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What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration

ROBERT F. TURNER*

INTRODUCTION

Contrary to the views of pundits and scholars alike who draw parallels with the "War on Poverty," following the terrorist attacks of September 11, 2001, America was at "war." To be sure, it was an unusual if not unique conflict for the United States, but it was nevertheless war—or to use the more common modern vernacular, America became involved in an "armed conflict."

The day following the attacks, the U.N. Security Council unanimously enacted Resolution 1368, denouncing the attacks and "[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter." That is the language of armed conflict, not law enforcement. On that same day, the North Atlantic Council, for the first time in its more than fifty year history, invoked

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This Article is derived from testimony the author presented before the Subcommittee on Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary on May 13, 2009, and the U.S. Senate Permanent Select Committee on Intelligence on September 25, 2007.

Article 5 of the NATO Treaty,\(^2\) recognizing that an “armed attack” had occurred, declaring it to be an attack against all NATO members, and pledging to assist the United States as an “exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations.”\(^3\)

Under the U.S. Constitution, the power “to declare War” is vested in Congress.\(^4\) One might argue (as I have\(^5\)) that in the post-U.N. Charter world a formal “declaration of war” is as much an anachronism as the power of Congress to “grant Letters of Marque and Reprisal”\(^6\) conveyed in the same sentence. Even the 1973 War Powers Resolution expressly recognizes the authority of the President without specific legislative authorization to use armed force in response to “a national emergency created by attack upon the United States.”\(^7\) In this instance Congress, too, agreed America was in an armed conflict and expressly authorized the President to use military force pursuant to the 1973 statute.\(^8\)

The Executive Branch under both Presidents Bush\(^9\) and Obama\(^10\) has also taken the position that America is at “war” as a result of the 9/11 attacks. Not counting pundits, political radicals, and editorial


\(^4\) U.S. Const. art. I, § 8, cl. 11.


\(^6\) U.S. Const. art. I, § 8, cl. 11. Such letters authorized privately owned ships (“privateers”) to use force on the high seas to seize vessels and property belonging to nationals of a foreign state with which the issuing government is at war or has a quarrel. They were outlawed by the Treaty of Paris of 1856. See Lassa Oppenheim, 1 International Law: A Treatise 74 (Ronald F. Foxburgh ed., 3d ed. 1920).


\(^10\) The Obama Administration has, at times, shied away from the term “war on terror,” opting instead for the term “Overseas Contingency Operation.” See Scott Wilson & Al Kamen, “Global War On Terror” Is Given New Name, Wash. Post, Mar. 25, 2009, at A04, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402878.html. Since the new moniker was adopted, however, President Obama has stated that “[w]e are at war, we are at war against al-Qaeda.” Press Release, President Barak H. Obama, Remarks by the President on Strengthening
writers, that would seem to leave only the judiciary to weigh in on the matter. The Supreme Court has repeatedly acknowledged that the United States is engaged in an “armed conflict” with al Qaeda and its allies and that the law of armed conflict therefore applies. 11

As will be discussed, 12 unlike many previous conflicts, the outcome of this one will be determined almost entirely on the basis of the quality of American intelligence collection. In the great wars of the last century, legitimate questions existed about whether our carrier battle groups, aircraft, and armored or infantry divisions would be strong enough to defeat our well-armed enemies. In contrast, al Qaeda has no carriers or infantry divisions; and if we can learn where they are and what they are planning to do we can likely foil their attacks and protect our country. That’s the job of the intelligence community.

In more traditional armed conflicts, sovereign states are involved on both sides and clear rules (set forth in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War 13 and other documents) provide universally accepted and understood standards of behavior towards soldiers who have the misfortune of falling into the hands of their enemy. 14 But it has been less clear how far the Convention protected al Qaeda terrorists and their allies in this unusual conflict. Article 4 of the Third Convention (the POW Convention) provides that

- prisoners of war . . . are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

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11. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557 passim (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (“The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’”).

12. See infra Part III.


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(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
   (a) that of being commanded by a person responsible for his subordinates;
   (b) that of having a fixed distinctive sign recognizable at a distance;
   (c) that of carrying arms openly;
   (d) that of conducting their operations in accordance with the laws and customs of war.\(^{15}\)

While some argued that it would be a nice gesture for the United States to declare voluntarily that all detainees in this conflict would receive the full protections of the Third Convention, there was almost unanimous agreement that al Qaeda and related non-governmental terrorist organizations clearly failed to qualify as a matter of right for such protection. Article 4 made that obvious, since terrorist attacks on civilian targets flagrantly violate "the laws and customs of war."\(^{16}\)

But there were other legal questions, such as whether Common Article 3 of the 1949 Conventions gave certain minimal protections to al Qaeda detainees and whether other provisions of international or United States domestic law might place at risk interrogators who were particularly harsh in their efforts to extract information they felt might help prevent the next catastrophic terrorist attack. Wanting to identify the precise limits of the law so their interrogators could "push the envelope" and perhaps get information that would save large numbers of lives, without breaking the law and perhaps exposing interrogators and their superiors to criminal responsibility in the process, both military and intelligence community lawyers sought guidance from above.

While a variety of controversial classified memoranda relevant to these issues were written between 2002 and 2005 that later became public, the greatest outrage has focused upon memos prepared by the Office of Legal Counsel (OLC) in the Department of Justice. Sometimes referred to as "the President's law firm,"\(^{17}\) the OLC provides binding legal advice throughout the Executive Branch on both constitutional and statutory interpretation and has traditionally been staffed by some of the brightest legal minds in the nation.

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15. POW Convention, supra note 13, art. 4, para. (A) (original emphasis omitted).
16. Id. art. 4, para. (A)(2)(d).
When several of these memoranda became public, they created an outcry and led to demands that their authors (primarily the OLC's Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General and University of California Berkeley Law School Professor John Yoo) be investigated, disbarred, prosecuted, and in the case of Bybee—now a federal judge—impeached. The Department of Justice’s Office of Professional Responsibility investigated the issue at great length, but in January 2010 its senior career attorney, David Margolis, concluded that Bybee and Yoo had displayed “poor judgment” but had not engaged in “professional misconduct.”

In the interest of full disclosure, I must note that I was a strong critic of Bush administration decisions to engage in “enhanced” interrogation techniques. Many experts with whom I have spoken have assured me that traditional interrogation techniques are more successful in obtaining actionable intelligence, and although I am not an expert in this area, I find their arguments generally persuasive. But to me, the decisive point was that the enhanced techniques were clearly in violation of America’s obligations under Common Article 3 of the 1949 Geneva Conventions. Indeed, as will be discussed, at the very hour the Supreme Court handed down the Hamdan decision, I was giving a lecture at the Naval War College explaining that it did not matter whether waterboarding and other controversial interrogation techniques constituted “torture” under the 1987 U.N. Convention Against Torture—as narrowly construed by the U.S. Senate’s reservation—

20. See infra Part V.
22. The Senate conditioned its ratification of the Convention Against Torture as follows:

[The United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment”, only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

because we had a clear legal obligation under Common Article 3 to
treat all detainees during armed conflict "humanely." 23

It is in my view imperative that America retains the moral high
ground in its dealings with the world. As Thomas Jefferson noted to
President James Madison in 1809, "it has a great effect on the opinion
of our people and the world to have the moral right on our side." 24
Prudentially, this is important if we are to maintain the support of our
own people and of people of good will around the globe. It is impor-
tant if we want our own military personnel in future wars to have any
chance of humane treatment. And it is important if we want to be able
to apply pressure on countries like Iran and North Korea to abide by
their own international legal obligations. But more fundamentally, it
is the right thing to do.

So, working from the premise that the authors of the OLC memo-
randa did on occasion display "poor judgment," and more specifically
some of their legal interpretations were in my view seriously mistaken,
we face two questions: (1) how did it happen; and (2) what should we
do about it? Before turning to those issues, however, perhaps I should
say a word about the importance of holding wrongdoers accountable if
we expect the laws to be observed.

I. HOLDING WRONGDOERS ACCOUNTABLE IS GENERALLY DESIRABLE

The question of holding wrongdoers accountable for "war crimes"
is not a new one for me. When Saddam Hussein sent much of the
Iraqi army into neighboring Kuwait on August 2, 1990, my colleague
Professor John Norton Moore and I immediately sat down and penned
an op-ed that was ultimately published in the International Herald Trib-
une under the title "Apply the Rule of Law," calling for a war crimes
trial for Saddam. 25 In August of the following year, while serving my
third and final term as chairman of the American Bar Association's
Standing Committee on Law and National Security, I wrote the first
resolution and report endorsing a war crimes trial ever approved by the
ABA House of Delegates. 26 I also worked with both houses of Con-

documents/organization/100296.pdf (quoting the Senate reservation and explaining
one specific concern that led to the reservation).

23. POW Convention, supra note 13, art. 3; see infra text accompanying note 53.
24. Letter from Thomas Jefferson to James Madison (Apr. 19, 1809), in 9 Writings
of Thomas Jefferson 251, 251-52 (Paul Leicester Ford ed., 1898).
26. The resolution was approved by voice vote, without any opposition.
In early 1986, it was my great honor to be selected as the first president of the United States Institute of Peace (USIP), which was established by Congress to study and promote peaceful resolution of international conflicts. Professor Moore served as the first Chairman of the USIP Board. During this period we both became interested in the role of "incentive structures" in the deterrence of international aggression, and in 1995 we began co-teaching a seminar at the University of Virginia School of Law on "War and Peace: New Thinking About the Causes of War and War Avoidance." In 2004, Professor Moore published a landmark book entitled Solving the War Puzzle that has been favorably compared with the writings of Clausewitz in its importance.

Put simply, it is clear that incentives matter. If we want to discourage armed international aggression, war crimes, and other undesirable behavior, we must attach sufficient costs to such conduct so that rational decision-makers will make other choices. As an aside, this is one of the reasons that I have long defended the legality of intentionally targeting regime elites who have committed armed international aggression.

Thus, in principle I am a strong believer in holding wrongdoers accountable. I think the decision to authorize waterboarding in the current conflict was a tremendous blunder that was clearly contrary to America's treaty obligations and has contributed to seriously undermining the coalition against al Qaeda and its allies. Indeed, in July of 2007, I co-authored an unequivocal indictment of an executive order approving non-traditional CIA interrogation techniques. This Washington-
ton Post article was entitled “War Crimes and the White House,”\footnote{P.X. Kelley & Robert F. Turner, War Crimes and the White House, WASH. POST, July 26, 2007, at A21, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072501881.html. According to the Post’s website, this was the most frequently e-mailed article from the site for nearly twenty-four hours.} and in it, we reasoned as follows:

In April of 1793, Secretary of State Thomas Jefferson wrote to President George Washington that nations were to interpret treaty obligations for themselves but that “the tribunal of our consciences remains, and that also of the opinion of the world.” He added that “as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.”

To date in the war on terrorism, including the victims of the Sept. 11 attacks and all U.S. military personnel killed in action in Afghanistan and Iraq, America’s losses total about 2 percent of the forces we lost in World War II and less than 7 percent of those killed in Vietnam. Yet we did not find it necessary to compromise our honor or abandon our commitment to the rule of law to defeat Nazi Germany or imperial Japan, or to resist communist aggression in Indochina. On the contrary, in Vietnam—where we both proudly served twice—America voluntarily extended the protections of the full Geneva Convention on prisoners of war to Viet Cong guerrillas who, like al-Qaeda, did not even arguably qualify for such protections.\footnote{Id.}

Late in 2008, under the auspices of the Center for Victims of Torture, I served on a drafting committee to prepare a new executive order—which was to be provided to the winner of the November presidential election—banning torture and other acts of detainee abuse. Nevertheless, I am opposed to either a “truth commission” inquiry or the prosecution of those involved at any level in this tragic decision. Let me explain some of the reasons why.

II. GOOD PEOPLE SOMETIMES MAKE HORRIBLE MISTAKES: A PARALLEL

I submit there is a useful parallel to the issue before us. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066 authorizing the apprehension and detention in “War Relocation Camps” of well over 100,000 people living lawfully and peacefully in this country. More than sixty percent of those detained were U.S. citizens, and many of them had never even visited Japan—their only “crime” being that they were descendants of people who had once lived in Japan.
Sadly, some of the most famous civil libertarians of the twentieth century approved this horrendous abuse of the rights of innocent American citizens. In addition to President Roosevelt, California Attorney General (and later Supreme Court Chief Justice) Earl Warren argued strongly for the detention, and Justice Hugo Black wrote the majority opinion for the Supreme Court in *Korematsu v. United States*, holding that the measures were justified.\(^{32}\) It was not until 1988, when former California Governor Ronald Reagan was president, that Senator Alan Simpson took the lead in enacting legislation to apologize formally to the victims of that policy, which had been broadly supported within the government at the time. Ironically, given the way in which he is perceived by many today, one of the most determined critics of the incarceration at the time was J. Edgar Hoover, the Director of the FBI. Hoover wrote to Attorney General Biddle that “[e]very complaint in this regard has been investigated, but in no case has any information been obtained which would substantiate the allegation,” and argued it would be unconstitutional to detain American citizens without probable cause and due process in any event.\(^{33}\)

To the best of my knowledge, when World War II ended, the Senate Judiciary Committee did not hold a “What Went Wrong?” hearing investigating those horrible decisions—not even when Republican Dwight Eisenhower became president and the Republicans briefly controlled both chambers of Congress. Surely by 1953, in hindsight, many Americans realized that a terrible wrong had been done to our fellow citizens. But most had the common sense to realize that good people had made a horrible decision because they honestly believed that a failure to act might cost a large number of American lives. It is true that they did not violate the Geneva Conventions (which in their current form had not yet been written), but they clearly violated the United States Constitution. Surely no one will deny that their decision to incarcerate more than 100,000 Americans without the slightest probable cause or individualized suspicion was a greater offense than what was done to the three senior al Qaeda terrorist leaders who were waterboarded following 9/11.


\(^{33}\) Memorandum from J. Edgar Hoover, Director, FBI, to Francis B. Biddle, U.S. Att’y Gen., U.S. Dept of Justice (n.d.), *available at* http://www.densho.org/causes/primarysource/C3-d-03.htm (discussing one of the justifications for internment: allegations that signals were emanating from ships in the pacific ocean). For an excellent discussion of Hoover’s views and actions, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 293–94 (2004), and CONRAD BLACK, *FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM* 721 (2003).
Those who planned, authorized, and carried out the 1942 detention policies acted out of fear, and their motive was not cruelty or evil intentions. Rather, it was a sincere belief that subjecting more than 100,000 “U.S. Persons” to temporary detention (to use the modern vernacular) was a lesser moral evil than permitting a small number of possible saboteurs within their ranks to engage in terrorist attacks or otherwise undermine the war effort that might ultimately jeopardize the freedom of all Americans.

It is easy to forget that less than three months before the decision to incarcerate Americans of Japanese ancestry was made, the Japanese Navy had sunk a good part of our Pacific Fleet, and it was far from clear that we were going to emerge from the war victorious. People were afraid—very afraid—and those entrusted with the national security were particularly anxious to do everything reasonably possible within their powers to protect the lives and freedom of the American people. Their motives were admirable and honorable; the decision they made was neither.

I submit the same is true of the OLC lawyers who recently have come under fire. The only one that I know personally is Professor John Yoo, with whom I have shared a few panels at law schools and legal conferences since 9/11. I doubt I have spent more than two or three minutes in conversation with him, and I've written one law review article that was more than a little critical of one of his books. But my strong sense is he is an able legal scholar and an honorable man of principle. And I have no reason to think any differently with respect to the other lawyers involved in drafting and approving the controversial memoranda.

Did they provide perfectly balanced, objective, sterile legal opinions—or is it likely they very much wanted to reach a particular outcome and they let their interest in that outcome color their scholarship? I don’t know. But my guess is that they were not at all neutral or objective in their approach to these issues. They were dedicated patriots who dearly loved this country, watched the horrors of the 9/11 attacks replay on television time and again, and felt very strongly that the United States ought to do everything reasonably possible and appropriate to prevent future such attacks. That is to say, their mindset was probably very much like that of Franklin Roosevelt, Earl Warren, and Hugo Black in the aftermath of Pearl Harbor (which actually claimed fewer lives than the 9/11 attacks).

34. See Robert F. Turner, An Insider’s Look at the War on Terrorism, 93 Cornell L. Rev. 471 (2008) (reviewing John Yoo, War by Other Means: An Insider’s Account of the War on Terror (2006)).
Because I am not well-acquainted personally with the OLC lawyers involved, I am a bit reticent to speculate about their motives. But my guess is they did want to reach a certain outcome—one that would allow America to get the intelligence information they felt necessary to reduce the chances of another 9/11 attack or an even greater slaughter of their fellow citizens by a fanatical enemy that had repeatedly proven itself unwilling to abide by the most fundamental principles of civilized behavior. And, as I will discuss, I doubt seriously they understood at the time that some of their recommendations were contrary to America’s domestic law or our obligations under international law.

III. THE IMPORTANCE OF GOOD INTELLIGENCE IN THE STRUGGLE AGAINST AL QAEDA

The war on terror is an unusual if not unique armed conflict for the United States. From the American Revolution through both World Wars to Operation Desert Storm, intelligence has been an important element in the struggle for victory. Through intelligence sources and methods we learn the enemy’s locations and intentions, and then we call upon our own military establishment—our infantry, armor, artillery, naval vessels, aircraft, and more—to engage and destroy that enemy. But in the struggle against al Qaeda, intelligence is by far the single most important factor in preventing attacks and achieving victory. One day, if we don’t prevail in this struggle, al Qaeda may be armed with biological toxins or primitive nuclear or radiological weapons. But at present they have no tanks, no warships, and no airplanes. If our intelligence assets can locate them, a big city police force could probably either destroy them or apprehend them for trial.

The importance of the intelligence function in this conflict was no secret, and when the CIA—to its credit—sought legal guidance on the limits to which they could subject captured high-value enemy leaders in their quest for actionable intelligence, the lawyers charged with responding almost certainly knew that their answers might affect whether hundreds, thousands, or even tens of thousands of their fellow Americans might live or die in future terrorist attacks.

Had they advocated incarcerating tens of thousands of American Muslims in “War Relocation Camps,” or authorized beheadings, branding, maiming, severe beatings, or other traditional techniques of “torture”—many used regularly by our enemies in this conflict—I hope and assume that all Americans would have voiced their disgust. Had I been on Lieutenant William Calley’s courts martial board following the 1969 My Lai massacre of hundreds of innocent Vietnamese civilians, I would have without reservation favored the death penalty. At the time,
I was a reconnaissance platoon leader in an Army infantry battalion, and part of my job was training my men (which in those days they all were) about our obligations under the Geneva POW Convention. We knew the basic rules, and they didn't permit targeting civilians or waterboarding anyone.

But like virtually every other national security lawyer, after the 9/11 attacks, I told everyone who asked that the protections of the Geneva Conventions did not apply to al Qaeda. Like pirates and slave-traders, international terrorists are *hostis humani generis* (common enemies of mankind). But I also would usually note that, once apprehended, even pirates are entitled to humane treatment and fundamental international standards of due process of law today.

It is interesting to note the detail in which some of the authorized "enhanced" interrogation procedures were spelled out—exactly how a slap could be administered, how long a detainee could be exposed to cold water of a certain temperature, and the like. Even for Abu Zubaydah—believed by the CIA to be "one of the highest ranking members of the al Qaeda terrorist organization"—interrogations were to be monitored by medical experts. The OLC prohibited the use of "facial slaps" for the purpose of "inflict[ing] physical pain that [was] severe or lasting," and "a rolled hood or towel" had to be used "to help prevent whiplash" if Zubaydah was to be pushed against a wall.

These detailed restrictions strongly suggest that the authors of these memoranda were trying very hard to walk the difficult line between what Attorney General Gonzales later admitted were "harsh" interrogations intended to elicit actionable intelligence that might save lives, on the one hand, and authorizing unconstrained "torture" on the other. (As I will explain below, I don't think these lawyers realized that the proper legal standard here in any event was not "torture," but the humane treatment requirements of Common Article 3.)

Let me be clear: I believe that waterboarding crosses the line and is "torture" by any reasonable interpretation—but as a close colleague has put it, despite being outraged by the activity, it is "torture lite." Clearly the officials who wrote these memoranda were trying to draw an admittedly difficult bright line and prohibit acts they felt were

36. Id. at 4.
37. Id. at 2.
38. Id.
39. See infra Parts VII-VIII.
clearly across that line. In my judgment, these were not memos that intentionally advocated “torture”—but in their desire to protect American lives, the authors simply got the answer tragically wrong.

I happen to be very fond of the Army’s “Golden Rule” for interrogation: If you would be offended to learn our enemies were treating our soldiers in this manner, don’t do it to them. I must confess that I have not greatly focused on the precise meaning of “torture,” because in my view Common Article 3 requires us to treat all detainees “humanely”—a much higher standard.

By far the most extreme measure approved by the OLC was waterboarding. Until recently, I had the impression that large numbers of al Qaeda suspects had been waterboarded by the CIA. But according to a once-top-secret 2005 OLC memo, waterboarding was authorized for use on only three individuals—Khalid Sheikh Mohammed, Zubaydah, and Abd Al-Rahim Al-Nashiri—and the practice was ended in March 2003. Another OLC memorandum noted:

You have explained that the waterboard technique is used only if:
1. the CIA has credible intelligence that a terrorist attack is imminent;
2. there are “substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack”; and
3. other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack.

This doesn’t sound too far off from the “ticking bomb” scenario, which Professor Alan Dershowitz argued in the wake of the 9/11 attacks might justify resorting to torture. I am not defending it. I think it was wrong, and the resulting publicity has done very serious harm to our national security by costing us public support both within the United States and among people of good will around the world. But I have no reason to doubt the sincerity of assertions by senior intelli-


41. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John Rizzo, Senior Deputy Gen. Counsel, CIA 14 (May 10, 2005).

42. See Alan M. Dershowitz, Want to Torture? Get a Warrant, SAN FRANCISCO CHRONICLE, Jan. 22, 2002, at A9 (proposing that torture be permitted after securing a warrant from a judge that would be “based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it”).
gence community officials who have declared it probably did save American lives.

The fact that I believe the use of waterboarding was a tragic mistake does not mean I don't understand how a reasonable person might conclude that such conduct was morally justified as the lesser of two clear evils. If confronted with a moral hypothetical requiring one either to kill a known wrongdoer who is poised to murder hundreds or thousands of innocent people, or to sit quietly and watch the resulting carnage unfold, I simply cannot come down on the side of preserving the wrongdoer's life. I am not fond of summary extrajudicial executions even in wartime, but the life of one clear wrongdoer does not outweigh the lives of numerous innocent civilians, in my view.

Under American law, depending upon the specific facts, a preemptive killing of such a wrongdoer might be justified under the doctrines of self-defense or defense of others. But even if those justifications were not available, and one were certain that preventing the slaughter would amount to a breach of the law, moral principles might still counsel violating it. Thomas Jefferson made the point quite well in a September 20, 1810 letter to John Colvin:

A strict observance of the written laws is doubtless one of the highest duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving the country when in danger are of higher obligation. To lose our country by a scrupulous adherence to written laws, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.43

But I don't think we are anywhere near that point yet—and I don't see it coming. We didn't have to resort to torturing POWs during World War II, and I don't sense the al Qaeda threat to be even close to that level of threat. But a Gallup Poll conducted in 2009 reported that by a margin of 55% to 36%—and an even larger split of 61% to 37% percent among those polled who claimed to have followed the story closely—the American people believe the harsh interrogation techniques were justified.44 My guess is that had we experienced more terrorist attacks within the United States in recent years, those figures


in support of enhanced interrogation techniques would have been much larger.

However, when one steps back from trying to balance the relative evils of killing (or torturing) one terrorist leader versus permitting that terrorist to withhold information that could prevent the detonation of a weapon of mass destruction in a major American city, and looks instead at the big picture, the benefits of breaking the law to eliminate the terrorist are far less compelling. Among other considerations, it is imperative for a democracy to maintain the moral high ground if it wishes to maintain the support of its people. Foreign governments we traditionally consider among our strongest allies reportedly instructed their intelligence services not to cooperate with U.S. intelligence agencies in several key areas because of outrage over waterboarding and other allegations of American misconduct. America's ability to pressure Iran and North Korea to comply with their legal obligations has also suffered with perceptions that we have violated our own obligations. American POWs in future armed conflicts may also pay an extra price as our enemies rely upon our own behavior and public statements about the scope of the Geneva Conventions.

Put simply, I think we erred horribly on this issue. The mistakes have made me at times very angry. Yet as I look at these decisions I do not see "evil" people at the OLC, in the uniformed military, or at the CIA. I see good and able people who made mistakes because they were desperately anxious to protect American lives.

IV. WHAT WENT WRONG?

How could some obviously very able and honorable lawyers approve the use of waterboarding against defenseless human beings held in United States custody? I think the short answer is a simple one—a tragic ignorance about the important field of "national security law" among most lawyers trained before at least 1991. I may have been the first individual to enter an American law school for the express purpose of studying "law and national security" (as national security law was then known at the one law school in the nation where it was taught—the University of Virginia School of Law). I had worked as national security adviser to a member of the Senate Foreign Relations Committee for five years, and during that time I had frequently encountered issues of constitutional and international law that I did not feel competent to address. I had studied aspects of treaty law and the separation of powers between Congress and the Executive at considerable length on my own by reading treatises, law review articles, and getting to know some of the preeminent legal scholars that
Indeed, I take great pride in the fact that, seven years before the Supreme Court struck down "legislative vetoes" as unconstitutional, I wrote a lengthy floor statement for Senator Griffin making the same point for the same reasons.\footnote{46} I had first become interested in these issues listening to a lecture by the great Professor Quincy Wright in 1966, and by the time I actually entered law school I was already a pretty good national security lawyer on some issues.

But at that time, Virginia was the only law school in America even offering a course in national security law, which was first taught by my colleague John Norton Moore in 1969 under the title “International Law II: Law and National Security.” When I graduated, John and I co-founded the Center for National Security Law in order to promote interdisciplinary advanced scholarship in the field. Our first major project was to prepare a major law school casebook on national security law,\footnote{47} which in its most recent edition is more than 1400 pages long. In 1991, we held the first National Security Law Institute to help train law professors to teach in this rapidly growing field,\footnote{48} and today national security law is taught at most American law schools. But most such courses began in response to the 9/11 attacks and were probably not available for most of the lawyers working at the OLC during the Bush Administration. Perhaps none of the lawyers who helped write or signed the so-called “torture memos” that have recently been released had detailed knowledge of Common Article 3 of the 1949 Geneva Conventions prior to the attacks of September 11, 2001. Indeed, I’d wager they had never even heard of it. Few American lawyers had.

This general lack of understanding of \textit{jus in bello} and other aspects of national security law has caused a great deal of confusion and helped divide our country over the past nine years. Some very able lawyers, trained to believe that if the government detains someone it must charge that individual with a crime and take the evidence to federal court, simply assumed that the last administration was

\footnote{45. In this regard, I am especially indebted to Professor Myres McDougal at Yale, who became a cherished friend for decades, and to Professors Richard Baxter at Harvard and William Bishop at the University of Michigan School of Law—both of whom proved patient and willing to assist me in my independent studies.}
\footnote{47. \textit{NATIONAL SECURITY LAW} (John Norton Moore & Robert F. Turner eds., 2d. ed. 2005).}
\footnote{48. For more information on the National Security Institute, see National Security Law Institute, http://www.virginia.edu/cnsl/nsli.html (last visited Aug. 9, 2010).}
betraying the most fundamental principles of due process—totally oblivious to the firmly-established international law norm that enemy combatants captured during armed conflict may be detained (under humane conditions) for the duration of hostilities. During World War II, more than 400,000 German POWs were detained at POW camps spread across more than forty American states. And as for the hated idea of “military commissions,” the POW Convention provides that “[a] prisoner of war shall be tried only by a military court.”49 This is not the time to start a major debate about the President’s independent constitutional power to authorize warrantless foreign intelligence surveillance, but Congress itself acknowledged that power when it enacted the first wiretap statute in 1968, and every appellate court to decide the issue has affirmed such a power.50 I think there would have been a lot less criticism of the previous administration had more Americans understood national security law.

V. Common Article 3—Did It Really Apply?

On the morning of June 29, 2006, I made a presentation at the Naval War College during which I argued that, while the general provisions of the POW Convention did not apply in the struggle against al Qaeda, we were nevertheless constrained by Common Article 3 of those Conventions to treat all detainees “humanely.” After my talk, I learned the Supreme Court had just handed down its opinion in Hamdan v. Rumsfeld, in which it declared Common Article 3 applicable “even if the relevant conflict is not between signatories.”51

The relevant language of Common Article 3 (discussed in greater detail below)52 provides that

[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

49. POW Convention, supra note 13, art. 84.


52. See infra Part VII.
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.\textsuperscript{53}

It is important to understand that, before a divided Supreme Court resolved the issue, not everyone was in agreement that Common Article 3 applied to this struggle. Under international law, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."\textsuperscript{54} There is obvious ambiguity in the first sentence of Common Article 3, which reads: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . ." As for the struggle against al Qaeda,\textsuperscript{55} in which something like seventy-five sovereign states (all parties to the Geneva Conventions) were participating in one form or another, was it an "armed conflict not of an international character," or was it an "international" conflict? Keep in mind that Senate Joint Resolution 23—approved by Congress by a combined vote of 518-1 (with twelve members not voting) on September 14, 2001, and later signed into law—provided authority for an "international" conflict by empowering the President to use force against other "nations." Section 2 of this resolution authorized

the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\textsuperscript{56}

But we can't say that the struggle against al Qaeda was clearly "occurring in the territory of one of the High Contracting Parties,"\textsuperscript{57} because al Qaeda had attacked the United States in our own country, in Tanzania and Kenya by bombing our embassies in 1998, in Saudi

\textsuperscript{53} POW Convention, supra note 13, art. 3 (emphasis added).
\textsuperscript{55} At the time the torture memos were written, the conflict was widely known as the "Global War on Terrorism."
\textsuperscript{57} POW Convention, supra note 13, art. 3 (emphasis added).
Arabia (Khobar Towers bombing), and in Yemen (U.S.S. Cole). Other attacks have occurred in Europe and elsewhere. Obviously, the term “occurring in the territory of one of the High Contracting Parties” could merely be a jurisdictional clause making it clear that the Geneva Conventions did not pretend to establish legal rules for conflicts entirely between non-Parties to the treaties. But it could just as easily be interpreted as excluding from the coverage of Common Article 3 armed conflicts involving the territory of more than one High Contracting Party to the Conventions.

It was my pleasure to testify on these issues before the Senate Select Committee on Intelligence in September 2007, and at that time I noted that the travaux préparatoires (preparatory works or negotiating history) of Common Article 3 clearly reveal that it was originally designed to deal with “civil wars” or “rebellions” within the territory of a single state.⁵⁸ Indeed, it is clear that well after the Conventions entered into force, prominent legal scholars continued to view Common Article 3 as a set of minimal guarantees for civil wars and rebellions within a single state.

VI. A BRIEF HISTORY OF JUS IN BELLO AND COMMON ARTICLE 3

The law of war (often referred to as the “law of armed conflict”)⁵⁹ has developed over centuries as sovereignties began in their own self-interest to find ways to mitigate the horrors of war. The first multinational treaty dealing with these issues was the 1856 Declaration of Paris, which (among other things) outlawed privateers and ultimately made the power of Congress to “grant Letters of Marque and Reprisal”⁶⁰ an anachronism.

American specialists in this field take pride in the fact that the first effort to codify the customary rules of warfare was in this country during the Civil War. General Order No. 100, entitled “Instructions for the Government of Armies of the United States in the Field” and written by former Columbia University legal scholar Francis Lieber, was issued by President Abraham Lincoln in 1863. The “Lieber Code” is still cited today for its landmark effort to collect in one place the customary law of war.


⁵⁹. For an overview of the history and modern law of armed conflict, see generally NATIONAL SECURITY LAW, supra note 47, at 321-71.

⁶⁰. U.S. CONST. art. I, § 8, cl. 11.
The first Geneva Convention dealing with humanitarian principles of armed conflict was concluded in 1864. It provided that members of armed forces during war who were wounded, sick, or “harmless” were to be respected and cared for. By 1867, all of the great powers except the United States had ratified it, and we did so in 1882. Another Geneva Convention followed in 1906.

Historically, conflicts within a single state—armed revolutions or civil wars—were viewed as outside the scope of the law of nations. Indeed, even inquiring about how a sovereign state treated its own nationals was viewed as wrongful interference in that state’s internal affairs. However, in 1756, Emerich de Vattel wrote in The Law of Nations that parties to a civil war had a duty to observe the established customs of war.61 In 1912, the International Committee of the Red Cross (ICRC) sought to interest states in a draft convention on the role of the Red Cross in civil wars and insurrections, but there was little interest.

The first Convention to provide humane treatment for prisoners of war came in 1929 but was limited to international armed conflicts. In 1938, at the Sixteenth International Red Cross Conference, a resolution was passed urging the application of the “essential principles” of the Geneva Convention to “civil wars.”62

The horrors of World War II led to demands for a new multilateral treaty regime. At a preliminary Conference of National Red Cross Societies in 1946, the ICRC recommended “in the event of civil war in a country, the parties should be invited to state that they were prepared to apply the principles of the Convention on a basis of reciprocity.”63 The conference went even further, and recommended inserting a new article to this effect: “In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary.”64 In 1947, the ICRC convened a conference of government experts that drafted an article providing that “the principles of the Convention” were to be applied in civil wars by contracting parties “provided the adverse Party did the same.”65

63. Id. at 41.
64. Id. at 41-42.
65. Id. at 42.
This principle of reciprocity was a key element in international law, as nations agreed to surrender rights in return for assurances that their treaty partners would observe the same constraints. If one country abused prisoners of war, its adversary in the conflict would reciprocate—in the process providing an incentive for the first violator to adjust its behavior in order to protect its own soldiers from abuse. Indeed, Thomas Jefferson—an early champion of the humane treatment of prisoners of war—argued in 1779 that engaging in reprisals in response to mistreatment of prisoners of war was in the long run the most humane approach, as it would promote compliance with the law by both sides. As international humanitarian and human rights law rapidly developed in the years following World War II and the birth of the United Nations, a different view emerged asserting that no state had a “right” to engage in torture or inhumane treatment in the first place, so no derogation should be permitted from these rules. But while this concept is logically true, it tends to undermine the incentives by which much of international law is routinely enforced.

Pictet asserts that the reciprocity clause was ultimately omitted because “doubt was expressed as to whether insurgents could be legally bound by a convention which they had not themselves signed.” If the insurgents claimed to be the lawful government of the country, they would then be bound by the country’s treaties. Besides, there was no harm to the de jure government, “for no Government can possibly claim that it is entitled to make use of torture and other inhumane acts prohibited by the Convention, as a means of combating its enemies.”

The ICRC drafted a new article for submission to the Seventeenth International Red Cross Conference in Stockholm, which read in part:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries.

67. Id. at 45–46 (“When a uniform exercise of kindness to prisoners on our part has been returned by as uniform severity on the part of our enemies, you must excuse me for saying it is high time, by other lessons, to teach respect to the dictates of humanity; in such a case, retaliation becomes an act of benevolence.”).
68. Pictet, supra note 62, at 51.
69. Id. at 52.
70. Id. at 42–43 (emphasis added).
This was the first time the idea of extending what became Common Article 3 beyond "civil wars" was suggested. But the language "especially in cases of civil war, colonial conflicts, or wars of religion" was objected to and omitted by conference delegates, as were the words "or more."

According to Pictet, this deletion had the effect of enlarging the scope of the provision, which is a reasonable interpretation but hardly the only reasonable one. He notes that the principal objections to the Stockholm draft involved concerns that "it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage." In response, he notes:

Others argued that the behaviour of the insurgents in the field would show whether they were in fact mere brigands, or, on the contrary, genuine soldiers deserving of the benefit of the Conventions. Again, it was pointed out that the inclusion of the reciprocity clause in all four Conventions... would be sufficient to allay the apprehensions of the opponents of the Stockholm proposals. It was not possible to talk of "terrorism", "anarchy" or "disorders" in the case of rebels who complied with humanitarian principles.

The deliberate deletion of the words "or more" in the sentence "which may occur in the territory of one or more of the High Contracting parties" could reasonably be interpreted as a narrowing of the scope of Common Article 3 to cover only conflicts occurring within the territory of a single state, such as a civil war or internal revolution. As discussed in more detail below, this understanding of the language was shared by several prominent international experts on the Geneva Conventions.

The lack of agreement on the Stockholm draft led to the appointment of a working party to prepare new drafts. The second of these provided in part: "This obligation presupposes, furthermore, that the adverse party likewise recognizes its obligation in the conflict at issue to comply with the present Convention and the other laws and customs of war." Pictet observes that that there was "almost universal opposition to the application of the Convention, with all its provisions, to all cases of non-international conflict."

A second working party was established to attempt to find a solution, and the final language is largely a product of this effort. It

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71. Id. at 43.
72. Id.
73. Id. at 44.
74. Id. at 45.
75. Id. at 46.
dropped the requirement for reciprocity. In 1949, delegates from fifty-nine countries took part in a diplomatic conference that produced four Geneva Conventions dealing with the humanitarian law of armed conflict. On July 6, 1955, after only a brief hearing and floor discussion, the Senate gave its advice and consent to all four Conventions by a vote of 77 to none. President Eisenhower ratified them in 1955, and today all 194 of the world's sovereign states are parties to all four conventions. Indeed, more states are parties to the 1949 Geneva Conventions than to any other treaty in the history of the world.

VII. THE TEXT AND MEANING OF COMMON ARTICLE 3

Initial plans to have a formal preface to the Geneva Conventions were scrapped, and instead, all four Conventions began with the same first three articles. Pictet asserts that the purpose was to place at the beginning of all four conventions "the principal provisions of a general character, in particular those which enunciated fundamental principles" of international law. He adds that Article 3 was viewed by the ICRC as "one of the most important articles" of the Conventions, and also one of the most controversial. Twenty-five meetings were devoted to it.

In the end, Common Article 3 (called "Common" because it appears as the third article of each of the four treaties) provided as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

76. Id. at 47-48.
78. PICTET, supra note 62, at 36.
79. Id. at 38.
(b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. 80

There are several points to note here. First, this language attempts to set “minimum standards” for all parties to the conflict. Second, everyone detained who is no longer taking an active part in the conflict is entitled to be “treated humanely.” Third, all “violence to life and person,” especially including “cruel treatment” and “torture,” is prohibited. Finally, “outrages upon personal dignity” and “humiliating” and “degrading” treatment are expressly outlawed.

Many scholars have observed that the travaux préparatoires (negotiating history) provide very little clarity on the meaning of these terms. 81 Indeed, Pictet writes that it was viewed as “dangerous” to try to enumerate all of the rights of protected persons under Common Article 3, because it would be difficult to anticipate every conceivable form of abuse, and a detailed list of specific examples might be interpreted as the exclusion of others (expressio unius est exclusio alterius) that should be covered. 82

The interpretation of treaties and other international agreements is governed by the 1969 Vienna Convention on the Law of Treaties. Although the treaty has been in force for most of the world since 1980 and was signed and submitted to the Senate by President Nixon in 1976, the United States is still not a Party. While serving as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs 1984-1985, I attempted without success to urge the Senate to take action on the Vienna Convention. But my efforts were halted when I was informed by staff members to Senator Jesse Helms that the Senator was not going to permit the treaty to be “railroaded through”

80. POW Convention, supra note 13, art. 3 (emphasis added).
82. PICTET, supra note 62, at 52-53.
the Senate. I was already working hard to obtain Senate consent to the ratification of the Genocide Convention, and elected to expend my (ultimately successful) energies in that direction.

Although not a party, the United States has repeatedly acknowledged that most of the provisions of the Vienna Convention on the Law of Treaties are binding on all states as customary international law. These include Article 31, governing the interpretation of treaties. The basic rule is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Recourse may be had to the travaux and other supplemental means of interpretation only when the “ordinary meaning” test leaves the meaning of the treaty “ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”

Obviously, terms like “humane treatment” are not only ambiguous but also contextual. During the Vietnam War, for example, it would not have been reasonable to demand that North Vietnam—whose own people were subsisting on rations of rice and small servings of fish—feed American POWs the kinds of meals to which they were accustomed in the United States or on Navy aircraft carriers. But this was no excuse for striking POWs with rifle butts and hanging them from the ceiling with their arms painfully bound with ropes—behavior that outraged Americans and led to such sufficient international criticism that torture was largely stopped following Ho Chi Minh’s death in September 1969.

VIII. Does Common Article 3 Apply to the War Against al Qaeda?

The White House and Department of Justice have argued that Common Article 3 was intended only to apply “to internal conflicts between a State and an insurgent group,” and the conflict with al Qaeda is clearly taking place in several nations. Thus, the argument goes, it is an international conflict and not an “armed conflict not of an international character” so as to be covered by Common Article 3.

84. Id. art. 32.
Like most legal scholars, I have always dismissed this argument, for the same reason the Supreme Court did in _Hamdan_—the test is not where the conflict takes place but whether there are sovereign states on both sides. True, the Conventions say “occurring in the territory of one of the High Contracting Parties,” but I have explained this away on the theory that if a conflict occurred on the territory of one (or more) states that were not parties to the Conventions, that state could not be bound by a treaty it had never accepted. Thus, to be applicable, the non-international conflict had to occur within the territory of (at least) one High Contracting Party to the Conventions.

However, the argument that Common Article 3 was intended to apply only to civil wars and internal conflicts has some support both in travaux and the scholarly literature. Pictet’s commentary on the 1949 Geneva Conventions—published by the ICRC—is replete with references to Common Article 3 as addressing “civil wars,” “insurrections,” and armed conflicts “of an internal character.”

Pictet notes this is a “general” and “vague” expression, and discusses the various amendments that were proposed in an effort to explain the intentions of the delegates. All of them referred to “revolt” or “insurgents”—strongly suggesting that this was viewed as a provision addressing internal conflicts or civil wars. And in discussing the Article, Pictet himself repeatedly refers to “cases where armed strife breaks out in a country,” “civil disturbances,” and conflicts involving “internal enemies.” But the actual language adopted was broader, and the “ordinary meaning” of “armed conflicts not of an international character” would seem to encompass transnational conflicts in which there are not sovereign states on both sides. Further, in 1986, the International Court of Justice concluded that Common Article 3 provided a “minimum yardstick” for international and non-inte-

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86. See Fionnuala Ní Aoláin, _Hamdan and Common Article 3_, 91 MINN. L. REV. 1523, 1556 (2007) (“Because of the apparent absence of a nexus between al Qaeda and any sovereign State, most legal scholars seem to have viewed this as a conflict not of an international character.”).

87. See, e.g., PICTET, _supra_ note 62, at 38-43 (using the term “civil war” over a dozen times, along with “armed conflicts . . . of an internal character,” “insurrections,” “social or revolutionary disturbances,” and conflicts “within the borders of a state”).

88. _Id._ at 49-50.

89. _Id._
national conflicts alike. However, this view is rejected by some of the world's foremost scholars of international law.

Writing in a special issue of the *Georgia Journal of International and Comparative Law* honoring former Secretary of State Dean Rusk, the late and legendary British scholar G.I.A.D. Draper—who served as Director of Legal Services for the British Army and participated in the Nuremberg war crimes trials—introduced his discussion of Common Article 3 by asserting: "This is the sole article in each of the four Conventions that deals exclusively with so-called 'internal armed conflicts.'" Other scholars make similar points.

The International Criminal Tribunal for the Former Yugoslavia also applied Common Article 3 in a non-civil war setting in its 1997 *Tadić* case. But the issue is arguably moot because the Supreme Court in *Hamdan* declared that Common Article 3 does apply. However, that was based upon an interpretation of the 1949 Conventions, and under *Whitney v. Robertson*, the Court will be bound by an inconsistent statute of more recent date (that does not violate the Constitution).

Because the struggle against al Qaeda and its allies does not clearly involve sovereign states openly taking part on both sides, the Supreme Court in *Hamdan* got it right—and this is the view of most *jus in bello* specialists with whom I have spoken. I would note that the

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91. Included in this group would be Professor Yoram Dinstein, former President of the University of Tel Aviv and Dean of its law school. We share the common bond of having both occupied the Charles H. Stockton Chair of International Law at the Naval War College, and I took the liberty of communicating with him on this issue.

92. Draper, *supra* note 61, at 268. Elsewhere in the same article he added: "No convention dealing with the law of war made any reference to conduct in *internal armed conflicts* until the four Geneva Conventions of 1949." *Id.* at 259.

93. See, e.g., Aolain, *supra* note 86, at 1558 (addressing whether Common Article 3 applies in "transnational contexts" and observing that a "formalistic approach would suggest that a conflict must be either an interstate (international) conflict or an internal conflict taking place in the territory of a specific state"); ALBERTO T. MUYOT & ANA THERESA B. DEL ROSARIO, *THE HUMANITARIAN LAW ON NON-INTERNATIONAL ARMED CONFLICTS: COMMON ARTICLE 3 AND PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS* 14-15, 27-28 (1994).


95. See *Whitney v. Robinson*, 124 U.S. 190, 193 (1888) ("When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other . . . .").
majority view of the specialists with whom I have communicated is that a violation of Common Article 3 is not a “grave breach” of the Conventions and thus technically not a “war crime.” That was not my own interpretation of the Conventions, but it was supported by a strong majority of experts with whom I communicated in this country and abroad. As a technical matter, however, for purposes of American law that is clearly not the rule; for the War Crimes Act of 1996 includes within its definition of “war crimes” any conduct that “constitutes a grave breach of common Article 3.”

IX. WHY NOT A TRUTH COMMISSION?

In some ways, having a national inquiry into what really happened in connection with these enhanced interrogation techniques is appealing. If we could get Lee Hamilton, George Mitchell, Howard Baker, Larry Eagleburger, Jim Schlesinger, and others of such talents and character to take on the task independent of outside pressures, we might even learn what House Speaker Nancy Pelosi (who was reportedly briefed repeatedly on these programs) knew and when she knew it.

But my guess is we would instead wind up with more partisan commissioners, or even something like the 1975–1976 Church Committee that investigated intelligence abuses in a very partisan and sensational manner—in the process doing serious damage to our national security and our intelligence community that continues to haunt us today. As a Senate staff member at the time, I sat through some of those hearings as senators of both parties competed to see who could make the front pages of the next day’s newspapers with the more sensational allegations. In 2009, a former Commandant of the Marine Corps and a former supervisor of FBI counter-terrorism activities joined me in signing an op-ed that opposed the idea of a “truth commission.” We are still engaged in a dangerous war, and President Obama is right when he says we ought to move forward.


97. In the end, I would note, the Church Committee admitted that it has been unable to find a single instance in which the CIA had “assassinated” anyone; and directors Richard Helms and William Colby had each issued internal CIA regulations prohibiting any involvement with assassination years before the Church hearings began.

X. Should We Prosecute Anyone?

I do not believe it would be useful to bring criminal charges against CIA or military interrogators who carried out their orders and were told the Attorney General had determined that these techniques were lawful. Indeed, I can think of few steps more calculated to impose a chilling effect on those who go into harm’s way on America’s behalf. If interrogators who in good faith engaged in rough treatment of detained enemy combatants are subjected to criminal trials upon the election of a president from a different political party, what message will we be sending to the young infantrymen we train and then send out to kill and perhaps die for us? If shoving and slapping a terrorist leader is impermissible even when the orders come from the very top, what soldier is likely to risk killing an enemy soldier without at least a court order? Who knows? Perhaps the angry-looking man carrying the AK-47 across the battlefield was actually just heading over to the local rod and gun club for a turkey shoot (or so his lawyer might later assert). Without federal judges on the scene to review the evidence and determine the existence of probable cause, only a fool would actually try to engage the enemy and risk facing criminal charges years later if a new administration that opposed the war comes to power.

Mistakes were clearly made by some very able and honorable individuals who, in their quest to save American lives, drew the line in the wrong place. If we now punish them for giving too much weight in their analysis to trying to protect American lives, their successors will be unlikely to miss the lesson. If confronted by a decision about whether to safeguard the lives of thousands of innocent Americans or the civil liberties of a single foreign terrorist, they will recall that protecting the Americans could land a good lawyer in prison. That’s not a desirable message to send.

Some agree we ought not go after the small fish, but rather the lawyers like John Yoo, Jay Bybee, and David Addington, or even bigger game like Secretary Rumsfeld, Vice President Cheney, and President Bush. But I don’t see evidence that the lawyers lied—at worst they tried too hard to prevent another 9/11. As non-lawyers, Bush, Cheney, and Rumsfeld presumably relied in good faith upon the advice of the lawyers around them. These were not simple issues, and few of the lawyers involved fully understood them. We should learn from our mistakes, but conducting show trials of people from the previous administration is not going to solve our problems.

Indeed, that was tried in 1977 when the Carter Justice Department decided it should make examples of two senior FBI officials
named Mark Felt and Edward Miller. They had authorized FBI counter-terrorism agents to cross the line in trying to prevent a major terrorist attack at a New Jersey military base by members of the Weather Underground. Determined to "make an example" of the defendants, the Government refused to consider plea bargains, and in the end both were convicted of felonies at great personal expense. The message was not lost, and for years thereafter it was almost impossible to get FBI agents to volunteer for counter-terrorism/counter-intelligence duty. Years later, Griffin Bell told Oliver "Buck" Revell—who for six years served as Associate Deputy Director of the Federal Bureau of Investigations (FBI)—that his biggest mistake as the nation's Attorney General during the Carter Administration was approving the Felt-Miller prosecutions.

Another reason for not prosecuting those involved in this matter is that the odds of getting a conviction are very slim. I have already noted that the Gallup Poll shows that roughly two-thirds of those polled approve of the use of enhanced interrogation techniques. When a jury hears testimony that the motive for these techniques was to save American lives during wartime, and the only people waterboarded were the three most senior al Qaeda terrorists in U.S. custody, the odds are slim that any jury of twelve Americans would be willing to convict anyone involved in this matter by unanimous vote.

Conclusion

Were mistakes made in the preparation of the controversial OLC memoranda? There is no question about it; they were very serious mistakes, and they have harmed this country. But I think part of the explanation is that the authors of the "torture" memoranda lacked sufficient expertise in national security law, and honestly believed that a conflict involving more than seventy-five sovereign nations was "international" in scope. They reasonably read the language in Common Article 3 limiting its application to conflicts "occurring in the territory of one of the High Contracting Parties" as excluding its applicability to a struggle taking place across much of the world. And the fact that the


100. I learned this during a conversation with Mr. Revell in February 2009.

101. See supra note 44 and accompanying text.
D.C. Circuit Court of Appeals unanimously accepted this reasoning (before being overturned by a divided Supreme Court) would seem to be prima facie evidence that the interpretation was reasonable.

If there is a broad lesson to be learned from this tragic experience, it may be about the importance of having able lawyers within the government who are trained in the important field of national security law. As one of the co-founders of that field three decades ago, I am hardly an objective observer. But I take some solace in the knowledge that, since the summer of 1991, our Center for National Security Law has conducted eighteen National Security Law Institutes to train law professors and government lawyers from six continents about this important new field. During that time we have helped educate hundreds of lawyers from every federal government department or agency with national security responsibilities. Hopefully, if the future brings a similar situation, there will be trained attorneys skilled in this field available to avoid such tragic misunderstandings of the law.