the authority to order any and all treatment falling short of the pain associated with organ failure or death, but also that it would be *unconstitutional* for Congress to pass legislation (including the criminal prohibition of acts of torture already in the federal criminal code) that would interfere in this exercise of power.<sup>22</sup>

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Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 7 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

18. Memorandum from Alberto Gonzales, White House Gen. Counsel, to President George W. Bush, Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), <http://msnbc.msn.com/id/4999148/site/newsweek> (citing Geneva Convention III, *supra* note 17). The memorandum did not address—and indeed, appeared to assume irrelevant—the question whether al Qaeda detainees would be entitled to more basic protection against inhumane treatment provided by the fourth Geneva Convention governing all others caught up in the scope of armed conflict. *See* Geneva Convention IV, *supra* note 17.

19. Secretary Rumsfeld stated that “technically unlawful combatants do not have any rights under the Geneva Conventions.” Donald Rumsfeld & Gen. Richard B. Myers, Department of Defense News Briefing (Jan. 11, 2002), [http://www.defenselink.mil/transcripts/2002/t01112002\\_t0111sd.html](http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html); *see also* HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS 11–12 (2004), [http://www.humanrightsfirst.org/us\\_law/PDF/EndingSecretDetentions\\_web.pdf](http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf).

20. Bybee Memo, *supra* note 4, (citing 18 U.S.C. §2340 (1998)).

21. 18 U.S.C. § 2340 (1998).

22. Bybee Memo, *supra* note 3 (citing 18 U.S.C. §2340 (1998)).

For the U.S. invasion of Iraq in April 2003, the administration adopted a new approach. It stated publicly that it would only hold detainees in that conflict under the protection of one or the other of the two most relevant Geneva Conventions regarding prisoners of war and civilians picked up in the course of armed conflict—presumably including their prohibitions of cruel treatment.<sup>23</sup> Despite the apparent return to the standard Geneva regime for the war in Iraq, additional policy-level judgments worked quickly to cloud the picture.

Established military doctrine implementing the Geneva regime had recognized four categories of detainees: enemy prisoners of war, retained personnel, civilian internees, and a catch-all “other detainee” category. Without updating that doctrinal guidance, the United States began housing thousands of detainees whose non-doctrinal identification brought with it indeterminate legal status: enemy combatants, unprivileged enemy combatants, security internees, criminal detainees, military intelligence holds, persons under U.S. forces control, and low-level enemy combatants.<sup>24</sup> Traditional categories like “prisoner of war” were used for only a handful of the many thousands the U.S. held in custody.<sup>25</sup> As command and troops were transferred from Afghanistan to Iraq, the shifting set of apparently applicable rules—including what kind of treatment attached to what kind of detainee—became increasingly difficult to follow.<sup>26</sup>

At the same time, OLC lawyers again worked to recast seemingly clear Geneva provisions, this time, for instance, on the question of whether Geneva permitted the administration to remove certain detainees from Iraq for interrogation elsewhere.<sup>27</sup> Article 49 of Geneva IV broadly prohibits the removal of “protected persons from occupied territory.”<sup>28</sup> Yet in the months following the publication of the photos from Abu Ghraib, it became clear that prisoners had been removed from Iraq, presumably for the purpose of interrogating them in a place or under circumstances in which the interrogation rules applicable in the Iraqi theater would not seem to apply.<sup>29</sup> It also

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23. News Transcript, Dep’t of Def., Briefing on Geneva Convention, EPW’s and War Crimes, (Apr. 7, 2003), available at [http://www.defenselink.mil/transcripts/2003/t04072003\\_t407genv.html](http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html). For a discussion of the lawfulness of these particular techniques under the Constitution and the laws of the United States, see *infra* note 52.

24. DAIG REPORT, *supra* note 15, at 44–47, FAY REPORT, *supra* note 14, at 11–12.

25. HUMAN RIGHTS FIRST, *supra* note 19 at 9–17. News Transcript, Dep’t of Def., Enemy Prisoner of War Briefing from Kuwait City (May 8, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030508-0160.html>.

26. For more on the confusion, see *infra* notes 48–55 and accompanying text.

27. Article 49 of the Fourth Geneva Convention categorically prohibits the forcible transfer or deportation of “protected persons” outside occupied territory. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”). See Memorandum from Jack L. Goldsmith, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: The Permissibility on Relocating Certain “Protected Persons” from Occupied Iraq (Mar. 19, 2004), available at [http://www.humanrightsfirst.org/us%5Flaw/etn/gonzales/memos\\_dir/memo\\_20040319\\_Golds\\_Gonz.pdf](http://www.humanrightsfirst.org/us%5Flaw/etn/gonzales/memos_dir/memo_20040319_Golds_Gonz.pdf); Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

28. Geneva Convention art. 49, *supra* note 27.

29. In March 2004, Assistant Attorney General Jack Goldsmith wrote a confidential memo

eventually became clear that U.S. forces in Iraq were holding prisoners off the rolls—without recording their identity or existence on official Army records—again a violation of Geneva and domestic implementing regulations.<sup>30</sup> And, as later became painfully apparent, unauthorized and unlawful treatment of detainees was pervasive in practice.<sup>31</sup>

The administration's equivocal relationship with the Geneva Convention regime—the only set of rules the military had been trained to follow with respect to prisoner detention and interrogation operations<sup>32</sup>—left, at the very least, a vacuum in policy guidance. Into that vacuum rushed a series of directives that left little doubt that interrogators' gloves, in any theater of operations, were meant to come off.<sup>33</sup>

## 2. Implementing Changes in the Field

Whether or not the broadest statements of administration policy were lawful or accurate interpretations of the underlying law (and arguments are vigorous that they were not<sup>34</sup>), there is no question that this guidance found its way into subsequent Defense Department directives to frontline forces on what treatment was authorized toward detainees in U.S. custody.<sup>35</sup>

For example, in November 2002, two months after OLC promulgated its memo expansively defining presidential authority, Defense Secretary Rumsfeld approved the use of military dogs to induce fear and to exploit “individual phobias” during the

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to Alberto Gonzales, arguing that the CIA could secretly transfer prisoners out of Iraq, despite Article 49 of the Fourth Geneva Convention. See Memorandum from Jack L. Goldsmith, *supra* note 27; Priest, *supra* note 27.

30. HUMAN RIGHTS FIRST, *supra* note 19 at 7.

31. See *infra*, Part II.C.

32. See *infra*, Part III.A.

33. Cofer Black, Director of the CIA's Counterterrorist Center from 1999 until May of 2002, stated on September 26, 2002 that “All I want to say is that there was ‘before’ 9/11 and ‘after’ 9/11. After 9/11 the gloves come off.” *Joint Inquiry into Intelligence Activities Before and After the Terrorist Attacks of September 11, 2001, Before the S. Select Comm. on Intelligence and the H. Permanent Select Comm. on Intelligence*, 107th Cong. 600–02 (2002) (statement of Cofer Black, Former Chief, DCI's Counterterrorist Center, Central Intelligence Agency), available at [http://www.fas.org/irp/congress/2002\\_hr/092602black.pdf](http://www.fas.org/irp/congress/2002_hr/092602black.pdf).

34. See e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Neil McDonald and Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror,”* 44 HARV. INT'L L.J. 301 (2003); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Julie Angell, Comment, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005).

35. After the Geneva memos but evidently before the Bybee memo was complete, Defense Secretary Rumsfeld approved a list of interrogation techniques on Dec. 2, 2002, for use on detainees at Guantanamo (most of whom had been detained in connection with hostilities in Afghanistan). These December techniques included the use of “stress positions,” twenty-hour interrogations, the removal of clothing, playing upon a detainee's phobias to induce stress (such as through the use of dogs), isolation for up to thirty days, and sensory deprivation. Some of these policies were soon withdrawn, at least in part in response to Pentagon lawyers' objections. See 151 CONG. REC. 8794–96 (July 25, 2005) (Military JAG Memos on Working Group Report), available at [http://www.humanrightsfirst.org/us\\_law/etn/pdf/jag-memos-072505.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/jag-memos-072505.pdf).

interrogation of a specific detainee at Guantánamo.<sup>36</sup> In December, the directive became more aggressive still, including in addition the use of “stress positions,” twenty-hour interrogations, the removal of clothing, isolation for up to thirty days, and sensory deprivation.<sup>37</sup> In addition to promulgating this guidance for use at Guantánamo Bay, U.S. Army Central Command (responsible for ongoing operations in Afghanistan) told command officers in Afghanistan that “doctrinal approaches” to detainee operations were not “tak[ing] full advantage of the various policies adopted by civilian leadership to deal with the unique nature of this unconventional operation.”<sup>38</sup> While the primary Pentagon investigation into U.S. detention and interrogation operations in Afghanistan has never been released publicly,<sup>39</sup> a summary of the official military investigation into Guantánamo concluded that a number of the December techniques had “migrated” to operations in Afghanistan.<sup>40</sup>

It was at this time, late 2002, that Federal Bureau of Investigation (FBI) agents conducting intelligence operations at Guantánamo began complaining to the Department of Defense General Counsel’s office and others that Guantánamo detainees were being subjected to sexual humiliation, threatened by dogs, and left naked, isolated

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36. SCHMIDT REPORT, *supra* note 15, at 14; Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASH. POST, July 28, 2005, at A18.

37. Memorandum from William J. Haynes, General Counsel to Donald Rumsfeld, U.S. Department of Defense, Re: Counter-Resistance Techniques (Nov. 27, 2002) (approved by Rumsfeld on December 2, 2002, with hand-written comment: “However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?”). Haynes’ memo attaches a memo from General James Hill (Oct. 25, 2002); a memo from Maj. Gen. Michael Dunlavey (Oct. 11, 2002), a memo (legal review) by LTC Diane Beaver (Oct. 11, 2002) and a Request for Approval for Counter-Resistance Strategies from LTC Jerald Phifer (Oct. 11, 2002).

38. An internal military document issued by the U.S. Army Central Command stated: “[D]octrinal approaches to ‘EPW’ or ‘Detainee’ operations initially utilized by CFLCC [Coalition Forces Land Component Command] did not take full advantage of the various policies adopted by civilian leadership to deal with the unique nature of this unconventional operation. The laws and policies regarding the war against terrorism must be used to the maximum extent possible and support flexibility for commanders instead of acting as restrictive barriers. The laws permit greater latitude than what is exercised in conventional operations.” ARCENT CAAT Initial Impressions Report, ch. 3, Operational Intelligence, at DODDOA13242, 13243 (no date) (unpublished, partial, and unidentified document, on file with Human Rights First).

39. Lieutenant General David Barno, Commander, Combined Forces Command, Afghanistan, announced the planned investigation in June 2004: “I’ve directed a top-to-bottom review of all of our detention facilities. It will be conducted by Brigadier General Chuck Jacoby, who is our deputy commander for support in Bagram there with Combined Joint Task Force 76. He’s wrapping up that top-to-bottom review now. I’ll be getting a report out on where we stand today by the end of the month on all of our facilities vice the standards we’ve set to make sure we’re in complete compliance with our own standards.” See News Transcript, Department of Defense, Central Command Briefing (June 17, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040617-0882.html>. To date, the Jacoby report has not been made public. Human Rights First filed a FOIA request for the Jacoby report in June 2004; as of November 2005, the Defense Department was still reviewing the request. Request from Human Rights First to Defense Department (June 2004) (request on file with Human Rights First).

40. CHURCH REPORT, *supra* note 15, at 6.

in frigid temperatures without access to bathrooms.<sup>41</sup> Between January 2002, when detainees first began arriving at Guantánamo Bay, and September 2003, at least thirty-two detainees attempted suicide.<sup>42</sup> It was also at this time that the first known deaths in U.S. custody occurred in Afghanistan: Mullah Habibullah and Dilawar were killed at the U.S. Air Force Base at Bagram while being interrogated—the men had been chained to the ceiling by their wrists and beaten severely. As one officer later told Army investigators, treatment of detainees involving forcing them to remain standing, handcuffed to chains from the ceiling, had become known practice at Bagram.<sup>43</sup>

Perhaps the most broad-reaching among the publicly known manifestations of the new policy guidance was the conclusion of a Pentagon “Working Group” on interrogation techniques, established by Defense Secretary Donald Rumsfeld, which issued recommended guidance in March 2003.<sup>44</sup> During its deliberations in early 2003, the Working Group had been instructed to accept as binding the OLC’s analysis on all legal issues concerning techniques that would constitute torture or cruel, inhuman, or degrading treatment under U.S. and international law.<sup>45</sup> The Group eventually proposed for approval a harsh list of interrogation techniques, a subset of which were approved by Secretary Rumsfeld in April 2003—including stress positions, environmental manipulation and removal of clothing, prolonged isolation, and the use of dogs.<sup>46</sup>

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41. SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 6–7 (2004) (describing Defense Department General Counsel Haynes receiving FBI complaints); Paisley Dodds, *FBI Letter Complains of Aggressive Interrogation Techniques at Guantanamo Starting in 2002*, ASSOCIATED PRESS, Dec. 6, 2004, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/12/07/international0839EST0512.DTL>; Redacted FBI E-mail, “Legal Issues re: Guantanamo Bay,” Dec. 9, 2002 [FOIA Doc. 4076] (remarking on a “review of interrogation methods by a DOD lawyer”: “Basically, it appears that the lawyer worked hard to cwrite [sic] a legal justification for the type of interviews they (the Army) want to conduct here.”).

42. See Scott Higham, Joe Stephens & Margot Williams, *Guantanamo—A Holding Cell in War on Terror*, WASH. POST, May 2, 2004, at A1; DAVID ROSE, GUANTANAMO: THE WAR ON HUMAN RIGHTS 64 (The New Press, 2004).

43. Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1 (“Lt. Col. John W. Loffert Jr., who took over as the intelligence operations officer shortly before the deaths, said he saw the practice being used as soon as he arrived at the detention center. ‘I know they were forced to stand, handcuffed to chains that extended from the ceiling,’ Colonel Loffert told investigators. ‘Their hands were approximately chest-level. It was plainly visible and discussed as a technique’ during an inquiry ordered by the American military commander at Bagram after the deaths.”).

44. WORKING GROUP, DEP’T OF DEFENSE DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003), available at <http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf>.

45. *Detention Policies and Military Justice: Hearing Before the S. Subcomm. on Personnel of the S. Comm. of Armed Services*, 109th Congress 15 (2005) [hereinafter *Graham Hearing*]; CHURCH REPORT, *supra* note 15, at 5–6.

46. Memorandum from Gen. Counsel for the Dep’t of Defense to the Commander, U.S. Southern Command, Re: Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.

The guidance also made its way to field commanders in Iraq. For example, Secretary Rumsfeld sent an envoy to Iraq in summer 2003 to jump-start what were perceived as inadequate interrogation operations there. He ordered Major General Miller to Abu Ghraib, where Miller instructed field commanders on the techniques that had been approved initially for limited use at Guantánamo Bay.<sup>47</sup> Miller used the Working Group techniques as a “baseline” for his recommendations.<sup>48</sup> Following Miller’s visit, on September 14, 2003, Lieutenant General Ricardo Sanchez, then U.S. Army Commander of the Coalition Joint Task Force in Iraq, issued an order authorizing the use of twenty-nine interrogation techniques, including the use of dogs to exploit “Arab fear of dogs,” isolation, stress positions, sensory and sleep deprivation, and environmental manipulation.<sup>49</sup> Less than a month later, following objections from military attorneys finding many of the techniques “overly aggressive,”<sup>50</sup> Sanchez modified his previous order, but continued to authorize interrogators to “control” the lighting, heating, food, shelter, and clothing given to detainees.<sup>51</sup>

Apart from the authorization of techniques that themselves approached or transgressed the line of what had long been thought unlawful under U.S. and international law,<sup>52</sup> the orders were vague enough, and changeable enough, so as to

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47. FAY REPORT, *supra* note 14, at 24–25; MILLER REPORT, *supra* note 15, at 2; R. Jeffrey Smith, *General Is Said to Have Urged Use of Dogs*, WASH. POST, May 26, 2004, at A1.

48. MILLER REPORT, *supra* note 15, at 2 (reporting use of working group techniques as a “baseline”); Smith, *supra* note 48, at A1 (reporting that the head of military intelligence at Abu Ghraib told Army investigators that “[Miller] said that they used military working dogs at Gitmo, and that they were effective in setting the atmosphere for which, you know, you could get information’ from [detainees].”).

49. FAY REPORT, *supra* note 14, at 25.

50. CHURCH REPORT, *supra* note 15, at 8.

51. FAY REPORT, *supra* note 14, at 16, 26; SCHLESINGER REPORT, *supra* note 15, at 10, 14–15, 37–38.

52. While a full analysis of the legality of these orders is beyond the scope of this Article, several military officials have now acknowledged that the treatment authorized at least raises serious questions about the meaning of legal obligations to ensure humane treatment. *See, e.g.*, CHURCH REPORT, *supra* note 15, at 10 (“[I]nterrogations were sufficiently aggressive that they highlighted the difficult question of precisely defining the boundaries of humane treatment of detainees.”); Memorandum from Lt. Gen. Sanchez to Commander of U.S. Central Command, Re: CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003) (noting environmental manipulation may be considered inhumane treatment in certain circumstances).

Indeed, at least some of the techniques at one time or another directly authorized—including prolonged isolation, stress positions, sensory and sleep deprivation, and environmental manipulation, depending on their severity and use in combination—appear to run contrary to punitive provisions of the Uniform Code of Military Justice and federal criminal law, as well as constitutional prohibitions and treaty obligations. *See, e.g.*, 10 U.S.C. § 893 (2000) (“Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”); § 924 (maiming); § 928 (assault); § 933 (conduct unbecoming an officer and a gentleman); *see also* 18 U.S.C. § 2340 (criminalizing “torture,” including any “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”).

spawn a new problem. The uncertain effect of the broad, general guidance, coupled with the proliferation of various interrogation techniques that differed among theaters of operation, agencies, and military units—all of which operated in close proximity to one another—caused serious confusion among U.S. troops on the ground.<sup>53</sup> Indeed, as one army general investigating the abuses after the fact noted: “By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved.”<sup>54</sup> It was during this period, as later became painfully clear, that some of the worst torture and abuse occurred.

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Relevant constitutional prohibitions implicated by such techniques include substantive due process protection against treatment that “shocks the conscience,” *Rochin v. California*, 342 U.S. 165, 172–73 (1952) (physical force to extract evidence from body); amounts to cruel or unusual punishment, *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (prolonged use of painful restraints, temperature and dietary manipulation, and humiliation); or renders evidence or information gained so unreliable as to be inadmissible in any judicial proceeding, *see, e.g.*, *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968) (sleep and food deprivation, along with deprivation of outside contact, render confession involuntary); *Ashcraft v. Tennessee*, 322 U.S. 143, 153 (1944) (confession involuntary after 36-hour incommunicado interrogation); *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (prolonged solitary confinement, along with “[t]he rack, the thumbscrew, [and] the wheel,” renders confession involuntary).

Treaties to which the United States is signatory also prohibit torture and cruel treatment. These include Geneva Convention Common Article 3 (prohibiting “violence to life and person . . . murder of all kinds, mutilation, cruel treatment and torture”), as well as the Protocol Additional to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 75, June 8, 1977, S. TREATY DOC. NO. 100-2, 1125 U.N.T.S. 609 (“[P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article . . .”). They also include the International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 16(2), U.N. GAOR, U.N. Doc. A/39/51 (1984) [hereinafter “CAT”] (obligating Convention parties to “prevent in any territory under [their] jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to [acts of] torture”).

Without addressing the legality of authorized techniques per se, the Administration has maintained that neither U.S. constitutional nor treaty protections apply to non-citizens held on U.S. military bases or other areas of U.S. control overseas. *See* Responses of Alberto R. Gonzales, Nominee to be Attorney General to the Written Questions of Senator Dianne Feinstein, Answers 9, 14 and 20 (Jan. 2005); Responses of Alberto R. Gonzales, Nominee to be Attorney General to the Written Questions of Senator Russell D. Feingold (January 2005) (discussing Torture and Inhumane Treatment, Answer 2(c)).

53. *See* SCHLESINGER REPORT, *supra* note 15, at 14, 33–38, 70, 81; FAY REPORT, *supra* note 14, at 16, 21–30, 42–44, 52–55, 118–19; JONES REPORT, *supra* note 15, at 14–15; *Frontline: The Torture Question* (PBS television broadcast Oct. 18, 2005) (quoting Gen. Paul Kern), available at <http://www.pbs.org/wgbh/pages/frontline/torture/>.

54. FAY REPORT, *supra* note 14, at 8.

*B. Inaction*

In the face of what was at best uncertainty about the rules came an absence of correction when laws were breached. Both military doctrine and U.S. law have recognized for the past fifty years that commanders play a pivotal role in checking the appropriate use of military power. The doctrine of command responsibility, applied by the U.S. Supreme Court most famously in 1946,<sup>55</sup> imposes liability on superior officers if they (1) exercised effective control over subordinates who engaged in torture or abuse of detainees in violation of the law of nations; (2) knew or had reason to know of their subordinates' unlawful conduct; and (3) despite this knowledge, failed to take reasonable measures to prevent their subordinates' conduct. That doctrine has yet to be invoked in connection with any case of detainee torture or abuse since September 11.

Yet by January 2004—three months before the publication of the Abu Ghraib photos—the list of clues that senior military and civilian commanders knew that torture, or at least cruelty, was occurring under their command was extensive. Beginning in early 2002, organizations—including the International Committee of Red Cross, the United Nations, Amnesty International, Human Rights Watch, and Human Rights First—began writing letters to the Secretary of Defense and other officials in the U.S. government (including field commanders), raising concerns about the treatment of captured detainees.<sup>56</sup>

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55. In re Yamashita, 327 U.S. 1 (1946). A commander “may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control.” U.S. ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 501; *see also* JUDGE ADVOCATE GENERAL’S SCHOOL, LAW OF WAR DESKBOOK, Ch. 8 (Cdr. Brian J. Bill ed., 2000).

56. *See, e.g.*, Letter from Amnesty Int’l to Donald Rumsfeld, United States Secretary of Defense (Jan. 7, 2002), *available at* <http://web.amnesty.org/library/Index/engAMR510052002?OpenDocument&of=COUNTRIES%5CUSA>; *see also* The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483*, ¶ 47, *delivered to the U.N. Security Council*, U.N. DOC. S/2003/715 (July 17, 2003); FAY REPORT, *supra* note 14, at 65–67 (indicating that another officer discussed ICRC complaints with Karpinski; Pappas and Karpinski received “final report” in November); TAGUBA REPORT, *supra* note 15, at 7 (confirming date of Miller’s visit); *The File: Prison Abuse*, S.F. CHRON., June 20, 2004, at A17 (“Last November, the Red Cross gave notice to Gen. Ricardo Sanchez, the top U.S. officer in Iraq, outlining abuses it had uncovered at Abu Ghraib.”); Andrew Gully, *Iraqi POWs Say They Were Tortured by Coalition Forces: Amnesty*, AGENCE FR.-PRESSE, May 16, 2003; Douglas Jehl & Neil A. Lewis, *U.S. Military Disputed Protected Status of Prisoners Held in Iraq*, N.Y. TIMES, May 23, 2004, at A12; Douglas Jehl & Eric Schmitt, *Officer Says Army Tried to Curb Red Cross Visits to Prison in Iraq*, N.Y. TIMES, May 19, 2004, at A1; Neil MacFarquhar & Neela Banerjee, *Army is Reluctant to Flaunt Photos of Hussein’s Sons*, N.Y. TIMES, Jul. 24, 2003 at A1; Mark Matthews, *Powell Says Bush Was ‘Informed’ of Red Cross Concerns, Officials Advised President ‘In General Terms’ About Reports of Abuse, He Says*, BALT. SUN, May 12, 2004, at 12A; Johanna McGeary, *The Scandal’s Growing Stain: Abuses by U.S. Soldiers in Iraq Shock the World and Roil the Bush Administration*, TIME, May 17, 2004, at 26; REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS DURING ARREST, INTERNMENT, AND INTERROGATION 3, 15 (Feb. 2004) [hereinafter ICRC February 2004 Report], *available at* [www.informationclearinghouse.info/pdf/icrc\\_iraq.pdf](http://www.informationclearinghouse.info/pdf/icrc_iraq.pdf) (indicating it interrupted its visits and “requested an explanation from authorities”); Peter Slevin & Robin Wright, *Early Alarm Bells Sounded, Ignored: Abuse*

These organizations, as well as reports in the mainstream U.S. media, documented allegations of “stress and duress” techniques in interrogation (including sleep deprivation and isolation), as well as hooding, beating, electric shock, and deaths of detainees in U.S. custody, some dramatically listed in official leaked documents as a result of “blunt force trauma” at the hands of U.S. authorities.<sup>57</sup> As was later revealed, internal memoranda from FBI agents, Army Criminal Investigations Command, and other U.S. government agencies were reporting similar concerns. By January 2004, Army criminal investigators had copies of the Abu Ghraib photos, and by February, Army Major General Antonio Taguba had issued an internal report detailing the torture at Abu Ghraib.<sup>58</sup> As U.S. Central Command head General John Abizaid later testified to Congress in May 2004: “[W]e should have known. And we should have uncovered it and taken action before it [detainee abuse] got to the point that it got to. I think there’s no doubt about that.”<sup>59</sup>

Despite all of these reports, essentially no investigative progress had been made by 2004 in some of the most serious cases (including interrogation-related homicides of

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*Reports Began Almost at War’s Start*, S.F. CHRON., May 8, 2004, at A14; Letter from Human Rights Watch to George W. Bush, President, United States of America (Dec. 26, 2002) available at <http://www.hrw.org/press/2002/12/us1227.htm> [hereinafter Letter to Bush]; Letter from the Lawyers Committee to Paul Wolfowitz, Deputy Secretary of Defense (Jan. 14, 2003) available at [http://www.humanrightsfirst.org/us\\_law/us\\_law\\_let\\_011403.pdf](http://www.humanrightsfirst.org/us_law/us_law_let_011403.pdf) [hereinafter Letter to Wolfowitz]; Memorandum from Amnesty Int’l, Re: Concerns Relating to Law and Order, 24–26, available at <http://web.amnesty.org/library/Index/ENGMDE141572003> [hereinafter Memorandum from Amnesty Int’l]; Amnesty Int’l, USA, *Chronology of Correspondence and Action*, NEWS AMNESTY (Mar. 27, 2003), <http://news.amnesty.org/pages/USChronology2>; Peter Eisler & Tom Squitieri, *Red Cross Report Describes Systematic U.S. Abuse in Iraq*, USATODAY.COM, May 10, 2004, [http://www.usatoday.com/news/world/iraq/2004-05-10-redcross\\_x.htm](http://www.usatoday.com/news/world/iraq/2004-05-10-redcross_x.htm); Ed Johnson, *Coalition Troops Are Accused of Torture*, ASSOCIATED PRESS ONLINE, May 16, 2003 (“Amnesty International is investigating claims that British and American troops tortured prisoners of war in Iraq with night-long beatings and, in at least one case, electric shocks, the group said Friday.”); Secretary Rumsfeld and Gen. Myers, DoD News Briefing, [http://www.dod.mil/transcripts/2002/t04152002\\_t0415sd.html](http://www.dod.mil/transcripts/2002/t04152002_t0415sd.html); *Transcript: Senate Hearing on Iraq Prison Abuse*, WASHINGTONPOST.COM, May 19, 2004, [http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19\\_4.html](http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19_4.html).

57. Press Release, Army Criminal Investigation Command, Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Enduring Freedom, Operation Iraqi Freedom (Mar. 25, 2005) (“blunt force trauma”), available at <http://www.cid.army.mil/Documents/OIFOEF%20Homicides.pdf>, at 3–4; see also *The File: Prison Abuse*, *supra* note 56 (“Last November, the Red Cross gave notice to Gen. Ricardo Sanchez, the top U.S. officer in Iraq, outlining abuses it had uncovered at Abu Ghraib.”); Gully, *supra* note 56; Jehl & Lewis, *supra* note 56; Jehl & Schmitt, *supra* note 56; Matthews, *supra* note 56; McGeary, *supra* note 56; Slevin & Wright, *supra* note 56; Letter to Bush, *supra* note 56; Letter to Wolfowitz, *supra* note 56; Memorandum from Amnesty Int’l, *supra* note 56; Eisler & Squitieri, *supra* note 56; Johnson, *supra* note 56 (“Amnesty International is investigating claims that British and American troops tortured prisoners of war in Iraq with night-long beatings and, in at least one case, electric shocks, the group said Friday.”).

58. 151 CONG. REC. S8772, (daily ed. July 25, 2005) (debate concerning the National Defense Authorization Act for Fiscal Year 2006).

59. *Transcript: Senate Hearing on Iraq Prison Abuse*, WASH. POST, May 19, 2004, available at [http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19\\_4.html](http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19_4.html).

detainees in U.S. custody),<sup>60</sup> and commanders overseeing units in which some of the worst abuse had happened had not been disciplined; rather, most had been or soon were to be promoted.<sup>61</sup> To date, the most senior officer to be punished criminally in connection with a detainee death is a Marine Corps major.<sup>62</sup>

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60. See HUMAN RIGHTS FIRST, *supra* note 5. For example, Mullah Habibullah and Dilawar, two Afghan detainees, were killed in U.S. custody in December 2002 at the Bagram detention facility while being interrogated by members of the 519th Military Intelligence Battalion. Even after U.S. military physicians concluded that the cause of the detainees' deaths was homicide, the commander of U.S. military forces in Afghanistan continued to insist publicly that the two detainees had died of natural causes. See Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 4, 2003, at A14 ("A death certificate, dated Dec. 13 and signed by Maj. Elizabeth A. Rouse, a pathologist with the Armed Forces Institute of Pathology, based in Washington, says the man died as a result of 'blunt force injuries to lower extremities complicating coronary artery disease.'"); Marc Kaufman, *Army Probing Deaths of 2 Afghan Prisoners*, WASH. POST, Mar. 5, 2003, at A13 ("The army previously reported that Dilawar had died of a heart attack and Habibullah of a blood clot. The fact that an Army pathologist had listed the two deaths as homicides was first reported in today's New York Times."); see also Carlotta Gall & David Rohde, *Afghan Abuse Charges Raise New Questions on Authority*, N.Y. TIMES, Sept. 17, 2004, at A10 (referring to statements by McNeill and other officials in February 2003 that failed to disclose finding of homicide).

61. See Susan Taylor Martin, *Report Steers Clear of Interrogator's Boss*, ST. PETERSBURG TIMES, May 8, 2004, [http://www.sptimes.com/2004/05/08/Worldandnation/Report\\_steers\\_clear\\_o.shtml](http://www.sptimes.com/2004/05/08/Worldandnation/Report_steers_clear_o.shtml); Jackie Spinner, *Abu Ghraib Policy Defended—Having MP's Assist Intelligence Didn't Cause Abuse, General Says*, WASH. POST, Aug. 17, 2004, at A11 (reporting that the month after the Abu Ghraib photos became public, Major General Miller was made senior commander in charge of detention operations in Iraq); Dennis Wagner, *New Fort Huachuca Chief Focused on the Future*, ARIZ. REP., May 4, 2005, <http://www.azcentral.com/arizonarepublic/local/articles/0504fast04.html> (reporting that Major General Barbara Fast, a military intelligence commander in Iraq, who reported directly to defendant Sanchez, had been assigned to lead the Army's main interrogation training facility at Fort Huachuca, Arizona in April 2005); Lieutenant General Ricardo S. Sanchez, V Corps Commanding General, Biography, <http://www.vcorps.army.mil/leaders/Biography-SanchezRicardoS.pdf> (indicating that defendant Sanchez, who has been identified as bearing command responsibility for the torture and abuse in Iraq by numerous Pentagon investigations, now leads the Army's V Corps in Europe); Press Release, U.S. Dep't of Defense, General Officer Announcements (Mar. 4, 2004), <http://www.dod.gov/releases/2004/nr20040304-0408.html> (reporting that Lieutenant General Dan McNeill—who oversaw military operations in Afghanistan during the time that detainees were tortured to death at the Bagram detention facility and who claimed there were no indications of abuse leading to the deaths despite autopsy reports finding severe trauma to the detainees' bodies—received a fourth star and was promoted to Commanding General, U.S. Army Forces Command, in March 2004).

62. The highest ranking military member criminally punished is Marine Major Clarke Paulus, who was found guilty of maltreatment and dereliction of duty in connection with the death of an Iraqi prisoner and dismissed from the service. See Monica Davey, *An Iraqi Police Officer's Death, A Soldier's Varying Accounts*, N.Y. TIMES, May 23, 2005, at A1; Francis J. Harvey and Peter J. Schoomaker, *Detainee Details*, NAT'L REV. ONLINE, Sept. 22, 2005, [http://www.nationalreview.com/comment/harvey\\_schoomaker200509220821.asp](http://www.nationalreview.com/comment/harvey_schoomaker200509220821.asp); U.S. Dep't of Defense, News Transcript, DoD News Briefing, June 1, 2005, <http://www.defenselink.mil/transcripts/2005/tr20050601-secdef2981.html>

It was in part for these reasons that Pentagon investigations later concluded that “leader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred.”<sup>63</sup> Former Defense Secretary James Schlesinger’s report concurred; the widespread abuse was “not just the failure of some individuals to follow known standards, and [it is] more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.”<sup>64</sup> A review of Department of Defense (DoD) interrogation operations prepared by Vice Admiral Albert T. Church III and released (only in executive summary form) in 2005 went further, describing development of the interrogation policy in which senior DoD officials failed adequately to respond to reports of cruel treatment of detainees and provided inadequate guidance on interrogation techniques in Afghanistan and Iraq. The summary acknowledges that abuses were caused in part by “a failure to react to early warning signs of abuse” and that “stronger leadership and greater oversight would have lessened the likelihood of abuse.”<sup>65</sup>

### *C. Resources, Training, and a Plan*

Finally, Pentagon and other post hoc investigations have held up planning and training failures as significantly to blame for much of the confusion and lawlessness that at times reigned in the field of operations in Afghanistan, Guantánamo, and Iraq. Most of the after-action military investigations into torture and abuse were categorical in their criticism: “[P]re-war planning [did] not include[] planning for detainee operations” in Iraq, according to Lieutenant General Anthony R. Jones, tasked with investigating the Abu Ghraib Prison and the 205th Military Intelligence Brigade.<sup>66</sup> Personnel responsible for detention operations in Iraq were burdened with assignments from both the regular chain of command and from the newly formed Coalition Provisional Authority. With no planning for major detention operations, much less an insurgency, the ratio of detainees to military police at facilities like Abu Ghraib in June 2004 rose to 75:1 (about 7,000 prisoners to about 92 military police).<sup>67</sup> And all this in facilities in which command exercised no regular oversight, routine inspections and monitoring were absent, and no JAG officers (military lawyers charged with monitoring operational legal compliance) appeared to have been dedicated to interrogation operations per se.<sup>68</sup>

Perhaps greater in impact than all of these, however, was a lack of training for troops or command engaged in detention and interrogation operations in Afghanistan and Iraq—a factor cited in every major military investigation conducted since the Abu

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63. FAY REPORT, *supra* note 14, at 8.

64. SCHLESINGER REPORT, *supra* note 15, at 5.

65. CHURCH REPORT, *supra* note 15, at 16.

66. JONES REPORT, *supra* note 15, at 24.

67. SCHLESINGER REPORT, *supra* note 15, at 47, 54, 60; *see also* CHURCH REPORT, *supra* note 15, at 3 (“Another missed opportunity . . . is that we found no evidence that specific detention or interrogation lessons learned from previous conflicts (such as those from the Balkans, or even those from earlier conflicts such as Vietnam) were incorporated into planning for operations in support of the Global War on Terror.”).

68. DAIG REPORT, *supra* note 15, at 15, 19.

Ghraib photos were released as contributing to torture and abuse in U.S. custody.<sup>69</sup> In Afghanistan, military police who engaged in detention operations at the U.S. Air Force Base in Bagram (the primary U.S. detention facility in the country) in late 2002 report having been given only one hour of instruction on the levels of force to be used on detainees.<sup>70</sup> Noncommissioned officers in charge of interrogators at Bagram reported that the newly arrived military interrogators were unprepared and inexperienced,<sup>71</sup> and that what training they had received was based on Cold War-era models of the subjects trainees might face in interviews.<sup>72</sup>

In Iraq, the situation was often worse. The 372nd Military Police Company—the unit in charge of military police operations at Abu Ghraib during the period when the worst abuses were taking place—was a combat support unit, with no training at all in detainee operations.<sup>73</sup> A post-Abu Ghraib survey conducted by the Army Inspector General found non-commissioned officers complaining that they had received little detention operations training, and that training exercises had not involved instruction in how to process or assign a legal status to detainees.<sup>74</sup> Reservists in particular (many of whom did not know they would be engaging in detention operations until after they were deployed) cited the confusing difference between what training they had received on the Geneva Conventions, and the new instructions they were receiving in the field.<sup>75</sup> At more senior levels, eighty-seven percent of units stationed in Afghanistan and Iraq inspected by the Army Inspector General post-Abu Ghraib responded that the basic professional military education they had received lacked instruction on conducting detainee operations.<sup>76</sup>

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69. See DAIG REPORT, *supra* note 15, at 36 (noting that “[t]actical Military Intelligence officers are not adequately trained on how to manage the full spectrum of the collection and analysis of human intelligence”); FAY REPORT, *supra* note 14, at 16–19 (noting in part that “[v]ery little training is available or conducted to train command and staff elements on the conduct, direction, and oversight of interrogation operations”); SCHLESINGER REPORT, *supra* note 15, at 55 (noting that “[t]he MP detention units did not receive detention-specific training during their mobilization period, which was a critical deficiency” and that “there was no theater-specific training”); TAGUBA REPORT, *supra* note 15, at 19 (“I find that prior to its deployment to Iraq for Operation Iraqi Freedom, the 320th MP Battalion and the 372nd MP Company had received no training in detention/internee operations.”).

70. *Soldier in Afghan Case Said Ill-Trained*, ASSOCIATED PRESS, Aug. 16, 2005, available at [http://www.military.com/NewsContent/0,13319,FL\\_trained\\_081605,00.html](http://www.military.com/NewsContent/0,13319,FL_trained_081605,00.html).

71. Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at I1; Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1.

72. CHRIS MACKEY & GREG MILLER, *THE INTERROGATORS: TASK FORCE 500 AND AMERICA'S SECRET WAR AGAINST AL QAEDA*, at xxi, xxv, 44–45 (2004).

73. See Summary of Interview by Taguba Panel with Sgt. First Class, 372d Military Police Company, in Abu Ghraib, Iraq (Feb. 9, 2004), available at <http://www.aclu.org/torturefoia/released/a85.pdf> (interviewee's name redacted).

74. DAIG REPORT, *supra* note 15, at 81; see also CHURCH REPORT, *supra* note 15, at 19 (“Few U.S. personnel, however, had received specific training relevant to detainee screening and medical treatment. As a result, in Afghanistan and Iraq we found inconsistent field-level implementation of specific requirements.”).

75. DAIG REPORT, *supra* note 15, at 81, 83–84.

76. *Id.* The problem was particularly acute with inspected reservist units, many members of

As with the other factors described in this Part, lack of training alone is probably inadequate to explain the dozens of detainee deaths in U.S. custody, as well as the hundreds of reported incidents of torture and other forms of abuse. But when compounded by the shifting guidance to the field described above, the lack of theater-specific or skill-specific training made significantly more likely the abuses eventually documented in U.S. detention and interrogation operations since 2002.

## II. EXECUTIVE LIMITS: FINDING CONSTRAINTS THAT WORK

The record above makes it difficult to doubt that at least some number of the structural checks built into the federal government failed—either to prevent the policy and operational decisions that contributed to the abuse, or to forestall the widespread incidents of abuse in practice. Perhaps most striking among these failed checks, Congress was largely absent from engagement in U.S. policies of detention and interrogation from 2001 through much of 2005.<sup>77</sup> Apart from the broad Authorization for Use of Military Force (AUMF)<sup>78</sup> (which expressly discusses neither detention nor interrogation operations) and the USA PATRIOT Act<sup>79</sup> (authorizing limited detention domestically of immigration law violators but without reference to coercive human intelligence gathering), both passed in the weeks immediately following September 11, Congress took no legislative action on these issues throughout the period when the worst abuses were taking place.<sup>80</sup>

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which reported that they were not notified that they would be involved in detainee operations until after their deployment overseas. *Id.* at 83 (“Interviewed Soldiers gave examples of being placed in stressful situations in internment/resettlement (I/R) facility with thousands of non-compliant detainees and not being trained to handle them.”).

77. See Kinkopf, *supra* note 8, at 1169. As Professor Kinkopf suggests, Congress’s silence is surely due in part to the uniformity in political control of both political branches of government. *Id.* at 1175. President Bush also no doubt benefited from a prolonged period of political unity following the attacks of September 11, as the country and its leaders sought to present a common front to the supporters of those who perpetrated the attacks.

78. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2000 & Supp. 2002)).

79. USA PATRIOT Act: Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.).

80. Notwithstanding the passage at the end of 2005 of the McCain and Graham Amendments to Defense Appropriations measures, see Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd (amended by National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006)) (regulating the detention and treatment of “war on terror” detainees), Congress’s first four years of silence speaks for itself. The sole exception to the absence of any congressional check on these issues is the Durbin Amendment passed in October 2004. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1093(c), 118 Stat. 1811 (2004). The provision, which was in many respects declarative of existing regulations, requires the Secretary of Defense to report regularly to the relevant committees in the U.S. House and Senate on the number and nationality of detainees in military custody, as well as on the number of detainees released from custody during the reporting period; it also requires the Secretary to report on the legal status of those detained and to report whether detainees once held by the United States have been transferred to other countries. The first compliance deadline came and went on July 28, 2005, with no report from the Pentagon. While Pentagon sources now say that at least some of the required information has been transmitted to Congress, some in classified form, it remains unclear

In some respects, Congress's relative silence on detention and interrogation powers should not be surprising; as has been the case increasingly through the past fifty years, the political incentives for members of Congress to engage in questions of security and international affairs have come to weigh heavily in favor of inaction. Congress is regularly stuck with the blame for failed initiatives, but popular support almost invariably rallies around the executive under any circumstances when international security affairs are at the fore.<sup>81</sup> It thus seems squarely in the political interest of both branches to leave the details of war fighting—of which detention and interrogation policy are part—to the executive alone.

At the same time, the past several years have seen some noteworthy shifts in executive policy and practice with respect to intelligence gathering in particular, and the treatment of detainees in the “war on terror” more generally. For example, the Department of Defense withdrew within months some of the most aggressive interrogation techniques initially authorized after the OLC memo was completed in 2002. Without change of executive administration, the OLC memo itself (setting forth a sweeping view of executive power) was rescinded in early 2004, replaced by noticeably narrower guidance to the executive about the scope of his power in this area. And where investigations into interrogation-related deaths in U.S. custody in 2002–03 had once languished, a number (if not all) of those involved are now facing prosecution. The United States' record of executive excess over the past three years has not been good, but it could have been worse. What brought about the shifts?

This Part argues that three key forces have been at least somewhat effective to constrain executive power during this period—and that they are often viewed as among the least democratic in our society: the professional military; the public oversight organizations of civil society; and the federal courts. While these institutions are far from sufficient to ensure the legality of executive action, recent experience has shown them to be essential features of a spectrum of checks on executive power.

#### A. *The Professional Military*

At least since the American Civil War, professionalism has been understood as a defining feature of the modern American military.<sup>82</sup> By military professionalism, Huntington (and the many scholars who have engaged his work since) meant most broadly the institutional acquisition and maintenance of a set of technical skills, norms, and ethics—as may be found in medicine, science, or law—that define and distinguish those trained in the profession from others.<sup>83</sup> One of the key reasons Huntington identified as to why such professionalism in the military was desirable was its role in

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whether this information may be made public. See E-mail from Dep't of Defense official to Human Rights First (Nov. 29, 2005 4:28 PM EST) (on file with Human Rights First).

81. THEODORE J. LOWI AND BENJAMIN GINSBURG, *AMERICAN GOVERNMENT: FREEDOM AND POWER* 290–93 (1990).

82. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 254 (1957); William B. Skelton, *Samuel P. Huntington and the Roots of the American Military Tradition*, 60 *J. MIL. HIST.* 325 (1996).

83. HUNTINGTON, *supra* note 82, at 7–8, 254–66; see also, e.g., DON M. SNIDER, JOHN A. NAGL & TONY PFAFF, *ARMY PROFESSIONALISM, THE MILITARY ETHIC, AND OFFICERSHIP IN THE 21ST CENTURY* (1999), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?PubID=282>.

helping to preserve *and also moderate* civilian control. Among other things, Huntington theorized that “[a] strong, integrated, highly professional officer corps . . . immune to politics and respected for its military character, would be a steadying balance wheel in the conduct of policy.”<sup>84</sup>

With the explosion of international human rights and humanitarian law after World War II (including the ratification of, among other treaties, the modern Geneva Conventions), compliance with increasingly formalized international rules and norms began to emerge as a key feature of professional military training and ethics.<sup>85</sup> But it was not until after the serious human rights crimes and other failures of the Vietnam War, including the U.S. military’s own participation in events like the My Lai massacre, that these norms began to manifest themselves more fully in military training and culture. Critically, high-level military investigations into U.S. war crimes during Vietnam found, among other things, that troops and command had been inadequately trained in Geneva law and the values behind it.<sup>86</sup> Among the actions taken to correct

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84. HUNTINGTON, *supra* note 82, at 464; *see also id.* at 237 (theorizing that military professionals have an “awareness of the science of war distinct from those other sciences existing outside it and from those subordinate sciences contributing to it,” namely, politics and technical education).

85. Law and its enforcement within the military was hardly a new concept. The Army has had a permanent Judge Advocate General’s Corps (military lawyers) since 1862, as the military expanded dramatically to fight the Civil War. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 114 (2004). Law had been taught at the U.S. military academy well before then, but in 1863 began to include the study of the then newly codified Laws of War. *Id.* at 114 (citing War Department General Order 100 adopting the Lieber Code, precursor to the modern Geneva Conventions). But there is no question the role of military lawyers and basic military legal instruction grew substantially after World War II, especially with the post-World War II adoption by Congress of the more-or-less modern Uniform Code of Military Justice. *Id.* at 122. Later, with the end of the draft in 1973, professional training increased significantly, not only in technical, strategic, and tactical war-fighting skills, but also in ethics, policy-making, and political-military affairs. In particular, in 1973 the Army established a separate command entity called TRADOC, Army Training and Doctrine Command, to address challenges to military professionalism, including those coming out of Vietnam. *See, e.g.*, Erik Blaine Riker-Coleman, *Reflection and Reform: Professionalism and Ethics in the U.S. Army Officer Corps, 1968–1975*, at 31, 38–39 (2001) (unpublished thesis, University of North Carolina, Chapel Hill) *available at* <http://www.unc.edu/~chaos1/reform.pdf>. Today, TRADOC includes twenty-seven schools (including, for example, the well known Defense Language Institute in Monterey, California) and more than 10,000 instructors, and is responsible for developing training programs for some 390,000 active and reserve component soldiers. *See generally* U.S. Army Training and Doctrine Command (TRADOC), <http://www.tradoc.army.mil/index.html> (last visited Jan. 30, 2006).

86. Following the events at My Lai, General William Westmoreland appointed Lt. Gen. William Peers to investigate what went wrong; the resulting report, *see* DEPARTMENT OF THE ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT I–II (1970) [hereinafter PEERS REPORT], concluded, *inter alia*, that the troops involved in the massacre “were not adequately trained as to . . . [t]heir responsibilities concerning the procedures for the reporting of war crimes” or “[t]he provisions of the Geneva Conventions.” *Id.* at 12-8. *See also* Seymour M. Hersh, *My Lai and, Its Omens*, N.Y. TIMES, Mar. 16, 1998, at A25 (citing unpublished 1967 Pentagon report, “Alleged Atrocities by U.S.

this perceived failing, the U.S. Army Field Manual was updated in 1976 and for the first time described the main objective of wartime detention operations not as the “acquisition of maximum intelligence information,” but rather as the “implementation of the Geneva Conventions.”<sup>87</sup>

It was in this post-Vietnam era training and culture that a number of the military professionals working in the Pentagon after September 11 had been steeped. Based on the little historical knowledge available so far about interrogation decision-making inside the Pentagon since 2001, it is clear that a handful of these officers ended up having an important moderating effect on some of the most aggressive interrogation measures advocated by civilian policy-makers at the Pentagon. Thus, for example, the December 2002 interrogation techniques that had been authorized by Defense Secretary Rumsfeld (including threatening detainees with dogs, placing them in painful “stress” positions, etc.) prompted a number of Judge Advocate General (JAG) lawyers and service general counsels to object vigorously, arguing that the techniques were inconsistent with existing law regarding detainee treatment. In response, the December techniques were rescinded.<sup>88</sup>

Likewise, when the Working Group that Rumsfeld established after rescinding the December techniques issued preliminary recommendations urging similarly or more aggressive interrogation techniques, top JAG officers in each of the services responded with stern memos in opposition.<sup>89</sup> In their opposition, the military lawyers expressly

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Military Forces in South Vietnam”) (describing Pentagon findings that training in the Geneva Conventions was inadequate).

87. James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, MIL. REV., Jan.–Feb. 2005, at 44, 50; see also James J. McGowan, Jr., *Training in the Geneva and Hague Conventions: A Dead Issue?*, ARMY LAW., Jan. 1974, at 5; William Greider, *Teaching of War Law Revitalized by Army*, WASH. POST, Feb. 14, 1971, at 1.

88. Memorandum from Donald Rumsfeld, U.S. Secretary of Defense, to Commander, U.S. Southern Command, Re: Counter-Resistance Techniques (Jan. 15, 2003) (rescinding his December 2, 2002 approval of the use of all Category II techniques and one Category III technique); see also CHURCH REPORT, *supra* note 15, at 4, 6; SCHLESINGER REPORT, *supra* note 15, at 7 (noting that Rumsfeld rescinded the majority of the December 2, 2002 techniques “[a]s a result of concerns raised by the Navy General Counsel”).

89. See 151 CONG. REC. S8794 (daily ed. July 25, 2005) (statement of Sen. Graham) (introducing into the congressional record memos prepared by service JAG officers, including Memorandum from Brig. Gen. Kevin M. Sandkuhler, Staff Judge Advocate to CMC, Re: U.S. Marine Corps, Working Group Recommendations on Detainee Interrogations (Feb. 27, 2003); Memorandum from Maj. Gen. Thomas J. Romig, Judge Advocate General, U.S. Army, Re: Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Mar. 3, 2003); Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Advocate General, U.S. Air Force, Re: Comment on Draft 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 (Feb. 6, 2003); Memorandum from Rear Adm. Michael F. Lohr, Judge Advocate General, U.S. Navy, Re: Working Group Recommendations Relating to Interrogation of Detainees (Feb. 6, 2003); Memorandum from Rear Adm. Michael F. Lohr, Judge Advocate General, U.S. Navy, Re: Comments on the 6 March 2003 Detainee Interrogation Working Group Report (Mar. 13, 2002); Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Advocate General, U.S. Air Force, Re: 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

condemned as inaccurate and counterproductive the OLC legal opinion indicating that the executive had the power to authorize interrogation techniques bordering on torture.<sup>90</sup> And they emphasized the harms involved in implementing techniques contrary to well-established military training since Vietnam.

[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral “high-road” in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict when our POWs were subjected to torture by their captors. We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.<sup>91</sup>

Ultimately, Defense Secretary Rumsfeld authorized only a subset of the techniques the Working Group (based on the OLC analysis) had recommended.<sup>92</sup>

Military law officers succeeded to a similar extent in moderating the most aggressive interrogation orders issued in the field during the war in Iraq. Recall that Lt. Gen. Ricardo Sanchez, then U.S. Army Commander of the Coalition Joint Task Force in Iraq, issued a September 14, 2003, order authorizing the use of twenty-nine interrogation techniques, including exploiting an “Arab fear of dogs,” prolonged isolation, stress positions, sensory and sleep deprivation, and environmental

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War on Terrorism (Feb. 5, 2003)), *available at* [http://www.humanrightsfirst.org/us\\_law/etn/pdf/jag-memos-072505.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/jag-memos-072505.pdf).

90. *See, e.g.*, Memorandum from Maj. Gen. Thomas J. Romig, Judge Advocate General, U.S. Army, Re: Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Mar. 3, 2003), *available at* [http://www.humanrightsfirst.org/us\\_law/etn/pdf/jag-memos-072505.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/jag-memos-072505.pdf).

While the OLC analysis speaks to a number of defenses that could be raised on behalf of those who engage in interrogation techniques later perceived to be illegal, the ‘bottom line’ defense proffered by OLC is an exceptionally broad concept of ‘necessity.’ This defense is based upon the premise that any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war. I question whether this theory would ultimately prevail in either the U.S. courts or in any international forum. If such a defense is not available, soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit.

*Id.*

91. Memorandum from Maj. Gen. Jack L. Rives, U.S. Air Force, Deputy Judge Advocate General, Re: 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 (Feb. 5, 2003).

92. *Compare* WORKING GROUP REPORT, *supra* note 44, *with* Memorandum from Donald Rumsfeld to the Commander, Re: U.S. Southern Command on Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003).

manipulation.<sup>93</sup> That authorization was rescinded less than a month later, following objections from military attorneys finding many of the techniques “overly aggressive.”<sup>94</sup>

And critically, it was the investigative report issued by Major General Antonio Taguba in February 2004—subsequently leaked and later described to Congress in hearings that followed the release of photographs of torture from Abu Ghraib—that helped identify and target some of those most responsible for not only acts of torture and abuse, but also the failures of resources, training, and corrective action.<sup>95</sup> In the wake of the Taguba Report, the Army, among other things, ordered its Criminal Investigation Division Headquarters to initiate an operational review of all detainee abuse and death cases in Iraq and Afghanistan which were then on file.<sup>96</sup>

Did senior military officials succeed in rolling back the policy guidance that subsequent reports have pointed to as part of the cause for widespread torture and abuse, or succeed in stopping the abuse itself? No. Indeed, given the primacy the United States has appropriately placed on civilian control of the military, it would seem at the very least problematic if the uniformed military did succeed in entirely thwarting civilian directives.

On the other hand, it does seem clear that some military professionals repeatedly sought *less authority* to engage in coercive interrogation than civilian officials were prepared to give, and that the military was at least modestly successful—based on the advocacy force of their professional training and norms—in reining in some of the most aggressive techniques. And it seems clear that professional training played a critical role in determining reactions of military personnel to the broadest executive demands. The availability of this training was a source of resistance among commissioned officers steeped in Geneva Convention law and ethics; its absence was a

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93. FAY REPORT, *supra* note 14, at 10, 25.

94. See CHURCH REPORT, *supra* note 15, at 8; FAY REPORT, *supra* note 14, at 16, 26; SCHLESINGER REPORT, *supra* note 15, at 10, 14–15, 37–38.

95. See TAGUBA REPORT, *supra* note 15; Testimony of Maj. Gen. Antonio Taguba before the U.S. Senate Armed Services Committee (May 11, 2004), transcript *available at* <http://www.washingtonpost.com/wp-dyn/articles/A17812-2004May11.html>. Taguba’s testimony before Congress was particularly candid. *Id.* at 17 (“WARNER: In simple words—your own soldier’s language—how did this happen? TAGUBA: Failure in leadership, sir, from the brigade commander on down. Lack of discipline, no training whatsoever and no supervision. Supervisory omission was rampant.”); see also, *id.* at 10–11

On 24 January, 2004, I was directed by Lieutenant General David McKiernan, the commanding general, ARCENT/CFLCC, to conduct an investigation into the allegations of detainee abuse at Abu Ghraib Prison. . . . As I assembled the investigation team, my specific instructions to my teammates were clear: maintain our objectivity and integrity throughout the course of our mission in what I considered to be a very grave, highly sensitive and serious situation; to be mindful of our personal values and the moral values of our nation; and to maintain the Army values in all of our dealings; and to be complete, thorough and fair in the course of the investigation.

*Id.*

96. See Memorandum from Commander, 6th Military Police Group, Department of the Army, to Commander, USACIDC, Re: Operational Review of 0149-03-CID469-60209, at 28 (May 19, 2004), *available at* [http://www.aclu.org/torturefoia/released/DOA\\_1053\\_1082.pdf](http://www.aclu.org/torturefoia/released/DOA_1053_1082.pdf).

major factor in explaining the sometimes egregiously poor behavior of active duty and reserve enlisted soldiers facing pressure to produce in the field.<sup>97</sup> While the professional military was not a surefire mechanism for reining in executive abuses, it provided a structure through which constraining forces could, at times effectively, hold executive power in check.

### *B. The Public Oversight Organizations of Civil Society*

The phrase “civil society” has been used widely and loosely to describe a wide range of domestic and international non-governmental organizations (NGOs) including major humanitarian, environmental, and human rights organizations (such as CARE, Doctors Without Borders, Greenpeace, and Amnesty International), as well as religious organizations, civic networks, and a range of traditional nonprofit entities (from arts and cultural organizations to health care centers to domestic advocacy groups).<sup>98</sup> Independent media outlets are not commonly included in the category of “civil society”—given their for-profit motivation—but the free press has some claim to similar status: non-governmental entities that ideally function as a watchdog on official conduct. While NGOs and the press have historically been understood as forces essential to the sound functioning of democracy,<sup>99</sup> the growth since World War II of

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97. See *supra* notes 66–73.

98. E.g., Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65–78; LESTER M. SALAMON, ET AL., THE JOHNS HOPKINS COMPARATIVE NONPROFIT SECTOR PROJECT, GLOBAL CIVIL SOCIETY (2003) (describing civil society as composed of organizations private in nature but with a public purpose), available at <http://www.jhu.edu/~ccss/pubs/pdf/globalciv.pdf>. According to data assembled by the U.S. Bureau of Labor Statistics and the Johns Hopkins Center for Civil Society Studies, 195,145 charitable nonprofit organizations in the United States employed close to nine million people in 2002, accounting for 8.2 percent of the country's private employment. See Lester M. Salamon & S. Wojciech Sokolowski, *Nonprofit Organizations: New Insights from QCEW Data*, MONTHLY LABOR REV., Sept. 2005, at 21, available at <http://www.bls.gov/opub/mlr/2005/09/art3full.pdf>. While the vast majority of these people are employed in health care, education, or social service organizations (rather than issue-specific membership organizations), *id.*, there can be no question that “civil society” so defined has the potential to have a tremendous impact on public policy and national life.

99. On the democracy-enhancing role of civil society organizations, see ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 180–95 (J.P. Mayer ed., 1969); THE FEDERALIST NO. 10 (James Madison) (Isaac Kramnick ed., 1987). See also LOWI & GINSBURG, *supra* note 81, at 533–34 (1990); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 89–90 (1993); Marina S. Ottaway, *Strengthening Civil Society in Other Countries*, CHRON. HIGHER EDUC., June 29, 2001, at 14, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=774>. On the role of a free press in democracy, see Justice Black's concurrence in *New York Times Co. v. United States*:

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in

highly professionalized international organizations, sophisticated domestic advocacy groups, and highly capitalized media corporations has prompted growing criticism of these entities as, ironically, undemocratic (“Who elected the NGOs?”) or even anti-democratic in nature.<sup>100</sup>

To the extent that constraining the power of one branch of government is a sign of a well-functioning democracy, the conduct of the U.S. Government in the “war on terror” has provided rich material for testing the democracy-enhancing effectiveness (vel non) of civil society. Indeed, civil society’s ability to act as an effective constraint in the context of human intelligence operations would be particularly impressive given that government intelligence operations have always presented a special challenge for effective oversight. A web of laws and regulations governing the use of classified information—driven in significant measure by appropriate policy interests in protecting U.S. intelligence sources and methods—requires that much of the work of the House and Senate Intelligence Oversight Committees be carried out in secret.<sup>101</sup> The committees, responsible for reviewing the activities of more than two dozen civilian and military intelligence agencies, are chronically overburdened and limited by structural and staffing failings.<sup>102</sup> And although law requires the executive to keep

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government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

100. *E.g.*, Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 CHI. J. INT’L L. 371, 383 (2001) (“It is no exaggeration to regard the international NGOs . . . as not merely undemocratic but as profoundly antidemocratic.”); Paul Wapner, *The Democratic Accountability of Non-Governmental Organizations: Paradise Lost? NGOs and Global Accountability*, 3 CHI. J. INT’L L. 155 (2002) (summarizing arguments that NGOs lack democratic accountability because leadership is not elected, accountability mechanisms are limited, and capacity for political influence is high); Gary Johns, *The NGO Challenge: Whose Democracy Is It Anyway?* (June 11, 2003) (unpublished conference paper), available at [http://www.aei.org/docLib/20030630\\_johns.pdf](http://www.aei.org/docLib/20030630_johns.pdf). The growth of profit-driven and spin-controlled mainstream media outlets has likewise been a source in recent decades for increased criticism of the modern press as an anti-democratic force. *See, e.g.*, EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY* (1999) (arguing that modern media benefits wealthy investors, advertisers, and corporate interests—not free, public choice).

101. *See, e.g.*, 50 U.S.C. § 413(d); SELECT COMM. ON INTELLIGENCE U.S. SENATE, 109TH CONG., RULES OF PROCEDURE, S. PRINT NO. 109-22, at 5–7 (2005), available at <http://intelligence.senate.gov/rules%20of%20procedure.htm>; PERMANENT SELECT COMMITTEE ON INTELLIGENCE U.S. HOUSE OF REPRESENTATIVES, 108TH CONG., RULES OF PROCEDURE, 8–15 (Comm. Print 2003), available at <http://intelligence.house.gov/Media/PDFS/Rules108.pdf>. *See generally* FREDERICK M. KAISER, CONGRESSIONAL RESEARCH SERVICE, *A JOINT COMMITTEE ON INTELLIGENCE: PROPOSALS AND OPTIONS FROM THE 9/11 COMMISSION AND OTHERS* (Aug. 25, 2004), available at <http://www.fas.org/irp/crs/RL32525.pdf>.

102. *See, e.g.*, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 420 (2004) (finding that House and Senate intelligence committees “lack the power, influence, and sustained capability” to meet the challenges facing the nation’s intelligence agencies); KAISER, *supra* note 101 (reviewing proposals to revise congressional oversight structures to solve current failings).

House and Senate intelligence committees informed of all intelligence-gathering activities,<sup>103</sup> the post-September 11 executive has regularly resisted sharing information even with members of Congress.<sup>104</sup> Because of these limits, civil society organizations that typically bring expert advice to Congress on a range of issues—from agricultural technology to drug approval to school lunch programs—are limited in their ability to review and consult on intelligence policy in practice.<sup>105</sup>

It was for these and other reasons that, in the first years following the attacks of September 11, a number of signs suggested civil society would be of limited effectiveness in checking detention and interrogation operations. The post-September 11th media has been widely criticized for having abandoned critical assessment or analysis of executive “war on terror” activities.<sup>106</sup> The decades-old practice employed by human-rights NGO’s of “naming and shaming” similarly (and relatedly) was unsuccessful at either calling attention to or remedying the serious torture and abuse in U.S. custody that began in 2002.<sup>107</sup>

But while assessing the impact of civil society on effecting policy shifts is a difficult proposition—first and foremost because of the difficulty in isolating civil society as the

103. 50 U.S.C. § 413(a)(1) (“The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity . . .”).

104. The controversy at the end of 2005 over the thoroughness of White House briefings to Congress regarding the existence of a secret NSA surveillance program inside the United States, see James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (“It is not clear how much the members of Congress were told about the . . . eavesdropping program.”), is only the most recent in a series of battles between the Executive and Congress over access to information about U.S. intelligence operations. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL 8–12 (2003) (describing clashes between the executive and Congress in 2002 and 2003 over, inter alia, access to information about the use of PATRIOT Act powers), available at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>; Douglas Jehl, *White House Has Tightly Restricted Oversight of CIA Detentions, Officials Say*, N.Y. TIMES, April 6, 2005, at A21.

105. See Kevin Whitelaw & David E. Kaplan, *Don’t Ask, Don’t Tell*, U.S. NEWS & WORLD REPORT, Sept. 13, 2004, at 36 (describing collapse of congressional intelligence oversight function in general and highlighting the inability of NGOs to intervene):

‘There is no outside organization that is providing consistent oversight, and whistle-blowing is not a respected tradition in the intelligence community,’ says Rep. Rush Holt, a Democrat who sits on the House Intelligence Committee. ‘There is nobody else to help.’ Both the CIA and the intelligence committees have blocked the Government Accountability Office, which performs independent audits of the federal government, from getting access to the CIA.

*Id.* See also Suzanne E. Spaulding, *Power Play*, WASH. POST, Dec. 25, 2005 at B1 (arguing that secret briefings to intelligence committee leaders alone—without staff input or possibility for analysis—leaves little chance for meaningful congressional oversight).

106. See, e.g., Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS, Feb. 26, 2004.

107. Indeed, as the discussion above should make clear, NGOs and journalists wrote letters and reported on incidents of torture and abuse in U.S. custody for more than two years with no success in, for example, obtaining a thorough investigation of homicides of two Afghan detainees who had been tortured to death by U.S. troops. See *supra* note 56–57 and accompanying text.

cause of a particular effect—there is reason here to suspect that civil society attention paid to the abuse and torture in U.S. operations played a significant role in driving executive policy change where the co-equal branches of government did not, or could not, act.

Consider first, and perhaps foremost, the executive response to the publication and subsequent investigative coverage of the photographs of torture at Abu Ghraib in April 2004.<sup>108</sup> Nearly two years' worth of letter writing, and some investigative reporting failed to capture public attention and therefore bring public pressure to bear on executive policy-making, but a handful of photographs from one "war on terror" prison (of the dozens then and still in operation worldwide) shifted the public discourse overnight. Media coverage of torture, interrogation, and abuse was sweeping. Within weeks of the initial story on *CBS News*, the Abu Ghraib scandal was on the covers of *Time*, *Newsweek*, and *U.S. News & World Report*. The *Washington Post* published a three-part series about U.S. interrogation operations, published previously secret statements of witnesses to the events at Abu Ghraib, and published additional photos of the abuse (causing its website traffic to soar).<sup>109</sup> Public opinion polls conducted two weeks after the photos were released found that seventy-seven percent of Americans believed the abuse they had seen could not be justified.<sup>110</sup>

Within weeks of the airing of the photos (in contrast to the months that had, by then, passed since the worst of the abuses in the summer/fall of the previous year), the President appeared on Arab television to condemn prisoner abuse;<sup>111</sup> the United States released some three hundred prisoners from the Abu Ghraib facility;<sup>112</sup> and the Department of Defense launched multiple major investigations into U.S. detention and interrogation operations overseas.<sup>113</sup> At the same time, the Army ordered its Criminal Investigation Division (CID) to review all detainee abuse and death cases in Iraq and Afghanistan then on file—requiring that every investigation conducted into the cases to

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108. See, e.g., *60 Minutes II* (CBS television broadcast Apr. 28, 2004).

109. The Online News Association, *Washingtonpost.com's traffic soars due to Abu Ghraib prison coverage*, June 28, 2004, <http://www.cyberjournalist.net/news/001415.php>.

110. David Paul Kuhn, *Bush Ratings Fall Amid Iraq Woes*, CBS NEWS, May 12, 2004, <http://www.cbsnews.com/stories/2004/05/12/politics/main617122.shtml>.

111. David Paul Kuhn, *Damage Control on Abu Ghraib*, CBS NEWS, May 5, 2004, <http://www.cbsnews.com/stories/2004/05/05/politics/main615811.shtml>.

112. *U.S. Troops Release Nearly 300 from Iraq's Abu Ghraib Prison*, ASSOCIATED PRESS, May 15, 2004.

113. See FAY REPORT, *supra* note 14, at 4 (reporting that on June 14, 2004, the Secretary of Defense requested the appointment of a new investigating officer, one who outranked Lt. Gen. Ricardo S. Sanchez—who had commanded the Combined Joint Task Force in Iraq during relevant times—to review facts and circumstances surrounding the conduct of Army intelligence operations at Abu Ghraib); SCHLESINGER REPORT, *supra* note 15, (Secretary of Defense chartered Schlesinger panel on May 12, 2004, to review DoD detention operations); Vice Admiral Tom Church, *Media Availability with Vice Admiral Church* (May 12, 2004), <http://www.defense.gov/transcripts/2004/tr20040512-0750.html> [hereinafter Church Transcript] (Department of Defense News Transcript of Vice Admiral Albert T. Church's statement regarding receipt of orders from Secretary of Defense on May 3, 2004, to review conduct of detention operations at Guantánamo Bay and at Charleston, South Carolina—where, inter alia, U.S. citizen Jose Padilla has been held); HUMAN RIGHTS FIRST, *GETTING TO GROUND TRUTH 1-7* (2004) (summarizing official investigations launched).

date be reopened and reviewed anew.<sup>114</sup> The FBI requested information related to prisoner abuse from all of its agents who had served at Guantánamo Bay, causing several previously unreported incidents to come to light.<sup>115</sup> And the Pentagon issued a series of policy orders to address the now widely publicized cases of detainees dying in U.S. custody: Army commanders were admonished to immediately report the death of any detainee to military law enforcement authorities, and the bodies of detainees could not be released until an Armed Forces medical examiner decided whether an autopsy was required.<sup>116</sup>

It is easy to contend with some certainty that public attention to the issue of prisoner treatment helped drive these steps; it is more difficult to determine whether the executive response that followed amounted to a shift in course. Nonetheless, while some Pentagon investigations had been launched before publication of the photos, the post-publication investigations were generally broader in scope,<sup>117</sup> and in at least one

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114. See Memorandum from the 11th Military Police Battalion to the Commander of the U.S. Army Criminal Investigation Command on Operational Review of 0149-03-CID469-60209 (May 19, 2004), available at [http://www.aclu.org/torturefoia/released/DOA\\_1053\\_1082.pdf](http://www.aclu.org/torturefoia/released/DOA_1053_1082.pdf).

115. See ARMY REGULATION 15-6, FINAL REPORT: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 1-2 (2005), available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>; E-mail from Steven C. McGraw to multiple redacted recipients (July 7, 2004, 14:10 EST), available at [http://www.aclu.org/torturefoia/released/FBI\\_3944\\_3947.pdf](http://www.aclu.org/torturefoia/released/FBI_3944_3947.pdf).

116. Memorandum from U.S. Army Criminal Investigation Command, Re: ALCID Memorandum 012-04, Chapter 5, CID Regulation 195-1, Criminal Investigation Operational Procedures 68-69 (June 7, 2004), available at [http://www.aclu.org/torturefoia/released/042105/9290\\_9388.pdf](http://www.aclu.org/torturefoia/released/042105/9290_9388.pdf) (In the case of a death of any person held as a detainee under the custody of the U.S. Army, the commander . . . will immediately report the death to Army law enforcement authorities. . . . The body will not be released from US custody without . . . approval from the Armed Forces Medical Examiner.”); see also UNITED STATES MARINE CORPS, MCWP 3-34.1: MILITARY POLICE IN SUPPORT OF THE MAGTF, at 5-4, available at [http://www.tpub.com/content/USMC/mcwp3341/css/mcwp3341\\_31.htm](http://www.tpub.com/content/USMC/mcwp3341/css/mcwp3341_31.htm) (last visited Apr. 4, 2006) (“Upon receiving information concerning alleged war crimes committed by Marines, commanders must immediately notify the nearest CID field office.”).

117. The Taguba and Miller reports, both completed prior to the release of the photographs depicting abuse at Abu Ghraib, were far more narrowly focused than the Schlesinger and Church reports, which followed the release of the photographs. The Taguba Report looked only at the role of the operations of U.S. military police at Abu Ghraib, specifically on the Army’s 800th Military Police Brigade. TAGUBA REPORT, *supra* note 15, at 6-7. The Miller Report was designed not to look at abuse, but rather at how to enhance the collection of intelligence. See MILLER REPORT, *supra* note 15, at 2. It was geared toward “discussing current theatre ability to rapidly exploit interneers for actionable intelligence.” *Id.* at 11. In contrast, the Schlesinger report, which was ordered by the Secretary of Defense in May 2004, immediately following the Abu Ghraib revelations, reviewed Defense Department detention operations with a somewhat broader mandate. See SCHLESINGER REPORT, *supra* note 15, (chartered to review DoD-wide detention operations). The Church report was ordered to review conduct of detention operations at Guantanamo Bay and at Charleston, South Carolina. Church Transcript, *supra* note 113. The very next month, in June 2004, Vice Admiral Church was directed to expand his investigation to include detention and interrogation operations in Iraq and Afghanistan. HUMAN RIGHTS FIRST, *supra* note 113, at 11.

case, redesigned to address more senior levels of command.<sup>118</sup> The results of the investigations in and of themselves were rich in information, including extensively documenting abusive and unlawful practices.<sup>119</sup> This information in turn helped form the basis for civil lawsuits against Pentagon officials,<sup>120</sup> and various disciplinary actions against some of those involved.<sup>121</sup> While these actions surely did not address all existing causes of abuse or secure full accountability for those responsible, it is noteworthy that, in an era of one-party control of the political branches, anything happened at all. Throughout this period, there was not a single court order, act of Congress, or direct election that mandated the executive's actions—what change did come was fundamentally the result of the force of civil society pressure disfavoring executive conduct.

A more complex example of civil society-driven impact may be found in the response to the President's nomination, in early November 2004, of former White House Counsel Alberto Gonzales to become Attorney General—after the initial furor surrounding Abu Ghraib photos had begun to die down. Although Gonzales had played a key role in the administration's development of detention and interrogation policy (as

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118. In June 2004, the Army replaced Major General Fay, the chief investigator of a report examining the role of military intelligence in the abuse of prisoners at Abu Ghraib, with Lieutenant General Jones, a more senior officer. Somini Sengupta, *U.S. Attacks Falluja as Iraqis Renew Hint of Martial Law*, N.Y. TIMES, June 26, 2004, at A7; see Lawrence Di Rita, Principal Deputy Assistant Sec'y of Def., and Lieutenant General Norton Schwartz, Defense Department Operational Update Briefing (July 28, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040728-1043.html> (Department of Defense News Transcript of briefing by Lawrence Di Rita explaining that General Jones was appointed "to do the investigatory work that General Fay was less appropriate to do").

119. SCHLESINGER REPORT, *supra* note 15, at 13; FAY REPORT, *supra* note 14, at 68–95, 109.

120. See, e.g., Consolidated Amended Complaint for Declaratory Relief and Damages, *Ali v. Tappas*, No. 05-cv-1377 (D.D.C. Jan. 5, 2006), available at <http://www.humanrightsfirst.info/pdf/06105-etn-rums-complaint.pdf>; *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005).

121. For example, MG Antonio M. Taguba made thirteen recommendations for disciplinary action in Part III of his investigation of the 800th Military Police Brigade. One of his recommendations was that "BG Janis L. Karpinski, Commander, 800th MP Brigade be Relieved from Command and given a General Officer Memorandum of Reprimand." TAGUBA REPORT, *supra* note 15, at 44. Following these recommendations, Karpinski was demoted to colonel, relieved of command, and given a written reprimand. See *Abu Ghraib Colonel Relieved of Command*, ASSOCIATED PRESS, May 12, 2005, available at <http://www.foxnews.com/story/0,2933,156400,00.html>; *Report: Demoted General Details Alleged Shoplifting Incident*, ASSOCIATED PRESS, May 12, 2005, available at <http://www.signonsandiego.com/news/state/20050512-2155-ca-prisonerabuse-karpinski.html>. Taguba's investigation also found: "I suspect that COL Thomas M. Pappas, LTC Steve L. Jordan, Mr. Steven Stephanowicz, and Mr. John Israel were either directly or indirectly responsible for the abuses at Abu Ghraib (BCCF) and strongly recommend immediate disciplinary action as described in the preceding paragraphs as well as the initiation of a Procedure 15 Inquiry to determine the full extent of their culpability." TAGUBA REPORT, *supra* note 15, at 48. In May 2005, Col. Pappas was relieved of his command of the 205th Military Intelligence Brigade, reprimanded, and fined \$8,000 for his authorization of the use of dogs in interrogations. See *Abu Ghraib Colonel Relieved of Command*, ASSOCIATED PRESS, *supra*; David Dishneau, *Abu Ghraib Officer Defends Use of Dogs*, ASSOCIATED PRESS, Mar. 16, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/16/AR2006031600306.html>.

emerged in the flood of leaked documents that appeared in the post-Abu Ghraib frenzy),<sup>122</sup> Gonzales's nomination was initially welcomed warmly by bipartisan leaders throughout Washington, and media coverage focused on his personal triumph in achieving this level of success.<sup>123</sup>

By the time of the Gonzales confirmation hearings in January 2005—despite the President's having won popular reelection in the interim—all eight Democrats on the Senate Judiciary Committee voted against confirmation,<sup>124</sup> and thirty-six Senators voted against Gonzales in the full Senate; the vote was the second narrowest to confirm an Attorney General nominee in eighty years.<sup>125</sup> More significantly, on the eve of the January confirmation hearing, the Administration for the first time formally withdrew the August 2002 OLC opinion narrowly defining torture—a move characterized by mainstream media as a “significant[] retreat[]” and a “sharply scal[ed] back” version of its previous position.<sup>126</sup> The 2002 OLC memorandum was replaced with a new OLC opinion aimed directly at defusing a resurgent media focus on torture; in marked contrast to the 2002 version, the new memorandum began with the statement: “Torture is abhorrent both to American law and values and to international norms.”<sup>127</sup>

Between the bold nomination in November and the confirmation struggle and policy reversal by January, what forces functioned to influence executive behavior? There is a strong argument that NGO activism was a driving force in refocusing congressional attention, shifting the media coverage, and deploying strategic advocacy which was pivotal in swaying events. Immediately following the nomination, human rights NGOs launched a classic advocacy campaign. Memos drafted by advocacy organizations were circulated broadly throughout Washington, D.C. outlining Gonzales's role in devising

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122. See HUMAN RIGHTS FIRST, ATTORNEY GENERAL CONFIRMATION HEARINGS 1–5 (2004), available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/briefs/brief\\_20041220\\_Gonz\\_all.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/briefs/brief_20041220_Gonz_all.pdf); Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

123. See, e.g., Zachary Coile, *Latino Tapped to Head Justice; Bush Names Longtime Aide to Be Next Attorney General*, S.F. CHRON., Nov. 11, 2004, at A3; Ron Hutcheson, *An Inspiring Story, with Some Plot Twists*, SEATTLE TIMES, Nov. 12, 2004, at A6; Ron Hutcheson, *Gonzales Has Inspiring Personal History, Critics on Left and Right*, KNIGHT RIDDER, Nov. 11, 2004.

124. Eric Lichtblau & Carl Hulse, *Senate Panel Approves Gonzales on a Party-Line Vote*, N.Y. TIMES, Jan. 27, 2005, at A21.

125. Charles Babington & Dan Eggen, *Senate Confirms Gonzales, 60 to 36; Vote Reflects Concern over Detainee Policy*, WASH. POST, Feb. 4, 2005, at A1.

126. See Jess Bravin, *U.S. Revamps Policy on Torture Of War Prisoners*, WALL ST. J., Dec. 31, 2004, at A1 (reporting the issuance of a new definition of what constitutes torture, “sharply scaling back its previous legal position that inflicting pain approaching that of organ failure or death was lawful, and retreating from earlier assertions that the president can authorize torture”); Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1 (“The Justice Department has broadened its definition of torture, significantly retreating from a memorandum in August 2002 that defined torture extremely narrowly and said President Bush could ignore domestic and international prohibitions against torture in the name of national security.”).

127. Memorandum from Daniel Levin, Acting Assistant Attorney General, U.S. Dep't of Justice, to James C. Comey, Deputy Attorney General, U.S. Dep't of Justice, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, at 1 (Dec. 30, 2004), available at <http://justice.gov/olc/dagmemo.pdf>.

interrogation policy and relaxing the prohibition against torture and cruel treatment of detainees.<sup>128</sup> The memos formed the basis of a growing list of questions by congressional staff. The memos also provided the substantive basis for a strategy of op-eds, editorial board writings in the districts of key congressional members, and national media commentary.<sup>129</sup> Central to these efforts was a letter signed by twelve retired high-ranking military officers, including former Chairman of the Joint Chiefs of Staff General John Shalikashvili, urging Members of the Judiciary Committee to sharply question Gonzales about his role in shaping torture and interrogation policies.<sup>130</sup> According to military historian Richard H. Kohn, quoted in an article in the *Washington Post*, this action by a retired group of military officers was unprecedented.<sup>131</sup> Dozens of national media outlets, including virtually all mainstream press, covered the military letter.<sup>132</sup> Questioned in press briefings about the import of the letter, a White House spokesman engaged the debate: “We adhere to our laws and our treaty obligations. That’s the policy of the United States government, and that’s what we expect to be followed.”<sup>133</sup>

It should be emphasized that any executive shift in response to the furor over the Gonzales nomination was limited; in the end, Gonzales was confirmed, having given the Senate committee only equivocal answers on some of the difficult questions of what interrogation methods the executive was prepared to allow. And while the White

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128. See ACLU, THE CIVIL LIBERTIES AND CIVIL RIGHTS RECORD OF ATTORNEY GENERAL NOMINEE ALBERTO GONZALES 2–5 (Jan. 2005), available at <http://www.aclu.org/FilesPDFs/gonzalesreport.pdf>; ALLIANCE FOR JUSTICE, REPORT ON THE NOMINATION OF WHITE HOUSE COUNSEL ALBERTO GONZALES TO BE ATTORNEY GENERAL OF THE UNITED STATES 2–3 (Jan. 2005), available at [http://www.allianceforjustice.org/hot\\_topic/Gonzales0105.pdf](http://www.allianceforjustice.org/hot_topic/Gonzales0105.pdf); HUMAN RIGHTS FIRST, BACKGROUND PAPERS ON ALBERTO GONZALES TORTURE, EXECUTIVE POWER, THE GENEVA CONVENTIONS AND MILITARY COMMISSIONS (Dec. 2004), available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/briefs/brief\\_20041220\\_Gonz\\_all.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/briefs/brief_20041220_Gonz_all.pdf); PEOPLE FOR THE AMERICAN WAY, TORTURING THE TRUTH: MYTHS AND REALITY IN RIGHT WING ATTACKS ON THE GENEVA CONVENTIONS, <http://www.pfaw.org/pfaw/general/default.aspx?oId=17725> (last visited Jan. 15, 2006).

129. See, e.g., Editorial, *A Degrading Policy*, WASH. POST, Jan. 26, 2005, at A20; Bob Herbert, Op-Ed., *Promoting Torture’s Promoter*, N.Y. TIMES, Jan. 7, 2005, at A23; Editorial, *Rewarding Mr. Gonzales*, N.Y. TIMES, Jan. 5, 2005, at A22; Editorial, *The Torture Memos*, BOSTON GLOBE, Jan. 1, 2005, at A14.

130. See Letter from Retired Military Leaders to Senate Judiciary Comm., (Jan. 4, 2005), available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/statements/gonz\\_military\\_010405.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_military_010405.pdf).

131. Dan Eggen, *Gonzales Nomination Draws Military Criticism; Retired Officers Cite His Role in Shaping Policies on Torture*, WASH. POST, Jan. 4, 2005, at A2 (“‘I don’t know of any precedent for something like this . . . . A retired group of military officers bands together to virtually oppose a Cabinet nominee? And a non-military one? It is highly unusual, to say the least.’” (quoting Richard H. Kohn)).

132. See, e.g., *id.*; *Top Brass Wary of a Gonzales-led DOJ*, UNITED PRESS INT’L, Jan. 4, 2005; Editorial, *Is Gonzales Fit to be Attorney General?*, MILWAUKEE J. SENTINEL, Jan. 5, 2005 at A10; James Rosen, *Officers Object to Nominee; Bush’s Pick Signed Torture Memos*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 5, 2005, at A3; Jerry Seper and Charles Hurt, *Confirmation of Gonzales for Justice Expected*, WASH. TIMES, Jan. 5, 2005, at A6.

133. White House Press Briefing by Scott McClellan (Jan. 4, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050104-3.html#F>.

House rescinded the 2002 OLC torture memo on the eve of Gonzales' confirmation hearings, it maintained vigorously through 2005 that existing legal bans on the use of "cruel, inhuman and degrading treatment" (in particular, U.S. treaty obligations under the Convention Against Torture) do not apply outside the territory of the United States, and (although there is no basis in the treaties or laws banning such treatment that would suggest one agency is at all distinct from the other in required compliance) the same laws that bind the U.S. Armed Forces do not equally bind the CIA.<sup>134</sup>

But there is little question that the executive was pressured to change its stated policy stance in response to public questions, and that actions were taken that likely would not have been without the orchestrated pressure. Perhaps most importantly, the lessons of the Gonzales nomination emboldened anti-coercion advocates. The incipient coalition of military leaders was developed over the succeeding months, and played a pivotal role in securing Senator McCain's public engagement on the question of torture, and the eventual overwhelming passage of McCain's amendment to ban cruel, inhuman, or degrading treatment wherever U.S. officials operate.<sup>135</sup> Civil society

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134. See, e.g., Dana Priest & Robin Wright, *Cheney Fights for Detainee Policy: As Pressure Mounts to Limit Handling of Terror Suspects, He Holds Hard-Line*, WASH. POST, Nov. 7, 2005, at A1 ("Cheney . . . made 'an impassioned plea' to reject McCain's amendment, said a senatorial aide who was briefed on the meeting . . . Cheney said that aggressive interrogations of detainees such as Khalid Sheik Mohammed had yielded useful information, and that the option to treat prisoners harshly must not be taken from interrogators."); see also President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," 41 WKLY. COMP. PRES. DOC. 1918 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> (seeming to reserve authority to override just-passed ban on cruel, inhuman, or degrading treatment based on constitutional power as Commander in Chief).

135. See Detainee Treatment Act of 2005, Publ. L. No. 109-148 § 1001, 119 Stat. 2739 (McCain Amendment banning cruel, inhuman or degrading treatment); Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, at A1 (describing passage of McCain amendment by Senate vote of 90-9); Carl Hulse, *Messy Congressional Finale*, N.Y. TIMES, Dec. 23, 2005, at A24 (reporting final passage of McCain amendment). The coalition of military leaders who opposed Gonzales formed the core of a broader coalition of leaders who wrote a series of letters advocating for the McCain Amendment. See, e.g., Letter from Gen. Joseph Hoar, USMC (Ret.) et al., to Senator John McCain, (Oct. 3, 2005), available at [http://www.humanrightsfirst.org/us\\_law/etn/pdf/mccain-100305.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/mccain-100305.pdf) (urging passage of law to ban cruel, inhuman, or degrading treatment). The support of retired military figured centrally in debates over the amendment, and Senator McCain relied on their engagement heavily in securing Republican support. See, e.g., 151 CONG. REC. S11061, S11063 (2005) (statement of Sen. John McCain requesting that the letter from 29 retired military officers be printed in the Record); 151 CONG. REC. S11077, S11094 (2005) (McCain introduced a letter from Colin Powell to the record which read "I fully support this amendment. Further, I align myself with the letter written to you by General Shalikashvili and a distinguished group of senior officers in support of the amendment. . . . Our troops need to hear from the Congress, which has an obligation to speak to such matters under Article I, Section 8 of the Constitution. I also believe the world will note that America is making a clear statement with respect to the expected future behavior of our soldiers. Such a reaction will help deal with the terrible public diplomacy crisis created by Abu Ghraib."); Jim Lobe, *White House Losing Ground on Prisoner Treatment*, INTER PRESS SERV. NEWS, Oct. 4, 2005, available at <http://www.ipsnews.net/news.asp?idnews=30528>; Eric Schmitt, *Senate Moves to Protect*

played a forcing function in jumpstarting other structural mechanisms for change; without its engagement, it is unclear whether Congress or the Executive would to this day have taken action to address detainee torture or abuse.

### C. Activist Federal Courts

The notion that the federal courts are countermajoritarian in nature—less democratic because judges are not elected or responsible to majority preferences—has long been part of constitutional debate.<sup>136</sup> Concerns about the propriety of judicial involvement have been particularly acute when it comes to matters of war, foreign affairs, national security, and intelligence—both because of judges' perceived distance from the political branches' decision making thought central to war and security policy, and because they are otherwise perceived as institutionally ill-suited to act.<sup>137</sup> Indeed, it

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*Military Prisoners Despite Veto Threat*, N.Y. TIMES, Oct. 6, 2005 (“The measure ignited a fierce debate among many Senate Republicans and the White House . . . . Nonetheless, the measure passed, 90 to 9, with 46 Republicans, including Bill Frist of Tennessee, the majority leader, joining 43 Democrats and one independent in favor. More than two dozen retired senior military officers, including Colin L. Powell and John M. Shalikashvili, two former chairmen of the Joint Chiefs of Staff, endorsed the amendment.”); Liz Sidoti, *Senate to Engage in Debate over Detainees*, ASSOCIATED PRESS, Oct. 5, 2005 (“Eight Republicans support McCain's proposal and Democrats also are on board . . . . Since July, a list of retired generals and admirals backing the effort has doubled from 14 to 28.”); Roxana Tiron, *Rights Groups Turn Up Pressure for Prisoner Abuse Amendments*, THE HILL, Oct. 4, 2005, available at <http://www.thehill.com/thehill/export/TheHill/Business/100405.html>.

136. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . . .”); see also, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) (“The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.”). For a recent summary of criticisms of the view of the Supreme Court as countermajoritarian, see Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. J. 1, 12–32 (2005).

137. On the institutional incompetence of the courts in security matters as compared to the political branches, see, for example, THE FEDERALIST No. 70 (Alexander Hamilton); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 768, at 546–47 (Ronald D. Rotunda & John E. Nowak eds., 1987) (“Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.”); see also *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (“In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.” (quoting *Hamdi v. Rumsfeld* (*Hamdi II*), 296 F.3d 278, 281) (internal quotation marks omitted)); ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973); Alberto R. Gonzales, Counsel to the President, Remarks to the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), available at [http://www.abanet.org/natsecurity/judge\\_gonzales.pdf](http://www.abanet.org/natsecurity/judge_gonzales.pdf) (rejecting the suggestion that “our judges—even though untrained in executing war plans—have a substantive role in the war decisions of the Commander-in-Chief”).

is virtually impossible to find a discussion of executive military or national security powers in the classic treatises on constitutional law—and therefore in recent advocacy on behalf of the executive in “war on terror” cases—that does not begin by noting with acceptance or approval the “traditional reluctance of courts ‘to intrude upon the authority of the Executive in military and national security affairs.’”<sup>138</sup> While some advance this position as a matter of historical description, and others view it as a matter of normative propriety, the chorus of scholars insisting that national security requires judicial deference and expansive executive authority was so vigorous post-September 11 as to create for a time what seemed to be a self-fulfilling prophecy of judicial disengagement with executive action.<sup>139</sup>

Despite the overwhelming weight of historical opinion and popular punditry that the courts are not well suited (because of competence or habit) to play an active role in

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138. Brief for the Petitioner at 44, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988)); *see also, e.g.*, EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 236 (4th ed. 1957) (“In short, it is the lesson of these cases that in the war crucible the more general principles of constitutional law and theory, those that ordinarily govern the delegation of legislative power, the scope of national power over the ordinary life of the citizen, and the interpretation of the ‘due process’ clause as a restraint on substantive legislative power, become highly malleable, and that even the more specific provisions of the Bill of Rights take on an unaccustomed flexibility.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 53 (1996) (“[W]here security needs or emergency are claimed, the Court is likely to interpret the powers of the President generously and even to reduce the restrictions and safeguards of the Bill of Rights.”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 670 (3d ed. 2000) ([T]he President’s “domestic executive authority is most expansive in time of war”).

139. *See, e.g.*, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Statement Before the S. Comm. on the Judiciary Subcomm. on Administrative Oversight and the Courts*, 106th Cong. (2001), (statement of Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=129&wit\\_id=73](http://judiciary.senate.gov/print_testimony.cfm?id=129&wit_id=73) (“[C]ourts necessarily see but one case at a time and in wartime tend to defer to the executive’s greater knowledge and expertise . . . .”); Robert H. Bork, *Civil Liberties After 9/11*, COMMENT., July-Aug. 2003, at 29–35; Ruth Wedgwood, *The Rule of Law and the War on Terror*, N.Y. TIMES, Dec. 23, 2003, at A27; Joel B. Grossman, *Careless With the Constitution? The Problem with Military Tribunals*, FINDLAW’S WRIT, Nov. 29, 2001, [http://writ.news.findlaw.com/commentary/20011129\\_grossman.html](http://writ.news.findlaw.com/commentary/20011129_grossman.html) (“Rights are always at risk in wartime. Perhaps it is an exaggeration to claim that “inter arma silent leges” (during war law is silent), but in times of national emergency law often takes a back seat.”); Sanford Levinson, *What Is the Constitution’s Role in Wartime?: Why Free Speech and Other Rights Are Not as Safe as You Might Think*, FINDLAW’S WRIT, Oct. 17, 2001, [http://writ.news.findlaw.com/commentary/20011017\\_levinson.html](http://writ.news.findlaw.com/commentary/20011017_levinson.html) (“Does law speak in time of war? And, if so, to whom, and how loudly? . . . It is difficult to read our constitutional history, however, without believing that the Constitution is often reduced at best to a whisper during times of war.”). Early court decisions following the September 11 attacks were replete with this view of the role of the courts. *See, e.g.*, *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002) (“the President’s wartime detention decisions are to be accorded great deference from the courts”); *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (“In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.”) (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (2002)).

constraining executive power in times of emergency, the courts have turned out to be among the most effective actors in actually changing the course of executive policy since September 11. The Supreme Court's engagement in detention cases related to the "war on terror"—over vigorous executive branch objection<sup>140</sup>—is the most visible example. The Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*—regarding the legality of indefinitely detaining a U.S. citizen captured on a battlefield in Afghanistan—led to the quickly negotiated release of a detainee the President had argued was a danger to the national security of the United States.<sup>141</sup> The Court's decision the same Term in *Rasul v. Bush* led hundreds of detainees at Guantánamo Bay to gain access to U.S. attorneys.<sup>142</sup> It was this newfound access that helped bring about the exposure of abusive practices at Guantánamo as the lawyers released the stories told by their clients,<sup>143</sup> about ongoing harsh conditions of detention,<sup>144</sup> and about the hunger strike a number of detainees were undertaking by the end of 2005.<sup>145</sup> And the Court's evident general willingness to engage the government on its assertions of power—regardless of the outcome in the particular case—had in itself an effect on the

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140. See Brief for the Respondents in Opposition, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (No. 03-6696), available at <http://news.findlaw.com/hdocs/docs/hamdi/hamdirums120303gopp.pdf>; Petition for Writ of Certiorari, *Rumsfeld v. Padilla*, cert. granted, 352 F.3d 695 (2d Cir. 2003) (No. 03-1027), available at <http://news.findlaw.com/hdocs/docs/padilla/rumspad11604certpet.pdf>; Brief for the Respondents in Opposition, *Rasul v. Bush*, 321 F.3d 1134 (2003) (Nos. 03-334 and 03-343), available at [http://www.humanrightsfirst.org/us\\_law/inthecourts/gitmo\\_briefs/Brief\\_For\\_Respondents\\_in\\_Opposition.pdf](http://www.humanrightsfirst.org/us_law/inthecourts/gitmo_briefs/Brief_For_Respondents_in_Opposition.pdf). The Supreme Court also granted certiorari in 2005 in the case of *Hamdan v. Rumsfeld*, challenging the legality of military commission proceedings at Guantánamo Bay. See *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005) (order granting writ of certiorari). But see Respondents' Motion to Dismiss for Lack of Jurisdiction, *Hamdan v. Rumsfeld* 126 S. Ct. 622 (2005) (No. 05-184) (urging Supreme Court to deny certiorari in part on grounds of risk of interfering with military exigency).

141. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). After being held for three years without charge, Yaser Hamdi was released on October 11, 2004 and deported to Saudi Arabia. See *U.S.-Freed 'Combatant' Is Returned to Saudi Arabia*, L.A. TIMES, Oct. 12, 2004, at A8.

142. *Rasul v. Bush*, 542 U.S. 466 (2004); Emily Heller, *A Different Take on Detainees Scores Big*, NAT'L L.J., Jan. 3, 2005, at 13; Deroy Murdock, *Gitmo Legal*, NAT'L REV., Dec. 5, 2005, at 28.

143. See, e.g., CENTER FOR CONSTITUTIONAL RIGHTS, DETENTION IN AFGHANISTAN AND GUANTANAMO BAY: STATEMENT OF SHAFIQ RASUL, ASIF IQBAL AND RLUHEL AHMED, [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Guantanamo\\_composite\\_statement\\_FINAL.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Guantanamo_composite_statement_FINAL.pdf) (last visited Feb. 2, 2006); see also DAVID ROSE, GUANTANAMO: THE WAR ON HUMAN RIGHTS (2004); Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantánamo Bay*, N.Y. TIMES, May 30, 2005, at A10; *All Things Considered: Guantánamo Detainees Freed in Britain* (National Public Radio March 11, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1761236>.

144. Brief for Human Rights First as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (petition for cert. granted Nov. 7, 2005) (No. 05-184), 2005 WL 2178808 (describing effects of prolonged solitary confinement and other harsh conditions of detention).

145. See Neil A. Lewis, *Widespread Hunger Strike at Guantánamo*, N.Y. TIMES, Sept. 18, 2005, at A24.

day-to-day conduct of detainee operations that, without Court involvement, would not have come to be.<sup>146</sup>

The Supreme Court has hardly been alone in active engagement since September 11; federal district courts from South Carolina to New York City have at times rejected executive practice in vigorous terms.<sup>147</sup> Perhaps as significantly, they have on occasion issued direct orders mandating specific action in ongoing detention operations. In one of the more dramatic examples of the effective power of the courts to stay the hand of the executive, federal district court Judge James Robertson ruled in November 2004 that the military commission trials at Guantánamo Bay were inconsistent with U.S. treaty obligations; within minutes of the court's order, an aide handed the presiding military commissioner a slip of paper, and commission proceedings then underway at Guantánamo were called to an immediate and indefinite halt.<sup>148</sup> At the same time, the district court issued an injunctive order compelling the Defense Department to keep commission defendant Salim Ahmed Hamdan out of solitary confinement (where he had been for close to a year, and according to his attorneys, had begun suffering significant adverse psychiatric consequences) and to return him to the general Guantánamo population.<sup>149</sup> The court reinforced that order at the end of 2005 when it

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146. Following the Supreme Court's decision to hear the cases of Jose Padilla and Yaser Hamdi, both of whom had been held in detention for nearly two years, both men were for the first time granted a visit with their lawyers. See Jerry Markon, *Terror Suspect, Attorneys Meet for 1st Time*, WASH. POST, Feb. 4, 2004, at B3; Stevenson Swanson, *Padilla Gets to Talk with His Lawyers*, CHI. TRIB., Mar. 4, 2004, at A1. Soon after the Supreme Court's rulings in *Hamdi* and *Rasul*, the Department of Defense announced the formation of Combatant Status Review Tribunals for detainees held at Guantánamo Bay, which gives detainees the ability to contest their status as enemy combatants. See U.S. Department of Defense News Release, *Combatant Status Review Tribunal Order Issued (July 7, 2004)*, available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>.

147. See, e.g., *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005) (ordering the Commander of the U.S. Naval Brig in Charleston, South Carolina to release Padilla from his custody within 45 days of the order), *rev'd*, 423 F.3d 386 (4th Cir. 2005); *In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (finding detainees had stated both constitutional and treaty law claims); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004) (ordering suspension of military commission proceedings at the U.S. Naval Base at Guantánamo Bay, Cuba), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005). *But see*, e.g., *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (finding "no viable legal theory exists" by which the court could grant writ of habeas corpus to Guantanamo Bay detainees). "The President's ability to make the decisions necessary to prosecute a Congressionally authorized armed conflict must be interpreted expansively." *Id.* at 318. For a summary of other post-September 11 cases addressing various constitutional challenges to executive action, see Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 816-41 (2004) ("To their credit, the trial courts have not routinely deferred to the administration's policies in this most recent war. Many courts have held that the administration's actions do not pass constitutional muster, and those that have held otherwise have subjected those actions to serious constitutional scrutiny.").

148. *Hamdan*, 344 F. Supp. 2d at 173; see also Avi Cover, Human Rights First, *Guantanamo Bay, Cuba, Military Commission Trial Observation* (Nov. 8, 2004), [http://www.humanrightsfirst.org/us\\_law/detainees/military\\_commission\\_diary.htm#day2](http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day2).

149. *Hamdan*, 344 F. Supp. 2d at 174 ("FURTHER ORDERED that petitioner be released

appeared Hamdan's location had been changed again;<sup>150</sup> the government promptly complied.<sup>151</sup> A similar, albeit limited, directive was issued in response to attorney complaints about the treatment of hunger-striking detainees at Guantánamo.<sup>152</sup>

Perhaps the most significant court action bearing directly on the question of torture and interrogation to date was the ruling of a New York federal district court in litigation brought under the Freedom of Information Act (FOIA) seeking the release of thousands of pages of official documents bearing on U.S. interrogation policy and practice, as well as the official response to prisoner mistreatment.<sup>153</sup> Despite the executive's vigorous objection to the release of the requested documents,<sup>154</sup> the slow and steady release of documents that followed the district court's order helped to prompt an additional high-profile military investigation into accusations of abuse,<sup>155</sup>

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from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment.”); *see also* Brief of Amici Curiae Human Rights First, et al. in Support of Petitioner, *Hamdan v. Rumsfeld*, 543 U.S. 1019 (2004) (No. 04-702), (describing effects of prolonged solitary confinement and other harsh conditions of detention).

150. *See* Emergency Motion to Compel and for Writ in Aid of Jurisdiction at 2, *Hamdan*, 344 F. Supp. 2d 152 (No. 1:04-CV-01519).

151. Minute Order Denying Petitioner's Motion to Compel and for Writ in Aid of Jurisdiction, *Hamdan*, 344 F. Supp. 2d 152; *see also* Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 86–88 (“When his lawyers learned about [Hamdan's relocation at Guantanamo] in early December, they were not pleased. Not only had Hamdan's relocation violated the explicit order of a federal judge that he be kept among the general population at Delta, but he also would be right next to Ali Hamza Ahmed Sulayman al-Bahlul, a supposed Qaeda propagandist with a reputation for turning other detainees against their U.S. attorneys. . . . [Hamdan's attorneys] promptly filed an emergency motion to have their client returned to a normal cellblock, and the authorities at Guantánamo complied.”).

152. *See* *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 23 (D.D.C. 2005) (ordering the government to “provide notice to Petitioners' counsel within 24 hours of the commencement of any forced feeding of their clients,” and for those who are force fed, the provision to counsel of “medical records spanning the period beginning one week prior to the date forced feeding commenced . . . at a minimum, on a weekly basis until forced feeding concludes”).

153. Stipulation and Order, *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (No. 04 Civ. 4151), *available at* <http://www.aclu.org/torturefoia/legaldocuments/eeOrderforResponsivedocs.pdf>.

154. *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Partial Summary Judgment, *ACLU*, 389 F. Supp. 2d 547 (No. 04 Civ. 4151), *available at* <http://www.aclu.org/torturefoia/legaldocuments/wCIAOppBrief030305.pdf>.

155. *See* FBI Documents, *ACLU FOIA Litigation* (Dec. 20, 2004), <http://www.aclu.org/torturefoia/released/122004.html> (including FBI memos—the first such accounts from *government* officials—describing Guantanamo detainees in frigid temperatures left chained to the floor, lying in their own excrement, and in one case pulling his own hair out in response); SCHMIDT REPORT, *supra* note 14, at 2 (“In response to FBI agent allegations of aggressive interrogation techniques at Joint Task Force Guantanamo Bay (JTF-GTMO) Cuba, that were disclosed in Dec 04 as a result of FOIA releases, General (GEN) Bantz J. Craddock, Commander United States Southern Command (USSOUTHCOM), ordered an AR 15-6 investigation and appointed Brigadier General (BG) John T. Furlow, United States Army South Deputy Commander for Support, as the investigating officer.”) (ordering investigation into use of dogs, sleep deprivation, temperature extremes, and other coercive interrogation techniques).

and helped ensure the sustained focus on the treatment of prisoners that civil society organizations relied on in their advocacy work.<sup>156</sup>

As with the professional military and civil society, the federal courts have been far from uniform in their response to executive detention and interrogation policy; they have ruled for the executive as well as against.<sup>157</sup> Likewise, the government's response has, despite a series of adverse rulings, seemed at times startlingly intransigent in failing to recognize the constraints judicial decisions appeared to place squarely on its conduct. While the Supreme Court in 2004 deferred deciding the merits of the case of Jose Padilla (the U.S. citizen "enemy combatant" arrested at Chicago's O'Hare Airport), the Court's 8-1 ruling in the parallel case of U.S. citizen "enemy combatant" Yaser Hamdi (picked up in Afghanistan) rejected the President's broadest assertion of executive power—to hold U.S. citizens indefinitely as "enemy combatants" with no set process for resolving their status—and should have put the executive on notice that its existing strategy in Padilla's case was untenable. Yet it was not until November 2005—nearly a year and a half after the Court's *Hamdi* decision, and more than three years since Padilla's initial arrest—that the government finally indicted Padilla on criminal charges. And even then, the government has refused to renounce the power to designate Padilla himself—or any other U.S. citizen the President might choose—an "enemy combatant" again.<sup>158</sup> Finally, it is important to note that many of the most

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Among the Schmidt Report's recommendations is "a policy-level review and determination of the status and treatment of all detainees, when not classified as EPWs [enemy prisoners of war]. This review needs to particularly focus on the definitions of humane treatment, military necessity, and proper employment of interrogation techniques." *Id.* at 28.

156. *See supra* Part III.B.

157. *See, e.g.,* Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005); Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005); Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2003); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005).

158. *See* Supplemental Brief for the Appellant at 11, *Padilla*, 432 F.3d 582 (No. 05-6396), available at <http://news.findlaw.com/hdocs/docs/padilla/padhnt120905sb4th.pdf> (noting that "the President could redesignate [Padilla] for detention as an enemy combatant"); President's Order to Secretary of Defense Transferring Detainee to Control of Attorney General (Nov. 20, 2005), <http://news.findlaw.com/hdocs/docs/padilla/gwb112005memo.html> (declining to revoke Padilla's designation as an "enemy combatant"); *see also* Alberto Gonzales, U.S. Att'y Gen., Justice Department News Briefing on the Indictment of Jose Padilla (Nov. 22, 2005), available at 2005 WL 3113525 (declining to comment on executive's continuing power to detain indefinitely designated "enemy combatants," and commenting "[t]he Fourth Circuit has held that the President of the United States was authorized to detain Mr. Padilla as an enemy combatant. And so I would just leave it at that."); Michael Isikoff & Mark Hosenball, *Case Not Closed*, NEWSWEEK, Nov. 23, 2005, <http://msnbc.msn.com/id/%2010184957/> (quoting Justice Department spokesperson refusing to answer whether Padilla would be freed if acquitted of criminal charges or detained further as "enemy combatant"). It should be noted the Government's indictment of Padilla came only after Padilla filed a new petition for writ of certiorari, meaning the case was again poised for Supreme Court review. The Fourth Circuit denied the government's transfer motion, suggesting that the government was trying to avoid Supreme Court review. Padilla v. Hanft, 432 F.3d 582, 583 (4th Cir. 2005) (finding that the government's motion "appeared to be an attempt to avoid consideration of the issues by the Supreme Court"). The Supreme Court reversed, granting the government's transfer request in January 2006. Hanft v. Padilla, 126 S. Ct. 978 (2006).

important questions of executive power to engage in coercive interrogation have yet to come before the courts in the post-September 11 era.<sup>159</sup>

Nonetheless, it is possible to draw some conclusions about the effectiveness of the judiciary as a constraint on executive power in the “war on terror.” Most significantly, the federal courts have not been shy about taking on questions of executive conduct bearing on individual rights (related to arbitrary detention, fair trial, secrecy, and prisoner treatment), often ruling against executive demands. In doing so, the courts have not much troubled themselves with historical warnings about their supposed limited competence in these delicate areas of national security.<sup>160</sup> Neither has there been a predictably partisan pattern to judicial decisionmaking for or against the executive; right-leaning judges have vigorously rejected the Republican President’s claims,<sup>161</sup> and left-leaning judges have at times afforded the executive substantial discretion to proceed largely as he would.<sup>162</sup> Rather, in largely measured decisions,<sup>163</sup> the courts have forced, if not bigger-picture policy shifts, then at least case-specific limits on policy judgments, and marginal (or better) improvements in the handling of day-to-day detention operations.<sup>164</sup>

In the end, it may be time to rethink the longstanding historical prejudice against judicial engagement in matters of national security. The courts have for the most part

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159. See, e.g., Consolidated Amended Complaint for Declaratory Relief and Damages, *Ali v. Rumsfeld*, No. 05-CV-1378 (D.D.C. filed Jan. 5, 2006), available at <http://www.humanrightsfirst.info/pdf/06105-etn-rums-complaint.pdf>; *Ibrahim v. Titan*, 391 F. Supp. 2d 10 (D.D.C. 2005) (considering liability of private government contractors for alleged torture).

160. Indeed, the only occasion on which a justice of the Supreme Court has quoted the famous passage from Hamilton’s Federalist No. 70 about the institutional competence of the courts in matters of national security is in Justice Thomas’s dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting) (“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains.”) (citing THE FEDERALIST NO. 70 (Alexander Hamilton)). Justice Thomas was the sole justice to find that the President had inherent authority not only to detain Hamdi but also to make “virtually conclusive factual findings” unchecked by the courts. *Id.* at 589.

161. See, e.g., *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting); *Padilla*, 432 F.3d at 583; *Padilla v. Hanft*, 389 F.Supp.2d 678, 692 (D.S.C. 2005)

162. See, e.g., *Hamdi*, 542 U.S. at 533–34 (plurality opinion of O’Connor, J., joined by, *inter alios*, Breyer, J.); *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003) (“We agree that great deference is afforded the President’s exercise of his authority as Commander-in-Chief. We also agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. Because we have no authority to do so, we do not address the government’s underlying assumption that an undeclared war exists between al Qaeda and the United States.”) (citations omitted).

163. Even the most aggressive judicial decisions against the government have left open options for how an illegally held detainee may be handled going forward. See, e.g., *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting); *Padilla*, 389 F. Supp. 2d at 691–92. The Supreme Court’s decisions broadly against the executive likewise left ample room for the executive to decide how best to proceed, within certain parameters set down by the justices. See *Hamdi*, 542 U.S. at 533–34 (O’Connor, J.); *Rasul*, 542 U.S. 466.

164. See *supra* Part III.C.

seemed no more troubled by complex questions of national security presented by many of these cases than they have been by the complexities of copyright, antitrust, or ERISA legislation. And while judges are indeed unelected, and in that sense undeniably “countermajoritarian,” they stood essentially alone among the branches for four years in suggesting that the executive’s power in our constitutional democracy was not unlimited. In identifying ways to enhance protections against torture or other coercive interrogation, measures that ensure judicial enforceability and strengthen judicial independence appear essential.

#### CONCLUSION

The government’s response to the “war on terror” has taught us a great deal about democracy and the rule of law in the United States. Among other things, this Article suggests that the mechanisms described above may not fully deserve the anti-democratic criticisms that they have all, at various times, endured. If an effectively constrained executive is to remain a key measure of democratic vigor,<sup>165</sup> then pro-democracy advocates in the United States should consider steps to enhance the checking effects of these institutions.

Thus, for example, rather than shying away from a highly trained and professionalized military, we should consider exploring ways to enhance internal military monitoring—an examination of the need for professional training and ethics requirements, an expanded role for the JAG corps in monitoring and reporting on interrogation operations, mandatory command accountability, or automatic triggers for third-party investigations (including access to classified materials) following evidence of military and intelligence community wrongdoing.<sup>166</sup> Rather than questioning the competence of the courts to opine on matters of national security and military affairs, we should strive to ensure that affirmative protections for rights in law (under the Constitution, statutes, and treaties of the United States) include or are interpreted to include vigorous and ready enforcement mechanisms that centrally engage the courts.

Above all, we should strive to keep these remaining “independent” actors independent from principal executive decision makers. The checks and balances written into the Constitution alone are not adequate to constrain an overly aggressive executive. But constitutional checks in combination with institutions driven by less classically democratic incentives and accountability structures—these leave ample room for believing that it is possible to constrain even the wartime executive.

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165. DE TOCQUEVILLE, *supra* note 99, at 121–31 (J.P. Mayer ed., 1969).

166. *See supra* note 64 and accompanying text (regarding absence of oversight and training functions as partial cause of widespread torture and abuse).

