U.S. Army (Brandon Hubbard)

Joint Interrogation and Debriefing Center staff interview of Iraqi detainee at Camp Cropper, Baghdad

Law and Ethics

By JAMES P. TERRY

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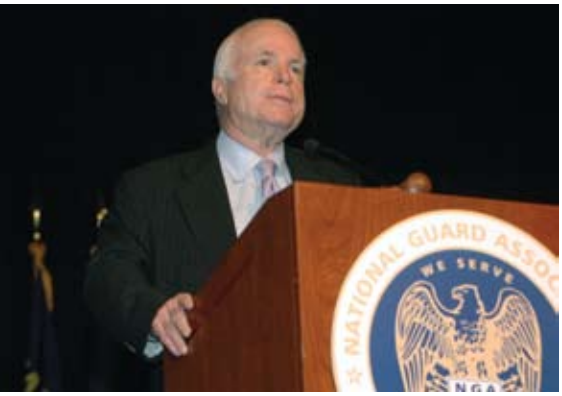
Professor Harvey Rishikof's fine article on institutional ethics in three distinct scenarios includes some troubling elements that bear additional scrutiny and analysis. Professor Rishikof capably addresses the interplay between law and ethics and the intersection of the respective roles of the President, Congress, and courts in drawing the line between lawful and unlawful conduct in prosecuting the war on terror and in evaluating the factors inherent in determining where that line should be drawn. He admits that the placement of that line may vary in different circumstances, and properly so.

Most international law practitioners would endorse the discussion in the first two sections of his article (addressing command responsibility under the Uniform Code of Military Justice, the principles underlying Protocol I [which lacks ratification], and the role of the judiciary reflected in the Israeli institutional court view). The discussion in the third section invites further review. This section addresses interrogation/prosecution issues and the need for greater congressional oversight of this process to ensure that the tenets of the Geneva Conventions are properly applied. Few could be disturbed by Congress exercising its authority over military operations through control of defense appropriations and through other appropriate legislation. This prerogative was addressed in a recent article in *Joint Force Quarterly*.[1] Similarly, there is no disagreement with Professor Rishikof that the provisions of Common Article 3 of the convention, addressing noninternational armed conflict, apply.[2]

What is troubling is Professor Rishikof's view that protections beyond those within Common Article 3 (applicable to unlawful belligerents) of the Third Geneva Convention apply *as a matter of law* to the detainees at Guantanamo. For example, in advocating a legislative commission to "preclude any deviation from the Geneva Conventions again," as he

apparently believes occurred at Guantanamo, he asserts that "under the Geneva Conventions, only name, rank, age, and serial number are required." No al Qaeda member is a lawful belligerent to whom these rules beyond Article 3 apply, and none has a rank or serial number recognized in law.

The war against the terrorists who attacked the United States on September 11, 2001, and their supporters does not represent traditional warfare between states adhering to the law of armed conflict. Rather, it reflects nontraditional violence against states and innocent civilians by individuals or groups for political ends without regard to the "civilized" behavior on the battlefield that underpins the four 1949 Geneva Conventions, including the Convention Relative to the Treatment of Prisoners of War (GC III).[3]



National Guard Bureau (Jim Greenhill)

Senator John McCain supports prohibiting military personnel from engaging in harsh interrogation techniques

Despite the fact that the Taliban and al Qaeda fighters being held at Guantanamo do not warrant prisoner of war (POW) treatment under GC III because they exhibited none of the criteria for lawful belligerent status under Article 4A of GC III (wearing uniforms or distinctive emblems, carrying arms openly, serving under a recognized command structure, and observing the laws of armed conflict), the Bush administration stated early on that those detained would enjoy humane treatment in confinement, although not the status of POWs.[4] The pertinent question is what this means in terms of access to the courts and interrogation of detainees.

The question of detainee access to U.S. District Courts was answered by the Supreme Court in *Boumediene v. Bush*,[5] decided June 12, 2008. The court in *Boumediene* reversed the Court of Appeals for the DC Circuit and held that aliens detained as enemy combatants at the Naval Station at Guantanamo Bay, Cuba, were entitled to the right of habeas corpus to challenge the legality of their detention.[6] The court further held that the provision (Article 7) of the Military Commissions Act (MCA) denying Federal courts jurisdiction to hear habeas corpus suits that were pending at the time of its enactment amounted to an unconstitutional suspension of the writ to these individuals.[7] Furthermore, the Supreme Court found that the Suspension Clause[8] had full effect at the Naval Station at Guantanamo Bay,[9] that the detainees were entitled to prompt habeas corpus hearings,[10] and that they could not be required to exhaust other review procedures prior to filing their habeas petition.[11]

Separate from, but related to, the jurisdictional arguments of the detainees in the *Boumediene* case were their claims under the Suspension Clause of the Constitution. The Supreme Court had previously held in 2001 that the Suspension Clause protects the writ of habeas corpus "as it existed in 1789," when the first Judiciary Act created the Federal court system and granted jurisdiction to those courts to issue writs of habeas corpus.[12] Before the DC Circuit in the *Boumediene*[13] appeal, however, appellants argued that in 1789, the privilege of the writ extended to aliens outside the sovereign's territory.[14]

Unfortunately, in none of the cases cited by appellants in the Circuit Court were the aliens outside the territory of the sovereign.[15] More significantly, the historical antecedents in England upon which U.S. practice is based show that the writ was simply not available in any land not the sovereign territory of the Crown. Given the clear history of the writ in England prior to the founding of this country, habeas corpus would not have been available to aliens in the United States in 1789 without presence or property within its territory. This is borne out by the Supreme Court's 1950 decision in *Johnson v. Eisentrager*,[16] where the court stated: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."[17] Similarly, the majority in the DC Circuit Court in *Boumediene* in 2007 observed: "We are aware of no case prior to 1789 going the detainees' way, and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government."[18]

Notwithstanding this clear record, the 5–4 Supreme Court majority upended history on June 12, 2008.

The question of what constitutes improper interrogation, and Congress' role in that determination, continues to be a vexing problem. As the Supreme Court recognized in 2004, the President's constitutional authority to deploy military and intelligence capabilities to protect the interests of the United States in time of armed conflict necessarily includes authority to effect the capture, detention, *interrogation*, and, where appropriate, trial of enemy forces, as well as their transfer to other nations.[19] President Bill Clinton's Justice Department further recognized in 1996 that Congress "may not unduly constrain or inhibit the President's authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military operations in the field."[20]

Concurrently, Article I, section 8, of the Constitution grants significant war powers to Congress. Its power to "define and punish . . . offenses against the laws of nations"[21] provides a basis for Congress to establish a statutory framework, such as that set forth in the MCA of 2006[22] for trying and punishing unlawful enemy combatants for violations of the law of war and other hostile acts in support of terrorism. This view was confirmed by President Bush's support for enactment of the MCA following the Supreme Court's decision in *Hamdan v. Rumsfeld*.[23] Furthermore, the power to "make rules for the government and regulation of the land and naval forces"[24] gives Congress the recognized authority to establish standards for detention, interrogation, and transfer to foreign nations. This is precisely what Congress did in passing the Detainee Treatment Act of 2005, which addresses the treatment of alien detainees held in the custody of the Department of Defense.[25]

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While the Executive and Congress share responsibility for detainee matters, the detention of unlawful combatants rests solely with the former. Early in the present conflict, Congress passed Senate Joint Resolution (SJR) 23,[26] which recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international ter-

rorism against the United States."[27] Additionally, the resolution specifically authorizes "the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist acts that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent any future acts of international terrorism against the United States* by such nations, organizations, or persons."[28] Thus, Congress in SJR 23 has specifically endorsed not only the use of appropriate military force, but also the included authority to detain enemy combatants to prevent them from conducting further hostilities against the Nation. Effective interrogation of those with knowledge of terrorist planning is directly related to preventing future terrorist acts.

These views were distilled most succinctly by then-Congressman (later Judge) Abe Mikva in 1971 when addressing the effect on the President's power of the repeal of the 1950 Emergency Detention Act. Representative Mikva stated:

After all, if the President's war powers are inherent, he must have the right to exercise them without regard to congressional action. Arguably, any statute which impeded his ability to preserve and protect the republic from imminent harm could be suspended from operation. It is a contradiction in terms to talk of Congress' limiting or undercutting an inherent power given by the Constitution or some higher authority.[29]

Relating this to the harsh interrogation used by intelligence agency professionals against Khalid Sheikh Mohammed, significant intelligence was secured that has saved American lives. While Professor Rishikof does not rule out harsh interrogation measures where extreme necessity may exist, we are left searching for guidance on what constitutes the line between lawful and unlawful interrogation and how Mikva's "imminent harm" or Rishikof's "extreme necessity" is to be measured.

The answer may come from the new Commander in Chief himself. When President Barack Obama was campaigning for office, he was sharply critical of President Bush's acceptance of practices involving enemy operatives and detainees in foreign locations deemed necessary to secure information and keep the Nation free from subsequent attack. These practices included warrantless wiretaps, enhanced interrogation, and detention without trial (as provided at that time by *Johnson*). Upon his election, however, President Obama has moderated these statements and has opined, most recently on ABC's *This Week*, that "we shouldn't be making judgments based upon . . . incomplete information or campaign rhetoric." As cautious a leader as President Obama apparently is, he will likely be reluctant to throw away the entirety of the intelligence architecture that has kept the United States safe for the past 7-plus years.

In late 2005, the Senate passed an amendment sponsored by Senator John McCain to the Defense Authorization Bill that now regulates the interrogation of detainees held by U.S. military forces. The amendment severely restricts harsh interrogation practices and prohibits "cruel, inhumane and degrading" treatment of detainees (torture has long been prohibited by both domestic and international law). Senator McCain has subsequently indicated he does not rule out harsh treatment in an emergency such as a hostage rescue or an imminent attack.[30]

To obtain the best possible balance between the obligations of both national security and human rights, three fundamental steps must now be taken to more carefully define this process. The first, as suggested by Charles Krauthammer,[31] John McCain, and others, would prohibit military personnel from ever engaging in the harsh techniques addressed by the McCain amendment and would require that, when they are authorized under limited and discrete circumstances, their application be restricted to nonmilitary intelligence professionals. The second is that the rationale be carefully circumscribed to only imminent danger situations, as suggested by Senator McCain. The third, given voice by President Obama himself in early March 2009, would require prior written authority from a review body modeled on the Foreign Intelligence Surveillance Court, which conducts a similar balancing of interests in the surveillance area. With these procedures in place, the respective institutional roles would be honored, and the process of drawing a line between the unlawful and the legally justified would satisfy both theorist and practitioner. **JFQ**

NOTES

[1] See James P. Terry, "The Use of Military Force by the President: Defensive Uses Short of War," *Joint Force Quarterly* 50 (3d Quarter 2008), 113–120, available at <www.ndu.edu/inss/Press/jfq_pages/editions/i50/25.pdf>.

[2] Article 3 of each of the four 1949 Geneva Conventions creates a "mini convention" providing certain minimum humanitarian protections in non-international armed conflict.

[3] Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

[4] See February 7, 2002, press briefing by Press Secretary Ari Fleisher at the White House. The President's Military Order of November 13, 2001, like the Secretary of Defense's Military Commission Order No. 1 of March 21, 2002, was designed to ensure that individuals subject thereto received a full and fair trial.

[5] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

[6] Ibid., 2234.

[7] Ibid., 2234–2235.

[8] The Suspension Clause in Art. I, sec. 9, cl. 2, directs that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[9] Ibid., 2235, 2276.

[10] Ibid., 2237.

[11] Ibid., 2275.

[12] See *INS v. St. Cyr*, 533 U.S. 289, at 301 (2001).

[13] *Boumediene v. Bush*, 476 F. 3d 981, at 988 (2007).

[14] At *Boumediene v. Bush*, 988, the appellants cited three cases for this proposition: Lockington's Case, Bright. (N.P.) 269 (Pa. 1813); The Case of Three Spanish Sailors, 96 Eng. Rep. 775 (C.P. 1779); and *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759).

[15] Ibid.

[16] *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

[17] Ibid.

[18] *Boumediene v. Bush*, 990–991.

[19] Compare, for example, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (describing important incidents of war).

[20] See, for example, Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 185 (1996).

[21] Art. I, sect. 8, cl. 10, U.S. Constitution.

[22] Pub. L. No. 109–366, 120 Stat. 2600 (2006). The President signed the Military Commissions Act into law on October 17, 2006.

[23] 548 U.S. 557 (2006).

[24] Art. I, sect. 8, cl. 14, U.S. Constitution.

[25] Pub. L. No. 109–148, 119 Stat. 2680 (2005), signed into law December 30, 2005.

[26] Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

[27] Ibid., preamble.

[28] Ibid., sect 2(a).

[29] 117 Cong. Rec. 31557 (1971).

[30] See Cathy Young, "Torturing Logic," March 2006, available at <www.reason.com/news/show/33263.html>.

[31] See Charles Krauthammer, "The Truth about Torture," *Weekly Standard*, December 5, 2005.