Torture and Public Policy

JAMES P. PFIFFNER

Abstract

This article examines the abuse and torture of prisoners by U.S. military personnel at Abu Ghraib, Iraq, in 2003. The evidence demonstrates that the abuses were not merely the actions of a few sadistic and ill-trained guards, but that official memoranda, policy changes, operational decisions, and command changes led to harsh interrogation techniques and set the conditions for torture.

On the occasion of United Nations International Day in Support of Victims of Torture in June 2003, President George W. Bush proclaimed the official position of the United States with regard to torture:

> Freedom from Torture is an inalienable human right. . . . The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments . . . [to help] in prohibiting, investigating, and prosecuting all acts of torture . . . in all its forms. (Bush 2003)

At the time of this announcement, the president had already set in motion the series of events that led to the abuse, torture, and deaths of detainees at the hands of U.S. personnel at Abu Ghraib and other detention centers in the world. There is no public evidence that President Bush ordered or condoned the torture of prisoners, yet he and other officers of the United States made decisions that set the conditions under which prisoners would be tortured and abused, as revealed first in the photographs taken in the fall of 2003 at Abu Ghraib prison in Iraq and later in a number of official investigative reports (Fay 2004; Jones 2005; Schlesinger 2004; Taguba 2004).

Torture *per se* was never explicitly established as policy. But the argument here is that formal decisions that denied "nonlegal combatants" the protections of the Geneva

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Conventions, memoranda that narrowed the definition of torture, and operational changes in handling prisoners constituted, when taken together, a working policy that led to torture at Abu Ghraib and other U.S. detention centers.[1] The abuse and torture involved more than the arbitrary actions of a few sadistic and ill-trained guards; it was conducted in the context of perceived demands for actionable intelligence and loosened restraints on interrogation techniques (Schlesinger 2004, 2).[2]

For present purposes, it is not necessary to define precisely where physical abuse becomes torture. It is simply necessary to document that violent abuse occurred and that it resulted in the deaths of detainees in a number of cases. Fifteen of those who died between December 2002 and May 2004 were "shot, strangled or beaten" before they died. The circumstances surrounding several of the deaths included "blunt force trauma," "strangulation," and "asphyxia due to smothering and chest compression," among other things (Barry, Hirsh, and Isikoff 2004; Graham 2004a and 2004b; Myers 2004; Squitieri and Moniz 2004). Military officials later determined that thirty-seven of sixty-eight deaths of detainees in U.S. custody were possible homicides, with eleven considered justifiable (Jehl and Schmidt 2005). That aggressive techniques of interrogation led to the deaths of a number of prisoners is *prima facie* evidence that torture, however defined or justified, did occur.

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The evidence shows that the abuse and torture were not merely the actions of a few sadistic guards, but that a series of official actions, including memoranda, policy changes, and command changes, set the conditions for the abuse and torture of detainees. Several official reports of abuse by American soldiers (and civilian officials and contractors) will be briefly reviewed below, followed by an examination of possible justifications for torture and its efficacy. The official policy and operational changes that set the conditions for abuse and torture will be summarized. Finally, the discussion will conclude with an assessment of the chain of events that led to these unfortunate incidents.

Torture and Inhumane Treatment of Prisoners

In the spring and summer of 2004 it became clear that U.S. forces had abused and tortured detainees in Guantanamo, Afghanistan, Iraq, and other places. After U.S. forces invaded Iraq and defeated the military forces of Saddam Hussein, the notorious prison at Abu Ghraib, the center for much of Saddam's torture and killing, was looted and stripped of any useful building materials. The U.S. occupying authority had the prison rebuilt and converted to use for American occupying forces for the detention of prisoners.

General Janice Karpinski took formal control of U.S. military prisons in Iraq on June 30, 2003, and the Abu Ghraib facility went into operation on August 4, 2004. A month later, General Geoffrey Miller, the commander of the detention center at Guantanamo Bay, Cuba, visited Abu Ghraib and recommended changes that would require the military police to assist military intelligence personnel in their mission of extracting information from inmates of the prison. After this visit, particularly in October, November, and December 2003, U.S. personnel engaged in the now-noto-

rious abuses that resulted in the humiliation, injury, and death of prisoners.

After photographic evidence of abuse was reported in early January 2004, Major General Antonio M. Taguba investigated the activities at Abu Ghraib. Taguba found that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force" (Taguba 2004, 416). The types of "intentional abuse of detainees by military police" he documented were:

> Punching, slapping, and kicking detainees; jumping on their naked feet; Videotaping and photographing naked male and female detainees. . . . Arranging naked male detainees in a pile and then jumping on them. . . . A male MP guard having sex with a female detainee; Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; Taking photographs of dead Iraqi detainees. (Ibid., 416)

In addition, Taguba also found that the U.S. soldiers were guilty of "Breaking chemical lights and pouring the phosphoric liquid on detainees; Pouring cold water on naked detainees; Beating detainees with a broom handle and a chair; . . . Sodomizing a detainee with chemical light and perhaps a broom stick" (ibid., 417). Taguba concluded that abuse of prisoners was often done at the request of military intelligence personnel and "Other US Government Agencies' (OGA) interrogators" (i.e., CIA) in order to "set physical and mental conditions for favorable interrogation of witnesses" (ibid., 418).

The International Committee of the Red Cross (ICRC) visited fourteen U.S. detention sites in Iraq between March and November 2003 and objected to many cases of what in its judgment was abuse of detainees (Lewis 2004). The ICRC report catalogued a wide range of abuses and ill treatment of detainees by U.S. and coalition forces. The main violations of the Geneva Conventions on treatment of those captured included "brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury; absence of notification of arrest; physical or psychological coercion during interrogation; prolonged solitary confinement in cells devoid of daylight; excessive and disproportionate use of force . . . (Red Cross 2004, 384).

The report then specified methods of ill-treatment that were most frequently alleged, including hooding to disorient and interfere with breathing, handcuffing with flexi-cuffs that injured wrists, beatings with hard objects, threats against family members, pressing the face into the ground with boots, solitary confinement without clothes, and acts of humiliation (Red Cross 2004, 392). Perhaps most alarming in the report is the statement: "Certain CF [Coalition Forces] military intelligence officers told the ICRC that in their estimate between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake" (Red Cross 2004, 388).

While the Taguba Report focused on the behavior of the military police at Abu Ghraib, Major General George Fay's report (2004) investigated the behavior of the 205th Military Intelligence Brigade (Fay 2004). General Fay specifically identified forty-four instances of alleged detainee abuse committed by soldiers and civilian contractors at Abu Ghraib. The physical abuse involved slapping, kicking, restricting breathing, dislocating the shoulder of a detainee, and other harsh treatment. Dogs

were used to "threaten and terrify detainees" and were released in the cells with juvenile detainees. The report argued that the abuses resulted from "systemic problems" and "intense pressure felt by the personnel on the ground to produce actionable intelligence from detainees" (Fay 2004, 110–111). Fay concluded that "the climate created at Abu Ghraib provided the opportunity for such abuse to occur and to continue undiscovered by higher authority for a long period of time" (Fay 2004, 118).

Lieutenant General Anthony R. Jones was instructed to investigate the possible involvement of personnel higher in the chain of command than the 205th Military Intelligence Brigade (Jones 2005). He argued that "the events at Abu Ghraib cannot be understood in a vacuum" (ibid., 3–5, 17). The causes of the abuses, in his view, ranged from inadequate resources, to confusion about allowable interrogation techniques, to conflicting "policy memoranda," to "leadership failure." Jones concluded that "leadership failure, at the brigade level and below, clearly was a factor in not sooner discovering and taking actions to prevent" the abuses (ibid. 2005, 17).

In May 2004, FBI officials in Iraq sent e-mails to Washington to request guidance regarding what types of observed behavior they were obligated to report as abuse. One memorandum said that before the policy was changed in May 2004, "an Executive Order signed by President Bush [had] authorized the following interrogation techniques among others: 'sleep management,' use of MWDs [military working dogs], 'stress positions' such as half-squats, 'environmental manipulation,' such as the use of loud music, sensory deprivation through the use of hoods, etc." (FBI 2004a, 1).[3] In August 2004, an FBI official at Guantanamo sent an e-mail reporting on "what I observed at GTMO." The official said that on several occasions he had observed detainees "chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated [*sic*] on themselves, and had been left there for 18 [to] 24 hours or more." The temperature in the rooms was at times made extremely cold or "well over 100 degrees" (FBI 2004b, 1).

The information presented in this section is merely meant to establish that physical and psychological abuse and torture occurred at Abu Ghraib. The questions of why and how these acts happened will be addressed below. The analysis will first take up possible justifications for torture; it will then examine the series of memoranda that justified torture and set the tone for its practice; and finally it will document the operational changes that led to the abuses.

Justifying Torture

The most compelling argument that torture may be necessary or justified is the "ticking time bomb" scenario. Blanket condemnations of torture are often countered with a hypothetical situation in which a captive knows where a time bomb has been hidden and refuses to divulge the information. In such a case, the argument goes, torture would be necessary in order to save many innocent lives; thus torture would be justified. The chain of premises upon which such a scenario rests includes:

1. There must be a planned attack (the bomb is still ticking).
2. The captive must know about the planned attack.
3. Torture must be the only way to obtain the information.

4. The captive must be persuaded to provide the information.
5. The information must be accurate.
6. If the information is obtained, there must be time and means to prevent the attack.

If any one of these premises is absent, torture will not solve the problem. Thus even if one posits that torture is justified in order to save innocent lives, as in the above scenario, most torture scenarios are ruled out. The further a situation is removed from the ticking bomb scenario, the less torture is justified.

The ticking bomb scenario did not apply with respect to Abu Ghraib, since the detainees were Iraqis who did not have knowledge of future planned attacks on the United States by al Qaeda. Although some detainees were involved in the insurgency, many were ordinary criminals, and some were innocent civilians detained by mistake. What the interrogators seemed to want was tactical intelligence about the Iraqi insurgency, presuming that the detainees had such information and that it would help U.S. forces tactically to suppress the insurgency and avoid casualties.

This type of argument can easily be made in any combat situation. Since enemy captives may have information that could help one's own side, torture might be justified by any nation in any armed conflict. The justification of torture as a means to extract tactical information is the reason that rules of warfare have developed over the centuries and why the United States is a party to the Geneva Conventions. The generally accepted rules of warfare forbid torture and provide for the humane treatment of enemy captives. Without these rules, all armed forces would be vulnerable to torture if captured by the enemy; therefore, all sides have a stake in limiting the use of torture.

One of the key elements of the ticking time bomb scenario is the ability to get a person to divulge crucial information to save lives. While there is a wide range of interrogation techniques, from seemingly friendly trickery to the most extreme infliction of pain, the results are mixed (Bowden 2004). Approaches that work with some people do not work with others. Even if people are forced to talk, they may not have the requisite information or may not be telling the truth. They may say whatever it takes to stop the pain. The *Army Field Manual* on interrogation states: "Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality. The primary concerns, in addition to the effect on information quality, are the adverse effect on future interrogations and the behavioral change on those being interrogated" (Working Group Report 2003, 332). In testimony before Congress in March 2005, Porter Goss, director of the CIA, stated, "As I said publicly before, and I know for a fact, that torture is not —it's not productive. . . . That's not professional interrogation. We don't do torture" (Jehl 2005, 1).

In February of 2004 the CIA reported that a bin Laden aide, Ibn al-Shaykh al-Libi, had recanted his confession about cooperation between al Qaeda and Iraq. Recent investigations indicated that he might have told interrogators what they wanted to hear. Libi was the source of President Bush's claim that Iraq had given training in "poisons and deadly gasses" to al Qaeda. Libi's statement was made subsequent to "aggressive interrogation techniques" intended to get him to talk (Isikoff 2004; Jehl 2004; Priest 2004). It would be ironic if one of the administration's reasons for going to war with Iraq was based on false evidence coerced by "aggressive" interroga-

tion of an al Qaeda operative. In short, the use of torture in interrogation is morally suspect and of dubious efficacy.

Legal Memoranda Set the Conditions for Torture

Although the philosophical justifications for torture were not addressed explicitly, legal analyses developed by the Bush administration loosened the bounds traditionally set on treatment of prisoners. The memoranda argued that the Geneva Conventions did not apply to members of al Qaeda, that torture had a very high threshold, and that neither international agreements nor U.S. public law bound the president with respect to the treatment of prisoners.

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Suspending the Geneva Conventions

In January 2002, Assistant Attorney General Jay S. Bybee wrote a memo that argued that the treaties concerning the laws of armed conflict (particularly Geneva Convention III concerning prisoners of war) did not protect members of al Qaeda because they were "non-state" actors (2002, 81). On January 25, 2002, Counsel to the President Alberto Gonzales wrote a memo that affirmed the reasoning of Bybee's memo and recommended that the Geneva Convention III on Treatment of Prisoners of War (GPW) should not apply to al Qaeda and Taliban prisoners. He reasoned that the war on terrorism was "a new kind of war" and that the "new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners" (Gonzalez 2002, 119). Gonzales argued that exempting captured al Qaeda and Taliban prisoners from the Geneva Convention protections would preclude the prosecution of U.S. soldiers under the War Crimes Act. "A determination that GPW is not applicable to the Taliban would mean that Section 2441 (of the U.S. War Crimes Act) would not apply to actions taken with respect to the Taliban" (Gonzales 2002, 119).[4]

Secretary of State Colin Powell objected to the reasoning of the Justice Department and the president's counsel, Alberto Gonzales. In a memo of January 26, 2002, he stated that the drawbacks of deciding not to apply the Geneva Conventions outweighed the advantages because "It will reverse over a century of policy . . . and undermines the protections of the law of war for our troops, both in this specific conflict and in general; It has a high cost in terms of negative international reaction . . . ; It will undermine public support among critical allies" (Powell 2002, 123). Powell noted that applying the Convention "maintains POW status for U.S. forces . . . and generally supports the U.S. objective of ensuring its forces are accorded protection under the Convention" (2002, 123). The memo also addressed the intended applicability of the Convention to non-traditional conflicts, observing that "the GPW was intended to cover all types of armed conflict and did not by its terms limit its application" (ibid., 124–125). According to the Schlesinger Report, the legal adviser to the chairman of the Joint Chiefs of Staff and "many [uniformed] service lawyers" agreed with the State Department's position (Schlesinger 2004, 29).

Despite Powell's memo, and in accord with the recommendations of the Justice Department and Gonzalez, President Bush signed a memorandum on February 7,

2002, that stated: "Pursuant to my authority as Commander in Chief . . . I . . . determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva" (Bush 2002, 134). This determination allowed the aggressive techniques of interrogation used by military intelligence at Guantanamo and later, in the fall of 2003, transferred to the prison at Abu Ghraib.

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The point is not that the legal reasoning supporting the policy judgment was wrong, but rather that, as a policy decision, it had the drawbacks specified by Secretary Powell.[5] The decision led to the expansion of the interrogation techniques used at Guantanamo via Secretary Rumsfeld's decisions about allowable techniques, and also to the "migration" of those techniques to Iraq via General Sanchez's decisions about interrogation techniques (Schlesinger 2004, 8–9). Unlike Guantanamo, the United States considered Iraq to be covered by the Geneva Conventions (Elsea 2004a, 2).

Office of Legal Counsel Memorandum on Torture

In the summer of 2002, Assistant Attorney General Jay S. Bybee, head of the Office of Legal Counsel (of the Justice Department), wrote a fifty-page, single-spaced legal memorandum dealing with the question of what would constitute torture under Title 18 of the U.S. Code (criminal law), which applied the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) to the United States.

The Geneva Conventions require 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" (Elsea 2004a, 2). The Convention Against Torture, as ratified by the United States, emphasizes 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" (Goldman and Tittemore 2002, 49).[6] The Torture Victims Protection Act , which implements the Convention Against Terror (CAT) in U.S. 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 (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control" (28 U.S.C. § 2340).

Part I of the Bybee memo construes the definition of torture narrowly and elevates the threshold of "severe pain" necessary to amount to torture. "We conclude that for an act to constitute torture, it must inflict pain that is . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" (2002, 1, 6). This definition would allow a wide range of brutal actions that do not meet the exacting requirements specified in the memo. The memo specifically excludes from torture "cruel, inhuman, or degrading treatment or punishment," some examples of which are specified, such as wall standing, hooding, noise, sleep deprivation, and deprivation of food and drink. According to Harold Koh, a legal scholar and former assistant secretary of state, "Under this absurdly narrow legal definition, many of the

heinous acts committed by the Iraqi security services under Saddam Hussein would not be torture" (2005, 4).

The memo holds that for the law to apply, the torturer must have the "specific intent to inflict severe pain" and it must be his "precise objective" (Bybee 2002, 3) "Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith" (ibid., 4). Thus, one could inflict pain that amounted to torture, but not be guilty of torture if the main objective was, for instance, to extract information rather than to cause pain. This reasoning borders on sophistry.[7]

In Section V, the memo argues that the president's commander-in-chief authority can overcome any law, stating that "the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces" (ibid., 33). Thus "any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional" (ibid., 31). Finally, the memo holds that any U.S. person accused of torture who was acting pursuant to the orders of the commander-in-chief could defend against the charge by arguing, among other things, "the right to self-defense," since "the nation itself is under attack" (ibid., 44). This overly broad defense of torture could be used in virtually any military or combat situation. The use of the commander-in-chief clause to defend against a charge of torture, however, was risky for the president, because it directly connects the president and his constitutional authority with the acts of torture. A contractor, a CIA agent, or a soldier cannot invoke the commander-in-chief power—only the president can.

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In June 2004, Alberto Gonzales tried to minimize the importance and legal status of the administration memos about torture, saying they were "unnecessary, overbroad discussions" and "not relied upon" by policymakers (Milbank 2004, A21). But the previous year, in commenting on the legal status of the Office of Legal Counsel memoranda, he argued that, "OLC's interpretation of this legal issue [Geneva Conventions' applicability to al Qaeda] *is definitive.* The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law. He has, in turn, delegated this role to OLC" (Gonzales 2002, 119, emphasis added).

These memoranda show that, despite internal reservations, the administration made conscious policy decisions that invoked the president's authority to expand the range of allowable interrogation techniques.

Operational Decisions and Directives

In addition to the loosening of the legal strictures on interrogations, several key changes in the operation of U.S. forces with respect to prisoners were made that allowed the abuses at Abu Ghraib to occur. Special interrogation techniques were

allowed and used at Guantanamo, these techniques and procedures were then transferred to Afghanistan, and the techniques and personnel were subsequently transferred from Afghanistan to Abu Ghraib (Schlesinger 2004, 7).[8]

Guantanamo

In January 2002, prisoners were brought to Guantanamo, and interrogators tried to extract information relevant to al Qaeda activities. But in 2003, according to one military official, "We'd been at this for a year-plus and got nothing out of them," so it was concluded that "we need to have a less-cramped view of what torture is and is not" (Bravin 2004). Major General Michael B. Dunlavey forwarded the requested changes and justified them by arguing that the normal field manual techniques "have become less effective over time" (Dunlavey 2002, 225). His request was forwarded to Secretary Rumsfeld by Defense Department General Counsel William J. Haynes II on November 27, 2002 with the recommendation that seventeen new techniques in several categories be authorized[9] (Haynes 2002, 236).

In December 2002, Secretary Rumsfeld approved all seventeen techniques of interrogation included in Categories I and II and only the one in Category III that allowed non-injurious physical contact (Golden and Van Natta 2004). Rumsfeld rescinded his December decision on January 15, 2003, after some of the techniques were actually used in Guantanamo and concern was expressed by some military officials (Rumsfeld 2003a, 239). He subsequently approved a list of twenty-four techniques that included those in the *Army Field Manual* and added the warning that some of the other techniques were probably prohibited by the Geneva Conventions, such as isolation and "attacking or insulting the ego of a detainee" (Rumsfeld 2003b). The Schlesinger Report concluded that "It is clear that pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense resulted in stronger interrogation techniques" (2004, 33).

Some of the techniques approved at Guantanamo as specified in these documents violated the Geneva Conventions, such as stress positions, up to thirty days of isolation, and removal of clothing (ibid., 72). Most did not amount to torture, although some of them were harsh and might amount to torture depending on intensity and application (e.g., 30 days isolation, sensory deprivation, 20-hour interrogations, non-injurious physical contact). The techniques used included deprivation of food, deprivation of sleep (for up to 96 hours), deprivation of clothes, and shackling in stress positions (Bravin 2004). The problem, of course, is that in the actual practice of interrogations, as was evident at Abu Ghraib, guards and interrogators can easily get carried away and move beyond the bounds specified in the legal memoranda. Ensuring that this does not happen is the obligation of leadership. According to some defense officials, of the approximately 600 men imprisoned at Guantanamo, only one-third to one-half seemed to be of value (Golden and Van Natta 2004; Hersh 2004, 2–3).

Abu Ghraib

In the summer of 2003, Abu Ghraib was visited by General Geoffrey Miller, who, according to General Janice Karpinski, intended to "Gitmo-ize" the facility. Miller

favored employing some of the procedures used at Guantanamo and held that MPs should be actively involved in intelligence collection by "setting the conditions" for prisoner interrogation by military intelligence troops (and CIA and contractor personnel) (Marzetti, Barnes, and Pound 2004; Wordon 2004). The subsequent changes in the methods of interrogation, according to Colonel Thomas Pappas, commander of the 205th Intelligence Brigade, were "enacted as the result of a specific visit by Maj. Gen. Geoffrey Miller" (Schlesinger 2004, 8). However, unlike Guantanamo, Abu Ghraib was covered by the Geneva Conventions.

The problem with Miller's transferring the interrogation techniques and other procedures from Guantanamo to Abu Ghraib, according to the Taguba Report, was that the two detention facilities had different functions and different types of detainees. Guantanamo was intended to hold members of al Qaeda who might have information related to possible future terrorist attacks on the United States, whereas the detainees at Abu Ghraib included large numbers of "Iraqi criminals" and individuals involved in the uprising against U.S. forces. In addition, according to Army doctrine, the role of MPs should remain distinct from that of military intelligence personnel (Taguba 2004, 410, 413).

MPs reported that intelligence personnel encouraged them to abuse the detainees and praised them when they did. For instance, the intelligence personnel were quoted as saying, "Loosen this guy up for us. Make sure he has a bad night. Make sure he gets the treatment." When they did what the intelligence personnel wanted, they were praised: "Good job, they're breaking down real fast. They answer every question. They're giving out good information. Keep up the good work" (ibid., 418). Taguba found that the MPs at Abu Ghraib "had received no training in detention / internee operations," and had little or no instruction on the Geneva rules for prisoners of war, which officially applied to the Iraq conflict (ibid., 419).

In August 2003, there was no formal policy for interrogation at Abu Ghraib aside from the standard Army field manual (Smith and White 2004). After Miller's visit in early September, according to Karpinski, Colonel Pappas formally asked General Sanchez to "escalate" the level of interrogations (Wordon 2004). The techniques included "dietary manipulation," "adjusting temperature," "isolation" (though for more than thirty days required special permission), use of "Military Working Dogs" (muzzled), "sleep management" of up to twenty hours per day, "loud music and light control," and "stress positions" (Sanchez 2003a, 2003b).

After the objections of officials at U.S. Central Command in Florida, Sanchez on October 12 rescinded some of the tactics on the list and insisted that the use of others required his direct approval. These included the use of dogs, more than thirty days isolation, and maintaining stress positions for forty-five minutes (Diehl 2004; Smith and White 2004). The Schlesinger Report found that General Sanchez's command, "reasoning from the President's memorandum of February 7, 2002," believed that the presence of "unlawful combatants" justified more aggressive interrogation techniques (Schlesinger 2004, 8–9). Schlesinger also concluded that these changes caused confusion among U.S. personnel at Abu Ghraib as to which techniques were acceptable and which were not (ibid., 9). Military intelligence was officially given control of Abu Ghraib on November 19, 2003, which formalized the replacement of military police control with military intelligence control (Taguba 2004, 434). It was during the October–December period that the abuses at Abu Ghraib were photographed.

Conclusion: Links in the Chain of Actions

There is no public evidence that President Bush directly ordered or condoned the torture of prisoners; nor is it likely that Secretary Rumsfeld foresaw the final consequences of his changes in policy for the interrogation of prisoners. Who, then, was responsible for the abuses and torture of prisoners during the war on terror and the war in Iraq? The argument here is that the formal changes from previous policy made a difference—memoranda were read and acted upon by civilian and military leaders, pressure from above for "actionable intelligence" was taken seriously. Leadership, from the top down, set the tone that allowed the abuse to occur.

For instance, the visit of a "senior member of the National Security Council staff" to Abu Ghraib in November 2003 sent a strong signal that intelligence in Iraq was valued at the highest levels of the United States government (Schlesinger 2004, 69). Army Lieutenant Colonel Steven Jordan, head of the Joint Interrogation and Detention Center at Abu Ghraib, said that he felt pressure to produce more actionable intelligence from senior officials who said that the reports were read by Secretary Rumsfeld, and particularly from the visit of Fran Townsend, deputy assistant to President Bush and one of the top aides to Condoleezza Rice on the National Security Council staff (Smith 2004).

Although it is difficult to specify clearly a firm chain of causation, the thrust of this argument is that the series of actions, specified above, set the conditions for and allowed the abuse and torture at Abu Ghraib. There is no claim that higher policymakers intended their actions to lead to the more severe abuses, but on the other hand, they did intend that their actions would have a significant effect on interrogation for purposes of extraction of intelligence.

The following actions contributed to the conditions under which abuse and torture occurred at Abu Ghraib.

- President Bush and Secretary Rumsfeld decided, against the advice of some professional military officers, to limit the number of troops sent to Iraq (Fallows 2004; O'Hanlon 2005; Schlesinger 2004, 10–11).[10]
- President Bush decided that the Geneva Conventions did not apply to al Qaeda.
- Assistant Attorney General Bybee defined torture narrowly and argued that the commander-in-chief power negated the law against torture.
- Secretary Rumsfeld expanded the range of permissible interrogation tactics.
- Rumsfeld decided that military intelligence would control Guantanamo.
- Stephen Cambone sent General Miller to change interrogation policy at Abu Ghraib.
- General Miller decided that military intelligence priorities would prevail over military police control.
- General Karpinski did not ensure that her MP troops were well trained or supplied.
- General Sanchez expanded the range of interrogation techniques allowed at Abu Ghraib.
- Colonel Pappas ran Abu Ghraib with an emphasis on extracting actionable intelligence.

- Members of the 205th Military Intelligence directed MPs to "set the conditions" for interrogations.
- Members of the 372nd Military Police Company committed the abusive acts that were photographed.

Each of the above actions was partially responsible for the abuse and torture at Abu Ghraib, whether specifically intended or not. The proximate causes of the abuse and torture were the low-ranking individuals who actually performed the actions, and they are responsible for their behavior. Their belief that their actions were ordered or encouraged by their superiors might be offered as mitigating circumstances, but "just following orders" is not a sufficient exculpation, as the Nuremberg trials established. While the most direct culpability belongs at the lowest levels, leadership responsibility is highest at the top levels. Leaders have the responsibility for the likely consequences of their official actions.

Even though many individuals fell short of the high standards expected of them, it must also be kept in mind that at many points in the series of actions, courageous individuals objected to the policies that led to abuse and torture:

- Secretary Powell objected to excluding prisoners from the Geneva Conventions.
- Judicial Advocate Corps (JAG) officers objected to ignoring the Geneva Conventions.
- U.S. officers at Guantanamo objected to the additional techniques of interrogation approved by Rumsfeld.
- An MP captain at Abu Ghraib refused to have his MPs keep prisoners up for twenty-four hours before interrogation at the request of military intelligence officers (Hersh 2004, 42).
- A Navy dog handler, William J. Kimbro, refused to have his dog used to terrorize prisoners at Abu Ghraib (Taguba 2004, 444).
- Specialist Joseph M. Darby turned in to military law enforcement a CD containing photographs that he found to be disturbing.
- General Taguba took his assignment seriously and reported thoroughly on the abuses at Abu Ghraib.

In the end, the most compelling arguments against torture are moral and practical rather than legal. The practice of torture brutalizes and dehumanizes its victims, but it also brutalizes and dehumanizes those who torture their fellow human beings. A strong argument can be made that public policy allowing torture is never justified. In the case of the ticking time bomb scenario, the likelihood of success is uncertain, and the dangers of its use are multiple.

The main problem is that the slope from the ticking bomb to routine torture for tactical purposes is very slippery, as is evident from our Abu Ghraib experience, the French experience in Algeria in the 1960s, and Israeli experience in the 1990s (Bowden 2004).[11] Even in the ticking time bomb scenario, it would be better to trust the careful judgment of a military tribunal (or judge or jury) as to whether torture is justified in a particular case. Genuine cases of the ticking time bomb scenario can

arguably be used as an adequate defense for torture. The consequences of formally adopting torture in official policy, even in very narrow circumstances, are simply too dangerous. Once torture is justified, it is difficult to distinguish the ticking bomb scenario from the pressing need for actionable intelligence in tactical situations.

It is an open question about how the broad framing of the conflict in Iraq may have affected the willingness of soldiers to torture detainees. Asserting that the occupation of Iraq is part of the Global War on Terror, that the United States is engaged in a war of good against evil, and that it is acting in conformance with God's will may very well make it easier to torture those who seem to be fighting against the United States in the struggle (Pfiffner 2004). Carrying out God's will was used as the justification for the terrors inflicted by the Catholic Church in Spain on Jews as well as other Christians during the Grand Inquisition of the fifteenth century (Burman 2004).

In the aftermath of the disclosures, the Army issued reprimands or tried in courts-martial 125 soldiers and officers involved in the abuses at Abu Ghraib. Five of seven low-ranking soldiers pleaded guilty, to charges and two were being court-martialed (in 2005). One of the leaders of the abuse at Abu Ghraib, Specialist Charles A. Graner Jr., was sentenced to ten years in prison. Colonel Thomas Pappas, commander of the 205th Military Intelligence Brigade, was reprimanded and fined. Of the five top Army officers who were responsible for the prisons in Iraq in 2003 and 2004, only General Janice Karpinski was disciplined (Schmitt 2005; Smith 2005).

Given the threat that these incidents posed to the professionalism of the U.S. Army, not to mention the long-term damage to the image of the United States throughout the world, it is likely that safeguards in doctrine and leadership will be firmly enforced in the future. Nevertheless, the brutality of the enemies of the United States will continue to tempt harsh retaliation from U.S. troops. It may be useful for U.S. policymakers to remember Nietzsche's admonition: "He who fights with monsters should be careful lest he thereby become a monster" (1927, 466).

NOTES

1. The word "policy" is used to include a series of official actions by authoritative government officials that allow and direct changes from previous policy. In this sense, expanding the types of interrogation techniques beyond those allowed under the *Army Field Manual* constitutes a change in policy.

2. According to the Schlesinger Report: "There is no evidence of a policy of abuse promulgated by senior officials or military authorities. Still, the abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels."

3. It is not clear what memo the writer was referring to, or whether the FBI official had seen such a memo or merely believed that it existed. However, it is significant that the FBI agent believed that such a document existed. Whether the memo existed or not, his belief illustrates the assumptions under which interrogations took place. Individuals in organizations respond to many social cues in addition to official, written policy pronouncements. The FBI memo was released via a FOIA request and posted on the ACLU Web site.

4. Many of the memoranda and oral directives included statements that detainees were to be treated "humanely" despite the more aggressive interrogation techniques to which they could be subjected. The problem was that if the detainees were in fact treated

humanely, it would be more difficult to extract information from them. Thus, these statements must have been considered to be *pro forma,* while the overall thrust of the directives was that detainees were to be subject to more aggressive interrogation techniques that were outside the Geneva Convention limits.

5. For a detailed analysis of the legal issues involved in the treatment of prisoners, see Elsea 2004a and 2004b, Goldman and Tittemore 2002, Green 1993, and Koh 2005.

6. See also Bravin 2004. 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" (Goldman and Tittemore 2002, 48).

7. On December 30, 2004, the Bybee memo was superceded "in its entirety" by the Levin memo. The memo did not address the commander-in-chief powers of the president because it was "unnecessary" (Levin 2004, 2).

8. According to the Schlesinger Report, "Interrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq" (7).

9. Action Memo for: Secretary of Defense; From: William J. Haynes II, General Counsel; Subject: Counter-Resistance Techniques (27 November 2002). On this memo, Secretary Rumsfeld wrote by hand, "However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?" This penned comment by Rumsfeld trivializing the use of stress positions must have been intended as either a glib joke or a serious question. In either case, it is unworthy of the secretary of defense. If he was serious, it demonstrates an amazing lack of familiarity with the stress techniques used by interrogators, which often involved standing in awkward and painful positions for long periods of time in the context of little food, little sleep, terror of dogs, and disorientation due to combinations of these techniques. If he did not, in fact, understand this, he was naive. If it was a joke, it was made in poor taste for the official of the United States government who authorized the series of techniques that led to the abuses of Abu Ghraib. A photocopy of the memo is contained in Greenberg and Dratel 2005, 236.

10. For a detailed analysis of how the civilian leaders of the Department of Defense ignored professional planning of likely post-war conditions in Iraq, see Fallows 2004, O'Hanlon 2005, and Schlesinger 2004, 10–11.

11. The 1987 Landau Report recommended that "moderate physical pressure" be allowed in limited circumstances, but the coercive methods allowed became so widespread and indiscriminately applied that the Israeli Supreme Court reversed the recommendations in the late 1990s. See Bowden 2004.

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ABOUT THE AUTHOR

James P. Pfiffner is University Professor in the School of Public Policy at George Mason University. He has written or edited ten books on the presidency and American national government, including *The Strategic Presidency: Hitting the Ground Running* (2nd ed., 1996), *The Modern Presidency* (4th ed., 2004), and *The Character Factor: How We Judge Our Presidents* (2004). While serving with the 25th Infantry Division (1/8 Artillery) in 1970 he received the Army Commendation Medal for Valor in Vietnam and Cambodia.