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978-0-521-18110-5 — The Politics of Prisoner Abuse
The United States and Enemy Prisoners after 9/11
David P. Forsythe
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The Politics of Prisoner Abuse
The United States and Enemy Prisoners after 9/11

DAVID P. FORSYTHE

When states are threatened by war and terrorism, can we really expect them to abide by human rights and humanitarian law? David P. Forsythe's bold analysis of US policies towards terror suspects after 9/11 addresses this issue directly. Covering moral, political, and legal aspects, he examines the abuse of enemy detainees at the hands of the US. At the center of the debate is the Bush Administration, which Forsythe argues displayed disdain for international law, in contrast to the general public's support for humanitarian affairs. Forsythe explores the similarities and differences between Presidents Obama and Bush on the question of prisoner treatment in an age of terrorism and asks how the Administration should proceed. The book traces the Pentagon's and CIA's records in mistreating prisoners, providing an account which will be of interest to all those who value human rights and humanitarian law.

DAVID P. FORSYTHE is currently Professor Emeritus of Political Science at the University of Nebraska–Lincoln. He has been a visiting professor at universities in Geneva and Utrecht, and in 2008 he held the Fulbright Distinguished Research Chair of Human Rights and International Studies at the Danish Institute of International Studies, Copenhagen. He has also been on staff for the United Nations University in Tokyo, and has been a consultant to both the UN Office of the High Commissioner for Refugees and the International Red Cross and Red Crescent Movement.

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CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India
 103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9780521181105

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First published 2011

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Forsythe, David P., 1941–

The politics of prisoner abuse : the United States and enemy prisoners after 9/11 / David P. Forsythe.

p. cm.

ISBN 978-1-107-00466-5

1. Torture – United States. 2. Political prisoners – Abuse of – United States. 3. Prisoners of war – Abuse of – United States. 4. September 11 Terrorist Attacks, 2001. 5. War on Terrorism, 2001–2009. I. Title.

HV8599.U6F67 2011

355.1'296 – dc22

2011010558

ISBN 978-1-107-00466-5 Hardback

ISBN 978-0-521-18110-5 Paperback

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The measure of a country is how it acts in peril.

(David M. Brahms, Brig. Gen., US Marines (ret.), quoted in Richard Bernstein, “Guantánamo Lawyers Showed Their Moral Fiber,” *New York Times*, October 6, 2010, www.nytimes.com/2010/10/07/us/07iht-letter.html)

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Preface

This is a book about US policies toward enemy prisoners after the Al-Qaeda terrorist attacks on New York and Washington of September 11, 2001. It analyzes the central moral, political, and legal factors in the US policy making process that led the George W. Bush Administration to abuse prisoners on a widespread basis. It also covers the early years of the Barack Obama Administration.

This study is based primarily on information already in the public domain. Its creativity and originality lies in the synthesis presented and the conclusions drawn. It does not purport, for the most part, to have uncovered new evidence from primary sources. That the United States abused prisoners after 9/11 is not in doubt. Questions remain about the scope of the abuse, the thinking of various officials in the making and implementation of policy, how often the abuse rose to the level of torture or inhuman treatment, and how often it led to increased US security. The undeniable fact is that high US officials knowingly authorized the severe abuse of various prisoners in various places, often as part of enforced disappearances or secret detention, in the face of legal prohibitions. How this came about merits full discussion. So does the question of what to do after the fact.

This book is intended for those seriously interested in this subject, including scholars, advanced university students, and others in the attentive public seeking to affect future policy on detention and interrogation matters. My intent is to pull together all the key factors in one source.

Unfortunately some of the existing studies on the topic are legalistic and arcane or otherwise obfuscatory. Some studies are helpful but fail to connect all the dots and are not fully clear and systematic. Many academic experts, especially those who teach advanced students, often fail to write in a clear and straightforward manner. This work tries to present fact and interpretation clearly, with a minimum of esoteric cant from academe, but also with a minimum of journalistic excursions into

personalized trivia. In particular, legal mumbo jumbo is translated into clear English. Despite the quest for a readable presentation, great care has been taken regarding accuracy. The manuscript has been read by a number of colleagues in various disciplines and professions. Finally, we know a lot more now compared to when some of the previous studies were compiled. It has actually been an advantage to lag behind some early studies.

This book is also intended to be “one stop shopping,” that is, comprehensive. In the extensive reference notes one can find further information on the topic. What we know on this subject thus far has come out in piecemeal fashion – a social science article here, a legal article there; a newspaper report here, a magazine article there; an internet blog or web site here, a television program there. Some of the early sources are decidedly dated. This book attempts to pull the major threads together into a coherent whole, be readable, and be as up-to-date as possible.

In my career of university teaching stretching over four decades, I never ceased to be reminded of how little my students know about more recent political history. The students I taught circa 2010 knew almost nothing about the Cold War, including seminal events such as the Suez Crisis or the various Soviet invasions of Eastern Europe. For those same students in 2010, the Al-Qaeda attacks of nine years earlier were a fuzzy event, most of my class members being about eleven years old at the time. To the extent that this book is assigned in university classes in political science and international relations, it should provide a useful overview of events, processes, and major issues to be considered.

I use the term “enemy prisoners” with care. It is a general term that may at times include other notions such as terror suspects, prisoners of war, unlawful combatants, civilian detainees, and so forth. Other authors have used various legal and political terms. It is important not to prejudge various individuals by assigning legal labels like “prisoner of war” or “unlawful enemy combatant” at the start. The focus here is on the detention and interrogation of those thought to represent violent danger to the security of the United States after 9/11. In Iraq after the US invasion of 2003 they might be armed insurgents, perhaps at certain times legally covered by international humanitarian law (IHL, the laws of war or of armed conflict). But beyond Iraq they might also be individuals picked up in Gambia or Pakistan and then shipped off to Guantánamo, whose link to the laws of war is not a matter of broad

agreement. They might in fact be civilians who did not take part in hostilities, or perhaps really fighters of some sort. They might even be, on occasion, US citizens and not aliens (foreigners). So the safest, most general, and most non-legal term to use at the start is “enemy prisoner.” It is the term used to advantage in the memoirs by Richard B. Myers, the retired Chairman of the Joint Chiefs of Staff (JCS). The Bush Administration, mainly through the CIA and the Department of Defense (DOD), viewed these prisoners as probable enemies of US security. That is the core focus. Of course if an enemy prisoner properly qualifies as a prisoner of war (POW) or falls into another legal category, that should be acknowledged because that affects personal rights and protections.

I also use terms like “torture” and “inhuman treatment” with some prudence. As with the legal categories for prisoners, one should take care with different categories of abuse. “Abuse” is a non-legal term that perhaps has four legal levels: (1) torture; (2) severe mistreatment that is cruel, inhuman, or degrading (CID, inhuman or cruel for short); (3) humiliating treatment; and (4) lesser abuse. Precision requires that we not rush to legal judgment about the extent or levels of abuse. After all, the national and international case law on the meaning and manifestations of the different categories is not so extensive. It is also not crystal clear. The European Court of Human Rights (ECHR) has itself reached different judgments at different times on what constitutes torture. That European Court and the European Commission on Human Rights (now defunct) sometimes disagreed on how to characterize prisoner abuse, as in Northern Ireland, looking at the same facts. New research suggests that even the distinction between torture and CID is misleading, in that supposedly lesser forms of abuse may produce more lasting distress in some persons than supposedly greater forms of abuse.

Above all, the book tries to highlight the importance of what has happened. The US government, which often articulates the notion of American exceptionalism and claims to represent an especially good nation, and which has throughout its history claimed a role in world affairs of leading others toward more freedom under the rule of law, has detained thousands without legal charge, often in secret, then severely abused a certain percentage of them. There is no doubt but that much of what the United States has done is prohibited by international and national law. To some legal experts, US leaders are criminals who should be prosecuted, if not under US law then under international

human rights or humanitarian law. In the view of these experts, US leaders have committed grave breaches of the 1949 Geneva Conventions or war crimes under IHL, which can lead to universal jurisdiction – that is, the right of any government to try the individuals regardless of nationality or place of the crime. Likewise, many of these same experts are sure that US leaders have authorized torture, also prohibited by the 1984 UN Convention against Torture (Torture Convention for short), to which the notion of universal jurisdiction likewise applies. In legal fact, the Torture Convention prohibits not just torture but also inhuman treatment (without, it might be noted, defining the latter).

One can also acknowledge that the term “terrorism” is subject to much disagreement. It is not defined in international law, and the International Criminal Court (ICC) does not include terrorism in its subject matter jurisdiction. For many, terrorism consists of violent attacks on civilian or military targets by those posing as civilians, in maneuvers falling short of guerrilla or irregular warfare, in an effort to spread terror broadly, for political purposes. This being primarily a political rather than legal study (although legal factors need to be covered), it is not necessary to dwell on why international law remains vague on the definition of terrorism. It is sufficient to note that the law bypasses this ambiguity by prohibiting a variety of acts – e.g. attacks on civilians, mistreatment of prisoners, interference with civilian aircraft, the taking of hostages, etc.

We need to be clear about how US abuse of prisoners on a broad scale came to be. Was it, or some of it, justified in an age of terrorism in the context of weapons of mass destruction (WMD)? Has the United States done great damage to international efforts to promote human rights and human dignity under law, or is this concern greatly misguided? Did the Bush Administration gravely endanger the rule of law, constitutional government, and democratic checks and balances at home, or was Vice President Cheney correct that President Bush was just restoring presidential power to its proper place after unwise restraints imposed by particularly the Congress from the 1970s on? Was the Bush Administration really acting so differently from other liberal democracies like the United Kingdom or Israel that had faced terrorism in the past? Campaign rhetoric aside, did the Administration of Barack Obama essentially continue the policies of the preceding Administration on many key points? What should the United States do in the aftermath

of various strained legal interpretations and widespread abuse? These and other questions are hugely important for the future of the United States and the world, and we all need clear thinking about them.

My conclusion comprises a bleak paradox. When governments, democratic or otherwise, perceive an existential threat, they will almost certainly go to the “dark side” of prisoner abuse. Yet that apparent fact does not absolve persons of progressive (read liberal) persuasion from the responsibility to struggle against that tendency. If one believes in the objectives of universal human rights, the rule of law, and limited rather than total war, one has the obligation to contest the views of Dick Cheney and John Yoo and other advocates of going to the dark side. The key is a political and subjective factor: not to engage in threat exaggeration, which normally also involves a self-critical appraisal of one’s own virtue. After 9/11 the George W. Bush war council had such an elevated view of American greatness, and such a dark view of the threat of terrorism (albeit also manipulated to pursue long-standing agendas), that abuse of prisoners followed on a large and serious scale. This did great damage to international human rights and humanitarian law, as well as great damage to American democracy and its constitutional principles. Trying to ensure that these policies of abuse are not replicated is no easy matter.

I would like to thank George Aldrich, Gabor Rona, and William Aceves for helping me make my legal points as clearly as possible. Peter Maslowski gave me the perspective of a military historian. Some friends in the British Red Cross helped me refine some of my points about the role of the United Kingdom, past and present. My colleague Patrice McMahan read the entire manuscript with a keen eye. Lindsey Forsythe, Annette Kovar, Ryan Hendrickson, and Barb Flanagan read parts of the manuscript for clarity and organization. Jay Osiovitich helped locate many legal documents. Jalele Defa and Ryan Lowry were helpful student assistants. Others played important roles but wish to remain unnamed. Two referees for Cambridge University Press were central to final revisions. Once again John Haslam at that Press was a wonderful editor. Naturally any remaining errors of fact and interpretation are mine.

David P. Forsythe
Lincoln, NE
December 2010

Abbreviations and acronyms

ABA	American Bar Association
ACLU	American Civil Liberties Union
AI	Amnesty International
AP	Associated Press
AUMF	Authorization to Use Military Force
BSCT	Behavioral Science Consultation Team (DOD)
CID	cruel, inhuman, or degrading (treatment)
CIL	customary international law
CJSOTF	Combined Joint Special Operations Task Force
CoE	Council of Europe
CSRT	Combatant Status Review Tribunals
CTC	Counter-terrorism Center (US Executive Branch)
DOD	Department of Defense
DOJ	Department of Justice
DTA	Detainee Treatment Act
ECHR	European Court of Human Rights
ETA	Euskadi Ta Askatasuna (Basque militant group)
EU	European Union
FBI	Federal Bureau of Intelligence
FDR	Franklin D. Roosevelt
FISA	Foreign Intelligence Surveillance Court
FOB	Forward Operating Base
GC	Geneva Convention
GID	General Intelligence Department (Jordan)
GTMO	Guantánamo Bay Detention Facility
GWOT	Global War on Terror
HRF	Human Rights First
HRW	Human Rights Watch
HVD	high-value detainee

List of abbreviations and acronyms

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IAC	International Armed Conflict
ICC	International Criminal Court (World Court)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IG	Inspector General (CIA)
IHL	international humanitarian law
IRA	Irish Republican Army
JAG	Judge Advocate General
JCS	Joint Chiefs of Staff
JPR	Joint Program for the Recovery of Assets (DOD)
JTF	Joint Task Force
KGB	Soviet Intelligence Agency
MC	Member of Congress
MCA	Military Commissions Act
MI	Military Intelligence
MP	Military Police
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NIAC	Non-International (Internal) Armed Conflict
NIE	National Intelligence Estimate
NSA	National Security Adviser
NSC	National Security Council
NVA	North Vietnam People's Army
OEF	Operation Enduring Freedom
OLC	Office of Legal Counsel (DOJ)
OPR	Office of Professional Responsibility (DOJ)
POW	prisoner of war
RUDs	reservations, understandings, and declarations
SERE	Survival, Evasion, Resistance, Escape (US military training program)
SF	Special Forces
SIB	Science Intelligence Board
SOP	Standard Operating Procedure

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TJ	transitional justice
TRC	Truth and Reconciliation Commission
UN	United Nations
VC	Viet Cong
WCA	War Crimes Act
WMD	weapons of mass destruction