

Cambridge University Press  
 978-0-521-18110-5 — The Politics of Prisoner Abuse  
 The United States and Enemy Prisoners after 9/11  
 David P. Forsythe  
 Excerpt  
[More Information](#)

# 1 *Torture and political morality in historical perspective*

The interrogation of someone like a terrorist suspect can be a real ethical dilemma. The available options may all be bad in some way.

(David Perry, Professor of Ethics, US Army War College, quoted in the  
*Christian Science Monitor*, May 26, 2004)

September 11, 2001 confronted the George W. Bush Administration with tough choices – to put it mildly. Any democratic government would have faced tough choices responding to similar events, given the Al-Qaeda attacks on New York and Washington that killed just under 3,000 persons, mostly civilians. (The 1941 Japanese attack on Pearl Harbor, preventive self-defense in the Japanese view, their version of the Bush Doctrine, had killed a little more than half that number, mostly military personnel.) When it came to treatment of what were called terror suspects or more generally enemy or security prisoners, which is the focus of this study, many liberal democratic governments had faced tough choices in the past: the British in dealing with violence by the Provisional Irish Republican Army (IRA) concerning Northern Ireland, the West German government in dealing with attacks on civilians by the Red Army Faction and other violent groups, Italy confronting the Red Army Brigades, Spain wrestling with ETA (Euskadi Ta Askatasuna, the nationalist/separatist organization) about Basque issues, India in dealing with Islamic militants incensed over New Delhi's control over much of Kashmir from 1947, Israel in dealing with Palestinian and other attacks since 1948 and especially after 1967, etc. The dilemmas were in fact old, even if some in the Bush Administration thought that everything had changed after 9/11.<sup>1</sup>

<sup>1</sup> For comparative analyses see further Alison Brysk and Gershon Shafir, eds., *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (Berkeley: University of California Press, 2007). I have a chapter in this book

This chapter outlines the three basic options open to the US government with regard to prisoner treatment in the context of terroristic total war – meaning unrestricted covert attacks by those posing as civilians, including on civilians. (There is no definition of terrorism in international law, owing to political disagreement as well as the difficulty of capturing complex phenomena in legal terminology.) The chapter then notes a drift in US policy from a relatively good record on treatment of enemy prisoners during the Second World War, especially in Europe, to a two-track policy thereafter: support for relevant human rights and humanitarian law norms in public, but a shift toward abuse – including torture – in secret, by both the CIA and the Pentagon. A kind analysis would say that what Bush did was to bring honesty to the subject, namely to bring US abuse of security suspects into the realm of public policy, whereas in the past it had been hidden in secrecy. A less kind analysis would say that what Bush did was to undermine the long quest to oppose torture and inhuman treatment, and thus open the flood gates to more abuse in the future, both at home and abroad.

This introduction sets the stage for what follows, namely analysis of the widespread abuse of enemy prisoners during the Bush Administration, much of it intended, as the secret maneuvers sought to bypass the public prohibitions. At the end of this introduction I indicate the specific arguments to follow in the various chapters. Throughout my analysis, one central question is whether a cost-benefit analysis supports the wisdom of harsh interrogation – was the actionable intelligence gained from abuse truly necessary and worth the long list of negatives inherent in the illegal process? Another persistent concern is, “what next,” especially since secret abuse never stays secret forever.

### **Political morality: two-and-a-half views**

In terms of general moral principles relevant to prisoner treatment, the choices were fairly clear – as they had been for others in times past.

regarding the United States. Also Robert Art and Louise Richardson, *Democratic Counter Terrorism: Lessons Learned* (Washington, DC: United States Institute of Peace, 2007). On the history of democracies and torture, see Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2006).

*Human rights as trumps*

On the one hand there was the absolutist opposition to, and legal prohibition against, torture and other major mistreatment of suspected enemies. In any ranking of human rights, the right to life and to what experts called the overlapping rights of personal integrity (no summary execution, no forced disappearances [secret detention], no torture, no mistreatment amounting to cruel, inhuman, or degrading treatment [CID]), all loomed large. This moral view commanded much respect, which is precisely why it is codified in much law. At the core of classical liberal thinking is respect for the individual, his autonomy, her capacity for reason and choice.

From the time of Henry Dunant and the first Geneva Convention for War Victims in 1864, it had been widely accepted, at least in theory, that when a combatant was out of the fight due to injury, the wounded soldier was entitled to humane treatment as an individual. He ceased being an active political agent and reverted to being a person meriting humane attention. This liberal logic was expanded to prisoners of war in the 1907 Hague regulations at the turn of the century, and then in the practice of the First World War – a practice further codified in the 1929 Geneva Convention on the subject. All of this was reaffirmed in the 1949 Geneva Conventions for war victims. Combatants when out of the fight were not to be abused, and civilians were never to be the objects of attack. (The episodic history of sparing war victims who are not active combatants is much longer than from just 1864 and thereafter.)<sup>2</sup>

Especially the 1949 Geneva Conventions for the Protection of Victims of Armed Conflict prohibit all of the above violations of personal integrity rights, covering both combatants and civilians, in both international and internal war. Geneva Convention III, together with Additional Protocol I (API) from 1977, prohibits abuse of all sorts of detained combatants when *hors de combat* (out of the fight) in international war. Geneva Convention IV, especially in the light of the same API, provides similar coverage for all civilians in international armed conflict or occupation resulting from that armed conflict. All four Conventions from 1949 contain Common Article 3 that

<sup>2</sup> For one source among many see Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford and New York: Oxford University Press, 3<sup>rd</sup> edn., 2000).

prohibits abuse of all prisoners in internal armed conflict (internal war, or civil war). In such situations, one of the fighting parties is a non-state actor – e.g. the rebel side in a civil war. The United States ratified the 1949 Geneva Conventions in 1955 and adopted legislation translating them into national law, including via the 1996 War Crimes Act (WCA), later amended. Geneva standards on treatment of prisoners are written into various versions of the US Army and Marine field manuals. Reference to the Geneva Conventions is printed on US military identification cards.

The 1984 UN Convention against Torture prohibits torture in all places at all times, whether in peace or war, with no exceptions for situations of “national emergency.” Prohibition of CID can be read as absolute or not, but if so read this has to be from inference, context, and legislative history, the body of the treaty primarily referring to torture.<sup>3</sup> The United States ratified in 1994, but restricted the definition of torture, made the treaty itself inapplicable in federal courts, and in other ways minimized legal change and effects.<sup>4</sup> The 1966 International Covenant on Civil and Political Rights (ICCPR) contained the same prohibitions in more general terms, which Washington ratified in 1992, although again the United States undermined its enforcement at home. Other international documents (often called instruments because the category included more than treaties) reinforced humane standards for prisoner treatment.<sup>5</sup>

Until 2001 the United States had officially and generally supported almost all of the international legal developments designed to regulate the treatment of prisoners so as to protect human dignity.<sup>6</sup> As will be shown, the United States might have violated these same standards from time to time, especially in the shadowy game of covert action that all states practiced regardless of their overt statements and policies. Still, in its official and overt policies, Washington had endorsed the view that prisoners, even those that fought against the United States, were entitled to humane detention and interrogation. As was true of all other states,

<sup>3</sup> John T. Parry believes that CID is not absolutely prohibited. *Understanding Torture: Law, Violence, and Political Identity* (Ann Arbor: University of Michigan Press, 2010), p. 5.

<sup>4</sup> See further *ibid.*

<sup>5</sup> E.g. UN Standard Minimum Rules for the Treatment of Detainees.

<sup>6</sup> The United States has never ratified Protocols I and II additional to the 1949 Geneva Conventions. More on this in chapter 2.

implementation did not always match legal requirements, but still, formal acceptance held out the promise of progressive achievement in implementation over time.

This absolutist moral-legal position does not prohibit expedient (self-interested) concerns. By adopting an absolute ban on torture and stigmatizing lesser mistreatment, the detaining authority might capture the high moral ground in the effort to win the hearts and minds of the civilian base of the enemy. Humane detention and interrogation might reduce the number of those who could otherwise become enemy terrorists or other combatants, or perhaps continue fighting rather than surrender. An absolute ban might contribute to one's self-interest under notions of reciprocity. And a commitment to humane policies might solidify morale, cohesion, and self-respect on the home front. Perhaps most importantly, many security officials believe that the route of humane interrogation is the right route for obtaining accurate intelligence.

In the last analysis, the absolutist position allows for pursuit of national security by all *humane* means possible, but it cannot guarantee that it has tried *every* means at its disposal.<sup>7</sup> This posture leaves a government open to challenge by its hard line critics if a major terrorist attack succeeds in penetrating defensive efforts. A sizable proportion of American society, for example, elevates the defense of the country, by torture if necessary, over considerations of adhering to human rights and humanitarian norms intended to protect the human dignity of all.<sup>8</sup> For many, their version of nationalism trumps the cosmopolitanism entailed in serious attention to human rights and humanitarian law. Even brutal or cruel defense of national objectives trumps the project to protect the fundamental rights of all. As the International Committee of the Red Cross (ICRC) understands because of its widespread prison visits in times of war or other national emergency, it is not very popular to seek humanitarian protection for those viewed as the enemy.<sup>9</sup>

<sup>7</sup> See further Yuval Ginbar, *Why Not Torture Terrorists? Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (Oxford and New York: Oxford University Press, 2008).

<sup>8</sup> According to one poll in June 2009, 40 percent of Americans sampled opposed a flat ban on torture in all situations, Program on International Public Attitudes, University of Maryland, June 25, 2009.

<sup>9</sup> David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005).

David Rodin has made a trenchant defense of the absolute ban on torture and inhuman treatment of terror suspects.<sup>10</sup> He says that a number of US public policies entail increased deaths for Americans but this is widely accepted: lenient handgun laws contribute to more than 25,000 murders each year; elevated highway speed limits contribute to about 43,000 traffic fatalities annually; and so on. Deaths from terrorism, which might have been prevented by torture, fall into this same line of thinking. If a terrorist blew up an airplane with hundreds on board, and if that terrorist might have been blocked by torture of his colleagues leading to actionable intelligence, that is no different from the other public policies he cited which led directly to deaths for Americans. An absolute commitment to humane interrogation, he says, entails a possible price that is the price we pay for upholding our best values. Terrorism, he continues, cannot defeat us; only we can defeat us, by abandoning our democratic and human rights values.

However, it is difficult for an elected US official to make this argument – namely, that American civilians might die if we uphold our values against torture or other cruelties. At least some political opponents can be counted on to attack this view, as we note in the next section.

### *National security as trumps*

By comparison to the absolutist position in defense of fundamental rights of personal integrity, there was utilitarian thinking about the greatest good for the greatest number. In this view, the torture or other cruel abuse of certain prisoners could be justified if the moral good derived from abuse was judged to be greater than the limited bad derived from otherwise unacceptable treatment of certain individuals. According to this reasoning, the defense of a liberal democratic nation-state could well entail the torture or other major abuse of terrorists opposed to liberal democracy. This is the lesser evil approach. The core value is a quest for actionable intelligence in the short run to protect the “good society,” even though this may entail “bad” for certain detainees

<sup>10</sup> Remarks by David Rodin, “Torture, Rights, and Values: Why the Prohibition of Torture is Absolute,” Carnegie Council for Ethics, June 26, 2008, [www.cceia.org/resources/transcripts/0051.html](http://www.cceia.org/resources/transcripts/0051.html).

who attack, or might attack, that good society.<sup>11</sup> It has long been argued in the realist political tradition well represented by Henry Kissinger, even in the Christian realist tradition represented by Reinhold Niebuhr, that the courageous national political leader or diplomat may have to take action normally considered evil in order to secure a larger legitimate good. Torture, normally an evil between individuals inside a secure democratic state, might be justifiable in an insecure world where the existence of a democratic state might come into question.

In the case of 9/11, so this second argument goes, Al-Qaeda sought to impose an ancient theocracy inimical to freedom in general, and especially gender equality, as seen in Taliban rule in Afghanistan first from Kandahar and later from Kabul. Al-Qaeda was said to be effectively intertwined with those extreme ruling Taliban. Some chose the label of Islamofascism to refer to this rule. Al-Qaeda and its shadowy allies observed no limits, attacking civilians, beheading prisoners, and otherwise pursuing a strategy of total war, limited only by the means at their disposal. Better to engage in the coercive interrogation of Al-Qaeda and Taliban suspects – and those similar to them – than run the risk of the demise of free societies, even if the latter manifested some defects here and there.

After all, so it is argued, democratic polities and the constitutions, statutes, and treaties they adopt do not constitute a suicide pact in which the law is to be upheld regardless of the danger to democracy itself.<sup>12</sup> For John Yoo, as we will see the author of some “torture memos” in the Bush Administration, the US Constitution allows the President to order torture if necessary to provide for the common defense, whatever treaties and statutes might say.<sup>13</sup> In a different but equally disturbing view, when democracies face an existential threat, they will do what is necessary to defend their way of life.<sup>14</sup> In this view, threats to fundamental

<sup>11</sup> See especially Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004).

<sup>12</sup> Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).

<sup>13</sup> John Yoo, *War by Other Means: An Insider's Account of the War on Terrorism* (New York: Grove/Atlantic, 2006); and *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Simon & Schuster, 2005).

<sup>14</sup> Paul Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor: University of Michigan Press, 2008).

sovereignty are not subject to the rule of law. In this argument, some see killing and torture in defense of the nation as a sacred commitment, not subject to secular legal restraint, just as Islamic militants see violent attacks on Americans as a sacred cause. One does not have to buy into the religious angle to understand the seriousness of this view. As the secular former Secretary of State Dean Acheson said apropos of the 1962 Cuban missile crisis, when state sovereignty is at stake, one should not expect law to constrain policy.<sup>15</sup> In these views, classical liberals, particularly the legalistic elements among them, should adjust to a dangerous world and adopt utilitarian thinking in times of national emergency.

If one accepts particularly the Posner–Yoo view, troubling questions follow. Suppose the President overstates the threat from enemies, or misuses a situation of threat to pursue other agendas? When and if these situations manifest themselves, if the President has unlimited authority as Commander in Chief, what institution has the authority to right the ship of state? And, since these views look to the President as the man on horseback to save the nation, what is the difference between democratic exceptionalism under an all-powerful president and a fascist glorification of the great man theory?<sup>16</sup> If George W. Bush could legally order torture, why not Pinochet, the Chilean dictator, or Franco, the Spanish dictator? They, too, thought they were saving a good Christian society from dastardly enemies, including godless Bolsheviks and Leninists, whether foreign or domestic.

Winston Churchill supposedly said, apropos of the Second World War, that truth is so important it has to be protected by a thicket of lies. In similar paradoxical reasoning, some contemporary thinkers argue that liberal democracy, human rights, and the rule of law are so important that they have to be defended with secret detention and abusive interrogation in the face of ruthless enemies. This is, if you will, the reasoned argument for torture.

(Much utilitarian thinking assumes that number matter, that it is morally justifiable to torture a few to protect the many. But once one

<sup>15</sup> Quoted in Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York and London: Oxford University Press, 1974), p. 1.

<sup>16</sup> Just as there has been a resurgence in the debate over torture, so there has been renewed interest in the legal theories of Carl Schmitt who defended Hitler and the German Third Reich given the chaos and insecurity of Weimar Germany in the inter-war years.



starts down this road, why not torture the many to protect the few? Why not torture many terror suspects to ensure that even a few innocent civilians are spared injury or death? This latter view might be termed consequentialist rather than utilitarian. Here, political morality depends on appreciation of outcomes and does not stop at categorical imperatives. Such a theoretical discussion about types of moral argument, and the exact dividing line between utilitarian and consequentialist arguments, is not the central point here.)

### *Splitting the difference*

A third school of thought tries to split the difference, more or less, between the moral absolutists and the utilitarian relativists by arguing for limited exceptions to the absolute prohibition on prisoner abuse. Hence Alan Dershowitz of Harvard Law School argued for “torture warrants,” under which Executive interrogators would have to get court permission to depart from the absolute prohibitions found in law in order to deal with the “ticking time bomb scenario.” In this logic, the necessity of national security could override normal legal protections for the prisoner who was very likely to have knowledge of future and significant attacks on a just society. But the checks would need to come from outside the Executive branch, from an independent judiciary or other independent body, to ensure against a version of “force drift,” namely the anticipated tendency to turn the limited exception into the general rule.<sup>17</sup> Some advocates of “the lesser evil” approach agreed on the need for strict limits to abuse.<sup>18</sup>

In Israel from 1999 the Supreme Court imposed an absolute ban on torture but allowed for the possibility of the “necessity defense” – namely, that some exceptions might be allowed *ex post facto* if the security services could reasonably show that torture was necessary for Israel’s national security.<sup>19</sup> This is similar to Dershowitz’s torture

<sup>17</sup> Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2003), where he argues that terrorism is never justified but torture sometimes is.

<sup>18</sup> Ignatieff, *The Lesser Evil*.

<sup>19</sup> For an overview, among several sources, see Gershon Shafir, “Torturing Democracies: The Curious Debate on the ‘Israeli Model,’” in Brysk and Shafir, *National Insecurity*.

warrants, in that the general and absolute ban on torture (and mistreatment) remains, but there is a formal effort to allow for the supposedly rare and very limited exception. The Israeli experience will get more attention in Chapter 7.

In the United States after the Al-Qaida attacks, the 9/11 Commission recommended the creation of a new civil liberties panel to oversee the detention process.<sup>20</sup> The Bush Administration was opposed and Congress never took up the issue. Similar concern about civil liberties and the collection of information in the United States led to a moribund body, the Privacy and Civil Liberties Oversight Board.<sup>21</sup> The US Civil Rights Commission took no interest in enemy prisoners after 9/11, even when American citizens were declared “unlawful enemy combatants” and deprived of their constitutional rights.

A central problem in this third approach remains: how to ensure that strict limitations do indeed occur concerning exceptional abuse? Even apart from the delicate question of torture for national security, it is well known that those charged with supervision and oversight tend over time to get co-opted, whether one speaks of those overseeing off-shore oil and gas drilling in 2010, or those who were supposed to regulate the railroads in the past. The Israeli example of trying to implement the necessity defense in law, to mitigate punishment under an absolute ban on torture, is highly problematic in this regard, meriting fuller discussion in Chapter 7. For now it suffices to say that the Israeli security services and others have been reluctant to cooperate with judicial doctrine, in that the country cannot show a series of follow-on cases demonstrating the application of the doctrine of necessary exception.

In sum thus far, these competing views of political morality, of how to do as much good as possible for the liberal democratic nation and as little bad to individuals, in the context of violent power struggles, manifest an interesting history in US policy debates. For reasons of time and space I limit myself to the era since 1941. One could go back to the US revolutionary war and study George Washington’s refusal to countenance the abuse of captured British soldiers. One could also examine the importance of Abraham Lincoln’s statement that military

<sup>20</sup> *9/11 Commission Report* (New York: Barnes & Noble, 2006), p. 395.

<sup>21</sup> Richard B. Schmitt, *Los Angeles Times*, “Civil Liberties Board Dormant, Despite Relevant Issues,” reprinted in *Lincoln Journal Star*, February 26, 2006, p. A-4.