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**AFTER ABU GHRAIB: DOES THE MCCAIN AMENDMENT, AS PART
OF THE 2006 DEFENSE APPROPRIATIONS ACT, CLARIFY U.S.
INTERROGATION POLICY OR TIE THE HANDS OF U.S.
INTERROGATORS?**

*Luke M. Meriwether**

I. INTRODUCTION

Torture is repulsive. It is deliberate cruelty, a crude and ancient tool of political oppression. It is commonly used . . . to wring confessions out of suspected criminals who may or may not be guilty. It is the classic shortcut for a lazy or incompetent investigator. . . . But professional terrorists pose a harder question. They are lockboxes containing potentially life-saving information.¹

Mark Bowden

The use of torture, defined as “[t]he infliction of intense pain to the body or mind to punish, to extract a confession . . . or to obtain sadistic pleasure,”² is abhorred and readily condemned by civilized people across the world.³ The

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1. Mark Bowden, *The Dark Art of Interrogation*, 292 THE ATLANTIC MONTHLY 51, 53 (October 2003).

2. BLACK’S LAW DICTIONARY 1528 (8th ed. 2004).

3. Bowden, *supra* note 1, at 53.

international community has consistently taken the position and has sought to protect “those rights [that] derive from the inherent dignity of the human person.”⁴ The United States has publicly accepted those principles and echoed the purpose of the U.N. Convention Against Torture, which is “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”⁵ However, many allegations throughout the United States’ “War on Terror” have publicly questioned the United States’ interrogation tactics, as well as the methodology and conditions of confinement imposed on detainees held by the United States in Afghanistan, Guantanamo Bay, Iraq,⁶ and other places around the world.⁷ These allegations have created an ongoing firestorm of controversy and debate, with one side opposed to any change in the current laws and processes, while the other side is calling for changes that are significant enough “to alter our current legal system’s focus from punishing completed crimes to a more aggressive approach capable of preventing [any future] terrorist attack.”⁸ The pivotal concern in every discussion on the topic is striking a balance “between protecting civil liberties⁹ and providing adequate safety to the nation from the threat of terrorism.”¹⁰ The recently adopted McCain Amendment, as part of the 2006 Defense Appropriations Act,¹¹ was designed to clarify some of the ambiguities surrounding the authorized techniques of interrogation, the line that is drawn between interrogation and torture, and the constitutional protections afforded to those held in the custody or effective control of the U.S. at home or abroad.¹²

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

5. *Id.*

6. Gretchen Borchelt, *Break Them Down: Systematic Use of Psychological Torture by US forces*, 2005 PHYSICIANS FOR HUMAN RIGHTS 1, available at http://www.phrusa.org/research/torture/pdf/pysch_torture.pdf (last visited Nov. 15, 2006) [hereinafter PHR Report].

7. See generally Bowden, *supra* note 1, at 54 (reporting that “[s]cores of other detainees, considered leaders, have been or are being held at various locations around the world: in Pakistan, Saudi Arabia, Egypt, Sudan, Syria, Jordan, Morocco, Yemen, Singapore, the Philippines, Thailand, and Iraq”).

8. Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?* 92 KY. L.J. 849, 850 (2003-2004).

9. Black’s defines civil liberty as “[f]reedom from undue governmental interference or restraint.” See BLACK’S LAW DICTIONARY 263 (8th ed. 2004).

10. Addicott, *supra* note 8, at 850.

11. Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

12. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1001, 119 Stat. 2739-40 (2005).

This comment explores whether the McCain Amendment, which is part of the 2006 Defense Appropriations Act, clarifies the United States' interrogation policy, by specifically explaining which techniques are permitted and which are prohibited, or restricts United States interrogators from gathering necessary information that could thwart a major terrorist attack. Section II of this comment explores the specific allegations of torture made against the United States alongside the backdrop of international law. Section III highlights the United States' response to these allegations, specifically breaking down the language of the recent McCain Amendment and exploring its practical application. Section IV discusses the ongoing problems that military personnel and law enforcement are faced with at home and abroad, mainly the complex nature of the "ticking time bomb"¹³ scenario and the legal protections and defenses afforded to an individual forced to make a choice between two evils.¹⁴ Finally, Section V concludes with the author's assessment of how to balance civil liberties and national security demands within the "War on Terror" and the hypocritical nature of a strict ban on all forms of torture and aggressive interrogation techniques.

II. ALLEGATIONS OF TORTURE AGAINST THE UNITED STATES

*"The War on Terrorism cannot be won without timely, reliable, and abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts."*¹⁵

Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency

13. See discussion *infra* Section IV. A "ticking time bomb" scenario involves the threat of imminent attack on U.S. interests at home or abroad. Such scenario would develop when a terrorist is taken into custody by U.S. officials who have sound reasons to believe that the suspect possesses specific knowledge of an imminent terrorist attack: for instance, a plot similar to 9/11 or a bomb placed on a New York City subway.

14. Addicott, *supra* note 8, at 899. Making a choice between two evils has often been referred to as a Hobson's choice. The Hobson's choice that U.S. interrogators would be faced with in a "ticking time bomb" scenario poses one of the strongest arguments in modern times for the use of non-lethal torture.

15. Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency at 6, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445), available at <http://www.state.de.us/cjc/PDF/Jacoby%20declaration.pdf> [hereinafter *Jacoby Declaration*] (mentioning that Lowell E. Jacoby is "a Vice Admiral in the United States Navy with more than 30 years of active federal commissioned service." From July 2002 to November 2005, Vice Admiral Jacoby served as the Director of the Defense Intelligence Agency (DIA) where he reported to the Secretary of Defense. DIA "is a [Department of Defense] combat support agency with over 7,000 military and civilian employees worldwide," and its "activities include collection of information needed by the President and Vice President, the National Security Council, the Secretaries of State and Defense, and other Executive Branch officials." *Id.* at 2.).

In 1945, after the atrocities of World War II were made public, the United Nations was formed seeking the protection of human rights around the world through the facilitation of agreements between member countries and international declarations.¹⁶ After a series of subsequent international declarations, including the 1948 Universal Declaration of Human Rights,¹⁷ the primary international agreement governing torture and ill-treatment was passed in 1985: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).¹⁸ The Torture Convention's stated purpose is "to promote universal respect for, and observance of, human rights and fundamental freedoms,"¹⁹ and to define and protect those who are subject to "torture and other cruel, inhuman or degrading treatment or punishment throughout the world."²⁰ The Torture Convention, to which the United States is a party, defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession, punishing him for an act he . . . has committed or is suspected of having committed . . . when such pain or suffering is inflicted by or . . . with the consent . . . of a public official or other person acting in an official capacity.²¹

When a person engages in acts of torture, he or she is not subject to international law to the degree that a state official acting in his or her official capacity would be.²² Under international law, only state actors can be found

16. U.N. Charter art. 1, para. 3, *available at* <http://www.un.org/aboutun/charter/chapter1.htm> (last visited Nov. 15, 2006).

17. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 12, 1948), *available at* <http://www.un.org/Overview/rights.html> (last visited Nov. 15, 2006) (In the Declaration's Preamble, it is stated that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world").

18. Torture Convention, *supra* note 4 (Adopted in 1984, this Convention serves as the primary international agreement governing torture and ill-treatment around the world).

19. *Id.*

20. *Id.*

21. *Id.* at art. 1, para. 1.

22. *See* State v. Anderson, 484 S.E.2d 543 (N.C. 1997). The case details a particularly gruesome murder in which the defendant, along with other individuals, tortured a victim. The Court deemed the torture as the proximate cause of the victim's death. To support jury charge for first-degree murder by torture, the Court had to review the evidence: the defendant had participated in torturing the victim in trailer by beating the victim, using soldering iron on the victim's arm, using an aerosol torch on the victim's genital area and carving derogatory term into the victim's

guilty of torture.²³ Article 16 of the Torture Convention further obliges states “to prevent . . . other acts of cruel, inhuman or degrading treatment which do not amount to torture as defined in Article.1,”²⁴ which has come to be known as “ill-treatment.”²⁵

The Torture Convention is a strict ban on torture and contains a clear “no exceptions clause” under Article 2, which states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”²⁶ Additionally, Article 3 of the Torture Convention prohibits any state from “expel[ing], return[ing] . . . or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁷ In making this determination, the state is responsible for taking into account all relevant considerations, which includes whether the State where the person is being transferred has shown “a consistent pattern of gross, flagrant or mass violations of human rights.”²⁸

In light of clear and universally recognized legal prohibitions on torture, “[i]nternational estimates suggest that governments use torture or other ill-treatment in more than sixty countries or territories worldwide.”²⁹ Innovative cruelty and torture are still commonplace in areas of Central and South America, the Middle East, and Africa.³⁰ Some governments allow rape and mutilation as a means of extorting confessions or information from prisoners in captivity.³¹ In countries that practice “Sharia,”³² such as Somalia, Iran, Saudi Arabia, Nigeria, Sudan, and others, maiming and physical abuse are legal; thieves that are caught by the authorities could have their hands chopped off and “women convicted of adultery may be stoned to death.”³³ These state-endorsed activities clearly fall

arm. The defendant and others living in trailer had discussed possible ways to kill the victim. Moreover, the torture had continued after defendant left trailer until the victim ultimately died in a closet. *Id.*

23. *See generally* Torture Convention, *supra* note 4.

24. *Id.* at art. 16, para. 1.

25. Addicott, *supra* note 8, at 857.

26. Torture Convention, *supra* note 4, at art. 2, para. 2.

27. *Id.* at art. 3, para. 1.

28. *Id.* at art. 3, para. 2.

29. Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 308 (2000).

30. *See generally* Bowden, *supra* note 1, at 53.

31. *Id.*

32. Sharia is defined as “the code of law based on the Koran.” It is also “derived . . . from the teachings and example of Mohammed; Sharia is only applicable to Muslims.” Moreover, “under Islamic law there is no separation of church and state.” WordNet, *Sharia*, available at <http://dictionary.reference.com/search?q=sharia> (last visited Oct. 4, 2006).

33. Bowden, *supra* note 1, at 53.

within the precise definition of torture and civilized societies around the world, including the United States, find this behavior repulsive and readily condemn it.³⁴ However, many groups around the world campaigning against all forms of torture fear that there are other forms or methods of torture being employed by the United States in the “War on Terror,” and that the rules forbidding such methods are being ignored.³⁵

These other methods, some people argue, fall short of torture and have come to be known as “torture lite.”³⁶ Some of the various methods employed as torture lite include sleep deprivation, exposure to extreme hot or cold, placing a smelly hood over the head of a prisoner, forcing a prisoner to stand or squat for hours,³⁷ and “playing on his fears for himself and his family.”³⁸ These types of “enhanced” interrogation techniques are less violent, but remain coercive and sometimes effective.³⁹ “Although excruciating for the victim, these tactics generally leave no permanent marks and do no lasting physical harm.”⁴⁰

Since September 11, 2001, imminent fear of another terrorist attack has led United States military personnel to use more aggressive forms of interrogation in the “War on Terror,” specifically “torture lite.”⁴¹ In testimony before the Senate Select Committee on Intelligence on September 26, 2002, former C.I.A. Chief of the Counterterrorist Center Cofer Black said, “All I want to say is that there was ‘before’ 9/11 and ‘after’ 9/11. After 9/11 the gloves came off.”⁴² A Newsweek article in November of 2005 reported that “[a]t one point, the Bush administration formally told the CIA it couldn’t be prosecuted for any technique short of inflicting the kind of pain that accompanies ‘organ failure’ or ‘death’.”⁴³ The success of implementing these tactics has produced mixed results.⁴⁴ On some occasions, it has led to the successful prevention of possible terrorist attacks.⁴⁵ British intelligence used some torture lite tactics to uncover the

34. *Id.* at 52-53.

35. *Id.* at 475-47.

36. Evan Thomas & Michael Hirsh, *The Debate Over Torture*, NEWSWEEK, Nov. 21, 2005, at 27, 28.

37. *Id.* at 27-28.

38. Bowden, *supra* note 1, at 53.

39. Thomas, *supra* note 36, at 28.

40. Bowden, *supra* note 1, at 53.

41. *See generally* Thomas, *supra* note 36, at 28.

42. *Joint Investigation: Before the United States Senate Select Committee on Intelligence*, 109th Cong. (2002) (Statement of Cofer Black, Former Chief of the Counterterrorist Center, Central Intelligence Agency).

43. Thomas, *supra* note 36, at 28.

44. *See id.* at 28.

45. *Id.*

command structure of the Irish Republican Army (IRA).⁴⁶ On more than one occasion, Israel successfully employed these tactics to stop Palestinian suicide bombers from striking.⁴⁷ A second wave of attacks by al Qaeda against targets on the West Coast of the United States was supposedly prevented because of the enhanced interrogation techniques used on Khalid Shaikh Mohammed,⁴⁸ the mastermind of September 11th.⁴⁹ In other situations, the use of these techniques has produced futile and often false information. Often, prisoners that are exposed to prolonged pain or other torture lite techniques will say anything, true or false, to make the pain stop.⁵⁰ The most appropriate illustration of this point is through the experiences of Senator John McCain, a Prisoner Of War during Vietnam who was exposed to horrific acts of torture, who said:

In my experience, abuse of prisoners often produces bad intelligence because under torture a person will say anything he thinks his captors want to hear—whether it is true or false—if he believes it will relieve his suffering. I was once physically coerced to provide my enemies with the names of the members of my flight squadron, information that had little if any value to my enemies as actionable intelligence. But I did not refuse, or repeat my insistence that I was required under the Geneva Conventions to provide my captors only with my name, rank and serial number. Instead, I gave them the names of the Green Bay Packers' offensive line, knowing that providing them false information was sufficient to suspend the abuse.⁵¹

In 2004 “[t]he infamous pictures from Abu Ghraib prison in Iraq indelibly brought home how”⁵² certain torture tactics, primarily methods of torture lite,

46. *Id.*

47. *Id.*

48. See generally Bowden, *supra* note 1, at 51-53 (Khalid Shaikh Mohammed (“KSM”) “is considered the architect of the two attempts on the World Trade Center: the one that failed, in 1993, and the one that succeeded [on September 11, 2001]. He is also believed to have been behind the attacks on the U.S. embassies in Kenya and Tanzania in 1998, and on the USS *Cole* [in 2000], and behind [the execution] of *The Wall Street Journal* reporter Daniel Pearl” He is also a close associate of Osama bin Laden and has been called the operations chief of al-Qaeda. Additionally, he is considered by many to be one of the biggest catches in the United States’ “War on Terror” for his far reaching knowledge of the inner-workings of the al-Qaeda terrorist network.).

49. Thomas, *supra* note 36, at 28.

50. See Bowden, *supra* note 1, at 53.

51. Sen. John McCain, *Torture’s Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34 [hereinafter McCain].

52. PHR Report, *supra* note 6, at 1.

were being used by the United States military forces and may continue today in Iraq, Afghanistan, Guantanamo and other places around the world.⁵³ The allegations have ranged from prolonged isolation and sleep deprivation to cultural and sexual humiliation of detainees.⁵⁴ Since Abu Ghraib, eleven separate investigations have been conducted by the Pentagon into alleged misconduct and prisoner abuse by military officials.⁵⁵

One common technique in all three areas of operation (Iraq, Afghanistan, and Guantanamo Bay) throughout the “War on Terror” has been prolonged isolation.⁵⁶ The use of isolation forms a large part of the housing system at Guantanamo.⁵⁷ Some reports have said that “detainees at Guantanamo [are] being kept in isolation for anywhere from . . . three months to [eighteen] months.”⁵⁸ Additionally, in its February 2004 report, the International Committee of the Red Cross (ICRC) reported that detainees at the Baghdad International Airport were being “held for nearly [twenty-three] hours a day in strict solitary confinement in small concrete cells devoid of daylight.”⁵⁹ The devastating effects associated with prolonged isolation “include depression . . . difficulty with concentration and memory . . . hallucinations and perceptual distortions, [and] paranoia.”⁶⁰ “In November 2002, FBI agents at Guantanamo Bay observed a detainee after he had been subjected to intense isolation in a cell that was continually flooded with light for over three months.” “They reported that the detainee was ‘evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end).’”⁶¹

Another common interrogation tactic employed by United States military personnel is sleep deprivation, which ranges in degree and method, but often

53. See Bowden, *supra* note 1, at 54 (reporting that “[s]cores of other detainees, considered leaders, have been or are being held at various locations around the world: in Pakistan, Saudi Arabia, Egypt, Sudan, Syria, Jordan, Morocco, Yemen, Singapore, the Philippines, Thailand, and Iraq.”).

54. See generally PHR Report, *supra* note 6, at 1-7.

55. Thomas, *supra* note 36, at 31.

56. PHR Report, *supra* note 6, at 3.

57. *Id.*

58. *Id.*

59. International Committee of the Red Cross [ICRC], Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation, at para. 43 (Feb. 2004).

60. PHR Report, *supra* note 6, at 10.

61. *Id.* (quoting the letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, to Major General Donald J. Ryder, Department of the Army (July 14, 2004), available at http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf (last visited Dec. 15, 2006)).

involves waking the detainees every fifteen minutes, continually playing loud music, and keeping bright lights on at all times.⁶² Military personnel, in describing how sleep deprivation was employed at the naval base in Guantanamo, reported:

[A]n inmate was awakened, subjected to an interrogation . . . then returned to a different cell. As soon as the guards determined the inmate had fallen into a deep sleep, he was awakened again for interrogation after which he would be returned to yet a different cell. This could happen five or six times during a night.⁶³

By most accounts, sleep deprivation produces nothing more than disorientation and confusion.⁶⁴ “During the Spanish Inquisition 500 years ago, priests” tried to get infidels to talk by using sleep deprivation, but found that it only induced hallucinations in the prisoners.⁶⁵ “[D]uring the Korean War, [after] 36 of 59 captured U.S. airmen confessed to war crimes” they did not commit, many in the United States feared that the Communists had developed a horrifying new method of torture or brainwashing to extract these false confessions.⁶⁶ After subsequent investigation, the United States learned that the tactic employed was actually prolonged, chronic sleep deprivation.⁶⁷ The health consequences associated with long periods of sleep deprivation “include [cognitive] ‘impairment[] in memory, learning . . . verbal processing, and decision-making,’”⁶⁸ as well as speech impairments and loss of short-term memory.⁶⁹ Richard Schwab, a medical director for the University of Pennsylvania’s Center for Sleep Disorders, has reported that “[a]fter one night of lost sleep, people’s judgment is impaired, their reactions slow, they have trouble

62. *See id.* at 4-5.

63. Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, at A1.

64. *See generally* PHR Report, *supra* note 6, at 11.

65. Thomas, *supra* note 36, at 27.

66. April Witt, *In Pr. George’s Homicides, No Rest for the Suspects*, WASH. POST, June 4, 2001, at A1.

67. *Id.*

68. PHR Report, *supra* note 6, at 11 (referencing to NOLEN-HOEKSEMA S., *ABNORMAL PSYCHOLOGY* 627 (McGraw-Hill 2d ed. 2005)).

69. *Id.* (referencing to 1 KAPLAN AND SADOCK’S *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 289 (B Sadock & V Sadock eds., Lippincott Williams & Wilkins 8th ed. 2005)).

making decisions and they are prone to mistakes After two nights . . . people can become temporarily psychotic and hallucinate.”⁷⁰

Other common interrogation techniques employed in Afghanistan, Guantanamo Bay, and Iraq include sexual and cultural humiliations, as well as physical abuses and the strategic use of detainees' phobias against them.⁷¹ The use of humiliation is a way to break down a detainee's resistance.⁷² These methods include forced nudity and grooming, using dogs during interrogations to incite fear, and using female interrogators,⁷³ which would “violat[e] Muslim taboos regarding sex and contact with women”⁷⁴ During late 2002, an FBI Special agent reported that he had observed a female United States military officer conducting an interrogation on a detainee at Guantanamo Bay who “was shackled and [had] his hands . . . cuffed to his waist.”⁷⁵ During this interrogation, through the surveillance camera, the agent observed the female interrogator “whispering in the detainee's ear, and caressing and applying lotion to his arms (this was during Ramadan when physical contact with a woman would have been particularly offensive to a Moslem male).”⁷⁶

Perhaps the most appalling behavior by United States military forces occurred at Abu Ghraib prison in Iraq, where “Maj[or] Gen[eral] Antonio Taguba confirmed in April 2004 that abuses by military police guards . . . included punching, slapping and kicking detainees; forcing naked male detainees to wear women's underwear; forcing groups of male detainees to masturbate . . . [and] letting a dog bite and severely injure a detainee”⁷⁷ The Physicians for Human Rights Report indicates that the behavior of military personnel at Abu Ghraib and the extreme forms of sexual humiliation shown in the photographs were not routine.⁷⁸ In fact, two former Pakistani prisoners at Guantanamo Bay told a reporter that they were not mistreated at all, except for some rough treatment immediately following their capture.⁷⁹ The two prisoners said, “[t]hey both felt bored, lonely, frustrated, angry, and helpless . . . but neither believed

70. Witt, *supra* note 66, at A1 (“Richard Swab . . . [also] said depriving people of sleep during prolonged interrogation and questioning can help extract confessions, even from the innocent.”).

71. See generally Thomas, *supra* note 36, at 31.

72. PHR Report, *supra* note 6, at 5.

73. See PHR Report, *supra* note 6, at 5-7.

74. *Id.* at 6.

75. Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, to Major General Donald J. Ryder, Department of the Army ¶ 1 (July 14, 2004), available at http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf. (last visited Oct. 12, 2006).

76. *Id.*

77. Thomas, *supra* note 36, at 31.

78. PHR Report, *supra* note 6, at 6.

79. Bowden, *supra* note 1, at 74.

that he would be harmed by [their] American captors”⁸⁰ However, a Southern Command report in early 2005 indicated that at least one detainee at Guantanamo Bay “was forced to perform dog tricks on a leash, was straddled by a female interrogator, told that his mother and sister were whores, forced to wear a woman’s bra and thong on his head during interrogation . . . and [was] subjected to an unmuzzled dog to scare him.”⁸¹

Many argue that the prisoner abuses were a direct result of the faulty implementation of “strategic interrogation” methods authorized by the Bush Administration.⁸² The techniques were poorly implemented and inadequately supervised, which resulted in unfortunate, untrained United States soldiers wanting to follow orders, but not knowing for sure what those orders were.⁸³ The case of Private Lynndie England, the female Army MP at Abu Ghraib who was shown in many of the now infamous pictures participating in the abuse of prisoners, demonstrates this confusion.⁸⁴ England was court-martialed and maintained throughout her ordeal that she was simply acting under orders from her superior officers.⁸⁵ She stated that she and other soldiers were ordered to “soften up” certain prisoners and make them weak for interrogation before other governmental agencies, like the CIA, could step in to conduct the actual interrogation.⁸⁶ The government has continually reiterated that the abuse of prisoners at United States detention facilities, such as Abu Ghraib, is nothing more than “the act of a few bad apples.”⁸⁷ However, there is stronger evidence that “the Bush administration made understandable decisions to permit the use of harsh interrogation techniques against a few individuals. [These] decisions were made in such an atmosphere of secrecy and confusion that the whole process spun out of control and produced atrocities” for the whole world to see.⁸⁸ Not only are these photos a source of embarrassment, but they could actually work against the United States’ national security.⁸⁹ The United States’ enemies could

80. *Id.*

81. Thomas, *supra* note 36, at 31.

82. *See id.* at 32-33.

83. *Id.* at 32.

84. Tony Gutierrez, *Lynndie England Convicted in Abu Ghraib Trial*, USA TODAY, Sept. 25, 2005, available at http://www.usatoday.com/news/nation/2005-09-26-england_x.htm (last visited Dec. 15, 2006) (Discussing the September 2005 sentencing of Lynndie England who “was convicted . . . by a military judge on six of seven counts.” England was also in one of the more famous pictures from the Abu Ghraib scandal, where she was pictured holding a naked inmate from a leash).

85. *The Pictures: Lynndie England*, CBS NEWS, May 12, 2004, available at <http://www.cbsnews.com/stories/2004/05/12/60II/main617121.shtml> (last visited Sept. 4, 2006).

86. *Id.*

87. *Id.*

88. Thomas, *supra* note 36, at 29.

89. H.R. REP. NO. 109-374, at 5 (2006).

use these photos as a recruiting tool for generating more hatred and animosity towards our country and our troops abroad.⁹⁰

In February 2006, a report by five U.N. officials called for the closing of the Guantanamo Bay detention center, and stated that "U.S. treatment of detainees in some cases amounted to torture"⁹¹ U.N. Secretary-General Kofi Annan echoed the suggestions of the report and said that "the U.S. should close the prison 'as soon as possible.'"⁹² The report, which was "based on an [eighteen]-month investigation by five U.N. officials,"⁹³ cites specific concerns with the U.S. treatment of hunger strikers.⁹⁴ Detainees, through their lawyers, "said long nasal tubes were brutally inserted and removed twice a day, causing intense pain, bleeding and vomiting."⁹⁵

The United States quickly dismissed the report, "calling it a 'rehash' of old allegations," and stating that detainees "were force-fed only to save their lives."⁹⁶ The United States cited specific concerns that the conclusions drawn by the U.N. officials were based on interviews with family members of detainees and former detainees.⁹⁷ White House Press Secretary Scott McClellan stated that the "terrorists that are being kept at Guantanamo Bay . . . are trained to provide false information, and al Qaeda training manuals talk about ways to disseminate false information"⁹⁸ The five-member team canceled a visit to Guantanamo Bay in November 2005 after the United States denied them access to the prisoners.⁹⁹ The reason U.N. officials were denied access to detainees is that the "International Committee of the Red Cross is the only independent organization allowed to visit detainees at Guantanamo and U.S. military bases in Afghanistan and Iraq, under a strict confidentiality agreement."¹⁰⁰

Today, this shroud of secrecy and restricted access has produced many questions regarding the treatment of detainees held in the custody of the United States and the nature of interrogation tactics being used by United States forces because "[m]uch of what [takes] place in the closed facilities where detainees

90. H.R. REP. NO. 109-374, at 5-6.

91. Maggie Farley, *U.S. Rejects Guantanamo Report*, LOS ANGELES TIMES, Feb. 17, 2006.

92. *Id.*

93. *See id.* (The five U.N. officials, called rapporteurs, have expertise in examining allegations of arbitrary detention, torture and violations of human rights. The U.N. Human Rights Commission appoints these officials for three-year terms.).

94. *Id.*

95. *Id.*

96. *Id.*

97. Farley, *supra* note 91.

98. *Id.*

99. *Id.*

100. *Id.*

[are] kept and interrogated remains secret.”¹⁰¹ “In particular, the policies and practices of the Central Intelligence Agency (CIA) are almost completely shielded from public scrutiny.”¹⁰² In the last few years, decisions were made by the Bush Administration to classify interrogation techniques, which were previously accessible to the public.¹⁰³ Should these policies and interrogation practices be kept secret? After all, “if the government is not engaging in improper interrogation tactics, why won’t it fully reveal its methods?”¹⁰⁴ This creates a dilemma between protecting the interests of national and operational security and disclosing techniques employed by interrogators for public comment and scrutiny.¹⁰⁵ “The government’s reluctance to release information about the exact interrogation techniques used on detainees is obviously rooted in the need for operational security.”¹⁰⁶ The biggest concern is that eventually, after widespread dissemination of the precise methods and tactics employed by American interrogators, al Qaeda or some other terrorist group could eventually develop counter-intelligence techniques to thwart any attempts at gathering information from one of its members held in United States custody.¹⁰⁷ Religious extremists pose the biggest obstacle to effective interrogation.¹⁰⁸ There is abundant evidence that many of these extremists perform a kind of self-hypnosis during interrogations,¹⁰⁹ with the most common resistance method being memorization and continuous recital of the Qur’an during questioning.¹¹⁰

The desire of government officials and military personnel to maintain secrecy in interrogations is further supported by a nine-page sworn statement from the Director of the Defense Intelligence Agency (DIA), which is commonly referred to as the Jacoby Declaration.¹¹¹ This Declaration was submitted to the District Court for the Southern District of New York on behalf of the government in *Padilla v. Bush*¹¹² by Vice Admiral Lowell E. Jacoby (USN), the Director of the DIA.¹¹³ The Declaration shed light not only on the government’s concern for maintaining secrecy in the interrogation process but also on the government’s fear that providing immediate access to counsel for suspects in the

101. PHR Report, *supra* note 6, at 2.

102. *Id.*

103. *Id.* at 15-16.

104. Addicott, *supra* note 8, at 878.

105. *See id.* at 877-79.

106. *Id.* at 878.

107. *See id.* at 877-79.

108. Bowden, *supra* note 1, at 64.

109. *Id.*

110. Thomas, *supra* note 36, at 31.

111. Jacoby Declaration, *supra* note 15, at 1.

112. *Padilla v. Bush*, 233 F. Supp. 2d 564, 570 (S.D.N.Y. 2002).

113. *See Jacoby Declaration*, *supra* note 15, at 1.

“War on Terror” will interrupt the gathering of useful intelligence.¹¹⁴ Vice Admiral Jacoby stated that “[o]ne of DIA’s highest priorities is to collect intelligence on terrorists, including al Qaida [sic] members, by interrogation and other means.”¹¹⁵ The Vice Admiral then went on to explain that “the security of this Nation and its citizens is dependent upon the United States government’s ability to gather . . . [useful intelligence] and disseminate” it in a timely and effective fashion to the public.¹¹⁶ To that effect, one of the primary tools that the United States has at its disposal when gathering intelligence and information is interrogation, which Vice Admiral Jacoby defined as “the art of questioning and examining a source to obtain the maximum amount of usable, reliable information in the least amount of time to meet intelligence requirements.”¹¹⁷ José Padilla, an American citizen, was arrested in Chicago in 2002 due to both his ties to the terrorist network of Al Qaeda and his implication in a plot to use a radiological, or dirty, bomb in the United States.¹¹⁸ In fact, the capture of José Padilla in 2002 was the direct result of effective intelligence gathering, which would not have occurred without the interrogation of other detainees held in United States custody, who knew of al Qaeda’s plot to detonate a “dirty bomb” within the United States.¹¹⁹ In the case against him, *Padilla v. Bush*,¹²⁰ the primary issue was the legality of whether an American citizen could be labeled an “enemy combatant” and detained in the United States without trial or access to an attorney.¹²¹

114. *See id.* at 1-9.

115. *Id.* at 2.

116. *Id.* at 2.

117. *Id.* at 4.

118. *See generally* Jacoby Declaration, *supra* note 15, at 7 (discussing that, in 2002, Jose Padilla—an American citizen—was arrested in Chicago and was “implicated in several plots to carry out attacks against the United States, including the possible use of a “dirty” radiological bomb in Washington DC or elsewhere, and the possible detonation of explosives in hotel rooms, gas stations, and train stations.” He is also alleged to have ties to the Al Qaeda terrorist network and Osama Bin Laden).

119. *See id.* at 5-8. At the time the declaration was written in 2002 “interrogations have been conducted at many locations worldwide by personnel from the DIA and other organizations in the Intelligence Community. The results of these interrogations have provided vital information to the President . . . and others involved in the War on Terrorism. It is estimated that more than 100 additional attacks on the United States and its interests have been thwarted since 11 September 2001 by the effective intelligence gathering efforts of the Intelligence Community and others.” *Id.* at 6.

120. *Padilla v. Bush*, 233 F. Supp. 2d 564, 570 (S.D.N.Y. 2002).

121. *See Padilla v. Rumsfeld*, 352 F.3d 695, 718 (2d Cir. 2003), *remanded*, 542 U.S. 426 (2004). The Second Circuit Court of Appeals held that, absent specific congressional authorization, the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat.

In addition to the collection of information, the purpose of detaining an enemy combatant also serves to protect the United States from future acts of violence by this specific detainee, ensuring that he does not immediately return to resume fighting against the United States and its allies.¹²² Vice Admiral Jacoby also stressed that interrogation methods and detention practices must maintain their secrecy because we are faced with a different kind of enemy in the “War on Terror.”¹²³ Sophisticated terrorist groups, such as Al Qaeda, have studied and learned many counterintelligence techniques employed by the United States, including the creation of a training manual that “provides instructions regarding, among other things: the collection of intelligence; counter-interrogation techniques; and means of covert communication during periods of capture.”¹²⁴ As information about the methods and tactics employed by United States interrogators becomes widely accessible to the public, the enemy’s collective knowledge on how to counteract those methods increases.¹²⁵ What results, according to Vice Admiral Jacoby, is an “[i]mpairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaida [sic]—[which] would undermine our Nation’s intelligence gathering efforts, thus jeopardizing the national security of the United States.”¹²⁶ As evidence of this problem, some counselors and translators for “detainees at Guantanamo Bay have been investigated for possible espionage” in the last few years.¹²⁷

“The primary protection against torture or ill-treatment is the Torture Convention which is effectively unenforceable by the international community.”¹²⁸ One reason that countries can have some flexibility under the Torture Convention and other international agreements is because these conventions or treaties are essentially self-policing systems, with a great deal of trust placed on each individual state actor to implement and ensure that its law enforcement personnel and civil or military personnel comply with the guidelines.¹²⁹ For example, “until about 1970, North Vietnam ignored its [international] obligations not to mistreat” and torture the American POWs they held in captivity.¹³⁰ North Vietnam’s justification was that an unlawful war had been declared against them; therefore, American POWs were not entitled to

122. Addicott, *supra* note 8, at 868-69.

123. Jacoby Declaration, *supra* note 15, at 6.

124. *Id.*

125. *Id.*

126. *Id.*

127. Addicott, *supra* note 8, at 879 (citing Eric Schmitt & Thom Shanker, *Fear of Sabotage by Mistranslation at Guantanamo*, N.Y. TIMES, Oct. 7, 2003, at A1).

128. *Id.* at 873.

129. Torture Convention, *supra* note 4, at art. 10, para. 1.

130. McCain, *supra* note 51, at 34-35.

international protections.¹³¹ Article 10 of the Torture Convention states that each state party shall “ensur[e] that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military,”¹³² as well as any “medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”¹³³

When there is “reasonable ground to believe that an act of torture has been committed [sic] in any territory under its jurisdiction,”¹³⁴ each state party is responsible for carrying out its own prompt and impartial investigation.¹³⁵ Additionally, an aggrieved party’s redress is dependent on the State’s commitment to ensure that its legal system offers “the victim of an act of torture . . . [the] enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.”¹³⁶ The success of the Torture Convention and its provisions are directly contingent on the willingness and the commitment of the state actor to individually enforce those provisions, which leaves it “effectively unenforceable by the international community.”¹³⁷

III. THE UNITED STATES’ RESPONSE

*Many of my comrades were subjected to very cruel, very inhumane and degrading treatment, a few of them unto death. But every one of us . . . knew and took great strength from the belief that we were different from our enemies, that we were better than them, that we, if the roles were reversed, would not disgrace ourselves by committing or approving such mistreatment of them.*¹³⁸

Senator John McCain

131. *Id.* at 35.

132. Torture Convention, *supra* note 4, at art. 10, para. 1.

133. *Id.*

134. *Id.* at art. 12.

135. *Id.*

136. *Id.* at art. 14, para. 1.

137. Addicott, *supra* note 8, at 873.

138. McCain, *supra* note 51, at 36. McCain goes on to state that he and his comrades “drew [great] strength from their faith in each other, from their faith in God and from their faith in [their] country. . . . That faith was indispensable not only to our survival, but to our attempts to return home with honor. For without honor, our homecoming would have had little value to us.” *Id.*

A. The Backdrop of the McCain Amendment

Against the backdrop of continual skepticism regarding United States interrogation techniques and constant complaints of prisoner abuse, Senator John McCain was determined to do something because, as he said, “America’s position in the world is at an all-time low.”¹³⁹ The McCain Amendment, which is part of the 2006 Defense Appropriations Act, outlaws “cruel, inhuman or degrading” interrogation techniques of all foreign prisoners, regardless of their nationality or the physical location where they are being held in the world.¹⁴⁰ McCain’s Amendment is written with a strong commitment to basic humanitarian values.¹⁴¹ He stresses that the war in which we are currently engaged is a war of ideas and “[p]risoner abuses exact a terrible toll on us in this war of ideas.”¹⁴² “They inevitably become public, and when they do they threaten our moral standing, and expose us to false but widely disseminated charges that democracies are no more inherently idealistic and moral than . . . [terrorist] regimes.”¹⁴³ When United States troops mistreat enemy prisoners, they endanger themselves if they are someday held captive by that enemy.¹⁴⁴ McCain focuses on the fact that, although Al Qaeda is far from a conventional enemy and disregards any notion of the principle of reciprocity, “we should not undermine today our defense of international prohibitions against torture and inhumane treatment of [detainees] that we will need to rely on in the future.”¹⁴⁵ “It is far better to embrace a standard that might be violated in extraordinary circumstances than to lower our standards to accommodate a remote contingency.”¹⁴⁶

Prior to the McCain Amendment, a gray area existed with regard to the United States treatment of detainees housed in foreign countries around the world because “the vast majority of . . . detainees are aliens located outside the United States,”¹⁴⁷ and therefore they were not entitled to the Constitutional protections under the Fifth and Fourteenth Amendments.¹⁴⁸ Since these detainees were not entitled to these Constitutional protections due to the physical location of their detention, their primary protection against torture or ill-treatment was the Torture Convention, which as stated previously, is “effectively

139. Thomas, *supra* note 36, at 32.

140. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1003(d), 119 Stat. 2739 (2005).

141. McCain, *supra* note 51, at 34-35.

142. *Id.* at 35.

143. *Id.*

144. *Id.* at 34.

145. *Id.* at 35.

146. *Id.* at 36.

147. Addicott, *supra* note 8, at 873.

148. *Id.*

unenforceable by the international community.”¹⁴⁹ The McCain Amendment is an attempt to clarify this gray area and ensure that detainees held by United States military personnel, regardless of physical location, are not subject to torture or other forms of cruel, inhuman or degrading treatment.¹⁵⁰

Additionally, the McCain Amendment is an attempt to provide assurances to individuals subjected to rendition, that they will not face torture or ill-treatment in the country to where they are being transferred.¹⁵¹ “Rendition is a term used in the international law enforcement community for the transfer of suspects from one country to another.”¹⁵² “According to press reports, the President has expanded the CIA’s authority to conduct renditions, and some reports suggest that over 100 terrorism related renditions have occurred.”¹⁵³ “These renditions of terrorist suspects have been surrounded by allegations of abuse by the receiving country, confusion as to what type of assurances regarding treatment have been obtained by the U.S. and allegations that the rendition occurred without the consent of the country from which the suspect was transferred.”¹⁵⁴ Transferring a person to another country where they may be subjected to torture or other cruel treatment is in clear violation of the Torture Convention.¹⁵⁵ Article 3 of the Torture Convention states that no country “shall expel . . . or extradite a person to another State where there are substantial grounds for believing that [person] would be in danger of being subjected to torture.”¹⁵⁶ Under Article 3, before someone is transferred to another state, the transferring country must take into consideration whether the receiving country has shown a “consistent pattern of gross, flagrant or mass violations of human rights.”¹⁵⁷

The Administration’s official position is that renditions have occurred, but people are not being transferred to countries where it is believed they will be tortured.¹⁵⁸ Still, as late as February 2006, there have been reports of individuals being transferred to countries where they are being subjected to torture.¹⁵⁹ For example, “an Egyptian-born Australian in American custody, was allegedly

149. *Id.*

150. *See generally* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739 (2005).

151. *See* Detainee Treatment Act § 1003 (a).

152. H.R. REP. NO. 109-374, at 6 (2006).

153. H.R. REP. NO. 109-374, at 6.

154. H.R. REP. NO. 109-374, at 6.

155. *See generally* Torture Convention, *supra* note 4, at art. 3.

156. *Id.* at art. 3, para. 1.

157. *Id.* at art. 3, para. 2.

158. H.R. REP. NO. 109-374, at 6-7.

159. H.R. REP. NO. 109-374, at 6-7.

transported from Pakistan to Afghanistan to Egypt to Guantanamo Bay.”¹⁶⁰ He alleges that, while being held in Egypt, he was subjected to beatings and electric shocks for six months.¹⁶¹ With the introduction of the McCain Amendment, instances such as this would be forbidden and the protections afforded to individuals subject to renditions would be clearly spelled out.¹⁶²

As stated earlier, the McCain Amendment’s specific focus is on preventing the “cruel, inhuman, or degrading treatment or punishment” of any individual regardless of their physical location.¹⁶³ The protection extends to any “individual in the custody or under the physical control of the United States Government, *regardless of nationality or physical location.*”¹⁶⁴ To amplify the point, specific language inserted under the Construction subsection of section 1003 of the Detainee Treatment Act states, “nothing in this section shall be construed to impose *any geographical limitation* on the applicability of the prohibition against cruel, inhuman, or degrading treatment.”¹⁶⁵ National security advisor, Stephen J. Hadley, described the Amendment as making the ban on torture and other forms of cruel or degrading treatment “a matter of law that applies worldwide, at home and abroad.”¹⁶⁶ Additionally, the Amendment clarifies the term “cruel, inhuman, or degrading treatment or punishment” to mean the “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments,” as well as the definition under the Torture Convention.¹⁶⁷ The Amendment seeks to ensure compliance by specifically stating that “no person under the effective control of the Department of Defense . . . shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence

160. H.R. REP. NO. 109-374, at 6.

161. H.R. REP. NO. 109-374, at 6. Additionally, the House Report details two other cases. The first one deals with “[a] dual Canadian-Syrian citizen . . . [who] was allegedly rendered to Syria, where he was allegedly tortured and interrogated for suspected terrorist activities with the acquiescence of the United States.” The second case deals with “U.S. intelligence operatives allegedly seiz[ing] in Italy and render[ing] to Egypt an Islamic cleric, allegedly without the consent of the Italian Government.” *See id.*

162. *See generally* Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1003, 119 Stat. 2739 (2005).

163. Detainee Treatment Act § 1003 (a).

164. Detainee Treatment Act § 1003 (a) (emphasis added).

165. Detainee Treatment Act § 1003 (b) (emphasis added).

166. Editorial, *Unchecked Abuse*, WASH. POST, Jan. 11, 2006, at A20, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001536_pf.html (last visited Nov. 15, 2006).

167. Detainee Treatment Act § 1003 (d).

Interrogation.”¹⁶⁸ According to Senator McCain, full compliance under the Army Field Manual would “still give interrogators some leeway.”¹⁶⁹

B. Compliance Under the United States Army Field Manual

The United States Army Field Manual on Intelligence Interrogation defines interrogation as the “process of examining a source”¹⁷⁰ which allows the interrogator “to obtain the maximum amount of usable information.”¹⁷¹ Such information has to be obtained “in a lawful manner, [and] in a minimum amount of time.”¹⁷² The information produced during an interrogation must be timely, complete, clear, and accurate in order for the interrogation to be considered a success.¹⁷³ Furthermore, the Army Field Manual states that the interrogator “has a position of authority over the source,” who upon realizing this position will “believe[] his future might depend upon his association with the interrogator.”¹⁷⁴ With respect to torture and use of force, the Army Field Manual is very specific in its prohibition against such acts.¹⁷⁵ The official language in the manual states that the “US policy expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.”¹⁷⁶ The Manual goes on to describe the use of force as a poor technique that “yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.”¹⁷⁷ Although the acts described above are prohibited, they should “not be confused with psychological ploys, verbal trickery, or other nonviolent or noncoercive ruses used by the interrogator.”¹⁷⁸

168. Detainee Treatment Act § 1002 (a).

169. Thomas, *supra* note 36, at 32.

170. DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992), at 1-6, available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf#search=%22FM%2034-52%20Field%20Manual%22> (last visited Nov. 15, 2006), [hereinafter “Army Field Manual”] (The U.S. Department Army Field Manual never once uses the words “prisoner,” “insurgent,” etc. Instead, the Field Manual continually uses the word “source” when discussing authorized interrogation techniques.).

171. *Id.*

172. *Id.* at 1-6 to 1-7.

173. *Id.* at 1-7.

174. *Id.* at 1-14.

175. *See generally id.* at 1-7 to 1-9.

176. Army Field Manual, *supra* note 170, at 1-8.

177. *Id.* The Army Field Manual adds that the use of force is not only a poor technique but also that “experience indicates that the use of [force on detainees] is not necessary to gain the cooperation of” the source. *Id.*

178. *Id.* Additionally, the Army Field Manual states that “[t]he psychological techniques and principles . . . should neither be confused with . . . unauthorized techniques such as brainwashing . . . mental torture, or any other form of mental coercion to include drugs.” *Id.*

With respect to the authorized approaches used by interrogators to get information, the Army Field Manual provides an exhaustive list of different approach techniques.¹⁷⁹ A majority of these approaches center on psychological techniques designed to exploit the mental fragility of the source.¹⁸⁰ Almost all of these techniques involve nothing that is physically demanding, threatening, or coercive by the interrogator; rather, they incorporate some sort of trickery or mind-game.¹⁸¹ For instance, a technique such as the “We Know All” Approach is intended to convince the source that the United States military forces already know everything, thus making resistance useless.¹⁸² The interrogator prepares all known information about the source, and after convincing the source that he or she has nothing to say which is unknown, interjects questions for which the interrogator does not have the corresponding answers.¹⁸³ Another illustration is the “Rapid Fire” Approach, which involves a “psychological ploy based upon the principles that [e]veryone likes to be heard when he speaks [and that] [i]t is confusing to be interrupted in mid-sentence with an unrelated question.”¹⁸⁴ This technique authorizes the interrogator to ask a series of unrelated questions in such a way that the source does not have enough time to answer one question before the next question is asked.¹⁸⁵ The intended result of this approach is to “confuse[] the source, [because] he will tend to contradict himself, as he has little time to [prepare] his answers.”¹⁸⁶

While all of the techniques authorized by the Army Field Manual are in clear compliance with the international prohibitions against torture and inhumane treatment by upholding the United States commitment to humanitarian values, one is left questioning the effectiveness of some of the techniques in practice, particularly with the kind of enemy that the United States faces today.¹⁸⁷ For example, the “Emotional Love Approach” instructs the interrogator to “focus on the anxiety felt by the source about the circumstances in which he finds himself . . . [and] direct the love the source feels toward the appropriate object: family, homeland, or comrades.”¹⁸⁸ A successful interrogator might effectively exploit the source by explaining to the source that providing information may bring “a quicker end to the war [and] save his

179. *See generally id.* at 3-13 to 3-20.

180. *See generally id.*

181. *See generally id.*

182. Army Field Manual, *supra* note 170, at 3-19.

183. *Id.*

184. *Id.* at 3-20.

185. *Id.*

186. *Id.*

187. *See id.* at 3-13 to 3-20.

188. Army Field Manual, *supra* note 170, at 3-15.

comrades' lives,"¹⁸⁹ and that failing to do so could result in their deaths.¹⁹⁰ Another authorized approach is the "Silence" Approach, which can be used on sources that appear nervous or confident.¹⁹¹ The Field Manual instructs the interrogator that "[w]hen employing this technique, the interrogator says nothing to the source, but looks him squarely in the eye, preferably with a slight smile on his face."¹⁹² "It is important not to look away from the source but force him to break eye contact first."¹⁹³

In the current context of the "War on Terror," how practically effective could these techniques really be? As stated in the Army Field Manual, the goal of the interrogation is to obtain usable information in the *least amount of time*.¹⁹⁴ Under the "Emotional Love Approach," explained above, does an Islamic extremist, who is willing to commit suicide for his cause, have any interest in bringing "a quicker end to the war to save his comrades' lives" on the battlefield, which would prompt him to provide information to interrogators?¹⁹⁵ After all, the United States is currently dealing with an unconventional enemy dedicated to the intentional destruction of innocent lives.¹⁹⁶ Senator John McCain has referred to al Qaeda as sociopaths that "will never be influenced by international sensibilities or open to moral suasion."¹⁹⁷ It is thus hard to imagine that any of these techniques will have any effect on Islamic extremists willing to end their lives for the destruction of innocent lives.¹⁹⁸

Problems associated with many of the approaches authorized by the Army Field Manual include the fact that some techniques require time-consuming preparation, while others risk that the source might eventually realize the trickery involved and refuse to cooperate.¹⁹⁹ The success of terrorism is imbedded in stealth and surprise.²⁰⁰ "To counter an enemy who relies on stealth and surprise, the most valuable tool is information . . ."²⁰¹ However, that information is only valuable if timely received by interrogators.²⁰² Interrogation techniques that fail

189. *Id.*

190. *See generally id.*

191. *Id.* at 3-20.

192. *Id.*

193. *Id.*

194. Army Field Manual, *supra* note 170, at 1-6 to 1.7.

195. *Id.* at 3-15.

196. McCain, *supra* note 51, at 35.

197. *Id.*

198. *See id.*

199. *See generally* Army Field Manual, *supra* note 170, at 3-13 to 3-20.

200. Bowden, *supra* note 1, at 53.

201. *Id.*

202. *See* Army Field Manual, *supra* note 170, at 1-6 to 1-7.

to provide timely information are useless in the “War on Terror.”²⁰³ For example, the “We Know All” Approach requires the interrogator to convince the source that the United States already knows everything the latter may have to offer.²⁰⁴ In order for this approach to be effective, the interrogator must organize, prepare, and commit to memory all available data on the source before the interrogation begins.²⁰⁵ This is a very time consuming process and an interrogator does not have the luxury of working from notes because it may show the source the limits of the information that is actually known.²⁰⁶

Another approach authorized by the Army Field Manual, which, as McCain has said, would still give interrogators some leeway, is the “Fear-Up (Harsh)” Approach.²⁰⁷ This approach allows the interrogator to “behave[] in an overpowering manner with a loud and threatening voice.”²⁰⁸ “The interrogator may even feel the need to throw objects across the room to heighten the source’s implanted feelings of fear.”²⁰⁹ However, this approach expressly warns the interrogator to take great care in ensuring that no violation of the Geneva Conventions against torture or ill-treatment is taking place.²¹⁰ The central focus of this approach is to instill fear in the source, and create the feeling that the source has no other option but to cooperate.²¹¹

C. The Use of Fear and Other “Aggressive” Techniques in Interrogation

The use of fear and coercion in interrogation has been a source of considerable debate for many years, although explicitly forbidden under the McCain Amendment and the Army Field Manual.²¹² The use of fear, primarily in the form of mock executions, such as waterboarding or exposure to extreme pain, have been supported by some and renounced by others. Waterboarding has received considerable press coverage, and involves the use of a technique “where a prisoner is restrained and blindfolded while an interrogator pours water on his face and into his mouth—causing the prisoner to believe he is being drowned. . . . [while in fact] there is no intention to injure him physically.”²¹³

203. This author posits that one could hardly argue that an interrogator or an interrogation system producing information about the September 11th attacks on September 13th represents an inefficient and useless endeavor. *See id.*

204. Army Field Manual, *supra* note 170, at 3-19.

205. *Id.*

206. *See id.*

207. *Id.* at 3-16.

208. *Id.*

209. *Id.*

210. Army Field Manual, *supra* note 170, at 3-16.

211. *See id.*

212. *See* Bowden, *supra* note 1, at 58-60.

213. McCain, *supra* note 51, at 36.

Many government officials, including Senator John McCain, have publicly renounced the use of waterboarding and other mock executions during interrogations.²¹⁴ McCain feels that waterboarding does constitute torture and has said:

[I]f you gave people who have suffered abuse as prisoners a choice between a beating and a mock execution, many, including me, would choose a beating. The effects of most beatings heal. The memory of an execution will haunt someone for a very long time and damage his or her psyche in ways that may never heal. In my view, to make someone believe that you are killing him by drowning is no different than holding a pistol to his head and firing a blank. I believe that it is torture, very exquisite torture.²¹⁵

However, the Administration and many of its lawyers have taken the position that the McCain Amendment would not necessarily forbid this technique, much less consider it to be torture.²¹⁶ Although it is hard to imagine someone arguing that using this technique is not cruel or degrading, the Justice Department has reasoned that this technique falls just short of torture and would still be permitted in certain circumstances.²¹⁷ The Administration's reluctance to label this technique outright torture is likely tied to the technique's proven effectiveness.²¹⁸ Mark Kirk,²¹⁹ a reserve Naval Intelligence officer who has personally been subjected to the technique, told a reporter in December of 2005 that "everyone breaks when waterboarded, usually in less than a minute, and that U.S. combat troops, pilots and others who might be captured routinely undergo the procedure as part of their training."²²⁰ Additionally, CIA officers reported that Khalid Sheikh Mohammed (KSM), the September 11th mastermind, was subjected to "waterboarding" and "held out for two and a half minutes before begging to talk."²²¹ KSM is regarded as the highest-ranking al Qaeda operative

214. *Id.* at 36.

215. *Id.*

216. See Morton M. Kondracke, Editorial, *McCain Amendment Goes Too Far Barring Coercive Interrogations*, ROLL CALL (Wash., D.C.), Dec. 15, 2005.

217. *Unchecked Abuse*, *supra* note 166.

218. See generally Kondracke, *supra* note 216.

219. U.S. Congressman Mark Steven Kirk, http://www.house.gov/kirk/about_mark.shtml (last visited Nov. 15, 2006) (Mark Kirk is a U.S. Congressman for the 10th Congressional District of Illinois. He "is a Naval Reserve intelligence officer who served during conflicts with Iraq, Haiti, and Bosnia. . . . The U.S. Navy named Kirk 'Intelligence Officer of the Year' in 1999 for his combat service in Kosovo.").

220. Kondracke, *supra* note 216.

221. *Id.*

captured, as well as the provider of valuable information in the “War on Terror.”²²² Clearly, the use of such technique would only be utilized on the highest value targets captured by the United States, such as another high-level operative like KSM; however, the debate continues as to whether the Bush Administration will consider waterboarding to be torture and forbid its use as an interrogation technique.²²³

Others support the notion that creating an atmosphere of profound fear is an effective technique.²²⁴ One retired Special Forces officer even suggested that “to make a man talk . . . [y]ou shoot the man to his left and the man to his right[, t]hen you can’t shut him up.”²²⁵ But it is the fear of having to endure intense pain, rather than the actual pain itself, that has had significant results.²²⁶ “[M]ost people cope with pain better than they think they will.”²²⁷ Once “people become . . . familiar with pain, they become conditioned to it.”²²⁸ The best illustration of this comes from the accounts of Bill Cowan, who spent three and a half years in Vietnam fighting in a highly volatile region located in the south of Saigon, where Vietcong battalions would launch surprise attacks from the muddy swamps of the area.²²⁹ Cowan’s unit “captured a Vietcong soldier who could warn of ambushes and lead them” to any troops hiding nearby.²³⁰ When the captured Vietcong soldier “refused to speak, wires were attached to [his] scrotum with alligator clips and electricity was cranked out of a 110-volt generator.”²³¹ Cowan reported, “It worked like a charm . . . [t]he minute the crank started to turn, [the Vietcong soldier] was ready to talk. We never had to do more than make it clear we could deliver a jolt. It was the fear more than the pain that made [him] talk.”²³²

However, outright threats of execution to a prisoner often prove fruitless in the end “because the sense of despair it induces can make the prisoner withdraw into depression—or, in some cases, see an honorable way out of [the] predicament.”²³³ It is the fear of the unknown or the fear of intense pain or execution, which has produced significant results.²³⁴

222. See generally Kondracke, *supra* note 216; see also Bowden, *supra* note 1, at 51-53.

223. See Kondracke, *supra* note 216.

224. Bowden, *supra* note 1, at 58-60.

225. *Id.* at 60.

226. *Id.* at 60.

227. *Id.*

228. *Id.* at 60.

229. *Id.* at 58-60.

230. Bowden, *supra* note 1, at 58.

231. *Id.* at 60.

232. *Id.*

233. *Id.*

234. See *id.*, at 58-60.

This ongoing debate comes at a time when some people, who have no objection to the use of coercive and aggressive interrogation techniques on high-value targets, have questioned whether the United States' interrogation tactics are forceful enough to make a difference in the "War on Terror."²³⁵ These people believe that current United States interrogation tactics amount to nothing more than "handling terrorists with kid gloves."²³⁶ One former CIA agent, with experience in South America, echoes that sentiment by stating "[e]verybody in the world knows that if you are arrested by the United States, nothing bad will happen to you."²³⁷

To illustrate this point, on March 27, 2006, Zacarias Moussaoui testified in his defense, against the advice from his attorneys, "at the federal [sentencing] trial that will determine if he serves the rest of his life in prison or [receives] the death penalty" for his role in the September 11th attacks.²³⁸ Moussaoui has long been referred to as the 20th hijacker of the September 11th attacks and would have actively pursued martyrdom that day with the other terrorists, but for his arrest in August of 2001.²³⁹ Moussaoui's testimony was a disturbing look into the mind of the enemy the United States now faces in the "War on Terror."²⁴⁰ Moussaoui admitted that he was the 20th hijacker and his intended mission was to hijack an airplane and crash it into the White House.²⁴¹ But it was his testimony regarding another subject that could present a strong argument for greater flexibility within interrogations of suspected terrorists.²⁴² Moussaoui testified that he lied to investigators after his arrest regarding his involvement with al Qaeda and continued to lie because he wanted the September 11th plan to go forward.²⁴³ The government has argued that the attacks may have been thwarted had Moussaoui been more cooperative with authorities.²⁴⁴

Part of the problem in the Moussaoui case was the failure of the FBI intelligence community to timely investigate clear warning signs regarding

235. *Id.* at 54-56.

236. Bowden, *supra* note 1, at 56.

237. *Id.*

238. *Moussaoui Shocks From Witness Stand*, CBS NEWS, Mar. 27, 2006, available at <http://www.cbsnews.com/stories/2006/03/23/terror/main1433313.shtml> (last visited Nov. 15, 2006).

239. *Id.*

240. *See id.*

241. *Id.*

242. *See id.*

243. *Id.*

244. *Moussaoui Shocks From Witness Stand*, *supra* note 238.

Moussaoui's possible terrorist intentions.²⁴⁵ Harry Samit, the FBI agent responsible for arresting Moussaoui in Minneapolis, has maintained since August 2001 that he repeatedly warned his superiors in the FBI "that Moussaoui might be a terrorist interested in hijacking an airliner."²⁴⁶ The question remains whether a more diligent investigation coupled with more aggressive interrogation techniques could have provided United States intelligence personnel with enough information to thwart the September 11th attacks.²⁴⁷ After all, there were clear warning signs discovered during Samit's investigation of Moussaoui that should have raised a red flag regarding his intentions in this country.²⁴⁸ Moussaoui was taking flight training in Norman, Oklahoma, and had expressed an urgent need to advance his flight training to include flying commercial airliners.²⁴⁹ Moussaoui was a radical Islamic extremist who, by all accounts including the deposition provided by his former roommate in Norman, obsessively talked everyday about the holy war.²⁵⁰ Perhaps these warning signs could have justified using more aggressive interrogation techniques on Moussaoui after his arrest, instead of simply relying on Moussaoui to cooperate with authorities in the investigation.²⁵¹

D. The Presidential Signing Statement

Many government officials criticized the Bush Administration's attempts to block the adoption of the McCain Amendment in late 2005.²⁵² One senator stated that "the administration only accepted it in the face of overwhelming congressional support and in the wake of international condemnation resulting from allegations" of United States torture and ill-treatment.²⁵³ Shortly after signing the Defense Appropriations Bill into law in early 2006, which included the McCain Amendment, President Bush issued a signing statement, which added to the criticism.²⁵⁴ A signing statement is "an official position by the

245. *FBI Big: Moussaoui Barely Discussed*, CBS NEWS, Mar. 21, 2006, available at <http://www.cbsnews.com/stories/2006/03/21/terror/main1424701.shtml> (last visited Nov. 15, 2006).

246. *Id.* Samit warned higher-ups in the FBI and other government officials at least 70 times that Moussaoui could be a terrorist looking to hijack a plane. *Id.*

247. *See id.*

248. *See id.*

249. *Id.*

250. *Id.*

251. *See Moussaoui Shocks From Witness Stand*, *supra* note 238.

252. *See* 151 CONG. REC. S14241, 14243-45 (2005) (statement of Sen. Dodd).

253. *Id.* at 14244.

254. *See generally* John W. Whitehead, *Bush Flouts McCain Anti-Torture Law*, COASTAL POST ONLINE, Feb. 2006, available at <http://www.coastalpost.com/06/02/08.html> (last visited Nov. 15, 2006).

President that pronounces his interpretation of a new law.”²⁵⁵ Bush’s signing statement was a declaration that he views the McCain Amendment “to be limited by his ‘inherent authority’ as commander-in-chief to protect the national security of America.”²⁵⁶

The language used by the President’s lawyers asserts that “his powers allow him, in wartime, to ignore statutes passed by Congress.”²⁵⁷ David Golove, a law professor at New York University School of Law, stated:

The signing statement is saying ‘I will only comply with this law when I want to, and if something arises in the war on terrorism where I think it’s important to torture or engage in cruel, inhuman, and degrading conduct, I have the authority to do so and nothing in this law is going to stop me.’²⁵⁸

This signing statement gave the President “the same power that the McCain Amendment sought to prevent,” which seems to be a recurring practice within the Bush Administration.²⁵⁹ Circumventing the other branches of government and neglecting the idea of separation of powers leaves the President with “the ultimate power to execute and interpret the law.”²⁶⁰ Although many administration officials have maintained that the President would only ignore the law in an emergency situation, many in Congress fear that the Bush Administration is exponentially expanding the power of the President.²⁶¹ For instance, “in a congressional hearing, US Attorney General Alberto Gonzales suggested that the President could invoke his authority as commander-in-chief to conclude that a law was unconstitutional and refuse to comply with it.”²⁶² However, the power to declare laws unconstitutional, under our Constitution, is a power vested solely in the judiciary.²⁶³

In fact, two strongly debated topics throughout the Judiciary Committee testimony of Justice Samuel Alito were the issue of presidential signing statements and the scope of executive power.²⁶⁴ “In a 1986 memorandum, Alito argued that the President should issue statements when signing a bill because the President’s ‘understanding of the bill should be just as important as that of

255. *Id.*

256. *Id.*

257. *Unchecked Abuse*, *supra* note 166.

258. Whitehead, *supra* note 254.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. 152 CONG. REC. S35, 85-89 (2006) (statement of Sen. Reed).

Congress.”²⁶⁵ One senator expressed his concern that “[t]he practice Judge Alito first advocated in the mid-1980s arguably helps the executive to thwart the will of Congress when it passes a law.”²⁶⁶ The current Supreme Court has given these signing statements, such as the one issued by President Bush regarding the McCain Amendment, no weight when they are interpreting the meanings of acts of Congress.²⁶⁷ However, there is some trepidation amongst many in Congress regarding Justice Alito’s views on Presidential signing statements, “should they [ever] come before him on the Supreme Court.”²⁶⁸

IV. THE ONGOING DILEMMA: THE “TICKING TIME BOMB” SCENARIO

*Getting at the information [terrorists] possess could allow us to thwart major attacks, unravel their organizations, and save thousands of lives. They and their situation pose one of the strongest arguments in modern times for the use of torture.*²⁶⁹

Mark Bowden

The McCain Amendment was written against the backdrop of damaging allegations against the United States.²⁷⁰ These allegations not only hurt the United States’ reputation as a nation but also discredited its efforts to promote democracy and human rights in the Muslim world.²⁷¹ The McCain Amendment was a direct attempt to clarify the United States’ official policy regarding the treatment of detainees.²⁷² Many in Congress were quick to support this Amendment because, as Senator Feingold stated, “it should help bring back some accountability to the process and restore our great Nation’s reputation as the world’s leading advocate for human rights.”²⁷³ However, aside from the issue of the presidential signing statement, the McCain Amendment still leaves some questions unanswered—specifically what can interrogators do when confronted with a ticking time bomb scenario? Such scenario involves the threat of an imminent terrorist attack on the United States or its interests abroad.²⁷⁴ For instance, the scenario would develop when a terrorist is taken into custody

265. *Id.* at 86.

266. *Id.*

267. *Id.*

268. *Id.*

269. Bowden, *supra* note 1, at 53.

270. *See generally* 151 CONG. REC. S14241, 14252-54 (2005) (statement of Sen. Feingold).

271. *Id.* at 14253.

272. *Id.*

273. *Id.*

274. McCain, *supra* note 51, at 36.

by United States officials who have sound reasons to believe that the terrorist knows and possesses specific knowledge of an imminent terrorist attack, such as a plot similar to September 11th, a bomb placed on a New York City subway, etc.²⁷⁵ In this instance, an interrogator would be faced with a major dilemma: comply with the McCain Amendment or resort to more extreme measures and methods to extract useful information that could stop the attack and save thousands of lives.²⁷⁶

Courts in the United States have developed a “shock[] the conscience” standard in domestic cases for determining whether police conduct amounts to cruel, inhuman, or degrading treatment.²⁷⁷ Since the McCain Amendment has been described by national security advisor Stephen J. Hadley and other public officials as making the ban on torture and other forms of cruel or degrading treatment a “matter of law that applies worldwide, at home and abroad,”²⁷⁸ the “shock the conscience” standard would presumably apply in interrogation settings within the “War on Terror,” regardless of where the interrogations took place in the world.²⁷⁹

The “shock the conscience” standard was originally developed in the 1952 Supreme Court case *Rochin v. California*, and was recently left in place in the 2003 Supreme Court decision in *Chavez v. Martinez*.²⁸⁰ In *Rochin*, three deputy sheriffs had information that Rochin was selling narcotics.²⁸¹ After entering the outside open door of Rochin’s two-story dwelling and forcing open the door to Rochin’s bedroom, the officers found Rochin sitting on the side of the bed along with two capsules on a nearby nightstand.²⁸² When questioned about the capsules’ owner, Rochin seized them and swallowed them.²⁸³ The sheriffs then handcuffed Rochin and took him to a hospital where, at their direction, “a doctor forced an emetic solution through a tube into Rochin’s stomach against his will.”²⁸⁴ The solution caused Rochin to vomit the two capsules, which were later found to be morphine, and he was subsequently convicted.²⁸⁵ “The Supreme Court overturned the conviction and held that obtaining evidence by

275. *See id.* at 36.

276. *Id.*

277. Thomas, *supra* note 36, at 32.

278. *Unchecked Abuse*, *supra* note 166.

279. *See* Thomas, *supra* note 36, at 32.

280. *Rochin v. California*, 342 U.S. 165, 166 (1952); *Chavez v. Martinez*, 538 U.S. 760 (2003); *see generally* Addicott, *supra* note 8, at 881-84.

281. *Rochin v. California*, 342 U.S. at 166.

282. *Id.* at 166.

283. *Id.*

284. *Id.*

285. *Id.*

methods that are 'so brutal and so offensive to human dignity' violate the Fourteen Amendment's Due Process Clause."²⁸⁶ The Court explained:

[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that *shocks the conscience*. . . . this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.²⁸⁷

The Court stressed that it will not condone this type of police conduct in discovering evidence because to do so "would be to afford brutality the cloak of law."²⁸⁸

Since the "shocks the conscience" standard is a subjective standard, it would allow for a sliding scale determination by the court.²⁸⁹ For example, it would not perhaps shock the conscience of the court if some high value targets were roughed up to gather information that would avert an attack on a United States city; however, under this standard, the humiliation of detainees at Abu Ghraib would clearly be off limits.²⁹⁰ In defending the controversial presidential signing statement regarding the McCain Amendment, administration officials stressed that the President would only bypass the law in emergencies, like a ticking time bomb situation.²⁹¹ Even McCain has acknowledged that some rare instances may call for the torture or ill-treatment of a suspect in order to prevent an imminent attack on our country or divert a threat to our national security.²⁹² According to Senator McCain, "[y]ou do what you have to do, [b]ut you take responsibility for it."²⁹³ "Abraham Lincoln suspended habeas corpus in the Civil War, and FDR violated the Neutrality Acts before World War II."²⁹⁴ Senator McCain did not write an exemption into the amendment to account for the ticking time bomb scenario due to the fear that carving out legal exemptions to the protection of human rights leaves the door open for systematic abuse as a

286. Addicott, *supra* note 8, at 884.

287. *Rochin*, 342 U.S. at 172 (emphasis added).

288. *Id.* at 173.

289. Thomas, *supra* note 36, at 32.

290. *Id.*

291. Whitehead, *supra* note 254.

292. *See* Thomas, *supra* note 36, at 33.

293. *Id.*

294. *Id.*

matter of course and results in the exception swallowing the rule.²⁹⁵ Senator McCain has also stated that “[i]t is far better to embrace a standard that might be violated in extraordinary circumstances than to lower our standards to accommodate a remote contingency; confusing personnel in the field and sending precisely the wrong message abroad about America’s purposes and practices.”²⁹⁶

McCain argues that if a United States interrogator does resort to extreme measures to extract information from a suspect and if it does result in the prevention of another September 11th attack, the public and authorities would take that into account when judging the interrogator and the dire situation which he or she confronted.²⁹⁷ However, this argument presupposes that the interrogator, the court, and the public have a clear understanding of just how deadly the prevented attack was without the attack ever happening. This author posits that no member of the United States’ intelligence community or general public could have possibly imagined how organized, elaborate, and destructive the September 11th hijackers’ plan was going to be on September 10, 2001. The seriousness of this attack did not become apparent until it played out in front of our eyes and was burned in our collective memories forever. A suspect arrested on September 10, 2001 and tortured by United States interrogators could have provided the United States with enough information to stop the attacks from taking place. Would the interrogator’s conduct have “shocked the conscience” even though the seriousness of the threat thwarted would be unclear?

The morality of torturing someone in extreme and urgent circumstances is easy to define on a large, broad scale, but breaks down dramatically in applying it to particular circumstances.²⁹⁸ Obviously, the United States has an interest in upholding and protecting the human rights of every individual that we hold in custody.²⁹⁹ Civil people everywhere can agree that torturing someone is evil and indefensible.³⁰⁰ However, the prevention of another large-scale terrorist attack and the protection of innocent lives in the United States and abroad could lead someone to argue that torture is justified in particular circumstances.³⁰¹ When asked whether he would favor waterboarding or another aggressive interrogation technique to extract information from a high value terrorist regarding terrorist networks or future planned attacks, one reporter stated that “[he] would [favor waterboarding] in a New York minute – that is, in memory of those who died at

295. McCain, *supra* note 51, at 36.

296. *Id.*

297. *Id.*

298. Bowden, *supra* note 1, at 70-71.

299. *See generally id.*

300. *Id.* at 70.

301. *Id.* at 70-71.

the World Trade Center and to protect those who might be saved by preventing the next Sept. 11.”³⁰²

The strongest argument for the use of torture or other aggressive interrogation techniques when faced with a ticking time bomb situation can be illustrated by the story of Jakob von Metzler.³⁰³ On September 27, 2003, in Frankfurt, Germany, a law student kidnapped an eleven-year-old boy named Jakob von Metzler.³⁰⁴

The kidnapper had covered Jakob’s mouth and nose with duct tape, wrapped the boy in plastic, and hidden him in a wooded area near a lake. The police captured the suspect when he tried to pick up ransom money, but the suspect wouldn’t reveal where he had left the boy, who the police thought might still be alive. So the deputy police chief of Frankfurt, Wolfgang Daschner, told his subordinates to threaten the suspect with torture. According to the suspect, he was told that a ‘specialist’ was being flown in who would ‘inflict pain on me of the sort I had never experienced.’ The suspect promptly told the police where he’d hidden Jakob, who, sadly, was found dead.³⁰⁵

The police chief immediately faced criticism for threatening the use of torture from many civil rights groups dedicated to combating torture wherever it exists in the world, including Amnesty International.³⁰⁶ When asked whether it was wrong for the police chief in the Jakob von Metzler case to threaten the use of torture under the circumstances, the director of government relations for Amnesty International stated that “[w]e recognize that there are difficult situations . . . [b]ut we are opposed to torture under any and all circumstances, and threatening torture is inflicting mental pain.”³⁰⁷

Author Mark Bowden describes the clashing moralities on this sensitive subject to the differences between the warrior and the civilian sensibilities.³⁰⁸ The civilian sensibility, adopted by many civil rights groups, sees abusive government power as a greater threat to society.³⁰⁹ No matter what “the difficulties posed by a particular situation, such as trying to find . . . Jakob von Metzler before he suffocated Allowing an exception in one case . . . would

302. Kondracke, *supra* note 216.

303. Bowden, *supra* note 1, at 70.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. Bowden, *supra* note 1, at 70.

open the door” for greater governmental abuses in the future.³¹⁰ The civilian sensibility values, above anything else, the rule of law and strict adherence to it.³¹¹ The primary fear within this community is that “[i]f the end justifies the means, then where would you draw the line?”³¹²

The warrior sensibility, on the other hand, is more focused on what needs to be done to complete a mission.³¹³ Bowden stresses the fact that “[b]y definition, war exists because civil means have failed.”³¹⁴ This sensibility strictly focuses on winning the war and preserving the lives of those you are sworn to protect.³¹⁵ To the warrior sensibility, the uncooperative enemy’s dignity or civil rights weigh little in comparison to the lives of his own men.³¹⁶ Bill Cowan, the interrogator who described using alligator clips on a subject in Vietnam, described the situation as:

It isn’t about getting mad, or payback It’s strictly business. Torturing people doesn’t fit my moral compass at all. But I don’t think there’s much of a gray area. Either the guy has information you need or not. Either it’s vital or it’s not. You know which guys you need to twist.³¹⁷

V. CONCLUSION

*If interrogators step over the line from coercion to outright torture, they should be held personally responsible. But no interrogator is ever going to be prosecuted for keeping Khalid Sheik Mohammed [or any other high value target] awake, cold, alone, and uncomfortable. Nor should he be.*³¹⁸

Mark Bowden

The “War on Terror” is changing the balance between civil liberties and national security demands.³¹⁹ Never before in our nation’s history have we faced an enemy with such a strong dedication to the destruction of western

310. *Id.*

311. *Id.*

312. *Id.* at 76.

313. *Id.* at 70.

314. *Id.*

315. Bowden, *supra* note 1, at 70.

316. *Id.*

317. *Id.*

318. *Id.* at 76.

319. Addicott, *supra* note 8, at 910.

civilization, specifically American lives.³²⁰ Terrorist organizations, such as Al Qaeda, will “never be influenced by international sensibilities or open to moral suasion.”³²¹ They are groups of radical Islamic extremists whose sense of morality is fundamentally opposed to our way of life, and they will justify any method of destroying it.³²² The pre-September 11th environment in which we lived in will never return and the threat of terrorism remains fixed in our everyday lives.³²³ One thing is certain: if the United States is to be successful in the “War on Terror,” interrogation will be the centerpiece in doing so.³²⁴ Interrogation techniques that provide timely and accurate information to the United States Intelligence Community are essential in stopping potential terrorist attacks and breaking up terror cells around the world. Torture is an illegal crime against humanity that is abhorred by civilized people everywhere, and it should continue to be readily condemned.³²⁵ The introduction of the McCain Amendment is a key tool in ensuring that the United States restores “our great Nation’s reputation as the world’s leading advocate for human rights.”³²⁶

However, with the new enemy that we face, it is important that we recognize that an emergency ticking time bomb situation may present itself, which could justify the use of interrogation techniques that could be seen as coercive or aggressive in order to save lives. The solution to this problem, as long as torture is illegal, is for an interrogator to use his or her best judgment under the circumstances, and accept the risk.³²⁷ The interrogator must be willing to accept the fact that he broke the law in order to avert a possible terrorist attack that could have cost thousands of lives and be judged by the “shock[] the conscience” standard in court. In most instances, the chance that the interrogator in a legitimate ticking time bomb situation would be prosecuted is very small.³²⁸ To date, “Wolfgang Daschner, the Frankfurt deputy police chief, has not been prosecuted for threatening to torture Jakob von Metzler’s kidnapper, even though he clearly broke the law.”³²⁹ In recognizing this threat, the use of the word “never” with regard to coercive or aggressive interrogation techniques should be accepted with a touch of hypocrisy.³³⁰ It is imperative to recognize that these techniques “should be banned but also quietly practiced” in situations that

320. See generally McCain, *supra* note 51, at 35.

321. *Id.*

322. *Id.*

323. Addicott, *supra* note 8, at 910.

324. *Id.* at 912.

325. See generally Bowden, *supra* note 1, at 53.

326. 151 CONG. REC. S14241, 14252-54 (2005) (statement of Sen. Feingold).

327. Bowden, *supra* note 1, at 76.

328. *Id.*

329. *Id.*

330. *Id.*

threaten our national security.³³¹ As the late Chief Justice William H. Rehnquist once wrote:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.³³²

331. *Id.*

332. Addicott, *supra* note 8, at 849.