

“WE DON’T TORTURE PEOPLE IN AMERICA:”
COERCIVE INTERROGATION IN THE GLOBAL VILLAGE.

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(a) Offense:

Whoever outside the United States commits or attempts to commit torture shall be...imprisoned not more than 20 years...

(b) Jurisdiction:

There is jurisdiction over the activity prohibited in subsection (a) if

(1) the alleged offender is a national of the United States...

INTRODUCTION.

‘Torture’ is an ugly word,² but not remotely comparable to the phenomenon which it denotes. Americans tend to think of systematic government torture as a hallmark of fascism; or of backward third-world regimes such as that of the thuggish Saddam Hussein in Iraq; or of the Islamist government in 1990s Sudan where – to worldwide condemnation:

People were routinely interrogated or tortured in “ghost houses” – anonymous villas used by the security forces.³

Those who closely follow the role of the United States in the larger world are aware that in recent times⁴ there have been quite a few episodes of torture inflicted by the U.S. (either directly, as in Vietnam⁵ or by proxy as in Latin America⁶). But heretofore no

¹ For purposes of sec. 2340A, “torture” is defined at sec.2340(2) as: “an act committed by a person acting under the color or law specifically intended to inflict severe physical or mental pain or suffering...upon an other person within his custody or physical control.”

² See Black’s Law Dictionary (7th ed., 2003): “The infliction of intense pain to the body or mind to...extract a confession or information...” An earlier edition from my law school days sets forth:
[I]n connection with the interrogation or examination of the person, as a means of extorting a confession of guilt, or of compelling him to disclose his accomplices. (4th ed., 1951)

³ Gilles Kepel, Jihad: The Trail of Political Islam [Anthony F. Roberts, tran.] (Cambridge: Harvard University Press, 2002), p.183. So too in Egypt whose prisons were the scene of frequent torture ”used to extract information and confessions.” (*Id.*, p.415 fn.4.)

⁴ If we turn the clock back even to the early twentieth century, torture of arrestees (the ‘third degree’) was commonplace. Hundreds of the several thousand resident aliens deported in the Palmer Raids suffered such treatment. (Richard G. Powers, Secrecy and Power: The Life of J. Edgar Hoover (New York: The Free Press, 1987), p.116.)

⁵ See the participant reports quoted in John Kifner, “Report on Brutal Vietnam Campaign Stirs Memories,” *The New York Times* (December 28, 2003), 18.

⁶ A declassified Pentagon report states that at its notorious School of the Americas facility that installation in the 1980s utilized manuals “advocating fighting [Latin American Marxist] insurgents with execution, blackmail, kidnapping and torture.” (Joanna Weiss, “Facing questions, Clark backs Army

one would have conceptualized the systematic, organized policy and practice of torture as central to American foreign policy. Since September 11, 2001 [hereinafter “9/11”] though, torture has been the practice and *de facto* policy of the Bush Administration (executed largely through the instrumentality of the Central Intelligence Agency) as a core means of conducting the so-called ‘war on terror.’⁷

By December, 2002 CIA Director George Tenet declared that many members of *Al Qaeda* had been captured as a result of information obtained from previously captured members.⁸ We can be confident that virtually none of this intelligence was proffered voluntarily.

I. THE TEMPTATION TO TORTURE ISLAMIST TERRORISTS.

The Executive asserts that this nation is embarked on a vast, open-ended and perform highly amorphous global ‘war on terror.’ Taken literally, this sort of a war is impossible to wage because terrorism, whether deployed domestically or projected

School,” *The Boston Globe* (January 17, 2004), A8.) See Human Resource Exploitation Manual (1983), at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB27/02-01.htm>

Mexico has recently arrested its former secret police chief, charged with responsibility for the torture of a domestic insurgent who was held secretly at a military camp for several years. The CIA had previously intervened on this official’s behalf in an American judicial criminal proceeding, designating him as a ‘key informant.’ (Tom Weiner, “Mexico Seizes Official in ‘Dirty War’ Case of 70’s,” *The New York Times* (February 20, 2004), A6.)

⁷ “It’s not that the United States has any particular interest in egregious human rights violations. It’s just that it’s a natural corollary to what it is interested in, and to how you achieve goals like that.” (Noam Chomsky, Power and Terror: Post-9/11 Talks and Interviews (New York: Seven Stories Press, 2003), p. 48.)

⁸ Dana Priest and Barton Gellman, “After 9/11. the gloves come off,” *The Boston Globe* (December 26, 2002), A32, A33.

abroad, is a *political strategy*, utilized by organized political movements in the service of other objectives.⁹ In part these objectives may encompass revenge:

For how long will fear, massacre, destruction, exile, orphanhood and widowhood be our lot, while security, stability and joy remain yours alone? As you kill, you will be killed, as you raid, you will be raided.¹⁰

But the main use of terror is to achieve specific policy outcomes, such as the Islamists' utopian goal¹¹ to eliminate American hegemony in the Muslim (especially Arabic) world.¹² Specifically, to counter American military power in the Middle East, Islamists must "concentrate on...the need to inflict the maximum casualties against the opponent, for this is the language understood by the West."¹³

For a variety of reasons, adoption of a strategy of inflicting terror on random civilians of an opponent's regime is ordinarily restricted to very weak and/or losing

⁹ Accord, Bob Kerrey, "Fighting the Wrong War," *The New York Times* (April 11, 2004), sec.4, p.11: "Terrorism is a tactic, not an enemy. The real enemy is a group of radical Islamists."

¹⁰ Osama bin Laden as quoted in James Risen, "New Recording May Be Threat from bin Laden," *The New York Times* (November 3, 2002), A1, A14. This view is widely shared in the Arab world. Thus, not so unreasonably, a writer in the Egyptian government-owned news weekly, *Al-Ahram al-Arabi* wrote: For many long years, America made many peoples in the world cry. It was always [America] that carried out the acts; now, acts are being carried out against it. A cook who concocts poison must one day also taste that poison. (Quoted in Daniel Benjamin and Steven Simon, "Islam's War of Words," *Time International* (November 12, 2001), 35.

¹¹ The radical Islamist movement is "unacceptable...not only [for its] cruelty, the disregard for human life, the disrespect for law, for women, the use of what is worst in technocapitalist modernity for the purposes of religious fanaticism. No, it is above all, the facts that such action and such discourse *open onto no future and, in my view, have no future....* [T]here is...*nothing good* to be hoped for from that quarter." (Jacques Derrida in Giovanni Borradori (ed.), Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida (Chicago: The University of Chicago Press, 2003) p.113.)

¹² Jurgen Habermas has pointed out that globalization – whose effect is to divide world society into winners and losers – has also created a defensive reaction to its "violent uprooting of traditional ways of life." In this sense, "[t]he West in its entirety serves as a scapegoat for the Arab world's own, very real experience of loss." (Borraderi (ed.), *supra*, p. 33.)

¹³ Ayman al-Zawahiri, [a leading *Al Qaeda* intellectual], Knights Under the Prophet's Banner as quoted in Daniel Benjamin and Steven Simon, The Age of Sacred Terror (New York: Random House, 2002), p.151-152.

groups.¹⁴ But as V.I. Lenin (whose brother was an executed anti-Czarist terrorist) pointed out a century ago, the political resort to terror is almost certain to result in the destruction of the terrorists and their cause. This general proposition is likely valid with respect to *Al Qaeda* and Islamist political fundamentalism more generically,¹⁵ as its influence in the Muslim world had peaked in the mid-1990s and was on a seemingly inexorable decline as of 9/11.¹⁶

Whether the American strategic response thereafter – in particular the unprovoked (and hence unjustified) war of aggression against Iraq¹⁷ – has succeeded in resuscitating that political movement remains to be seen. Numerous observers,¹⁸ including the former head of the CIA’s counter-terrorism and analysis division, have concluded that it will have precisely that effect:

As it now stands, our new war against Iraq will invite new enemies for our country whose weapons of choice will be guerrilla warfare and suicide bombings.¹⁹

¹⁴ “Power relationships have become increasingly asymmetrical since the 1960s and 70s, and the strategic standpoint of resistance reduced to terrorism, hostage taking and counter-cruelty.” (Alain Joxe, Empire of Disorder [Amy Hodges, trans.] (Cambridge: Semiotext(e), 2002), p. 152.

¹⁵ A good introduction to Islamist political ideology appears in Chapter 2 of Benjamin and Simon, *supra*, p. 38-94. Compare Jacob Taubes: “All the Christian concepts I know are highly political and explosive, or become so at a certain moment.” The Political Theology of Paul [Dana Hollander, trans.] (Stanford University Press, 2004), p.71

¹⁶ See generally, Kepel, *supra*.

¹⁷ The nation’s leading counter-terrorism expert, Dick Clarke, characterizes Iraq as “our unprovoked invasion.” He somberly concludes that “[w]e will pay the price for a long time.” (Richard Clarke, Against All Enemies: Inside America’s War on Terror (New York: Free Press, 2004), p.246, 287.)

¹⁸ For instance the Swedish diplomat Hans Blix concludes that “Iraq has bred a lot of terrorism and a lot of hatred to[ward] the Western world.” (Quoted in Warren Hoge, “Ex-U.N. Inspector Has Harsh Words for Bush,” *The New York Times* (March 16, 2004), p.A3.)

¹⁹ Vincent M. Cannistraro, “Balance wars against terror, Iraq,” *USA Today* (April 1, 2003), 13A.

Overall, the post-occupation developments within Iraq seem confirmatory of this negative perspective. It is of course certain that this strategy of the Bush Administration - of advancing the 'war on terror' by invading Iraq -- has radically increased the number of people throughout the world who hate our country.²⁰ As Egyptian President Hosni Mubarak – one of many who in advance tried to warn President Bush about an Iraqi debacle – recently observed: “After what has happened in Iraq...[t]here exists today a hatred [toward America] never equaled in the region.”²¹

The Bush Administration did not choose to respond to 9/11 as a law-enforcement or police operation, although it might be argued that that would have been the more appropriate and proportional response. Given the high degree of competence of elite American military units, such as the one which apparently tracked down Saddam Hussein, *Al Qaeda* could have been substantially dismembered by a few hundred specialized troops²² at a miniscule fraction of the monetary cost incurred in invading and occupying two far-off nations.

Instead, militarized counter-insurgency is the approach chosen by the Bush Administration, whose hallmark is the aggressive reliance on America's unprecedented worldwide military supremacy to achieve foreign policy objectives. Deputy Secretary of Defense Paul Wolfowitz has crudely summarized this model of American leadership:

²⁰ Susan Sachs, “Poll Finds Hostility Hardening Toward U.S. Policies,” *The New York Times* (March 17, 2004), A3.

²¹ He went on to indicate his judgment that the Iraqi occupation has been increasing the appeal of the Islamists. (“Egypt's leader says Arabs hate US more than ever,” *The Boston Globe* (April 21, 2004), A17.

²² Unknown to almost everyone in the government -- even on the Executive's national security staff - the CIA also maintained its own para-military force. (Benjamin & Simon, *supra*, p.285.)

[D]emonstrating that your friends will be protected and taken care of, that your enemies will be punished and that those who refuse to support you will live to regret having done so.²³

The classical counter-insurgency strategy is the deployment of superior force (the “white terror”). When the opponents are an underground organization ordinarily this takes the form of catching and torturing its cadre to gain the intelligence needed to destroy their networks.²⁴ The available evidence indicates that the United States is following this conventional path. Retrospectively it is evident that 9/11 served as a *deus ex machina* to enable President Bush and his coterie to put into effect their new overall foreign policy, one predicated on using America’s unprecedented and qualitative military supremacy as the basis for pre-emptive wars against foes.

At the maximum 9/11 provided a justification for attacking Afghanistan; (indeed, world public opinion did not turn against America in that venture but only once that turned out to be merely an opening salvo). But 9/11 was deliberately used by the Bush Administration as the underlying justification for the much larger project of invading Iraq. In a recent speech by Senator Edward M. Kennedy to the Council on Foreign Relations he flatly accused the President of deliberately resorting to:

pure, unadulterated fear-mongering, based on a devious strategy to convince the American people that Saddam’s ability to provide nuclear weapons to *Al Qaeda* justified immediate war.²⁵

²³ Quoted in Bill Keller, “The Sunshine Warrior,” *The New York Times Magazine* (September 22, 2002), 48, 52.

²⁴ “Every Partisan taken prisoner was regarded [by the Gestapo who set up a torture center in Rome] as the potential *passe-partout* to others still in hiding if only he or she could be made to talk.” (Robert Katz, *The Battle for Rome: The Germans, The Allies, The Partisans, and the Pope, September 1943 – June 1944* (Simon & Schuster, 2003), p.156.)

²⁵ Douglas Jehl, “Kennedy Gives Bush Stinging Rebuke on War,” *The New York Times* (March 6, 2004), A6. As Alain Joxe observed:

The electronic revolution allows wars almost without military casualties on America’s side, in other words, wars that make it easier to gain political consensus. The more precise tendency would be: wars that need no democratic political consensus. Populist media-based consent is enough.

We now know for certain that the Bush Administration had determined to oust Saddam Hussein by force from the very outset [Secretary of Treasury Paul O'Neill]; that the President initially viewed 9/11 as a manifestation of how Iraq as a 'rogue state' empowered terrorists [Dick Clarke]; and that as early as November, 2001 the President had ordered preparation of a military plan to attack Iraq.²⁶

In contradistinction to the conspiracy allegations concerning FDR and Pearl Harbor,²⁷ in the instance of 9/11 that latter event directly and powerfully served two obvious political objectives: re-election of the President in the wake of the inevitable jingoist mania, and *causa belli* for attacking Iraq.

The preposterous contention²⁸ that Iraq had so-called Weapons of Mass Destruction ("WMDs") *contemporaneously and publicly disproved by United Nations inspectors on the scene*²⁹ was only plausible to the ingenuous American people because 9/11 had recently occurred. Popular credulity relative to these confabulated WMDs³⁰ was

(Empire of Disorder, p. 172.)

²⁶ Bob Woodward, Plan of Attack (New York: Simon & Schuster, 2004).

²⁷ Joseph E. Persico, "Early Warnings: What Did He Know, and When?," *The New York Times* (April 18, 2004), sec. 4, p.4:
Given the lack of motive and the total absence of hard evidence linking F.D.R. to foreknowledge of the Japanese plan, the conspiracy case collapses.

²⁸ Having made the *a priori* decision that Iraq had WMDs desired by their bosses, American intelligence agencies simply ignored the direct evidence, for instance from defecting scientists and military officers, who told them that it did not. (See, e.g., "Douglas Jehl, "U.S. Certain That Iraq Had Illicit Arms, Reportedly Ignored Contrary Reports," *The New York Times* (March 6, 2004), A6.)

²⁹ Hans Blix, in Disarming Iraq (New York: Pantheon Books, 2004) scathingly characterized the Bush Administration's methodological approach to Iraqi WMDs as comparable to that of those government officials of early modern Europe who pursued witches.: "The witches exist; you are appointed to deal with these witches; testing whether there are witches is only a dilution of the witch hunt." (Quoted by Fareed Zakaria, *The New York Times Book Review* (April 11, 2004), 8.)

³⁰ Secretary of State Colin Powell contemporaneously described the crackpot methodology which justified the American 'pre-emptive' military attack on Iraq as follows:

especially high because Americans were almost hysterical with fear consequent to the World Trade Center incident.³¹ Whatever it elicited from the intelligence agencies in the way of ‘evidence’ of WMDs for public consumption, it is questionable whether President Bush and his coterie of close advisors ever themselves believed such palpable nonsense.³²

Less obviously, by falsely conflating Iraq with the ‘war on terror,’ the Bush administration also simultaneously considerably raised the political stakes in success in both endeavors.³³ Thus, our nation is subject to repeated admonitions by the President such as:

We are relentless. We are strong. We refuse to yield. Some two-thirds³⁴ of *Al*

Where is the evidence that Iraq has destroyed the tens of thousands of liters of anthrax and botulinum we know it had before it expelled the previous inspectors? (Speech of January 26, 2003 before the World Economic Forum, quoted in *The New York Times* (January 27, 2003), A8.) Iraq’s inability to ‘prove’ to U.S. satisfaction that it had destroyed a never-existent WMD was held to constitute proof of its existence.

³¹ As my old Yale Law School professor observed: “People’s respect for human and civil rights is often very fragile when they are frightened, and Americans are very frightened.” (Ronald Dworkin, “The Threat to Patriotism,” *The New York Review of Books* (February 28, 2002), 44, 45.)

³² Thus, on February 24, 2001, before he was enlisted to beat the war drums, Secretary of State Colin M. Powell stated that Hussein:

has not developed any significant capacity with respect to weapons of mass destruction. He is unable to project conventional power against his neighbors. (Quoted in Walter Pincus and Diana Priest, “US report to be inconclusive on search for Iraqi weapons,” *The Boston Globe* (September 25, 2003), A1, A3.)

And this understanding, although no longer stated publicly, apparently remained widespread in the Bush Administration until immediately prior to the invasion. A senior reporter for *The New York Times* recounted that “in private, administration officials concede that there is no single piece of dramatic evidence that Iraq has continued to try to acquire nuclear, chemical and biological weapons.” (John F. Burns, “A Top Iraqi aide Defies U.S. to Find Proof of Weapons,” *The New York Times* (December 9, 2002), A1.)

³³ As Jacques Derrida noted, “we must recall that maximum media coverage was in the *common* interest of the perpetrators of ‘September 11,’ the terrorists, and those who...wanted to declare ‘war on terrorism’.” (Borradori (ed.), *supra*, p. 108.)

³⁴ This is a confabulated propaganda number. As Steven Simon and Daniel Benjamin (former members of the National Security Council counter-terrorism staff) observe: “But since intelligence services have only a vague idea of how big al-Qaeda is, there is no way of knowing how much of the infrastructure has actually been dismantled.” (*The Age of Sacred Terror* (New York: Random House, 2002), p. 168.)

Qaeda's key leaders have been captured or killed. The rest of them hear us breathing down their neck. We're after them. We will not relent. We will bring these killers to justice.³⁵

And this incessant refrain and pledge inexorably intensifies the short-run political requirement to show progress in the extirpation of *Al Qaeda* and similar groups, and to prevent further terrorist attacks, while simultaneously functioning as a justification for the continuing American occupation of Iraq – which in turn is disingenuously portrayed as the ‘front line’ of the ‘war on terror.’

As torturing individual terrorist captives to make them reveal their associates’ is the simplest and most direct way to further this objective,³⁶ the political pressure to adopt this approach is greatly increased:

We have been able as a result of information gained here [at Guantanamo Bay] to take operational actions, even military campaigns,” said Steve Rodriguez, a veteran intelligence officer who oversees the interrogations teams. “There are instances of learning about active cells, and we have taken action to see that the cell was broken.³⁷

³⁵ Speech of President George W. Bush on March 2, 2004. (Quoted in Elisabeth Bumiller, “President Urges Renewal of the Antiterrorism Law,” *The New York Times* (March 3, 2004), A12.) “Bringing them to justice” is a term of art. The President’s communication director Dan Bartlett had already advised us over two years earlier that “the conventional way of bringing people to justice doesn’t apply to these times.” ([insert author], “Bush to Subject Terrorism Suspects to Military Trials,” *The New York Times* (November 14, 2001), A1, B8.)

³⁶ See, for instance, Nicholas D. Kristof, “Why didn’t We Stop 9/11?,” *The New York Times* (April 17, 2004), A27:
The Philippine police apprehended a key figure [in the foiled 1995 plot to simultaneously blow up numerous airplanes in the Pacific], Abdul Hakim Murad, along with the detonators. We let the Filipinos ‘interrogate’ Murad. After he’d been beaten with a chair, burned with cigarettes and half-drowned, he disclosed a plan for a suicide plane attack on the C.I.A.’s headquarters.

³⁷ Quoted from interview by Neil A. Lewis, “U.S. Military Describes Findings at Guantanamo,” *The New York Times* (March 21, 2004), sec.1, p.6.

That this is the path the Bush Administration has taken suggests, alas unsurprisingly, that countervailing humanitarian considerations fail to have pride of place among its key decision-makers.³⁸

II. EVIDENCE OF THE CURRENT POLICY AND PRACTICE OF TORTURE.

I want to outline three independent, but closely linked, pieces of evidence --each one of which is highly suggestive of an official pattern and practice of torture; and which in combination leave no reasonable doubt. They are: (A.) a quasi-admission to adopting this policy after 9/11 by the CIA to Congress; (B.) outright statements by CIA men and women³⁹ who are actually carrying out the torture together with confirmation by higher level CIA officials that such is in fact their practice; and (C.) a focused, aggressive legal campaign to strip captured terrorist suspects (denominated “enemy combatants”) of all human rights *including an express affirmative declaration by the Justice Department in open court that the Executive has entitlement to torture them.*⁴⁰

³⁸ Queried about repeated prior official State Department findings that the Northern Alliance had engaged in massive crimes (rape, pillage, etc.) when the U.S. was hooking up with them to overturn the Taliban, Secretary of Defense Donald Rumsfeld was his insouciant self: “Where have there not been things that in a perfect world one would characterize as a human rights violation.” (Quoted in Michael Kranish, “Taliban foes’ record on rights poses a problem,” *The Boston Globe* (November 2, 2001), A30.) It is difficult to imagine this sort of person undergoing a *volte face* in attitude and being inclined to forbid cruel counter-insurgency tactics when it comes to U.S. application of coercion against those we have detained as terrorist suspects.

³⁹ The interrogation of Islamist captives often utilizes female CIA operatives to heighten their humiliation. (Priest and Gellman, *supra*, A33.) While contrary to the import of ‘difference feminism,’ women are perfectly capable of inflicting death and brutal physical injury; and this was so long before society attempted equal employment opportunity. In overtly patriarchal Nazi Germany, for instance, the grim fact is “that most nurses performed these duties [i.e., selection and transportation of mentally ill, children with birth defects, etc. from sanatoria to the euthanasia centers prior to the Second World War] willingly and without protest.” (Matthew Stibbe, *Women in the Third Reich* (London: Arnold Publishers, 2003), pp.75-77.)

⁴⁰ *Gherebi v. Bush*, 352 F3d 1278 (9th Cir., December 18, 2003), *cert. granted*.

Additionally, the Bush Administration has taken a consistent position regarding possible international law control. In this arena too, its policy is that there should be no oversight by any organization of our treatment of Islamist prisoners; and *a fortiori* no judicial forum should have the authority to call anyone in this country to account for any crimes against humanity associated with the treatment of those designated as ‘unlawful combatants.’

One component of achieving complete international ‘hands off’ is to have the key interrogations occur in physical locations outside of the United States but also where no *other* nation-state can realistically claim territorial jurisdiction. In turn, the detainees may have been seized through international kidnappings, which were, Dick Clarke informs us already “routine...activity” by the mid-1990s.⁴¹ In Iraq and Afghanistan, of course, to the extent that there are “governments” operative, they are effectively subordinate to U.S. military occupation and authority. Alternatively, prisoners are kept in places such as military reservations in Diego Garcia and Guantanamo Bay. And other potential courts, such as the International Court of Justice, face implacable hostility designed to prevent them from ever functioning relative to any American accused of crimes against humanity.

Similarly, oversight relative to the captives is prevented by a unilateral decision that they are *not* to be afforded the protections available to prisoners of war pursuant to the *Geneva Conventions*. One has to carefully parse the official Pentagon statement intended to rebut charges of torture at Guantanamo Bay to realize that its content is the opposite of the impression left by a casual reading:

⁴¹ Against All Enemies, p. 143. These “‘extraordinary renditions’ were operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgement of the host government.” (*Id.*) See also Benjamin & Simon, *supra* p.251: In the late 1990s the CIA “vastly increase[d] the number of ‘renditions’ it carried out.”

All detainees are treated humanely and, *to the extent appropriate and consistent with military necessity*, in accordance with the principles of the Third Geneva Convention of 1949. [italics added]⁴²

What constitutes military necessity under this schema is merely the unilateral decision of the Executive itself – a far cry from the specific legal constraints set forth in the *Conventions*. But maintaining this sort of untrammelled authority is absolutely essential if the American counter-insurgency strategy of obtaining intelligence by torturing captured Islamists is to be implemented. Because Article 17 of the *Third Geneva Convention* provides that:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners to secure from them information of any kind whatsoever.

A. CIA Testimony before Congress.

On September 26, 2002 the then-head of the CIA's counterintelligence center, J. Cofer Black,⁴³ testified at a Joint Hearing of the House and Senate Intelligence Committees with respect to its new forms of "operational flexibility" in dealing with captured suspected terrorists. Here is what he said:

This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11 and there was an after 9/11. After 9/11 the gloves came off.⁴⁴

That is a curious locution, to the effect that the most relevant legislators should be aware of only the most general abstract parameters of how captives are treated, but no

⁴² Patrick E. Tyler quoting Pentagon spokeswoman Lt. Cmdr. Barbara Burfeind, "Ex-Guantanamo Detainee Charges Beating," *The New York Times* (March 12, 2004), A12.

⁴³ Dick Clarke informs us that he "was a hard-charging, get-it-done kind of CIA officer who had proved himself in the back alleys of unsavory places." (Against All Enemies, *supra*, p. 205.)

⁴⁴ Quoted in Dan Priest and Barton Gellman, "'After 9/11, the gloves come off,'" *The Boston Globe* (December 26, 2002), A32, A33.

more. Facially, there is one obvious reason for these representatives not to know more – to wit, that detailed knowledge might be disturbing either to them personally or be revealed to their constituents who in turn might well find it most unsettling.

In any event, the most obvious reading of the testimony is that there are no longer limits. Before 9/11 there were some constraints (presumably, *inter alia*, a bar on torture); but the successor “operational flexibility” has removed them.⁴⁵

B. The CIA Operatives and the Supervising Officials State that They Are Resorting to Physical Coercion.

This interpretation of officially authorized torture is supported by informal acknowledgement by the CIA. Numerous CIA officials with hands-on responsibilities for the prisoners, together with higher officials responsible for the policies to be implemented, have told reporters outright that they are utilizing physical coercion to break the will of their captives and to make them reveal all the useful information that they possess. While there is no official ‘on the record’ statement by the CIA, *The Boston Globe*’s reporters interviewed “several former intelligence officials and 10 current U.S. national security officials – including several people who witnessed the handling of prisoners” on this precise issue. Starkly:

⁴⁵ Dick Clarke suggests that Cofer Black’s testimony encompassed getting Bush Administration authorization to carry out sundry covert activities, including working “with other security services to identify and break up” Islamist cells around the globe. (*Against All Enemies supra*, p.276-77.) But as Clarke himself reveals that the U.S. was *already* “rendering” captured terrorists to other nations for them to torture (*Id.* 115-116); engaging in summary executions (*Id.*, p.138-39, 168); and carrying out kidnappings throughout the world (*Id.*, p. 143-45, 152-53), it is hard to fathom what new covert activity could have been added other than torture. (See, however, Craig B. Whitney, “In a War on Terror, Not All the Rules of War Apply” *The New York Times* (March 28, 2004), sec.4, p.5 who asserts that the change was that previously attempted assassination of Osama bin Laden could only occur *during* an effort to capture him, while after 9/11 that constraint was removed.)

each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary.⁴⁶

It may be noted that traditional methods of torturing prisoners⁴⁷ are now viewed as archaic by the relevant community of American experts. In their discourse, classical “physical coercion is largely ineffective” because as it proceeds, due to the injuries inflicted, prisoners often become non-responsive. (Furthermore, while unspoken there is the problem that if the prisoner is ever released, ghastly evidence of the procedures deployed may well be left on the body.) They insist that the current methods are *always* effective, so long as the captive is at their disposal for the requisite length of time -- no more than two to three months is needed for even the most recalcitrant.⁴⁸ These methods entail:

techniques like sleep and light deprivation and the temporary withholding of food, water, access to sunlight and medical attention....Routine techniques include covering suspects’ heads with black hoods for hours at a time⁴⁹ and forcing them to stand or kneel in uncomfortable positions in extreme cold or heat.⁵⁰

⁴⁶ Dana Priest and Barton Gellman, “After 9/11, the gloves come off,” *The Boston Globe* (December 26, 2002), A32.

⁴⁷ The ‘hymn’ of the Roman ‘Special Police Unit’ charged with combating terrorism during World War II gives the flavor of what occurred once they “nab the Partisans:”

From the room next door you can hear the sound/ of how the pleasures of the prisoner abound
If he persists and there’s nothing he’ll reveal/ there’s our man Zangheri who’ll make him squeal
But just what are those cries of pain?/ the work of Billi, going at it again
Or do they come from the mighty fists/ of big Pallone’s mighty mitts?...
And though the Communist’s face grows sadder/ in the end he tells it all just to end the matter...
So this is Koch’s squad/ men strong-minded and hard
Who work for Italy’s glory/ and for our Fascist victory.

(Quoted in Robert Katz, *The Battle for Rome: The Germans, The Allies, The Partisans and the Pope, September 1943-June 1944* (New York: Simon & Schuster, 2003), p.207.)

⁴⁸ Raymond Bonner *et al.*, “Questioning Terror Suspects in a Dark and Surreal World,” *The New York Times* (March 9, 2003), sec. 1, pp.1, 14. The interrogators, however, do not want the detainees released even then, for there is the possibility that subsequently garnered information will result in figuring out new questions to pose.

⁴⁹ An AP wire story on an Iraqi general who died just short of two months into his captivity stated: “His head was not hooded during interrogation...” (“Iraqi General Dies in American Custody,” *The New York Times* (November 28, 2003), A14.) There are other reports which are highly suggestive of deaths of American prisoners in Afghanistan induced by overly vigorous questioning. (See, e.g., Bonner *et al.*, *supra*; Jonathan Turley, “Rights on the Rack: Alleged Torture in Terror War Imperils U.S. Standards of

The New York Times article goes on to provide a case study of one of Osama bin Laden's confidants, a senior operative in *Al Qaeda*, who initially refused to provide any information:

[T]he questioning was prolonged, extending day and night for weeks. [Its pattern encompassed Omar Al-]Faruq left naked most of the time, his hands and feet bound....The [CIA] official said that over a three-month period, the suspect was fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees to 10 degrees. In the end he began to cooperate [providing detailed information on others in his network.]⁵¹

One of those involved told the reporters that this mode of interrogation was "not quite torture, but about as close as you can get."⁵² There is a specific legal reason for this sort of seemingly formalistic denial. As one legal scholar points out:

If U.S. interrogators are not using "torture" but are instead using lesser forms of coercion, then they are not subject to federal prosecution under 18 U.S.C. sec.2340A.⁵³

Humanity," *The Los Angeles Times* (March 6, 2003) at <<http://commondreams.org/views03/0306-05.htm>> (3/8/04).)

⁵⁰ Bonner *et al.*, *supra.* To similar effect, *see* Priest and Gellman, *supra.*; Mark Bowden, "The Dark Art of Interrogation," *The Atlantic* (October, 2003). Various human rights groups have also produced reports on this matter.

⁵¹ Bonner *et al.*, *supra.* Omar Al-Faruq had himself been caught consequent to prior interrogations of earlier detainees. (Priest and Gellman, *supra.*, A33.) After some time with the CIA interrogators, Al-Faruq in turn provided information leading to further multiple arrests of Islamists. (Raymond Bonner, "Cleric's Sentence Is Reduced by Indonesian Court," *The New York Times* (March 10, 2004), A12.) Thus, through successive episodes of torture, each link in the *Al Qaeda* network is in turn 'brought to justice.'

⁵² Bonner *et al.*, *supra.*

⁵³ John T. Parry, "What Is Torture, Are We Doing It, and What If We Are?" University of Pittsburgh Law Review Vol.64 (Winter, 2003), 237, 253. "[T]he interrogation methods adopted by U.S. forces are strikingly similar to those employed in the past by Britain and Israel and a strong but hardly conclusive argument exists that these actions fall into the category of cruel, inhuman, or degrading treatment instead of torture." (*Id.*, 251.) Both Israeli and European courts have made a distinction, respectively concerning Palestinians and Irish, between torture and actions which are "cruel, inhuman, or degrading" – and concluded that similar treatment to the CIA's current one with Islamist detainees falls within the latter category.

At the risk of some over-simplification, there is no legal defense to torture; but as to the latter, there is both possible justification by the state on grounds of national emergency, and as to the individuals

C. The Government's Legal Position Is That the Executive Has the Right to Torture
Captive 'Unlawful Combatants' Free of Any Judicial Impediment Whatsoever.

Ordinarily, we think of the American legal system as the crucial institutional barrier to any regime of torture. The Bush administration, however, has taken the position that the courts have no role relative to detained Islamists. The Secretary of Defense, Ronald Rumsfeld, has averred:

They are enemy combatants and terrorists who are being detained for acts of war against our country and that is why different rules have to apply.

Of course it is a *non sequitur* to assert that “different rules *have to* apply;” the government could just as readily apply the regular rules. It has made a political decision to preclude American courts from exercising any jurisdiction over its captives – which jurisdiction in turn threatens to impede the use of torture.⁵⁴ The more subtle meaning of Rumsfeld's comment is left unspecified, namely, what is the *content* of these “different rules.” Those engaged in ‘acts of war against our country’ could hardly be expected to benefit from more permissive rules; perforce the difference must be that they are substantially more harsh.

involved, a necessity or exceptional circumstances defense. And if what CIA operatives do is deemed to be “cruel, inhuman and degrading” as opposed to ‘torture,’ then 18 U.S.C. sec.2340A is not applicable.

⁵⁴ It is uncertain whether all (or for that matter, even a majority) the sitting Justices would be prepared to issue a binding judicial order forbidding the military and CIA from utilizing torture pursuant to an Executive assertion of such entitlement under the War Power. It should be noted that the Fourth Circuit – a bastion of the kind of ‘non-activist judges’ who increasingly predominate on the federal bench – has held that the Executive's power relative to those it designates as ‘unlawful combatants’ is effectively limitless. (Neil A. Lewis, “U.S. Is Allowed to Hold Citizen As Combatant,” *The New York Times* (January 9, 2003), A1.)

Since 9/11 a number of legal challenges have proceeded in the federal courts with respect to the scope of the Executive's discretionary authority relative to captured suspected terrorists. The Bush Administration has advanced a clear and unequivocal legal position, namely, that under the War Power the Executive has limitless authority as to whoever it deems, pursuant to an untrammelled discretion, to be an 'enemy combatant.'

The most crucial objective of this authority, it is asserted, is to obtain vital intelligence from detained enemy combatants. Thus, the President's June 9, 2002 determination relative to holding Jose Padilla,⁵⁵ avers:

he possesses intelligence, including intelligence about personnel and activities of Al Qaeda that, if communicated to the United States, would aid United States efforts to prevent attacks by Al Qaeda...⁵⁶

Presidential authority, the Solicitor General asserts, is subject to no judicial review because the courts lack jurisdiction. It is plenary, total power, which the Bush Administration has informed the courts inheres in the Executive. This legal approach commenced immediately after 9/11 with the creation of a new juridical category, 'enemy combatants' who, the President declared are:

non-US citizens⁵⁷ who plan and/or commit mass murder [and thus] are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life.⁵⁸

⁵⁵ This is a crucial legal predicate of the Administration's overall legal posture, and was carefully crafted with respect to potential U.S. Supreme Court review.

⁵⁶ Quoted in the Brief of Solicitor General Theodore Olsen and his deputy Paul D. Clement in Rumsfeld v. Padilla (No.03-1027), 2003 LEXIS U.S.Briefs 1027 (March 17, 2004).

⁵⁷ Subsequently, after it became clear that a significant fraction of the Islamists involved in potential incidents of terrorism are American citizens (either born here although raised in Arabic lands, or devout fundamentalists – from Muslim families or converts), the category was expanded so that Americans too are so designated. (Eric Lichtblau, "U.S. Reasserts Right to Declare Citizens to Be Enemy Combatants," *The New York Times* (January 18, 2004), A18.)

⁵⁸ Quoted in Mike Allen and Susan Schmidt, "Bush Defends Secret Tribunals for Terrorism Suspects," *The Washington Post* (November 30, 2001), A28.

The practical issue involving these persons has to do with when they are captured alive, as opposed to killed in armed confrontations.⁵⁹ The Executive's official position before the Supreme Court is simple and stark: there should be none whatsoever.⁶⁰

In its Brief filed with the Supreme Court in Rumsfeld v. Padilla, the Executive has reiterated that:

in opposing the original district court order to see counsel, the government submitted the affidavit of the Director of the Defense Intelligence Agency, which explains the significant national security concerns raised by interposing counsel into the military's efforts to obtain vital intelligence from detained enemy combatants.⁶¹

That affidavit makes for chilling reading. Vice Admiral Lowell E. Jacoby,

Director of the Defense Intelligence Agency, declares:

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the kind of relationship of trust and dependency necessary...can take a significant amount of time [-- months, or even years]....Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool.⁶²

⁵⁹ While we may suspect that in the instance of Hussein's sons a decision had been made *not to* capture them alive, ordinarily for counter-insurgency intelligence purposes it is far preferable to take Islamist terrorists into custody as prisoners as opposed to carrying out summary battlefield executions.

⁶⁰ In part, this position follows logically from a conundrum of legal doctrine to the effect that 'the greater power [by necessary implication] includes the lesser power.' Since under the War Power as Commander-in-Chief the President has the authority to order the killing of enemy combatants without any judicial review, this logic is held to mean that he also has the power to hold them as prisoners under whatever conditions he deems appropriate: which implicitly presumes that torturing someone is 'less' than shooting him.

⁶¹ Brief of Solicitor General, *supra*.

⁶² Joint Appendix to Brief, *supra*.

Thus the broken victim of torture is conceptualized by the torturers as choosing to betray his comrades, and as providing the evidence of his participation in terrorism that retrospectively justifies his treatment.⁶³

Similarly, in oral argument concerning the Guantanamo Bay captives before the Court of Appeals of the District of Columbia, Clement advanced precisely this intelligence-gathering rationale, averring that:

the detainees were being held not only to take them off the battlefield but also as a resource of information about *Al Qaeda*. Mr. Clement said that they were held...”to facilitate intelligence gathering” and that the authorities wanted the detainees available to answer questions that might arise as new information came in. He suggested that the value of such questioning would be limited if the detainees were able to have open communications with family members and lawyers....”The authority to hold them at all [as enemy combatants inherently encompasses] the authority to hold them under those conditions.”⁶⁴

This was merely the warm-up for perhaps the most remarkable statement ever made by a President’s lawyer to a federal court. It occurred on August 11, 2003 in Clement’s oral argument before the 9th Circuit in Gherebi v. Bush, another suit arising regarding the Guantanamo Bay ‘enemy combatants.’ The Bush Administration lost (and as of this writing the case is scheduled to be reviewed on *certiorari* in April, 2004). In relevant part the appeal court’s opinion reads:

Under the government’s theory, it is free to imprison Gherebi indefinitely...and

⁶³ As Mordechai Kremnitzer puts it:
The breaking of the victim and his “cooperation,” when he joins the side of the interrogators and acts in an undignified manner, provide legitimacy and moral approval, after the fact, for the process of his breaking and degradation: he who acts so now deserved what was done to him before.

“The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the ‘Needs’ of the Security Service,?” Israel Law Review Vol. 23, 216, 250 note 67.

⁶⁴ Neil A. Lewis, “Guantanamo Prisoners Seek to See Families and Lawyers,” *The Washington Post* (December 3, 2002). This last sentence is an allusion to the ‘greater power includes the lesser’ legal doctrine.

to do with Gherebi...as it will, when it pleases, without compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument [by Paul Clement], *the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge...the U.S. government has never before asserted such a grave and startling proposition...a position so extreme that it raises the gravest concerns under both American and international law.*⁶⁵

The Bush Administration asserts that many of these ‘enemy combatants’ “could be held for many years.”⁶⁶ (A number have already attempted, so far unsuccessfully, to commit suicide.) These prisoners are to be subjected indefinitely to whatever interrogation the government chooses.

III. PUBLIC MORALS AND THE ‘ACHILLES HEEL’ OF THE BUSH

ADMINISTRATION’S ‘WAR ON TERROR.’

It is possible that the CIA torturers are right. When interviewed they “expressed confidence that the American public would back their view.”⁶⁷ Perhaps the American people are so frightened or so morally debased, that they will tolerate a foreign policy based on our country being a kind of international “crimes against humanity” entity, kidnapping suspected ‘terrorists’ from all around the globe, transporting them to secret places, and then doing dreadful things to them.

We should bear in mind that while when posed in the abstract, questions about the morality of torturing of terrorists postulate that the person is both guilty and has

⁶⁵ 352 F.3d 1278, 2003 U.S. App LEXIS 25625 (December 18, 2003) [italics added].

⁶⁶ Neil A. Lewis, “U.S. Will Free 5 Britons Held at Cuba Base,” *The New York Times* (February 20, 2004), A22.

⁶⁷ Bonner *et al.*, *supra*.

pragmatically useful information to proffer: generally in real life neither of those conditions actually holds. Even within our established criminal justice system, which has quite considerable safeguards against sending innocent people to prison, a large number of errors are made. My own published estimate, for example, is to the effect that as many as one-quarter (25%) of those found guilty of rape are innocent.⁶⁸

In the ‘war on terror’ error rates of over-inclusivity (i.e., ‘false positives’) are far higher. For instance, it now appears that perhaps ninety percent (90%) of those held at Guantanamo Bay are not terrorists.⁶⁹ Only a handful of the twelve hundred resident aliens taken into custody after 9/11 have been shown to have had any ties to terrorism.⁷⁰ So in this latter instance, the over-inclusivity apparently was not ten-to-one (10:1) but perhaps one hundred-to-one (100:1).⁷¹ As the hoax⁷² involving Muslim army chaplain Captain James Yee personifies, a combination of adhering to the wrong religion and

⁶⁸ Edward Greer, “The Truth Behind Legal Dominance Feminism’s ‘Two Percent False Rape Claim’ Figure,” *Loyola of Los Angeles Law Review*, Vol 33, No. 3 (April 2000), 947-972. More recent empirical review of DNA reversals reveal that ninety percent of the “false convictions in the rape cases involved misidentification by witnesses, very often across races.” (Adam Liptak, “Study Suspects Thousands of False Convictions,” *The New York Times* (April 10, 2004), A14.)

⁶⁹ U.S. intelligence officers in Afghanistan repeatedly objected to no avail that of those sent to Guantanamo Bay “there’s a lot of farmers there.” (Greg Miller, “US said to hold prisoners for no reason,” *The Boston Globe* (December 22, 2002), A34.) Similarly, the individual in charge of interrogating the Guantanamo Bay inmates now asserts that only about fifty of the six hundred-plus men are “ardent” opponents. (Neil A. Lewis “U.S. Military Describes Findings at Guantanamo,” *The New York Times* (March 21, 2004), sec.1, p.6.)

⁷⁰ This phenomenon was sufficiently egregious that both the inspector general of the Justice Department and the 9/11 commission have issued reports condemning it. (Michael Janofsky, “9/11 Panel Calls Policies On Immigration Ineffective,” *The New York Times* (April 17, 2004), A8.)

⁷¹ There is nothing inevitable about this sort of gross over-inclusivity. Thus in England, where a similar legal regime regarding detention of alien residents is operative, the total number of those so held is fourteen. (Alan Cowell, “Britain, Citing Terrorist Threat, Plans to Expand Its Spy Industry,” *The New York Times* (February 26, 2004), A12.) It should be noted in this regard that for historical reasons, there are likely to be significantly more Islamist activists in that country than in ours. (Kepel, *supra*, p 303-305.)

⁷² After all charges against this innocent man were dismissed, his attorney stated that the grave charges against Captain Yee constituted “a hoax case.” (Jane Sutton, “Muslim Army chaplain cleared of convictions,” *The Boston Globe* (April 15, 2004), A3.)

being of non-white ethnicity (i.e., Arabs) is precisely where these errors are going to be concentrated.⁷³ The *realpolitik* argument on behalf of torturing detainees to prevent masses of innocent people from being blown up is a lot less persuasive once a note of realism is interpolated and it is recognized that a large fraction of those to be put to torture are actually innocent bystanders.

There is no poll data on this precise question of whether the American people would support a policy of torturing detained suspected terrorists. The first polls after 9/11 indicated that four-fifths of all Americans were ready to support an across-the-board diminution of civil liberties to fight the terrorists.⁷⁴ They have certainly gotten their wish.⁷⁵ Half of Democrats and three-fourths of Republicans are amenable to detaining suspected terrorists indefinitely without their being afforded any legal process whatsoever.⁷⁶ But ‘preventive detention’ of this sort -- while in Winston Churchill’s words “in the highest degree odious” to a democratic society⁷⁷ – falls way short of active torture. It seems rather unlikely that a majority of Americans favor it; and it is possible that only a relatively small minority of our citizenry is willing to transgress that taboo.

⁷³ To avoid any repetition of the development of any empathy for the captives, the replacement chaplain will be limited to ministering “only to Muslim soldiers and will not meet with detainees.” (Charlie Savage, “Limits put on new Muslim chaplain,” *The Boston Globe* (November 7, 2003), A8.)

⁷⁴ Mathew Purdy, “Bush’s New Rules to Fight Terror Transform the Legal Landscape,” *The New York Times* (November 25, 2001), A1, B4.

⁷⁵ Any citizen can be detained indefinitely as an unlawful enemy combatant as to whom neither Constitutional nor international prisoner-of-war protections apply. In addition, any American citizen can now be held secretly – and at least seven already have been -- pursuant to a sealed warrant by the Joint Terrorism Task Force, as a “material witness” under maximum security conditions for periods of at least several months. (Steve Fainaru and Margot Williams, “Many Held by US have not testified,” *The Boston Globe* (November 24, 2002), A30.)

⁷⁶ David Brooks, “The Bush Democrats,” *The New York Times* (January 13, 2004), A27.

⁷⁷ Quoted in A.W. Brian Simpson, *In the Highest Degree Odious* (London: Clarendon Press, 1992), an excellent monograph on the preventive detention of potential Nazi ‘fifth columnists’ during World War II.

When speaking publicly the President is unequivocal. In response to a question during a television interview about possible torture of Guantanamo Bay prisoners, Mr. Bush was adamant:

We don't torture people in America. And people who make that claim just don't know anything about our country.⁷⁸

This public official position is reiterated as required.⁷⁹ Thus, in dismissing the charges by newly released Guantanamo Bay prisoners of British nationality of having been tortured, the Pentagon stated:

As the President has said before, U.S. Policy condemns and prohibits torture. When questioning enemy combatants, U.S. personnel are required to follow this policy.⁸⁰

In the hegemonic legal ideology⁸¹ of the United States, torturing people is taboo.

This then is the political 'Achilles heel' of the torture policy. Once a public political campaign is launched, the government is already committed to outright denial of the practice. The greater the hue and cry, the more powerful will be the denial. But the repeated loud denials by our government that it is engaged in torture would amount to a tacit declaration that torture is wrong, reinforcing popular aversion. If the foregoing analysis is correct, and if torture is truly the policy and practice central to the Bush

⁷⁸ As quoted by Amnesty International, responding during an October 18, 2003 television interview to a query by Laurence Oakes about whether the Australians sequestered in Guantanamo Bay had been tortured. (<http://web.amnesty.org/library/Index/EN.GAMR511282003?open&of=ENG-USA> (January 2, 2004).)

⁷⁹ For instance, the President's spokesman, Ari Fleischer stated that the interrogations of detained Islamists are "humane and follow all international laws and accords." (Quoted in Jess Bravin and Gary Fields, "How Do U.S. Interrogators Make a Captured Terrorist Talk?," *Wall Street Journal* (March 4, 2003), B1.

⁸⁰ Quoted in Patrick E. Tyler, *supra*.

⁸¹ For a definition *see* Edward Greer, "Antonio Gramsci and 'Legal Hegemony'," in David Kairys (ed.), *The Politics of Law* (1st ed.) (New York: Pantheon Press, 1982), p.304-309.

Administration's strategy against the Islamists, it will not be feasible – in the face of a serious mass political campaign – to successfully maintain the duplicity about it over any protracted period of time.

Recent American history suggests that the combination of a President being caught repeatedly and brazenly lying to them about something about which many people are already morally quickly strips him of a portion of his popular legitimacy. A clamorous public campaign with the slogan: “We don't torture people in America. Stop the torture now,” is therefore both morally obligatory and apt to be successful.⁸² Who could ask for anything more?

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⁸² In France during the Algerian War (a far more bitterly divisive struggle than our current ‘war on terror’), a key shaping event was the joint public declaration of a large group of leading intellectuals that that nation's counter-insurgency strategic use of torture was insupportable.