

U.S. Obligations for the Treatment of Detainees

by James P. Pfiffner

The obligations of the United States government for treatment of prisoners during wartime are defined in international law, particularly the Geneva Conventions. Uncodified “customary international law” may also bind the United States by forbidding torture of prisoners. In addition, the United Nations Convention Against Torture, which has been implemented in the U.S. criminal code, also prohibits torture. This analysis will briefly examine the legal constraints on the United States in its treatment of prisoners. It will be argued that even if the Geneva Conventions are deemed not to apply to detainees, other laws prohibit torture.

Geneva Conventions

The four Geneva Conventions of 1949 were designed to protect individuals who are captured or at the mercy of the enemy during times of war. The Third Convention protects enemy combatants who are captured as prisoners of war. The conventions apply to those countries that have signed the treaty. This includes Iraq and arguably Afghanistan, but President George W. Bush declared through executive order that U.S. obligations under Geneva do not apply to members of the Taliban in Afghanistan nor to terrorists who may have plotted against the United States. The memo stated that “as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva.” (emphasis added)¹ The First Convention deals with the wounded and sick in the field; the

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Second Convention deals with the wounded, sick and shipwrecked at sea; the Third Convention deals with prisoners of war; and the Fourth Convention deals with the treatment of civilian persons during time of war.²

Geneva Convention III

The highest level of protection is accorded to prisoners of war and provides that prisoners must be treated humanely and that, if interrogated, they cannot be forced to reveal information beyond their name, rank, date of birth, and serial number.³ The convention does not forbid interrogation, but it limits the methods that can be used to those that are humane.

The Third Convention regarding prisoners of war states that: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind

whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”⁴ This prohibition of coercion would rule out many of the interrogation techniques and treatment of prisoners at Guantanamo Bay and at Abu Ghraib.

In order to qualify as a prisoner of war, members of states that have signed the treaty must (among other things): belong to an organized group that is a party to the conflict that is commanded by a responsible person; wear a “distinctive sign” identifying them as a combatant; must carry arms openly.⁵ If there is some doubt whether a detainee is entitled to status as a POW, the person is to be treated with prisoner of war status until a properly constituted tribunal has determined the person’s status.⁶ The United States recognized as prisoners of war those captured in the Korean, Vietnam and first Gulf wars.

Geneva Convention IV

Article IV of the Geneva Conventions applies to civilians under control of a military power. It forbids any “measure of such a character as to cause the physical suffering or extermination of protected persons . . . [including] murder, torture, corporal punishment . . .”⁷ Many of the prisoners at Abu Ghraib fall into the category of civilian detained by an occupying power.

United States Army Regulations 190-8 provides for treatment of enemy prisoners of war. It states that “all persons taken into

custody by U.S. forces will be provided with the protections of the [Geneva Convention on Prisoners of War] until some other legal status is determined by competent authority.” The regulation prohibits “inhumane treatment,” specifically “murder, torture, corporal punishment. . . sensory deprivation. . . and all cruel and degrading treatment.”⁸

Common Article 3 and Customary International Law

Each of the four Geneva Conventions has several common articles that are identical. Common Article 3 prohibits certain practices in the treatment of those persons under the control of military forces. The article requires that detained persons be treated “humanely,” and it prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment”⁹ According to Jennifer Elsea of the Congressional Research Service, “. . . Common Article 3 is now widely considered to have attained the status of customary international law.”¹⁰

Customary international law may bind the United States in its treatment of prisoners, irrespective of whether the Geneva Conventions are considered to apply. According to the *U.S. Army Field Manual of the Law of Land Warfare*, “unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. The unwritten or customary law of war is binding upon all nations.”¹¹

Protocol I, Article 75 of the Geneva Conventions, signed in 1977 but not ratified by the United States, also is considered to be part of customary international law. Protocol I provides that some acts “shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents.” These acts include “murder,” “torture of all kinds,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”¹² Goldman and Tittmore conclude that “the core provisions of

Article 75 should also be considered to constitute a part of customary international law binding on the United States.”¹³ Thus, even if the Geneva Conventions are deemed not to apply to captured persons suspected of terrorism, customary international law binds the United States to treat detainees humanely.

U.N. Convention Against Torture

The treatment of prisoners is also constrained by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴ The Convention Against Torture (CAT) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession”¹⁵ The U.N. Torture Convention provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁶

Goldman and Tittmore conclude that, based on the U.N. convention against torture and Article 75 of Protocol I (as part of customary international law) that it is “beyond question that the United States is subject to an absolute and nonderogable obligation under international human rights and humanitarian law to ensure that unprivileged combatants under its power are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.”¹⁷

In 1994 the United States passed legislation to implement the U.N. Convention Against Torture (18 U.S.C., par. 2340), which provides for criminal sanctions for perpetrators of torture, including the death penalty. Section 2340 of the law defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering”¹⁸ Thus even if the Geneva Conventions are deemed not to apply and customary international law is considered not to be binding on the

United States, the U.S. criminal code prohibits torture.¹⁹

The McCain Amendment of 2005

U.S. Senator John McCain endured five years as a prisoner of war in Vietnam and suffered severe torture. Thus his publicly expressed outrage at reports of torture perpetrated by U.S. soldiers and civilians at Guantanamo, Abu Ghraib, and in Afghanistan carried a large measure of legitimacy. McCain introduced an amendment to the Department of Defense Appropriations Act for 2006 that would ban torture by U.S. personnel, regardless of geographic location. Section 1003 of the Detainee Treatment Act of 2005 provides that “no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”²⁰

President Bush threatened to veto the bill if it were passed, and Vice President Richard B. Cheney led administration efforts in Congress to defeat the bill.²¹ Cheney first tried to get the bill dropped entirely, then to exempt the Central Intelligence Agency from its provisions. The efforts were unavailing, and the measure was passed with veto-proof majorities in both houses—90 to 9 in the Senate, and 308 to 122 in the House. In a compromise, McCain refused to change his wording, but he did agree to add provisions that would allow civilian U.S. personnel to use the same type of legal defense that is accorded to uniformed military personnel.²²

However, in a signing statement, President Bush used language that called into question whether he considered himself or the executive branch bound by the law. A signing statement is a statement by the president when a bill is signed that indicates how the president interprets the bill. It is intended to provide evidence of presidential intent corresponding to the weight given by federal courts to congressional intent in interpreting the law.²³ When President Bush signed the bill, he issued a signing statement that declared: “The executive branch shall construe Title X in

Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power”²⁴ Previous memoranda of the Bush administration interpreted executive power in expansive ways that argued that the president is not subject to the law when acting in his commander-in-chief capacity.²⁵

President Bush’s memorandum excluding al Qaeda from the Geneva Accords declared that detainees would be treated humanely “to the extent appropriate and consistent with military necessity.” This presidential directive led to (or allowed) the abuses that occurred at Guantanamo and Abu Ghraib. Thus, if President Bush’s reservation to the McCain amendment is interpreted in a similar fashion, there may be a loophole that allows torture deemed by the executive branch to be a “military necessity.”²⁶

Another possible impediment to the enforcement of the McCain amendment is a provision sponsored by Senator Lindsey Graham that precluded inmates at Guantanamo from appealing their incarceration to U.S. federal courts. The Justice Department argued in court that Yemeni Mohammed Bawazir, who claimed that painful force-feeding of him at Guantanamo constituted torture, did not have standing to sue because of Graham’s provision. The Justice Department argued that even if the force-feeding was in violation of the McCain amendment, the law provides no recourse for the victim in court.²⁷ Some might conclude that if the law is unenforceable in court, it is not binding. But that conclusion seems merely to avoid the issue of the status of laws in the United States constitutional system. It would seem that U.S. officials have the obligation to obey the law, even if the victims of abuse have no standing to bring an action in court.

Supreme Court Speaks

The U.S. Supreme Court delivered several setbacks to President Bush’s claims to

executive power. Yaser Hamdi was an American citizen who was captured in Afghanistan; when he was being held in Guantanamo, he filed for a writ of habeas corpus in order to challenge the right of the government to continue to hold him prisoner. In *Hamdi vs. Rumsfeld* (159 L.Ed. 2d 578, 2004) the Court ruled that Congress had authorized the war against al Qaeda and thus the president had the authority to detain enemy combatants to prevent them from returning to the battlefield, but that “indefinite detention for the purpose of interrogation is not authorized.”²⁸

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The Court declared that “the most elemental of liberty interests” is “the interest in being free from physical detention by one’s own government [“without due process of law”] . . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat” Thus “we reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law” This requirement of due process does not apply to “initial captures on the battlefield,” but “is due only when the determination is made to *continue* to hold those who have been seized.”²⁹ In making these judgments, the Court asserted that it had jurisdiction over exec-

utive branch imprisonments and that it was willing to enforce constitutional rights even during a time of war. In *Rasul v. Bush*, the Court held that noncitizens also had the right to challenge their imprisonment through a habeas corpus petition.³⁰

On the issue of whether the United States is permitted to try noncitizen enemy combatants by military commission, the Supreme Court in *Hamdan v. Rumsfeld* ruled in the negative, overturning a U.S. Court of Appeals decision.³¹ Hamdan was a Yemeni national who was captured in Afghanistan in November 2001 and turned over to U.S. forces. He was transported to Guantanamo, where he was charged with conspiracy to aid al Qaeda (as Osama bin Laden’s driver) and was going to be tried by a military commission established by President Bush.³²

Hamdan filed a habeas corpus petition, arguing that he was entitled to be tried under the requirements of Common Article 3 of the Third Geneva Convention and that the charge of conspiracy was not a violation of the law of war. Justice John Paul Stevens, writing for the Court, after ruling on standing and justiciability, concluded that the military commissions and procedures established by President Bush were not authorized by the Constitution or any U.S. law (not the Authorization to Use Military Force, the Detainee Treatment Act, nor the Uniform Code of Military Justice, UCMJ), and thus the President had to comply with existing U.S. laws. Stevens wrote that the “structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.”³³

Part of the problem was that the accused could be excluded from being present or being told of the evidence used against him. Also, the commission could use any evidence that the presiding officer thought “would have probative value to a reasonable person,” and thus might include evidence coerced through torture. The commissions also violated the Geneva Convention Common Article 3 which provides that detainees, “as a minimum” are entitled to be tried “by a regularly consti-

tuted court affording all the judicial guarantees . . . recognized as an indispensable by civilized peoples.”³⁴ The court did not say that Hamdan could not be detained for the duration of the hostilities, but if the government wanted to try him for a crime, it had to use regularly constituted courts that comply with minimal requirements of procedural due process to do so. The court concluded: “Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.”³⁵

Perhaps the most important principle established in these Supreme Court cases was Justice Sandra Day O’Conner’s statement in the majority opinion of the *Hamdi* case: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”³⁶

Military Commissions Act of 2006

In order to overcome the roadblock that the Supreme Court decisions threw in the way of administration policy, President Bush sought legislation that would authorize the creation of military commissions and spell out limits on the rights of detainees. President Bush argued that the types of harsh interrogation methods that he termed “the program” used by the CIA to interrogate detainees were essential to the war on terror. But *Hamdan* had called into question whether these techniques were legal and entailed the possibility that those who administered them could be charged with crimes under U.S. law.

In its argument for Senate Bill 3930 the White House reversed its previous position against the Detainee Treatment Act (DTA) sponsored by McCain. The Office of Legal Counsel analysis argued that using the DTA as the basis for interrogation policy would give the CIA interrogators more leeway than Common Article 3 of the Geneva Conventions allowed. President Bush argued strongly for passage of the administration’s proposal, say-

ing that it would provide “intelligence professionals with the tools they need.”³⁷ The allowed interrogation techniques were not specified in the law, but were said to include prolonged sleep deprivation, stress positions and loud noises, but administration sources said that “waterboarding” (simulated drowning) would not be used in the future.

After several weeks of contentious debate between the two political parties, Senate Bill 3930 was passed by both houses of Congress. President Bush signed the Military Commissions Act of 2006 (Public Law 109-366) into law on October 17, 2006. The law gave the Bush administration most of what it wanted in order to enable it to deal with detainees in ways that were prohibited by the *Hamdan* ruling. The law authorized the president to establish military commissions to try alien detainees believed to be terrorists or unlawful enemy combatants. The law defined “enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents,” or “a person who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal” established by the President or Secretary of Defense (Sec. 948a). These provisions seem to allow the possibility that U.S. citizens could be declared enemy combatants.

The law denied alien enemy combatants access to the courts for writs habeas corpus concerning “any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States.” (Sec. 7 (2)). The law forbids the use of testimony obtained through “torture,” and it specifically outlaws the more extreme forms of torture. The interrogation methods of statements that can be used against the accused also exclude those methods that “amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” (Sec. 948r)

Critics complained, however, that this language did not amount to the acceptance of

Common Article 3 of the Geneva Conventions and might be interpreted to allow very harsh treatment that could amount to torture. Techniques such as stress positions, sleep deprivation or loud noises could amount to torture, said critics, depending on the intensity and duration of their use. Proponents of the act said that waterboarding was outlawed, but the terms of the law were not explicit on these techniques. Statements obtained with these methods could be used against a detainee if the presiding officer decides that the “interests of justice would best be served” and that “the totality of the circumstances renders the statement reliable and possessing sufficient probative value.” (Sec. 948r) Although some top-level military lawyers objected to parts of the administration’s bill, Department of Defense General Counsel William J. Haynes was able to convince the top service lawyers to sign a letter stating that they “do not object” to the section of the law concerning treatment of detainees. It did, however, take several hours in a meeting for Hayes to prevail in his efforts to get them to sign the letter.³⁸

Critics of the administration argued that the new law would allow U.S. forces to capture anyone declared an “enemy combatant” anywhere in the world, including those thought to have purposefully supported hostilities against U.S. cobelligerents, and hold them indefinitely. These suspects could be held without charges being filed against them, and subjected to harsh interrogation techniques with no recourse to the courts for writs of habeas corpus, and thus there would be no check on executive actions. Critics also questioned whether the law could suspend the writ of habeas corpus as the law purported to do.³⁹

Conclusion

In the end, practical and moral arguments against torture may be more compelling than legal analysis. McCain spoke to the efficacy of torture and said that when he was asked by the North Vietnamese for the names of the members of his squadron, he gave them the names of the offensive line of the Green Bay Packers. “It

seems probable to me that the terrorists we interrogate under less than humane standards of treatment are also likely to resort to deceptive answers;⁴⁰ McCain said in November 2005. Representative John P. Murtha, a former marine officer who served in Vietnam, who was the ranking minority member of the House Appropriations Defense Subcommittee, said that, aside from questions of efficacy, “Torture does not help us win the hearts and minds of the people it’s used against If we allow torture in any form, we abandon our honor.”⁴¹ Finally, as McCain asserted, “This is not about who our enemies are, it’s about who we are.”⁴² ♪

Endnotes:

- 1 Memorandum for the Vice President, et al., Subject: Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), signed by President Bush. The memorandum is reproduced in Kareh J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (NY: Cambridge University Press, 2005), pp. 134-135.
- 2 For full legal citations see: Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” (Washington, D.C.: American Society of International Law Task Force Paper, 2002., p. 2, note 2.]
- 3 On POWs see L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993, pp. 188-206., p. 197.
- 4 Article 17, paragraph 4, quoted in Jennifer K. Elsea, “Lawfulness of Interrogation Techniques under the Geneva Conventions,” Washington: Congressional Research Service Report to Congress (RL32567), September 8, 2004, p. 2.
- 5 Goldman and Tittmore, “Unprivileged Combatants,” p. 11.
- 6 Green, *Contemporary Law of Armed Conflict*, p. 190.
- 7 Elsea, “Lawfulness of Interrogation Techniques,” p. 5.
- 8 U.S. Army Regulation 190-8, quoted in Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues,” Congressional Research Service Report for Congress (RL32395), December 2, 2004, p. 10.
- 9 Elsea, “Lawfulness of Interrogation Techniques,” p. 7.
- 10 Elsea, “Lawfulness of Interrogation Techniques,” p. 8.
- 11 U.S. Law of Land Warfare, Field Manual 27, paragraph 4(b), 7(c), quoted in L.C. Green, *The Contemporary Law of Armed Conflict* (NY: Manchester University Press, 1993), p. 31.
- 12 Elsea, “Lawfulness of Interrogation Techniques,” p. 9.
- 13 Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” (Washington, D.C.: American Society of International Law Task Force Paper, 2002, p. 38.
- 14 General Assembly Resolution 39/46, Annex, 39 U.. GAOR Sup. No. 51, U.N. Doc. A.39/51 (1984).
- 15 Elsea, “Lawfulness of Interrogation Techniques,” p. 9.
- 16 Goldman and Tittmore, “Unprivileged Combatants,” p. 49.
- 17 Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” (Washington, D.C.: American Society of International Law Task Force Paper, 2002., p. 49
- 18 18 U.S.C. par. 2340, quoted in Jennifer K. Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues” Congressional Research Service Report for Congress (RL32395) December 2, 2004), p. 14.
- 19 The War Crimes Act of 1996 defines war crimes as “grave breaches” of the Geneva Conventions and violations of Common Article 3. Source: P.L. 104-192, 110 Stat. 2104 (1996), 18 U.S.C. par. 2441. Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues” Congressional Research Service Report for Congress (RL32395) December 2, 2004), p. 11.
- 20 The Act defines cruel, inhuman, or degrading treatment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as defined in the United State Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment done at New York, December 10, 1984.” Source: “H.R. 2863, Department of Defense Appropriations Ace, 2006 (Enrolled as Agreed to or Passed by Both House and Senate).” Found at <http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414>:
- 21 Josh White, “President Relents, Backs Torture Ban,” *Washington Post* (December 16, 2005), p. 1.
- 22 That is, if the U.S. person undertakes interrogation practices that “were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.” Source: “H.R. 2863, Department of Defense Appropriations Ace, 2006 (Enrolled as Agreed to or Passed by Both House and Senate).” Found at <http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414>
- 23 The argument that the president’s intent should be given equal weight with congressional intent when interpreting the law is undermined by the first words of Article I of the Constitution, “All legislative Powers herein granted shall be vested in a Congress of the United States” For an analysis of signing statements, see Phillip J. Cooper, “George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements,” *Presidential Studies Quarterly* Vol. 35, No. 3 (September 2005), pp. 515-532.
- 24 The White House, “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.’” December 30, 2005. Found on White House Web site, <http://www.whitehouse.gov>.
- 25 For analysis of these constitutional issues see, James P. Pfiffner, “Torture and Public Policy,” *Public Integrity* Vol. 7, no. 4 (Fall 2005), pp. 313-330.
- 26 Even though Iraq was officially covered by the Geneva Conventions, the Schlesinger Report concluded that the techniques used at Guantanamo migrated to Abu Ghraib.
- 27 Josh White and Carol D. Leonnig, “U.S. Cites Exception in Torture Ban,” *Washington Post* (March 3, 2006), p. A4.
- 28 *Hamdi et al. v. Rumsfeld*, 159 L.Ed. 2d 578, 2004.
- 29 *Hamdi et al. v. Rumsfeld, Secretary of Defense* 159 Lawyers Edition 2nd 578 (2004).
- 30 *Rasul V. Bush* (159 L. Ed. 2nd 548 (2004).
- 31 *Hamdan v. Rumsfeld*, No. 05-184 (decided June 29, 2006), Slip Opinion, Supreme Court Web site.
- 32 The commissions were established by Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” Federal Register: Vo. 66. no. 222 (November 16, 2001), pp. 57831-57836.
- 33 Slip Opinion, p. 4.
- 34 Slip Opinion, pp. 4, 6
- 35 Slip Opinion, p. 7.
- 36 *Hamdi et al. v. Rumsfeld*, Secretary of Defense 159 Lawyers Edition 2nd 578 (2004). In remarks after she had retired from the Supreme Court, Justice O’Conner said about the intimidation of federal judges, “we must be ever-vigilant against those who would strongarm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings.” Her remarks were reported by Nina Totenberg of National Public Radio according to Raw Story, “Retired Supreme Court Justice hits attacks on courts and warns of dictatorship,” (March 10, 2006), Web site: rawstory.com.
- 37 R. Jeffrey Smith, “Beehind the Debate, CIA Techniques of Extreme Discomfort,” *Washington Post* (September 16, 2006), p. A3; R. Jeffrey Smith, “Detainee Measure to Have Fewer Restrictions,” *Washington Post* (September 26, 2006), p. 1; Charles Babington and Jonathan Weisman, “Senate Approves Detainee Bill Backed by Bush,” *Washington Post* (September 29, 2006), p. 1.
- 38 Mark Mazzetti and Neil A. Lewis, “Military Lawyers Caught in the Middle on Tribunals,” *New York Times* (September 16, 2006), p. 1, A11.
- 39 See Scott Shane and Adam Liptak, “Shifting Power To a President,” *New York Times* (September 30, 2006), p. 1; Kate Zernike, “Senate Approves Broad New Rules to Try Detainees,” *New York Times* (September 29, 2006), p. 1; Tim Grieve, “The pres-



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ident's power to imprison people forever," Salon, (September 26, 2006); Michael A. Fletcher, "Bush Signs Terrorism Measure," *Washington Post* (October 18, 2006), p. A4.

- 40 Scott Shane, "McCain Pays A Tribute At Funeral Of Ex-P.O.W.," *New York Times* (December 15, 2005), p. A14.
- 41 Eric Schmitt, "House Backs Ban on Inmate Abuse," *New York Times* (December 15, 2005), p. 1, A14.
- 42 Scott Shane, "McCain Pays A Tribute At Funeral Of Ex-P.O.W.," *New York Times* (December 15, 2005), p. A14.