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Dealing with the Enemy in a Time of Terror

On March 16, 1968, Hugh C. Thompson, Jr. was flying his helicopter over Viet Nam. He looked down to witness what we now know to be the My Lai massacre. American soldiers were lining up unarmed Vietnamese civilians and slaughtering them in a ditch. A lesser man might have radioed back to base and said, "I've just seen something incredible. You might want to send a team here to check things out." But what Hugh C. Thompson did was to land his helicopter between the civilians and the U.S. soldiers. He told the soldiers that if they made a move to harm any more civilians that his two crew members would be ordered – *ordered* – to open fire on their fellow U.S. soldiers. The massacre stopped, and Thompson took the few survivors to a U.S. Army hospital.

Only one of the soldiers, Lt. William Calley, ever served time for the killings. Lt. Calley spent three years under house arrest before receiving a presidential pardon. Mr. Thompson endured years of being shunned, insulted and even threatened for behaving in what some Americans saw as an unpatriotic fashion.[1]

But the laws of military conduct changed as a consequence of My Lai. Prior to My Lai, it was against the law to disobey an order. Today, it is against the law to obey an unlawful order. In his later years, Hugh Thompson was invited to speak at service academies and military bases. He told his audiences

[1] "A True Soldier," *The Fresno Bee*, January 10, 2006, p. B6.

that it was the duty of anyone wearing the American flag on their arm to refuse to abuse civilians or prisoners. "A soldier is instructed to take out the enemy, to take out the threat as quickly as possible," Mr. Thompson would tell his listeners. "When there is no more threat, you don't kill no more."[2]

Hugh Thompson died on January 6, aged 62. If a war crime can have a hero, Mr. Thompson was the hero of the My Lai massacre. Are there such heroes today? The humiliating photographs of Iraqi prisoners at Abu Ghraib attracted worldwide attention. But no high-ranking official has been prosecuted in connection with the scandal, nor has any Pentagon official ever been publicly reprimanded.[3] As a nation, we have put Abu Ghraib aside. This is very different from My Lai. What has happened to us? Why? This is what I'd like to explore with you this evening.

The conduct of the war in Iraq has deeply divided our United States. President George W. Bush has, however, said one thing on which all sides agree. While visiting the ruins of a still smoldering Pentagon in the days after September 11, Mr. Bush declared that what he was already calling the "war on terror" would be a "different type of war."[4] That prediction was accurate in many ways. This war is different because the enemy keeps changing. It was first Osama bin Laden, then the Taliban, then Saddam Hussein. Today, the enemy is faceless, nameless and stateless. This war is different because the battlefront shifts week by week from Bali to London to Jordan to Tel Aviv. It's different in

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[2]Hugh C. Thompson, Jr., speaking on *Weekend Edition,* National Public Radio, January 7, 2006.
[3] Thomas and Hirsch, "The Debate over Torture," *Newsweek*, November 21, 2005, p. 27, 33 (hereafter "Thomas and Hirsch").
[4] Hertzberg, "War and Antiwar," *The New Yorker,* September 5, 2005, p. 50.

terms of the arsenals used to fight it: language skills, coordinated intelligence and body armor count for much more than nuclear submarines or stealth bombers. It is different because we are fighting it almost as much with citizen soldiers from state militias as with a professional army.[5] It is different because the war's managers have made no effort to create even a pretense of shared sacrifice. The burdens of this war are borne almost entirely by the soldiers, their families, and the beneficiaries of the shrinking federal safety net from whom many of the soldiers are drawn.[6]

There is still another way this war is different. Americans are protecting civil liberties by destroying them.

As we all know, Congress curtailed a few civil liberties in passing the USA Patriot Act in those first frantic days after 9/11. (Judy Soley gave us the details of this in her paper to us three years ago.)[7] Most recently, it came to light that President Bush has been secretly ordering the National Security Agency to conduct warrantless wiretaps of thousands of Americans. The President

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[5] Burns, "Army to Shrink Guard's War Role," *The Fresno Bee*, February 2, 2006 p. A1 at p. A12 [National Guard units accounted for just under 50% of all combat forces in Iraq in 2005 and in some months had higher death tolls than the professional army].

[6] Westphal, "2006 Tax Cuts to Benefit the Wealthiest Americans," *The Fresno Bee*, January 4, 2006, p A3 [97% of tax cuts becoming effective n 2006 benefit those with incomes over $200,000 annually, but there will be $40 billion in spending cuts aimed primarily at programs benefiting the poor]; "Too Many Young Veterans Jobless," *The Fresno Bee*, February 3, 2006 <http://www.fresnobee.com/local/story/11763275p-12483823c.html> [unemployment rate for young veterans of the Iraq and Afghanistan wars is over 15% -- more than triple the national average of 4.9%, and employers are reluctant to hire National Guardsmen because they might be called up indefinitely for war in Iraq].

[7] Under the aegis of the USA Patriot Act, a college student doing a paper on Communism recently applied for an inter-library loan of Chairman Mao's little red book only to get a visit from two agents of the Department of Homeland Security. "Over the Line," *The Fresno Bee,* December 26, 2005, p. B7. The agents were concerned that the student had recently been out of the country.

responded by denouncing the disclosure as "shameful" and ordering the Justice Department to identify and prosecute those who leaked the story.[8]

But our most appalling abridgement of civil liberties has been our treatment of captives in the war on terror.

It was Vice President Dick Cheney who signaled what was to come. Shortly after September 11, he appeared on "Meet the Press." He said, "we will have to work . . . the dark side, if you will" in dealing with terrorist suspects. He continued, "It's going to be vital for us to use any means at our disposal."[9] As former CIA counterterrorism chief Cofer Black said later, "there was a before 9/11, and there was an after 9/11. After 9/11 the gloves came off."[10]

I am embarrassed to say that it was the legal profession that initiated the process of peeling off the gloves. On September 25, Deputy Assistant Attorney General John C. Yoo advised White House lawyers that the President's constitutional authority to conduct "military actions" against "terrorists" and the nations supporting them is "plenary."[11] This begs two vital questions that

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[8] Toobin, "Name That Source," *The New Yorker,* January 12, 2006, p. 30. The President said, "We're at war, and we must protect America's secrets." He said that the disclosure was a "shameful act" that has undermined American security. *Id*. The wiretaps bypassed the Foreign Intelligence Surveillance Court, set up under the Foreign Intelligence Surveillance Act of 1978 to consider and rule on such matters *even after* wiretapping begins. During the period 2000-2004, the FISA Court denied only 4 of the 6,650 applications made to it. Feldman, "Deliberation Nation," *The New York Times Magazine,* February 6, 2006, p. 17.

[9] Mayer, "A Deadly Interrogation," *The New Yorker*, November 14, 2005, p. 44.

[10] Thomas and Hirsch at 28.

[11] Memorandum dated September 25, 2001 by John C. Yoo, Deputy Assistant Attorney General, to Timothy E. Flanagan, Deputy Assistant Counsel to the President, reprinted in Greenberg and Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), p. 24 (hereafter *Torture Papers*). The Oxford English Dictionary defines "plenary" as "complete, entire, perfect, not deficient in any element or respect; absolute, unqualified." *The New Shorter Oxford English Dictionary* (Oxford, 1993), Vol. II, p. 2249.

resonate even tonight. Who decides what a "military action" is? And, who decides when someone is a "terrorist"?[12]

The United States attacked Afghanistan on October 7. It began capturing prisoners and shipping them to other locations. Over 500 were flown to the United States naval base in Guantanamo, Cuba. Many of these persons had simply been accused by Afghan and Pakistani bounty hunters of being al Qaeda or Taliban loyalists and turned over to American authorities for rewards of $3,000 to $25,000.[13] Why Guantanamo? On December 28, Mr. Yoo advised the Administration that Guantanamo Bay is beyond the reach of American laws and courts.[14]

On January 9, 2002, Mr. Yoo authored another memorandum counseling that that the Geneva Convention did not protect prisoners taken in Afghanistan.[15] Article 3 of the Third Geneva Convention of 1949 prohibits "violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture."[16] The Geneva Convention also entitles a captive the right to a hearing to determine if he is a regular soldier, a spy or a terrorist, or an innocent person

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[12] Will, "Bush's Approval of Surveillance 'a Mistake'," *The Fresno Bee,* December 21, 2005, p. B11.

[13] "Gitmo Detainees Say They Were Sold," *The San Francisco Chronicle,* May 31, 2005, <http://sfgate.com/cgi-bin/article.cgi?file=n/a/2005/05/31/international/i104958D76D> remarks by Thomas Wilner (counsel to 11 Kuwaitis imprisoned at Guantanamo in *Al Odah v. United States* (2004) ____ U.S. ____), "Justice Talking," National Public Radio, May 16, 2005.

[14] Memorandum dated December 28, 2001 by Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, to William J. Haynes, General Counsel, Department of Defense, reprinted in *Torture Papers*, p. 29. There is an interesting precedent for this. When the first Bush Administration (and later the Clinton Administration) was depositing Haitian boat people at Guantanamo and simply holding them there indefinitely, it successfully made the same contention. "The Law Students Who Took on Guantanamo," *The San Francisco Chronicle,* October 16, 2005, p. M2.

[15] Memorandum dated January 9, 2002 of John C. Yoo, Deputy Assistant Attorney General, and Robert C. Delabunty, Special Counsel, to William J. Haynes, Secretary of Defense, reprinted in *Torture Papers*, p. 118.

[16] *Id.* at 43.

picked up by chance. Mr. Yoo advised that the Geneva Convention applied only to traditional wars between nation states or to civil wars. Al Qaeda and Taliban fighters not being regular armed forces, and Afghanistan being a "failed" state, the Convention did not apply to them. Finally, the Geneva Convention being inapplicable, American officials could not be prosecuted under the War Crimes Act of 1996, which carries the death penalty. Mr. Yoo recently gave an address at Princeton University. In the question and answer session that followed, he was asked if the President could order someone tortured in front of a family member. His response was, "Show me the place in the Constitution that says he cannot."[17]

On January 25, 2002, White House Chief Counsel Alberto R. Gonzales formally advised the President that he was not bound by Federal laws or international conventions prohibiting torture. Nor, in Mr. Gonzales's opinion, were those committing torture under his authority open to Federal prosecution. He reasoned that the need to obtain information quickly from enemy prisoners to prevent further atrocities against American civilians rendered the Geneva Convention "obsolete."[18]

Days later, President Bush formally directed that "al Qaeda and Taliban detainees" were "unlawful combatants" not entitled to the protection of the

[17] Address by Anne-Marie Slaughter before the American Law Institute, May 18, 2005, reprinted in The American Law Institute, *Remarks and Addresses before the 82nd Annual Meeting* Philadelphia 2005), p. 74.
[18] Memorandum dated January 25, 2002 of Alberto R. Gonzales to the President, reprinted in *Torture Papers*, p. 118 at 119.

Geneva Convention.[19] The term "unlawful combatant" does not appear in the Geneva Convention nor, so far as I know, in any other law.

Mr. Gonzales also commissioned a secret study of standards of conduct under the 1985 United Nations Convention against Torture. The resulting legal memorandum is dated August 1, 2002 and signed by Jay S. Bybee, Assistant Attorney General. It concluded: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or death."[20] Reading that advice, one imagines an interrogator making nice judgments about the physical and mental condition of the suspect. It is chilling to consider that that physicians and psychologists closely follow interrogations at Guantanamo.[21] But Mr. Bybee went on. He concluded that torture was illegal only if the interrogator could be shown to have intended to cause the forbidden level of pain. Even torture was permissible if done in accordance with military necessity, on grounds of national self-defense.[22]

Five months later, Secretary Rumsfeld authorized (among other things) stripping Guantanamo prisoners, partially suffocating them, threatening them with

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[19] Memorandum dated February 7, 2002 of The White House to the Vice President and others, reprinted in *Torture Papers*, p. 134.
[20] Memorandum dated August 1, 2002 of Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, reprinted in *Torture Papers*, p. 172.
[21] "Inside the Interrogation of Detainee 063," *Time*, June 20, 2005, p. 26; Mayer, "The Experiment," *The New Yorker,* July 11, 2005, p.60; "Pentagon Leads Doctors on Guantanamo Tour," *The Fresno Bee,* November 13, 2005, p. A19.
[22] Bybee memorandum, *supra* n. 20, at 209 *ff*.

dogs, and leading them to believe that they or their families were going to be killed.[23]

When the Bybee memorandum was leaked to the press in the wake of the Abu Ghraib scandal, it provoked international revulsion. The Bush Administration swiftly repudiated the Bybee memorandum. It issued new memoranda relating to the treatment of prisoners, but to this day it declines to divulge them even to Congress.[24]

Why do I feel shame for my profession over these memoranda? The mindset that produced them is easy enough to see. After the terrorist attacks of September 11, 2001, the Bush administration reasoned that the Republic was up against the most insidious enemy in history. To defeat terrorism, it felt, we must have intelligence on the plans of al Qaeda and others. But we lacked informants inside terrorist organizations. So officials focused on getting information by questioning captured terrorist suspects. They asked the Justice Department and Defense Department what methods could be used to extract information without violating the law.

Any lawyer acting for a business is from time to time asked by company executives, "May we do this?" The lawyer understands that the executives want her to say "Yes." She is expected to spell out how far the company can go without getting into legal trouble. This is the implicit backdrop of the memoranda

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[23] Memorandum signed December 2, 2002, by Secretary of Defense Donald Rumsfeld, reprinted in *The Torture* Papers, p. 237.

[24] Mayer, "A Deadly Interrogation," *The New Yorker*, November 14, 2005, p. 44, at 50. This reluctance played a role in keeping Harriet Miers off the Supreme Court. The day after Senator Arlen Specter warned Ms. Miers that he would publicly question her views of Administration policy at Guantanamo, she withdrew her nomination. "Specter Warns Miers of Tough Queries Ahead," *The Fresno Bee*, October 27, 2005, p. A3.

I have just described to you. Lawyers were asked how far interrogators could go without becoming liable for war crimes. Or if that was not the explicit question, lawyers well understood that was the issue.

Some of you in this room give legal opinions. Others of you have to read them. You all know that legal opinions are sometimes a litany of equivocations. Sometimes, this is because the lawyer is uncomfortable with the answer desired by the individual putting the question to her. What the executive wants, and what is good for the company, may be different matters altogether. What astonished me in reading the memoranda I have just described was their unrelieved certainty. The Bybee memorandum, for example, is 50 pages long. It makes not a single mention of the leading Supreme Court case on the limits of the President's commander-in-chief powers: *Youngstown Sheet & Tube Co. v. Sawyer*.[25] It is inconceivable that Bybee did not know the *Youngstown* case. One can conclude only that Bybee gave the "company executives" what they wanted to hear.

When the going gets tough, the law disappears.

With memoranda from its lawyers in hand, the Administration began holding detainees not only in Guantanamo but in other clandestine, overseas locations. The best estimate is that our secret prisons now hold over 100 persons. All are incarcerated indefinitely, in isolation, without charges and

[25] (1952) 343 U.S. 579 [holding that President Truman's commander-in-chief powers did not give him power to seize the nation's steel mills to prevent a labor strike that would shut down the production of arms for the Korean War].

without access to counsel, hidden even from the International Red Cross.[26] In addition, our government began making use of a tool called "extraordinary rendition." During the Clinton Administration years, the Central Intelligence Agency initiated a program to capture fugitives in one country and "render" them to a second country where they were sought by local law enforcement. The Bush Administration has adapted this practice to send suspects to countries that never sought them in the first place. For example, the CIA seized a German citizen in Macedonia and flew him to Afghanistan, where he was held for five months and finally released without charges. He is now suing the United States.[27] In another rendition, a Muslim cleric was abducted in Milan and flown to Egypt, provoking an Italian judge to issue warrants for the arrests of 19 alleged CIA operatives.[28] The Parliaments of Sweden, Canada, Italy, France and the Netherlands have all launched inquiries into allegations of CIA abductions or imprisonment of their citizens.[29]

It was therefore not surprising that on the eve of her European tour last December, Secretary of State Condoleeza Rice issued a statement conceding that the United States utilizes extraordinary rendition. She insisted that it does so only after obtaining assurances that the prisoners will not be tortured. This seems disingenuous. What other reason can there be for the rendition?

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[26] "CIA Operating Secret Foreign Prisons," *The San Francisco Chronicle,* November 2, 2005 <http://sfgate.com/cgi-bin/article.cgi?file=c/a/2005/11/02/MNGACFHHV21.DTL>.
[27] "Rice and Merkel Discuss CIA Row," BBC News, December 6, 2005 <news.bbc.co.uk/1/hi/world/Europe/45109>.
[28] "U.S. Navy Office Contracted Planes," *The Fresno Bee*, September 25, 2005, p. B7, reporting that the Navy secretly contracted a 33-plane fleet, the ownership of which is mostly shielded behind "a maze of paperwork" and executives who cannot be located by a search of public records.
[29] "CIA Operating Secret Foreign Prisons," *The San Francisco Chronicle,* November 2, 2005 <http://sfgate.com/cgi-bin/article.cgi?file=c/a/2005/11/02/MNGACFHHV21.DTL>.

Secretary Rice admonished the Europeans that our nation's anti-terror methods help to protect them. But she avoided saying what the methods are, or even whether secret prisons exist. The Red Cross responded to Secretary Rice's remarks by renewing its demand that it be permitted to visit terror suspects held in secret prisons. That request was denied forthwith.[30]

At about the same time as Secretary Rice's tour, the debate about our treatment of alleged terrorists came to a head on Capitol Hill. The Congress overwhelmingly passed legislation barring "cruel, inhuman or degrading" interrogation techniques.[31] It did so despite vigorous lobbying by Vice President Cheney, who argued that the legislation would limit the President's – ahem – "flexibility" in war.[32] The new law was championed by Senator John McCain of Arizona, who as a prisoner of the Viet Cong had his arm broken, and worse. President Bush signed the McCain legislation because it was attached to a military spending bill. However, he asserts the McCain legislation does not bind him. He contends that neither the Congress[33] nor the courts[34] may abridge his powers as Commander-in-Chief in wartime, including making laws that govern

[30] "Red Cross Asks to See Prisoners," *The Fresno Bee,* December 10, 2005, p. A10. The previous month, President Bush had ducked the question on his South American tour. "Bush: Interrogation Tactics within the Law," *The Fresno Bee,* November 8, 2005, p. A1.
[31] The Senate vote was 90-9. "Treatment of Suspects Addressed," *The Fresno Bee*, October 6, 2005, p. A9.
[32] "Cheney on Hill Urging Block of Detention Bill," *The Fresno Bee*, July 24, 2005, p. A16.
[33] "Senators Criticize Bush's Assertion on Torture Ban," *The Fresno Bee,* January 5, 2006, p. A5. I personally make a sharp distinction between waging war, an act over which the President should have broad discretion, and meting out justice.
[34] For example, the Administration recently chided the Fourth Circuit Court of Appeals for "ignoring a Presidential directive" to move José Padilla from military custody to that of civil authorities. "Justices Asked to Permit Padilla Move," *The New York Times,* December 29, 2005, p. A16.

the treatment of prisoners. In any event, Mr. Bush blithely adds, the United States "doesn't do torture."[35]

So what does the United States "do?" The photographs from Abu Ghraib are so well known that I need not dwell on them here. But what goes on at Guantanamo Bay and in our clandestine prisons is shrouded in secrecy. We do know that over 100 detainees have died in U.S. custody so far.[36] At Christmas time, 84 prisoners at Guantanamo were on a hunger strike. Of these, 32 were being force-fed through nasal tubes.[37] There have been repeated reports about the CIA's treatment of suspected terrorists. They are grabbed and shaken. They are slapped with open hands to the face and the midsection. They are forced to stand with their hands and feet shackled for over 40 hours at a time in 50-degree temperatures while being periodically doused with water. They are also subjected to "water boarding," in which the prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. The gag reflex kicks in, leading to a terrifying fear of drowning.[38] Of the 500 or so inmates still detained in

[35] Thomas and Hirsch, p. 33. More recently he said "We do not torture." "Bush: Interrogation Tactics within the Law," *The Fresno Bee,* November 8, 2005, p. A1.
[36] Friedman, "Just Shut It Down," The New York Times, May 27, 2005 <http://nytimes.com/2005/05/27/opinion/27friedman.html>.
[37] "The World at a Glance," *This Week*, January 13, 2006, p. 5.
[38] "CIA's Harsh Interrogation Techniques Described," <abcnews.go.com/WNT/print?id=1322866>, November 18, 2005. According to this article, CIA officials who subjected themselves to these procedures lasted an average of 14 seconds before caving in.

Guantanamo, many for over four years, only ten have ever been designated for trial.[39] In fact, the detainees' very identities are mostly unknown.[40]

The consequences of all this are dreadful.

One is untrustworthy intelligence. In November 2001, Ibn al-Shaykh al-Libi, who helped run al Qaeda training camps, was picked up by U.S. intelligence in Afghanistan. He was "rendered" to Egypt. Under questioning there (with techniques said to have included water boarding)[41] al-Libi confessed that al Qaeda operatives had gone to Iraq in December 2000 to learn about chemical and biological weapons. This was just the evidence the Bush Administration needed to make the case for invading Iraq and getting rid of Saddam Hussein. In his famous (now discredited) speech to the United Nations in February 2003, then Secretary of State Colin Powell cited the intelligence extracted from al-Libi, referring to him not by name but as a "senior al Qaeda terrorist" who ran a training camp in Afghanistan.

There were only two problems with al-Libi's story.[42] First, it was bogus. Second, even before the Powell presentation, he recanted it.[43]

A second problem with harsh treatment of prisoners is that it has sometimes been directed against the wrong people. The most horrendous

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[39] "The Trust Gap," *The New York Times,* February 12, 2006, p. 13WK. Last November it was only four. "High Court to Rule on Military Panels," *The Fresno Bee*, November 8, 2005, p. A1 at A11.
[40] "Judge Rules for Release of Guantanamo Identities," *The Fresno Bee,* January 5, 2006, p. A5.
[41] The State Department's 2004 human rights report on Egypt says that "there were numerous, credible reports that security forces tortured and mistreated detainees." "Rice Defends U.S. Treatment of Detainees," *The Fresno Bee*, December 6, 2005, p. A8.
[42] "CIA's Harsh Interrogation Techniques Described," abcnews.com, November 18, 2005; Thomas and Hirsch at 30.
[43] "Uncollegial Committee," *Newsweek,* November 21, 2005, p. 8 [referring to a newly declassified CIA memorandum].

example yet published is that of an Afghan taxi driver who was tortured to death by interrogators who actually believed him to be innocent. His offense? He had simply driven his taxi past a military base at the wrong time.[44]

We have more than proved our fallibility in selecting suspects for detention. As of last summer, out of the 120 terrorist cases that could be found on the internet, there were only two actual convictions—both of Richard Reid, the notorious shoe bomber.[45] Now the spotlight rests on José Padilla, a Chicago-born convert to Islam, a former gang member, whom authorities apprehended when he attempted to re-enter this country. Attorney General John Ashcroft trumpeted that Padilla had planned to explode a "dirty bomb" and blow up apartment buildings. Mr. Padilla, he said, was a prime example of why the Administration needs to suspend prisoners' rights in the war on terror. Mr. Ashcroft's accusations were based on intelligence sweated out of an al Qaeda operative who was interrogated more than 100 times in a secret prison. But last month, only six days before the government was due to explain to the Supreme Court why it had held Mr. Padilla for more than three and a half years without charges, it indicted him with conspiracy to aid terrorists in other countries and turned him over to civil authorities. The allegations now pending against Padilla are serious. But they have nothing to do with dirty bombs.[46]

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[44] Pfaff, "What We've Lost: George W. Bush and the Price of Torture," *Harper's Magazine*, November 2205, p. 50 at 53.
[45] "After 9/11," *The Law School,* Autumn 2005, p. 109 at 110. The search engine was FindLaw.
[46] "Um, About the Dirty Bomb?" *The New York Times,* November 23, 2005, p. A28.

Another consequence of our treatment of prisoners is the erosion of our relations with our allies.[47] In Europe, it embodies what many see as American's dangerous drift away from the ideals that made it a moral beacon after World War II. When Rebecca, Katharine and I visited Dublin in June of 2004, we found Ireland preparing for the arrival of President Bush a few days later by making the largest mobilization of its armed forces since D-Day. But you don't have to travel to Europe to find out what the Europeans think. Go on line and read the European press for yourselves.

Still another dreadful result of how we treat prisoners is the effect on the Islamic world. Coercive interrogation gives the enemy extraordinary recruitment ammunition. For many Muslims, Guantanamo is a symbol of the low regard in which they believe the United States holds them. They are well aware of the Crusades and the decades of colonization of the Muslim world by the West. Images of caged men, clad in orange prison jumpsuits, on their knees, appear in station promos for Al Jazeera and Al Arabiya, the leading satellite television networks in the Middle East.[48] When *Newsweek* magazine published allegations that guards at Guantanamo had flushed copies of the Koran down the toilet, riots in Afghanistan (which we had only recently liberated from the Taliban) claimed 17 lives. More than 100 were injured.[49] We all know how fractious the Iraqis are. But at a unity conference last November, Iraqi political factions *unanimously*

[47] "U.S. Must not Be Seen as Torturer, McCain Says," *The Fresno Bee*, November 14, 2005, p. A3 (remarks of Senator McCain).
[48] "Guantanamo Comes to Define the U.S. to Muslims," The New York Times, May 21, 2005, p. A1 at A6.
[49] "Big News Week," *The New Yorker,* May 30, 2005, p. 33.

called on the United States for the immediate release of all prisoners who had not yet been charged.[50]

Is it any wonder that in Jordan and Egypt, the most moderate of the Arab states, 90% of those polled characterized Osama bin Laden as a freedom fighter? Only ten percent categorized him as a terrorist.[51]

If the war on terror is, at its heart, a battle to show the Islamic world that there is an alternative to oppressive theocracies and autocratic dictators, nothing is more important than how the United States dispenses justice to its detainees. Until now, America's practice has been to hold onto captured Islamic combatants until the end of hostilities, when there is no threat of them returning to the battlefield. But in the war on terror the battlefield is unmapped and hostilities could continue for decades.[52] After all, terrorism is a tactic, an eventuality, and not an opposition army or a rogue nation. If you caught every person who committed a terrorist act you still would not know where tomorrow's first-time terrorist will strike.[53]

Why would a decent society allow its leaders to embrace torture as a legitimate tool of warfare? Why would it allow them to hold prisoners indefinitely, secretly, and without charges?

The primary justification is that the ends justify the means. Americans must be protected from future attacks. In the last election, much was made of

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[50] "Iraqi Factions Seek Timetable for Pullout," *The New York Times*, November 22, 2005, p. A1.
[51] "How They See Us: What bin Laden Really Means to Bush," *This Week,* February 3, 2006, p. 15.
[52] Mahler, "The Bush Administration v. Salim Hamdan," *The New York Times Magazine*, January 22, 2006, p. 44, at 47.
[53] Steinback, "Fear Destroys what Bin Laden Could Not," *The Miami Herald,* December 26, 2005.

the fact that no terrorist attack occurred in the United States since 9/11. Does this mean that our Constitution is obsolete? It is much older than the Geneva Convention. I had thought that the guarantees of our Bill of Rights to be safe from unreasonable searches and seizures and from cruel and unusual punishment were bedrock American values.

A pragmatic argument for our treatment of detainees might be its symbolism. It is being used to produce "shock and awe" in our enemies, like the obliteration of Baghdad. The message is that we will do terrible things to avenge 9/11 and crush our enemies. We are indifferent to world opinion. Nothing will stop us.[54] This is a horrible error. The primary dimensions of the war on terror should be political and moral, not military.

It is also argued that Guantanamo is turning into an anti-American hothouse. That is, the more anti-American the detainees become, the greater the danger they pose, and thus the more necessary it is for us to continue to detain them. This is a self-fulfilling prophecy. If you weren't a terrorist when you went in, why would you not be a terrorist by the time you were let out?[55]

Another explanation for our treatment of prisoners might be theocratic. George W. Bush is the most aggressively religious president the United States has ever had. His religiosity has imbued him not with a sense of humility but of infallibility. He famously declared during the 2004 presidential debates that he could not recall making any mistake in his handling of the war on terror. To him, America's enemies are "evil" and deserve to be killed. (Neither Mr. Bush nor

[54] *Id.,* at 56.
[55] *Id.,* at 88.

Secretary Rumsfeld ever speaks of mere defeat of the enemy, much less – unlike the British in southern Iraq – negotiating with him.)[56] I believe that the cumulative effect of this dehumanization of the enemy has been to convey that not only are international norms of lawful conduct limited in the war against terror but commonly accepted religious concepts of civilized conduct no longer apply. It appears that my generation did not learn better from Vietnam. If we are to win the hearts and minds of the Islamic world, we cannot ignore our own moral bearings. To hear the word "torture" talked about openly as something we might countenance is horribly degrading to what we stand for.

Winston Churchill once said, "First we shape our structures, and then our structures shape us."[57] This is the core reason why we cannot tolerate abuse of our prisoners. Here is Melvin Laird, Secretary of Defense under President Nixon during the Vietnam years, a man of impeccable conservative credentials, writing recently in the journal *Foreign Affairs*:

> To me, the alleged prison scandals reported to have occurred in Iraq, in Afghanistan and Guantanamo Bay have been a disturbing reminder of the mistreatment of our own POWs by North Vietnam. The conditions in our current prison camps are nowhere near as horrific as they were at the 'Hanoi Hilton,' but that is no reason to pat ourselves on the back. The minute we begin to deport prisoners to other nations where they can be legally tortured, when we hold people without charges or trial, when we move prisoners around to avoid the prying inspections of the Red Cross, when prisoners die inexplicably on our watch, we are on a slippery slope toward the inhumanity we deplore.[58]

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[56] Pfaff, "What We've Lost: George W. Bush and the Price of Torture," *Harper's Magazine*, November 2205, p. 50 at 55.
[57] Quoted by Bevis Longstreth before the American Law Institute, May 17, 2005, reprinted in The American Law Institute, *Remarks and Addresses before the 82nd Annual Meeting* Philadelphia 2005), p. 30.
[58] Broder, "A Vietnam Architect's Wisdom on Iraq," The Washington Post, October 16, 2005 <http://www.washingtonpost.com/wp-dvp/content/article/2005/10/14/AR20051014>.

If George W. Bush is our most avowedly religious president, then surely Abraham Lincoln had the deepest spiritual insight. Though not enrolled in any religious denomination, Lincoln brooded over the infinite mystery of the Almighty. To claim knowledge of divine will and purpose in matters of national governance was, for Lincoln, an unpardonable sin.

Lincoln summed up his spiritual sense in his second inaugural address, delivered in the fifth year of the Civil War. He noted that both warring halves of the Union read the same Bible. They prayed to the same God. Each invoked God's aid against the other. Let us not judge, lest we be judged. Let us fight on, he said, with "firmness in the right, as God gives us to see the right." Even so, Lincoln warned, "The Almighty has his own purposes."[59]

[59] Schlesinger, "Forgetting Reinhold Niebuhr," *The New York Times Book Review,* September 18, 2005, p. 12, at 13.