

Institutional Ethics

Drawing Lines for Militant Democracies

By HARVEY RISHIKOF

Harvey Rishikof is Professor of National Security Law and former Chair of the Department of National Security Strategy at the National War College.

At his 2009 confirmation hearing for Attorney General of the United States, Eric Holder was asked whether he would pursue a criminal investigation of the interrogation programs of the Bush administration. He responded, “Senator, no one’s above the law, and we will follow the evidence, the facts, the law, and let that take us where it should.”¹ But he added, quoting Barack Obama, then-President-elect, “We don’t want to criminalize policy differences” and finally pleaded for time to study the matter. “One of the things I think I’m going to have to do,” Holder added, “is to become more familiar with what happened that led to the implementation of these policies.”

Many articles on ethics begin with the notion that the term *ethics* derives from the Greek word *ethika*, from *ethos*, meaning “character” or “custom” based on individual behavior. From this we deduce principles or a standard of human conduct, often termed *morals* (from the Latin *mores*, “customs”). By extension, the study of such principles becomes the foundation of moral philosophy. The focus or unit of analysis is the individual, and the question is, “What is the right thing to do?”

In the vast literature of personal responsibility, few works ever discuss the concept of “institutional ethics,” or how institutions should act to produce rules of behavior for themselves and those under their jurisdiction.

Witness to 2003 Lendu militia crimes against civilians in Democratic Republic of the Congo holds skull of alleged victim

This concept, however, would not have been alien to our Founding Fathers. A cornerstone of the Federalist Papers on how to avoid tyranny was the struggle among and between institutions. One of the most quoted but least analyzed passages from James Madison, from the perspective of institutional ethics, is in Federalist No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, which states:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

These “auxiliary precautions” were the different institutions of power, or the separation of power, by which the different departments standing on constitutional means would resist encroachments from each other. Our federalism itself is an institutional battle of the appropriate power owed to each sovereign. These encroachments are politically charged discussions since constitutional institutional prerogatives are at stake. The struggle determines the notion of who can decide, as an institutional matter, what the “right thing” to do is. This important insight was underscored by Judith Shklar, the acclaimed political philosopher, in *The Faces of Injustice*, in which she noted that the “line of separation

between injustice and misfortunes is a political choice, not a simple rule that can be taken as given. The question is, thus, not whether to draw a line between them at all, but where to do so in order both to enhance responsibility and to avoid random retaliation.”²

The political choice of where to draw the line sets public policy, which in turn establishes public morals and sets public responsibility for individuals. The resulting political framework creates criminal and civil liability for public officials and servants of the state. The tensions among our ideals over justice, necessity, individual responsibility, and authority are raised by these hard cases of line drawing, particularly when national security is involved.

To explore this puzzle, this article raises the question, “How do institutions discharge their ethical duties to shape public responsibility?” The three following examples address this question.

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The first example contrasts the understanding of command responsibility under our Uniform Code of Military Justice (UCMJ) and the international convention Protocol I. The second reviews the Israeli Supreme Court decision on its approach to targeted killing. Finally, to round out the discussion of institutions and individual liability, the third examines how Congress should approach the debate over alleged past violations of the law of interrogation.

Paradigms for Commander Responsibility

Our domestic legal codes and international conventions set the framework for our views of the rule of law and individual responsibility. On the individual level, take, for example, the contrast between the UCMJ and Protocol I under the Geneva Conventions when malfeasance takes place in a military command. How do these two regimes institutionally hold military commanders responsible? What is the standard of culpability under the two legal regimes? Victor Hansen points out that in cases stemming from the Vietnam era and the My Lai

massacre, the prosecution of the Charlie Company commander, Captain Ernest Medina, established the classic criminal standard for culpability under the common law.³ As Hansen notes, the evidence at trial established that Captain Medina was within a few hundred yards of the village for some 3 hours while his subordinates were killing unarmed civilians. There was no evidence, however, that he either took part in the killings or issued direct orders to his Soldiers to kill the villagers.

Under criminal common law as stipulated by the UCMJ, the judge in the case rejected an intentional murder charge and reduced the charge to involuntary manslaughter, which required showing that Captain Medina had a legal duty to take some action to prevent the unlawful killing and to prove that he possessed actual knowledge of his Soldiers’ law of war violations when he failed to act. The actual panel charge from the judge is quoted in the Hansen article as follows:

In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that the troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus, mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities [emphasis added].

This actual knowledge standard resulted in the acquittal of Captain Medina.

Compare this *mens rea* (guilty mind) and *actus rea* (guilty act) and actual knowledge obligation under the UCMJ to Protocol I, where Articles 86 and 87 represent the codification of the command responsibility doctrine. The articles state both a standard for failure to act and duty to act:

Article 86. Failure to Act

1. *The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.*

2. *The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.*

Article 87. Duty of Commanders

1. *The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.*

2. *In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.*

3. *The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such*

steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

As noted by Hansen, when these two articles—Article 86 and Article 87 under Protocol I—are read together, the result codifies the doctrine of command responsibility. Violations of the law of war can occur through acts of omission when a duty to act exists and further recognizes that a commander, due to his special responsibility, can be criminally responsible for war crimes committed by his subordinates. Understanding that commanders have unique responsibilities to ensure their troops' observance of the law of war, Article 87 sets out in general terms what a commander must do to meet those obligations—this is the *should or should have known standard* that was used in the Yamashita military tribunal.⁴ After World War II, General Tomoyuki Yamashita

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Serb forces wrought massive and wanton destruction in Kosovo



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of Japan was held responsible by the tribunal for the brutal atrocities and crimes of his troops in the Philippines, and his claims that he never ordered or gave permission for the actions, or had knowledge or control of the troops' actions, were rejected. The tribunal concluded that since the acts were not sporadic but methodically supervised by the officers, he had not provided effective control of the troops as was required by the circumstances.⁵ In short, the defense of not knowing, or not being directly involved, was rejected.

For the purposes of the concept of institutional ethics, the point is that Congress, by accepting the criminal common law standard and not the Yamashita standard, or the international standard of Protocol I (since we are not signatories to the protocol), establishes a different set of institutional incentives and obligations for our command structure. This institutional difference becomes particularly acute when we jointly deploy with our allies, who approach the issue of malfeasance under the "should or should have known" obligation versus the more restrictive "direct knowledge" requirement established currently for U.S. law.

Israeli Institutional Court View

Contrast this sense of institutional ethics with the decision of the Israeli supreme court in *The Public Committee Against Torture in Israel, et al. v. The Government of Israel, et al.* (HJC 769/02, December 11, 2005) on the legality of "targeted killings" or, as characterized by the court, "preventative strikes" against terrorists that at times also harm innocent third-party civilians. The opinion is a model for how to analyze institutional and ethical issues and processes for the Israel Defense Forces in the projection of force. At the outset, the court held that struggle in the West Bank and Gaza at that time was an armed conflict of an international character and that all international armed conflict is a compromise or balance between military necessity and humanitarian requirements. Under the law of armed conflict, the essential requirement for the lawful use of force entails the separation of individuals into combatants and noncombatants, or civilians. Commanders, under international customary law, have a duty both to refrain from acts that harm civilians and to take necessary action to ensure that civilians are not harmed.

What, then, is the status of terrorists and civilians taking part in the armed conflict? For the court, the terrorists, since they did not

conduct their operations in accordance with the laws and customs of war, were "unlawful combatants," but should these so-called unlawful combatants then be viewed as civilians under the law? The court concluded that they should not. The state of Israel argued that unlawful combatants are legitimate targets for attack as long as they are taking an active and continuous direct part in the hostilities. The court refused, however, to recognize this third category proffered of unlawful combatants under The Hague and Geneva Conventions and preferred analyzing the case as *civilians* who constitute unlawful combatants. This distinction became important for the court based on the remedy and process that it would craft. This distinction is critical because it places on the forces projecting power additional duties of obligation since, as a civilian, more responsibility is required.

As civilians taking a *direct part in hostilities*, the court concluded that under customary international law, the civilians no longer enjoyed the protection granted civilians and became lawful targets. But for the court, the question then arose: When does one take a direct part in hostilities? Bearing arms and heading to or from a fight is clear, but what of the gray areas—selling food and medicine or giving monetary aid to hostile forces, or not preventing incursions of hostile armed parties? Are such behaviors directly participating? What of those who recruit or send civilians into hostilities? Does "direct" mean the last actor in the chain of command or the whole chain of authority? The court rejected a "narrow" definition of the chain of command and reasoned that those who decided upon the violent act, planned the act, and sent the actor had made a direct and active contribution and therefore could be targeted. When does one become part of the chain of command of terrorist acts? Is a single act of participation enough, or does one have to be part of a series of hostile acts? Can one participate, take a few months off, and then rejoin in a "revolving door" fashion?

The court's resolution of this dilemma was to announce a four-part test before a strike could take place. First, information identifying a potential unlawful combatant civilian target would have to be "thoroughly verified." Second, if the actor could be arrested, interrogated, and tried, this less harmful means would be required in lieu of force. The requirement flowed from the fact that the target was a civilian acting unlawfully under international law.

Third, after the attack on a civilian suspected of directly participating in the hostilities, an independent, thorough investigation of the validity of the identification of the target and the circumstances surrounding the decision would be required by a review committee. Finally, if innocent third-party civilians were killed or injured due to collateral damage, the

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degree of force used would have to withstand the traditional proportionality test. The degree of collateral damage could not be excessive to the concrete and direct military advantage anticipated by the use of force under a values-based test.⁶

With this photograph as supporting evidence, the International Criminal Tribunal of Former Yugoslavia convicted Bosnian Serb Goran Jelić of crimes against humanity and violating customs of war



Courtesy of ICTY

Critics of the decision argued that the issues presented by targeted killings were political and military in nature and that the court should have concluded that they were nonjusticiable. The court, however, appears to be rejecting the Shklar formulation that decisions in this area are more political, reasoning instead that these issues are dominantly of a legal character:

When the character of the disputed question is political or military, it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional nonjusticiability does not apply. . . . The questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes which cause the deaths of terrorists and at times of nearby innocent civilians. The question is—as indicated by the analysis of our judgment—legal; the question is the legal classification of the military conflict taking place between Israel and terrorists from the area; the question is the existence or lack of existence of customary international law on the issue raised by the petition; the question is of the determination of the scope of that custom, to the extent that it is reflected in §51(d) of The First Protocol; the question is of the norms of proportionality applicable to

*the issue. The answers to all of those questions are of a dominant legal character.*⁷

The court drew the line and concluded that this was a legal issue. Rejecting the view of Cicero that “during war, the laws are silent” (*silent enim legis inter arma*), the court opined, “[I]t is when the cannons roar that we especially need the laws.”⁸ The court felt obliged to determine whether the executive had not a reasonable understanding, but rather a correct understanding, of the law. It could not, in its own words, “liberate itself from the burden of that authority.”⁹ Under this formulation, the court would determine whether a “reasonable” military commander would have made a similar decision under the circumstances when weighing the issues of necessity and the zone of

The Attorney General and Director of National Intelligence stated under oath in their confirmation hearings that, in their opinions, “waterboarding” is torture. This assessment on waterboarding comports with international law and the Geneva Conventions since we once prosecuted those in World War II for employing such an interrogation technique.¹¹ As is well known, the Bush administration and the past Attorney General would not concede that the coercive methods employed for interrogations constituted torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, as has been made public, waterboarding has been used in military survival, evasion, resistance, and escape training for our own pilots for

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proportionality. The court would do this retrospectively, and it would review the examination of the institutional review committee. Finally, the court recognized that the struggle against terrorism was turning the Israeli democracy into a “defensive” or “militant” democracy and that there could be no security without law. Given its institutional role, the court would therefore have to determine what is forbidden—what is legal and what is illegal.

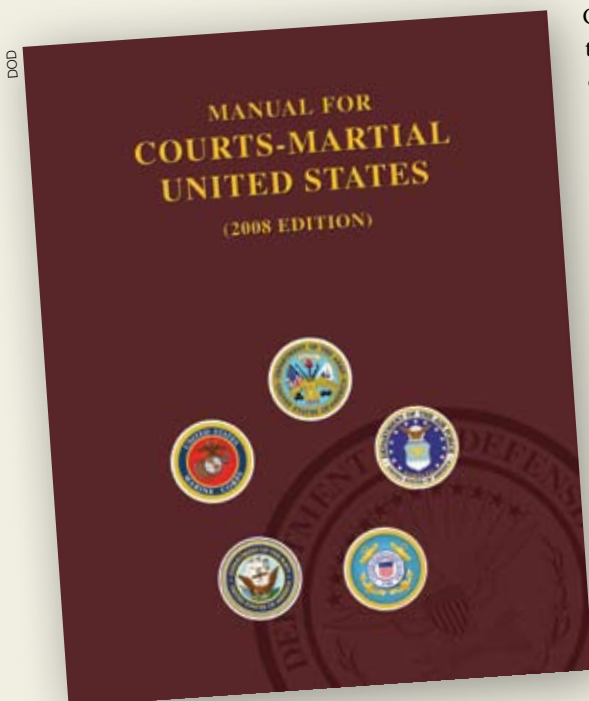
Congress and Interrogation-Prosecution Issues

How do the previous two case studies help inform our current debate over the issue of interrogation techniques and the appropriate role of the institutional parties? President Obama’s executive orders to close Guantanamo, stay detainee proceedings, and end “torture” interrogations through the use of the Army Field Manual have prominently signaled a new approach to the most controversial national security policies of the Bush administration.¹⁰ This proposed executive review has deservedly been greeted with general approval. The Special Interagency Task Force on Interrogation and Transfer Policies established by the executive orders is an excellent start to what should be a bipartisan assessment of the current situation and where we should go from here.

decades, based on the assumption that our military would experience such treatment when captured by enemies.

Despite this long-needed new policy assessment by the Obama administration, demands have been made on Congress to hold hearings on the process by which these unlawful techniques were approved and on the Department of Justice to launch investigations to determine if criminal charges should be made against members of the previous administration. Some have even called for investigations by state officials of the attorneys involved in the approval process to strip them of their state bar memberships. This congressional hearing approach would be a version of the Iran-Contra hearings, the same hearings that generated the minority report for then-Congressman Richard Cheney and then-minority staff counsel David Addington. This report contended that the findings of the hearings were an unconstitutional restraint on the Office of the Presidency and a criminalization of political disagreements.

Although we all are sympathetic to this call for justice, as a policy matter and as a guide to executive behavior for future Presidents, this purely executive response may not be the most constitutionally strategic approach to take. To have a full and open discussion, congressional immunity should be granted to all who participated in the process pursuant to a specific Presidential



Sources of military jurisdiction include the Constitution and international law, including the law of war

order or finding under the National Security Act of 1947. To prosecute low-level officials who believed they were acting under the color of law and not those who gave the orders would be a miscarriage of justice. These were *Presidential* decisions invoking reasons of necessity and reasons of state for preservation. We may vigorously disagree with the approach, but under one current understanding of Presidential power, such reasons accord the chief executive and Commander in Chief great flexibility to exercise the prerogatives of his office in the aftermath of an attack on the homeland.

To be sure, those who acted *ultra vires* (beyond their authority) and have no order, or finding, to justify their actions should be denied immunity and prosecuted. The goal of the legislative commission would be to clearly establish a set of procedures, processes, and rules involving the key political policy players and their attorneys in the event that a future President recommends any deviation from the Geneva Conventions again. Under the Geneva Conventions, only name, rank, age, and serial number are required, and as the Army Field Manual stipulates, only certain techniques are authorized. But a new President or a new set of circumstances that present a necessity defense could overturn these current restraints once again, depending on what the Special Interagency Task Force on Interrogation and Transfer Policies recommends. The decision to deviate from the Geneva Conventions and international law should not reside with the President alone. The Constitution clearly vests part of this right with Congress under Article I, Section 8, which states that it is the power of Congress:

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

The commission's report for Congress should include model legislation that would create a process that would have to include both the executive and legislative branches, a clearly recognized group of decisionmakers by statute, and a full set of procedures as does our current, albeit weak, legislation governing covert actions. Deviation from this process by any President would be grounds for impeachment, and practitioners asked to

perform such extrajudicial actions would be able to point to the legislation if the process had not been complied with to the letter. This defense for lower officials does not exist in the face of a new executive covert finding made tomorrow. In short, the President could order torture tomorrow based on his view of the Convention Against Torture. Those officials following the orders would have no defense to not follow them.

As the previous example of the Israeli court institutional ethic reveals, the authorities vested with the duty and obligation to craft rules shirk their institutional duty when they fail to act. The institutional ethical boundaries must be set for the individuals charged to act and perform their duty. All democratic states have defenses of necessity to disobey laws under a "reason of state" or for "peace, order, and good government." This is how martial law is invoked or due process rights are suspended.

Under our Constitution, as has been made clear by recent Supreme Court decisions, only the legislature can suspend the writ of habeas corpus and only under special circumscribed circumstances:

"when in cases of rebellion or invasion the public safety may require it." Some argue that there is a set of techniques that fall between Geneva rights and torture that are not covered by the Army Field Manual. How would a practitioner know if asked to perform one of these procedures under a new executive order if he were breaking the law if the legislative branch did not also concur? Presidential action alone is not sufficient, and this is why such a commission should be convened immediately and tasked to establish a set of procedures for the executive and legislative branches that

institutional ethical boundaries must be set for the individuals charged to act and perform their duty

clearly defines a process that the executive branch must follow for interrogations and prosecutions of prisoners captured in the struggle against extremism. The issues of capture, interrogation, prosecution forums, and detention all are part of the same chain



International War Crimes Tribunal, founded by UN resolution in 1993, has mandate to prosecute and try violators of international humanitarian law

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of custody that needs to be reviewed so all alternatives are fully explored.

The commission should work with the Presidential Special Interagency Task Force on Interrogation and Transfer Policies as a joint institutional method not only to protect our soldiers and others asked to perform such tasks in the future, but also to design a system that we can be proud of that comports with our longstanding tradition to respect the rule of law. Our Constitution, as noted in the often quoted insight by Edward Corwin, an acclaimed constitutional scholar, is an invitation to struggle for the privilege of directing American foreign policy; the power to determine the substantive content of American foreign policy is a divided power.

Immunity is important for those of the past administration who acted under color of law, not to condone what happened but to remove the potential protracted legal battle that will surely ensue if a criminal process is launched. Moreover, immunity will allow the commission to quickly get to the truth of why the procedures were thought necessary and what, if anything, was gained by them.

The true path for final justice and strategic advantage is to ensure that if any future President is confronted with a “ticking time bomb” scenario, the decision of what to do will not rest with him alone, but will require a showing of necessity under a process and a set of procedures for both the executive and legislative branches. Actions taken outside of the proscribed and published procedures will still be a crime, but a recognized process not solely controlled by the President will have established the necessity defense. This is the only way to ensure that coercive interrogation never happens again, and if it is contemplated for whatever reason, it cannot be hidden behind executive privilege and prerogative. This is what institutional ethics requires, and it is a discussion our Founding Fathers hoped would take place.

The three examples in this article illustrate how political and legal institutions that create policy shape the ethical and moral terms of our public responsibility. Where to draw the line is ultimately a political decision, but it is a political decision that must be buttressed by law. In a democracy, the institutions of power must struggle together for the just answers.

Political theorist Michael Walzer best captures this concept of the ethical struggle in his discussion of emergency ethics when a state is confronted with a “supreme emergency” or when our deepest values and our collective survival are in imminent danger.¹² For some in this debate, only a moral absolutist position is tenable; one should never deviate from one’s ethical compass regardless of the situation. One must act morally regardless of consequences—*fiat justitia, ruat caelum* (do justice even if the heavens fall). This is the moral suicide pact doctrine where normal or traditional values and rights cannot be trumped by consequences or contexts.

To others who take a more utilitarian view of supreme emergency, one must weigh the costs and benefits in context and act accordingly; necessity means dirty hands. But in these existential moments, how does one assign values where there is no recognized hierarchy of values—one life is worth how many? When does the principle of proportionality become arbitrary? This is, for Walzer, the ethical dilemma, which sets the utilitarianism of extremity against the rights, or morality, of absolutism.

How does one escape the ethical dilemma? For Walzer, again, action under a supreme emergency rests on a communitarian doctrine of how we view our group identity and our collective self-understanding. In the United States under the Constitution, it is the political community that frames our collective identity, and it is our collective political institutions that must resolve the dilemma—the President, Congress, and Supreme Court. We cannot defer the decision to one power; although public policy creates our public morals, we must shoulder public responsibility collectively. This is how democracies at war should draw public ethical lines, as each institution also should to the extent of its constitutional power. A political community, as Edmund Burke properly understood, is a contract among “those who are living, those who are dead, and those who are yet to be born.”¹³ Institutional ethics and rule of law must prevail when force is projected. **JFQ**

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NOTES

¹ See Scott Shane, “Remarks on Torture May Force New Administration’s Hand,” *The New York Times*, January 16, 2009, available at <www.nytimes.com/2009/01/17/us/politics/17detain.html?ref=todayspaper>.

² Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 5.

³ See Victor Hansen, “What’s Good for the Goose Is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own,” *Gonzaga Law Review* 42, no. 1 (2006–2007).

⁴ *In re Yamashita*, 327 U.S. 1 (1946).

⁵ As noted by Hansen, scholars still debate what the case means for command responsibility. Some have contended that Yamashita created a strict liability standard, while others maintain that the Yamashita standard is that a commander may be held criminally liable if he knew or should have known of the commission of war crimes by his forces. Still other scholars have contended that the Yamashita standard is that liability should attach if the commander knew or must have known of the war crimes. Finally, others contend that the real issue for the tribunal was General Yamashita’s total ignorance and complete delegation of authority, which created an unacceptable risk of future harm for future crimes. See Hansen, 23–24.

⁶ See *The Public Committee Against Torture in Israel, et al., v. The Government of Israel, et al.* (HJC 769/02, December 11, 2005, Para. 60), available at <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf>.

⁷ *Ibid.*, para. 50.

⁸ *Ibid.*, para. 61.

⁹ *Ibid.*, para. 56.

¹⁰ See “Executive Order—Ensuring Lawful Interrogations,” January 22, 2009, available at <www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/>.

¹¹ See Walter Pincus, “Waterboarding Historically Controversial,” *The Washington Post*, October 5, 2006, A17, available at <www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>.

¹² See Michael Walzer, *Arguing about War* (New Haven: Yale University Press, 2004), chap. 3, “Emergency Ethics.”

¹³ Edmund Burke, *Reflections on the Revolution in France* (London: J.M. Dent, 1919), 93, qtd. in Walzer, 14–15.