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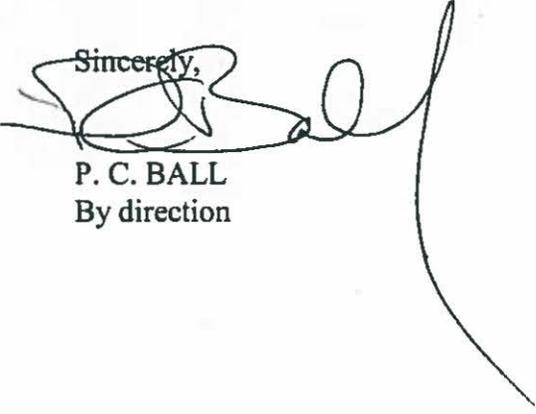
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NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

**THE EVOLUTION OF WARFARE,
THE LAWS OF WAR, AND THE ETHICAL
IMPLICATIONS OF U.S. DETAINEE POLICY IN THE
GLOBAL WAR ON TERROR AND BEYOND**

by

Marc A. Sheie

June 2006

Thesis Advisor:

George W. Lober

Second Reader:

Glenn E. Robinson

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**THE EVOLUTION OF WARFARE, THE LAWS OF WAR, AND THE ETHICAL
IMPLICATIONS OF U.S. DETAINEE POLICY IN THE GLOBAL WAR ON
TERROR AND BEYOND**

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requirements for the degree of

MASTER OF SCIENCE IN DEFENSE ANALYSIS

from the

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ABSTRACT

The atrocities committed by American GIs at Abu Ghraib shocked the collective moral conscience of the U.S. Guilty of inhumane treatment of its prisoners there, Abu Ghraib did immeasurable damage to America's international credibility and made clear that American detainee policy is off-track and needs to be corrected to comply with objective standards of law, morality, and operational effectiveness. The shock and emotional aftermath of 9/11 created a politically permissive environment within which the bureaucratic and organizational structures of the military were unsuited for the critical tasks assigned to them relative to the context of the Bush Administration's "new paradigm." Two issues sit at the forefront of the political and socio-cultural context of U.S. detainee policy: war powers and human rights. This thesis will utilize a synthesized decision-making model to analyze the President's decisions leading to the current detainee policy. Potential policy alternatives require smaller corrections to bureaucratic process rather than requiring a major reorganization of bureaucratic structure. This thesis will provide policy-makers with a moral and legal framework for the categorization and treatment of enemy prisoners. Adoption of the full framework of the 1949 Geneva Conventions, including U.S. ratification of Additional Protocols I and II (1977), provides the best available framework to combat transnational insurgency, while retaining the moral and legal high ground required of the world's champion of liberal democracy.

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I. INTRODUCTION

A. BACKGROUND

The Abu Ghraib Prison scandal sent shockwaves across the globe as the United States of America, the world's foremost champion of human rights, was found guilty of inhumane treatment of the detainees interned there. Significantly, the scandal damaged America's prestige as a defender of the rights of man. Perhaps equally important, the scandal shed the bright light of international and domestic scrutiny on the inability of United States' national policy and current international law to effectively deal with wars, or armed conflicts, undertaken by a nation-state against sub-state organizations and non-state actors, specifically the War on Terrorism. Particularly in the post-9/11 environment, when al Qaeda proved it could truly harm the governments and populations of nations through spectacular brutality and murderous violence, states must have the ability to act in self defense, not only to preserve their own system of governance, but also to protect the entire international system of governance from extremism and repression. The challenge then, relative to wartime detainees, is for states to operate within an internationally recognized legal framework that acknowledges the inherent legal, security, and ethical challenges posed by a nation versus sub-state conflict. To date, such adequate framework exists, but has not been ratified and accepted as an integral part of Geneva Conventions and the greater body of the international Law of War.

B. PURPOSE AND RELEVANCY

Within the context of the shift in the conduct of warfare—from state-against-state to a lesser defined state-against-non-state actors—the purpose of this thesis is to provide policy-makers with a moral and legal framework for the categorization, detention, treatment, and interrogation of enemy prisoners. Although volumes have been written about the international Law of War and the laws' impact and influence (or lack thereof) on nation-states engaged in armed conflict, relatively few documents have tackled the tougher issue of how states involved in self-defense and self-preservation against terrorists or an insurgency must act during the course of that conflict. Fewer documents still prescribe how the Law of War needs to adjust, relative to the accepted international

framework already in place, in order to effectively to govern the conduct of wars between recognized governments, and to prevent the unnecessary escalation of indiscriminate violence against armed forces, unlawful combatants, civilian populations, and other prisoners captured on or near the “fields of battle.” The problem facing governments is the lack of conceptual understanding of transnational insurgency and the networked organization executing that insurgency in an effort to seize power in one state and destroy the regional influence and hegemony of another state. The derivative problem from the shift in the framework of warfare is that the traditional laws, treaties, and conventions guiding how states treat enemy prisoners during war is neither completely relevant, nor operationally effective for the state in power.

1. Primary Research Questions

This thesis will address two primary questions resulting from the lack of an effective conceptual, moral, and legal framework in combat against transnational insurgents.

- a. With the increasing number and intensity of wars between states and non-state actors, does insurgency require a different approach to detainees than conventional war?
- b. With no defined frontlines, no rear areas, and civilian populations as the primary center of gravity, how should the United States revise its policies and practices with respect to Enemy Prisoner of War/Detainee/Civilian Internee classification and detention?

2. Secondary Research Questions

- c. Why is an update to Enemy Prisoner of War (EPW)/Detainee/Civilian Internee policy needed?
- d. What are the legal ethical/moral/practical implications of treating transnational terrorists as common criminals? What are the implications of bestowing them too much status?
- e. How can the U.S. revise its EPW/Detainee rules and regulations to effectively control detainees and extract quality, timely, and useful

intelligence from them while simultaneously maintaining (or regaining) the moral high ground and its posture as the defender of human rights?

- f. How should the U.S. propose changes to International Law/Law of Armed Conflict/Geneva Conventions/Hague Conference rulings to recognize and legitimate the changes in warfare from state versus state to a more unconventional state versus non-state actor?
- g. Does relinquishing the highest standards of protection of human rights in all cases lead down a slippery slope toward a national erosion of human rights protections over time?
- h. What methods of interrogation can be consistently applied to effectively influence prisoners of war/detainees to cooperate and provide information without interrogators having to resort to torture, abuse, or inhumane treatment? Are there any scientifically proven methods to influence people that do not rely on physical coercion?

C. TERMS

Definitions of key terms will be critical to properly frame the conceptual differences between traditional conventional conflict between states and the emerging type of asymmetric warfare between states and non-state actors, like the global insurgency being waged by al Qaeda. Additionally, specifically and accurately defining the category of a prisoner for either a privileged or unprivileged status requires a high degree of accuracy in an unstable, complex, and dynamic environment. Within such a context, the following terms will be defined and addressed in support of the proposed conceptual framework:

War

Insurgency (and Transnational Insurgency)

Terrorism

Unlawful Combatant

Militia versus Armed Forces of a State

Prisoner of War
Detainee
Cruel, Inhuman, or Degrading Treatment
Torture
Intent
Reciprocation
Authority
Commitment
Social Proof
Discrimination
Necessity
Proportionality
Due Process

D. METHODOLOGY

Since the Abu Ghraib prison scandal was the watershed event igniting the international firestorm of criticism over America's treatment of detainees in the War on Terrorism, a central part of this thesis will be to review the official Department of Defense reports regarding what happened, how it was handled, and what impact the event had on U.S. policy and practice. Further, this thesis will review a number of legal cases in which federal courts, to include the U.S. Supreme Court, have issued contradictory opinions on the classification of detainees as either civilians or Prisoners of War, as well as the military tribunal decisions regarding the necessity of their detention (Elsea, 2005, p. 2). The author also plans to research detention operations, prisoner treatment, and the prevalence of abuse or inhumane treatment in an inherently violent environment.

Additionally, research into the processes of the U.S. Department of Defense Combatant Status Review Tribunal (Elsea, 2005, p. 2) and their decisions regarding the

classification and designation of detainees as either enemy combatants or some other category, will provide important insight into the effectiveness of the existing system to accurately categorize prisoners captured in the course of an asymmetric conflict into the appropriate and correct status. Primary sources will include two Office of Legal Counsel Memoranda for Alberto Gonzales, Counsel to the President, the General Taguba Report on the Abu Ghraib detainee abuse incidents, the Schlesinger Panel Report, the Geneva Conventions, the Lieber Code, the Uniform Code of Military Justice and several key Supreme Court cases. Other key sources will include the 1971 Stanford Prison Experiment, a study on prisoner abuse by students, the Milgram Studies on the effects of authority on behavior, the DoD Joint Regulation on EPWs, Detainees, and Civilian Internees, and the 9/11 Commission's final report on Al Qaeda's attacks on the United States.

Critiques of decision making focus on choice. My decision in formulating a framework for analysis and presentation of U.S. national security policy decision making was to choose the process-oriented approach, explained by James Q. Wilson in his book, *Bureaucracy*. The benefit of a process-oriented framework is its focus on the process of decision making so that, by identifying and influencing the elements of the process in making the choice, the choice should become easier (Gustaitis, lecture, 2006); or in this case, easier to analyze. An approach synthesized by Naval Postgraduate School Professor Peter Gustaitis describes the elements of **Process** → **Choice** → **Output** → **Outcome** (Gustaitis lecture, 2006). I will analyze this national security policy decision process according to how each of these steps describe the impact of the President's policy decision. Under Process, I will apply Amy Zegart's National Security Agency Model, but will adapt it for an analysis of the contributing organizational inputs that recommended this particular National Security Policy, rather than as an organizational entity. Synthesizing Graham Allison's Organizational Process paradigm with James Wilson's examination of the roles of Operators and Executives in a bureaucracy within Zegart's model, I will analyze the process by which the President reached his decision regarding the "Humane Treatment of al Qaeda and Taliban Detainees," which rejected the application of the legal bounds of the Geneva Conventions upon these "unlawful combatants" (Detter, 2000, p. 987, as cited in Bybee, 7 Feb 2002, p. 6).

Choice represents the rational actor (Allison, 1971) within this synthesized model and is based on a desire to achieve both power and security. The rational actor relies on a consistent set of preferences, value maximizing actions and known constraints in order to make his or her decision. In this section, I will analyze the key elements of President Bush's decision as explained in his 7 February 2002 memorandum and will expound on the moral reasoning that ought to have been part of the policy decision-making process.

In discussing Outputs, I will analyze the other two key decisions resulting from the President's decision not to apply Geneva Conventions protections to Al Qaeda and Taliban detainees: to authorize coercive interrogation measures at GTMO for detainees in the War On Terror (WOT), and to authorize importation of these measures into the broader theaters of war against Iraq and Afghanistan. Other outputs implemented these policies: establishment of specific detention/interrogation facilities, approved coercive interrogation methods, and the importation of these methods in Iraq, where the application of the Geneva Conventions has been less defined.

In Outcomes, I will describe why these decisions resulted in outcomes such as Abu Ghraib, the military intelligence hard sites, the CIA secret prisons, and extraordinary rendition. Citing the findings of Doctors Stanley Milgram, Philip Zimbardo, and Robert Cialdini, I will relate the influences of authority and a lack of accountability to explain not only how such abuses can happen, but how they should have been predicted and if not intended by the policy decision-makers, prevented. This section will reference elements of other decision-making models and renew the ethical analysis as well.

Finally, based on a study of case law, historical precedent, ethics, and operational requirements, this thesis will aim to develop and recommend an improved conceptual framework from which to develop effective amendments to the Geneva Conventions, and to United States policy regarding the appropriate categorization, and treatment of captured transnational insurgents, without legitimizing their use of violence to the level of recognized and legitimate governments.

II. TRANSNATIONAL INSURGENCY: THE EVOLUTION OF UNCONVENTIONAL WAR

What is war? This seemingly obvious and simple question has generated uncounted volumes of study and analysis which have not yet produced the definitive answer. Beyond any kind of philosophical abstract to describe the nature of war, a composite definition must first break down the concept of war into its relevant parts, analyzing the types of war in which man engages. Carl von Clausewitz (1873) has probably written the best definition of war, which he called “an act of violence intended to compel our opponent to fulfill our will If our opponent is to be made to comply with our will, we must place him in a situation which is more oppressive to him than the sacrifice which we demand” (Weigley, 1973, p. xxi). While this definition is sufficient for a relatively timeless understanding of war in the abstract, it does not fully describe how modern warriors experience it. Warfare is changing. While this paper will not attempt to improve upon Clausewitz’s definition of war, it will attempt to provide some context to the nature of warfare the world has observed developing since the end of the Cold War. The broader issue this paper will address is that warfare is evolving from the exclusive activity of nation-states to an increasingly violent competition between states and sub-state factions for political control over contested civilizations. More specifically, this paper will delve into the phenomenon of transnational insurgency: what it is, what differentiates it from more conventional warfare, and how it should be fought in order to win. But before one can understand why such an evolution to transnational insurgency is occurring, the reader needs to understand what defines this type of warfare, relative to the broader concept, and why it must be understood, countered, and overcome.

In understanding the origins of modern warfare, one needs to understand the development and evolution of the nation state. Max Weber principally defined the state as the governing polity having a monopoly on the legitimate use of force. This definition is supported by Joel Migdal (1988) who observes, “Our [academic]view of the state, then, corresponds to Max Weber's notion of the state as institutional -- an organization -- enforcing regulations, at least in part through a monopoly of violence” (xii). Correspondingly, the key variable defining a nation-state’s strength (whether internal or

externally projected) is “the struggle for social control, the actual ability to make the operative rules of the game for people in the society” (Migdal, p. 261). The purpose of social control is the effective political mobilization of society toward specific ends defined by the leaders of the state. To simplify further, social control “is the currency over which organizations in an environment of conflict battle one another (Migdal, p. 32). In pursuing social control, however, state leaders cannot just spout rhetoric; they must deliver on promises to improve conditions for the society. If the state can honor its pledges, the bureaucracy must then measure its effectiveness in distributing the new social controls. “Increasing levels of social control are reflected in a scale of three indicators: *Compliance* (the ability to control dispersal of a broad scope of state resources, such as the police); *Participation* (repeated voluntary use of and action in state-run or state-authorized institutions); *Legitimation* (an acceptance of the state’s rules of the game, its social control, as true and right)” (Migdal, 1988, pp. 32-33). These are the factors which governed the rise of the nation-state in Europe and which were exported to Europe’s colonies between 1648 and 1945.

To compare the emergence of the nation-state in Europe with forms exported elsewhere, however, one must understand that European states evolved in a vacuum without significant external intervention. Consequently, the new order was established through blood (The Black Death), battle (the 30-Years War), catastrophic institutional change (global market expansion) and by usurping the universal authority of the Pope, through the Reformation, to make the rules of the society and confer legitimate sovereignty upon its rulers (Robinson lecture, 2005). This chain of events demolished the existing social order--primarily through massive loss of human life--and enabled the establishment of new social rules and strategies for peasant survival. Combined with the Enlightenment ideology, each European nation-state successfully concentrated its institutional social controls under an accepted, single set of rules.

The underlying theme of these monumental changes to a country’s system of governance is that timing and circumstances matter. “The foundation of power in the global system,” ‘wrote Kugler and Domke,’ “is the relationship between state and society. Governments acquire the tools of political influence through mobilization of human and material resources for state action” (as cited in Migdal, 1988, p. 22). Such

favorable circumstances and timing have rarely been replicated for those to whom the nation-state was exported. Third World states responded to entirely different social and environmental variables, particularly under the influence of colonialism, which prevented the natural rise of stronger regional powers (Robinson lecture, 2005). No one can be certain how, or even if, the state will ultimately lose its monopoly on legitimate use of violence and the subsequent ability to make and enforce the rules. With the tide of history as a guide, however, the matter will most likely find resolution from some manifestation of Clausewitz's abstract concept of war.

Perhaps the most perfect manifestation to date of Clausewitz's definition of "Trinitarian War" (Van Creveld, 1991, p. 40), defined as war between the army, the government, and the people, has been what historian Russell Weigley termed "the American Way of War: war that annihilates the enemy; war that relies on advanced technology and massive firepower to minimize casualties among U.S. forces; war that calls on dozens of legions of citizen soldiers; war that results in total victory" (as cited in Boot, 2002, p. xiv). Across history, there has been no other armed force so skilled, so well-educated, and so lethal as the Armed Forces of the United States.

Soldiers often claim that their general wartime mission is to "kill people and break stuff." However, economist-strategist Thomas Schelling provides a more complete purpose of American forces: "To seek out and destroy the enemy's military force, to achieve a crushing victory over enemy armies, [is] still the avowed purpose and the central aim of American strategy" (Weigley, 1973, p. 475). The irony, and design, of the American Way of War is that there are no other nations in the First World, much less the Third World, who could hope to defeat the United States in conventional combat. The problem with the American Way of War is that "conventional warfare is a method designed for an empty battlefield, populated only by the professional soldiers of the contesting armies" (Adams, 1998, p. 22). Unfortunately, there are few places left in the world where such a battle could take place and not impact a supporting or resident population. The result of these two hard facts is that the only way for nearly all states and sub-state organizations to challenge the United States' military might is through a strategy of unconventional or revolutionary war.

Unconventional war is principally a contest for the effective political control of a population. “Even more than conventional war, revolutionary war is a form of politics carried out by violent means” (Guillen, 1973, p. 322). As explained by a Vietnamese National Liberation Front central committee leader, “The real problem of revolutionary war is not primarily military . . . it is political” (Van Thieu, 1968, p. 316). As such, the National Liberation Front recognized one of the most important elements of their strategy: “We absolutely had to have cadres who knew and understood the peasantry . . . the main thing is to stick to a village” (Van Thieu, 1968, pp. 311-312) to carry out political propaganda. However, propaganda is not enough to mobilize the population, they must be made aware of the “need for armed struggle” (Van Thieu, 1968, p. 312). Unconventional war is non-Trinitarian in the fact that effective social and political control of the people is the ultimate objective. Unconventional, or revolutionary, war necessarily results from a challenge to a state’s monopoly on the legitimate use of violence and its authority to make the rules. Typically characterized by the circumstance where a weaker challenger competes against a stronger state, these types of wars are often referred to as “small wars.”

British Army Colonel C.E. Callwell was the first to really define the term small war. “The expression ‘small war’ has in reality no particular connection with the scale on which any campaign may be carried out; it is simply used to denote, in default of a better, operations of regular armies against irregular, or comparatively speaking irregular, forces” (Callwell, 1906, p. 21). An absence of commonly understood rules and principles is a primary difference between great wars and small ones. Great campaigns are governed by rules that are understood and accepted by its participants, “But in small wars all manner of opponents are met with, in no two campaigns does the enemy fight in the same fashion” (Callwell, 1906, p. 29).

The most common types of small wars pit weaker adversaries against a stronger, incumbent state and are considered unconventional campaigns of terrorism and insurgency. Terrorism is generally defined as a tactic and insurgency is a strategy by which a weaker organization undertakes a violent action in an attempt to seize political control from a stronger adversary. The two are not mutually exclusive; neither are they necessarily complimentary. “Terrorism has been defined as the sub-state application of

violence or threatened violence intended to sow panic in a society, to weaken or even overthrow the incumbents, and to bring about political change” (Laqueur, 1996, p. 150). The importance of terrorism as a tactic is to disorient the population, create a popular perception of systemic insecurity, and prove the regime cannot protect the people it governs. In this context, terrorism can be considered “the activity of insurgents who wish to disrupt the existing order and achieve power” (Thornton, p. 72).

Historically, terrorism has had very little real political influence; however, several recent acts of terrorism have achieved limited political aims. “Although terrorism has plagued civilization from its inception, there has been a heightened awareness since the end of 1967 Arab-Israeli War and the start of Israeli occupation of captured territory, at which point terrorism assumed a greater *transnational* character” (Enders and Sandler, 2001, p. 2). Enders and Sandler (2001) defined transnational character of terrorism as when the “actions and reactions of terrorists and states impose uncompensated costs or benefits upon the people or property of another country . . . or when an incident is planned in one country but executed in another, it is a transnational event” (p. 5). Enders and Sandler (2001) further contend “Transnational terrorism poses an important threat to the stability of the global community . . . By increasing cross-border interactions, globalization can augment the ramifications of catastrophic transnational terrorist events” (p. 5).

“Transnational terrorism has become much more prevalent during the last thirty years as terrorists have taken advantage of improvements in communication, transportation, and technology to intimidate a global community with threats of violence unless their political demands are met” (Enders and Sandler, 2001, p. 4). Additionally, as terrorism expert Walter Laqueur points out, "Society has also become vulnerable to a new kind of terrorism, in which the destructive power of both the individual terrorist and terrorism as a tactic are infinitely greater. The possibilities for creating chaos are almost unlimited even now, and vulnerability will almost certainly increase. If the new terrorism directs its energies toward information warfare, its destructive power will be exponentially greater than any it wielded in the past--greater even than it would be with

biological and chemical weapons" (Laqueur, 1996, pp. 156-157). Because of the expansion of its power and scope of its threat, transnational terrorism has gained greater international political influence.

Several recent terrorist attacks clearly illustrate both the transnational character and asymmetric power of an individual or small group to influence or affect populations. The 9/11 Al Qaeda attacks on the United States caused epic destruction, disrupted air travel, and pushed the global economy into recession (Enders and Sadler, 2001, p. 5). The 3/11 Al Qaeda attacks against Spain influenced the outcome of Spain's national elections and led to their subsequent withdrawal of troops from Iraq. The 1983 suicide bombing of the U.S. Marine Barracks in Beirut, Lebanon drove the withdrawal of U.S. troops from the Middle East. The 1979-1981 Iran Hostage Crisis, during which 52 Americans physically and an entire nation symbolically were held captive for 444 days by Iranian revolutionaries, caused the U.S. to suffer the dual humiliation of powerlessness and the bitter failure of an aborted rescue attempt.

These examples illustrate the transnational terrorists' need and growing capability to "disrupt the inertial relationship between incumbents and mass" (Thornton, p. 74). Explicitly political in nature, "This process is one of disorientation, the most characteristic use of terror. . . . and must remove the structural supports that give the society its strength" (Thornton, p. 74). The most significant danger facing the United States and other democratic governments is not from terrorism itself; rather, the real threat is posed by transnational insurgents who seek to use terrorism and guerrilla warfare in the "conquest of political power" (Guevara, 1963, p. 182).

While the political power of existing states is not necessarily declining, transnational insurgents have demonstrated their ability to exert control over some populations (such as Iraq and Afghanistan) while effecting significant political change in others (such as Spain and Italy). Their efforts have been facilitated by an increased "civilization consciousness" (Huntington, 1993, p. 6), economic and social change, a de-Westernization of elites, and perhaps most significantly, by the revival of fundamentalist religion, which "provides a basis for identity and commitment that transcends national boundaries and unites civilizations" (Huntington, 1993, p. 6). The alternative to

American hegemony for many nations is “to attempt to balance the West by developing economic and military power and cooperating with other non-Western societies against the West, while preserving indigenous values and institutions” (Huntington, 1993, p. 16). Particularly in the Islamic World, which has experienced the failure of colonialism, socialism, nationalism, and despotism, the radicals participating actively in the transnational insurgency are convinced that their real unifying agent, the truly effective strategy to counter Western influence in their sphere, is fundamentalist Islam.

Unlike terrorism, a strategy of insurgency has led the weak to victory over the strong on multiple occasions. Examples of insurgent victories against dominant major conventional powers include the British in Israel, the Russians in Afghanistan, the Israelis in Lebanon, Americans in Somalia, and the North Vietnamese Army in Cambodia (McCormick lecture, 2005). The two dominant characteristics of insurgency are 1) protractedness and 2) ambiguity, both of which are problematic for the great powers because they tend to mitigate the effectiveness of their conventional military and bureaucratic superiority (Metz & Millen, 2004, p. vi). Insurgency is defined as:

A strategy adopted by groups which cannot attain their political objectives through conventional means or by a quick seizure of power. It is used by those too weak to do otherwise. Insurgency is characterized by protracted, asymmetric violence, ambiguity, the use of complex terrain, psychological warfare, and political mobilization – all designed to protect the insurgents and eventually alter the balance of power in their favor. Insurgents may attempt to seize power to replace the existing government or they may have more limited aims such as separation, autonomy, or alteration of a particular policy. They avoid battlespaces where they are weakest – often the conventional military sphere – and focus on those where they can operate on more equal footing, particularly the psychological and political. Insurgents try to postpone decisive action, avoid defeat, sustain themselves, expand their support, and hope that over time, the power balance changes in their favor (Metz & Millen, 2004, p. 2).

The critical elements of insurgency are: 1) political mobilization of the population, 2) control over the population and political space, 3) insurgent groups are normally significantly larger in size than terrorist groups, 4) insurgency is a strategy, terrorism a tactic, and crime an activity (Byman, et al., 2001, pp. 5-6). 5) A common terror campaign is waged at a critical juncture as armed propaganda (Metz & Millen, 2004, p. 8).

Although this insurgency model essentially describes the 20th century Maoist People's War, according to Metz and Millen (2004), 21st century insurgency has already evolved from the Maoist model so the United States and its allies must adjust to the changes adopted by the transnational insurgents or risk a violent and dangerous social and political disruption. Several important trends describe the innovative evolution of Mao's model. First, the Maoist model is still the most important insurgent strategy invention from which further innovation is possible (p. 12). Second, insurgency is mutating from a rural based movement and becoming reliant on an urban population for sanctuary and support (p. 12). Third, insurgents are diversifying their logistics and operational support, relying less on state sponsors and increasingly on coalitions with organized crime (p. 13). This partnership with criminal organizations is particularly helpful when the insurgents have to go underground to survive and can utilize the criminal lines of communication and supply to bypass the traditional means controlled by the state, thereby remaining invisible. Fourth, insurgents are increasingly taking advantage of the internet and distributed communication systems for interconnected communication and information links between cells and sub-elements of the insurgency, permitting effective operational affiliations with lower risk of discovery by the state (p. 13). Fifth, continuing advances in technology permit insurgents and terrorists to generate increasingly asymmetric effects in their attacks on the state (p. 13). Sixth, insurgent ideology has shifted from Marxist-Leninist ideology to radical extremist Islam (p. 14). Seventh, the transparency of the insurgent network and organization allows for easier and more effective psychological war, enabled by instant global communications (p. 14). Finally, Al Qaeda "may be trying to engage in 'strategic swarming' – an effort to strike simultaneously, or with close sequencing, at widely separated targets But, so far, his ability to mount operations of strategic significance seems limited" (Arquilla & Ronfeldt, 2000, p. 53).

Complicating the incorporation of these trends into a more appropriate and responsive defense by the state is the transformation of the Al Qaeda organization from a more hierarchical terrorist group to an even more powerful and ambiguous idea, something resembling "a venture-capitalist firm, sponsoring projects submitted by a variety of groups or individuals in the hope that they would be profitable" (Burke, 2004,

p. 13). Particularly for Al Qaeda as a “loose network of networks” (Burke, 2004, p. 13), the implication of these trends illustrates the evolution to transnational insurgency whereby insurgent groups are increasingly networked, decentralized organizations, and unified by a common ideology (religion), with improved linkages and alliances with local political organizations to support increasing local population control (p. 14). The bottom line is that the increasing sophistication and distributed nature of insurgent organizations is even more pronounced for a transnational network like Al Qaeda, making them even more difficult for the state to identify, target, and eliminate.

The danger for the United States in combating religious fanatics as the perpetrators and cadre of a transnational insurgency lies in the possibility of being provoked into an overreaction and crackdown on the resident Muslim populations and Diaspora, reinforcing the belief for many that this war is a religious war, rather than a political one. In order to prevent or mitigate the vulnerability to that kind of psychological and information warfare, the United States and its allies, Western and Muslim, need to implement an effective political solution and to adopt the mindset of the National Liberation Front in their treatment of the Vietnamese peasantry: we absolutely need to have political and military cadres who understand the Muslim masses down to the village level. Without a relevant, meaningful, and valued political solution, the politics of violence will only breed more insurgents.

In describing the paradox of counterinsurgency, and referring specifically to America’s dislike for protracted conflict, Dr. Henry Kissinger noted “the guerrilla wins if he does not lose; the conventional army loses if it does not win” (Kissinger, 1994, p. 214). Particularly in an insurgency against an occupying power, such as the United States in Iraq, time is on the side of the insurgents. For the occupying power, however, insurgency is a timed event (McCormick lecture, 2005). It is imperative for the occupier to achieve victory quickly to show they have the legitimate authority and power to make the rules. For the occupier the war is one of national interest. However, the stakes are higher for the insurgent than the occupier. To the insurgent the war is a contest for their very existence, both physically and ideologically. Additionally, they are fighting with limited resources, versus the occupier’s relatively unlimited source of supply.. What many powerful states have learned through experience, however, is that “the power of

interest-type war is limited by definition, and pitting it against non-instrumental war, in many cases, does little more than invite defeat” (Van Creveld, 1991, p. 149).

While American armed forces are the most effective and lethal conventional military force in history, “the United States has been far less impressive in its use of more subtle tools of domestic and international statecraft, such as intelligence, law enforcement, economic sanctions, educational training, financial controls, public diplomacy, coalition building, international law, and foreign aid” (Cronin, 2003, p. 31). In his book *Military Strategy: A General Theory of Power Control*, Rear Admiral J.C. Wylie argued against the basic Clausewitzian dictum that “War is the continuation of politics by other means,” asserting instead that “War for a nonaggressor nation is actually a nearly complete collapse of policy” (as cited in Weigley, 1973, p. 476). Admiral Wylie questioned the wisdom of a strategy which actively promoted the use of military violence to preserve the international status quo because “war and the use of military violence inevitably cripple the policies in whose name they are invoked and shape new policies. War creates a momentum of its own; the use of violence cannot be so nicely controlled and restrained as strategists . . . would have it” (as cited in Weigley, 1973, pp. 475-476). Published in 1967 and reflective of the contradictions in national security policy he undoubtedly witnessed in Vietnam, Wylie’s insight remains prescient today. The danger to contemporary governments who overly rely on the violent side of politics is, “If states are decreasingly able to fight each other, then the concept of (political-military) intermingling already points to the rise of low-intensity conflict as an alternative. The very essence of such conflict consists in that it circumvents and undermines the Trinitarian structure of the modern state, which is why that state in many ways is singularly ill-suited for dealing with this kind of war” (Van Creveld, 2002, p. 194).

Modern states, to include the U.S., are poorly equipped to combat both pure and trans-national insurgencies because the inefficiency, momentum, and status quo of the state’s bureaucratic processes have a difficult time overcoming the insurgents’ more rapid cycle of change, their decentralized network with few real centers of gravity, and their relative invisibility to the state. Not only is western bureaucracy not designed to combat insurgency and revolution, but doctrine is inappropriate for the fight at hand because

Contemporary revolutions have been occurring in the non-western world, yet all the counterinsurgency theorists are westerners Hence the counterinsurgent ideology seldom develops in response to local needs; it is mechanically manufactured or imported and characteristically lacks not only native roots but even the necessary adaptations to the local culture and values (Ahmad, 1970, p. 260).

This doctrinal imbalance is the result of the American military's inward looking focus on achieving victory by concentrating superior resources and overwhelming firepower in order to destroy the enemy, or attrition warfare. However, to "the degree that intensity declines, the relevance of attrition must decline also, simply because the targets become less and less defined and more and more dispersed" (Luttwak, 1983, p. 337).

What is needed instead is an outer-regarding approach Luttwak called "relational maneuver" (p. 336), in which "victory is to be obtained by identifying the specific weaknesses of a particular enemy and then reconfiguring one's own capabilities to exploit those weaknesses" (p. 336). Because the United States already has a standing, trained, experienced force that specializes in relational maneuver, in Army Special Forces, what is needed more than anything else is a mind-set change. The new mind-set must abandon the traditionally accepted idea, epitomized by General Maxwell D. Taylor, that counterinsurgency is "just another form of small war" in which "Any well-trained organization can shift the tempo to that which might be required in this kind of situation" (Vandenbroucke, 1993, p. 177). The new mind-set must embrace the idea that counterinsurgency is the analytical opposite of conventional war (McCormick, 2005), and requires an appropriately sized force (Army SF), with the skills required to utilize relational maneuver, and the freedom from bureaucratic bonds in order to be flexible enough to adjust to the situation.

As this paper has shown, warfare is evolving from the exclusive activity of nation-states and is becoming an increasingly violent competition with sub-state, loosely networked factions, like Al Qaeda and Jamaa Islamiya, for effective political control of a fixed political space in the unlimited medium of international politics and public opinion. In contrast to a pure insurgency, however, today's transnational insurgency against the incumbent governing regimes in the Middle East, as well as Israel and the United States,

is being led by Al Qaeda and perpetrated by its networked, information-based, transnational insurgent organization. As history has shown, conventional war and traditional military violence is not the approved solution for this problem. What is urgently needed is a strong political solution, supported by a true counterinsurgent capability, in order to regain the support of the targeted and vulnerable Islamic populations.

III. THE LAWS OF WAR, U.S. WAR POWERS, AND DETAINEE POLICY IN THE WAR ON TERROR AND BEYOND

When there is a visible enemy to fight in open combat . . . many serve, all applaud and the tide of patriotism runs high. But when there is a long, slow struggle with no immediate, visible foe, your choice will seem hard indeed.

President John F. Kennedy's Address to the Graduating Class,
United States Naval Academy, June 1961

On the eve of the long, slow struggle that was to become the Vietnam War, President Kennedy's warning to America may have lacked the context it eventually came to encompass, although that context has become abundantly clear to us now. Having recently eclipsed the three-year anniversary of the beginning of the War in Iraq, and approaching four years since the start of the War on Terror, Americans have begun to perceive the current conflict in a political and social context resembling that of its long involvement in South Vietnam. The ambiguities surrounding America's justification for, and prosecution of, these conflicts have contributed to both a crisis of conscience and a re-examination of policy decisions. The most enduring and effectual of those choices leading the United States to its current position resided at the policy-making level – within the Executive and Legislative branches.

Of all the potential outcomes of the American foreign policy process, the resultant competition for domestic political power should have been easily anticipated. The struggle between Congressional and Presidential power can be understood nicely in the context of a statement made by Senator Daniel Inouye of Hawaii to President George H.W. Bush in the period leading up to the 1991 Persian Gulf War. Senator Inouye said, "Mr. President, do what you have to do. If it is quick and successful, everyone can take the credit. If it is drawn out, then be prepared for some in Congress to file impeachment papers against you" (Bush & Scowcroft, 1999, p. 435). This is not a new phenomenon; rather this tradeoff between Executive and Legislative power has existed, as intended, since the U.S. Constitution was written. As Alexander Hamilton noted in Federalist 8, "It is of the nature of war to increase the executive at the expense of the legislative

authority" (Hamilton, 1787, p. 68). The intent of this analysis is not to make a value judgment either about which branch of government should have the preponderance of emergency power or whether the War on Terror and the War in Iraq were justified; rather, the intent is to analyze the policy governing the conduct of United States Armed Forces during these conflicts as well as the influence of the legal implementation of American war policy on the participants. To do so, this chapter will examine the capability of Constitutional War Powers to effectively frame the war against terrorists and transnational insurgents, the applicability and suitability of international Laws of War, and the implications of rejecting the political, strategic, and social contexts (Gray, 2006) of an ad hoc policy of armed conflict. But before progressing into the analysis of these issues, it is important to examine one fundamental assumption upon which the analysis of this paper is based: whether or not America is at war.

There has been much debate over the nature of war and whether war can be conducted between states and non-state actors. Of particular concern has been whether the United States is truly at war with the transnational network of al Qaeda and its affiliates. In his 2006 monograph, *Recognizing and Understanding Revolutionary Change in Warfare: The Sovereignty of Context*, Colin Gray emphasized the primacy of the political context. Supporting Clausewitz's 1832 contention that "war is the extension of politics by other means," Gray states, "If there is no political context, there can be no war. Organized violence may be criminal, or recreational-sporting, but if it is not about the relative power of political entities, not only states, it is not warfare" (Gray, 2006, p. 17). Therefore, despite the fact that it is specifically non-territorial, because al Qaeda considers itself a transnational political entity, seeking definite political objectives on behalf of a specific identity group, it is both logical and necessary to recognize a state of war with the entity of al Qaeda. As noted by distinguished historian and professor Alvin H. Bernstein

Before we can fashion effective ... strategies for the various contingencies of sub-conventional conflict, we must in each case ask ourselves the most basic of questions: Are we at peace or are we at war? When American citizens have been killed at the direction of heads of state, we should consider abandoning the restrictions we have imposed on ourselves by

using the model of domestic law enforcement. We should admit that a state of belligerency exists between us and those (states) that kill our citizens (Bernstein, 1989, p. 158).

Whether that state of war is conducted within the legal framework established by international law, custom, and practice, is a subsequent question which will also be addressed in this chapter, specifically as it relates to the combatants.

A. WAR POWERS

The delegation and execution of emergency powers in defense of the Constitution, the territory and citizens of the United States, and the national interest, has been a contentious and divisive issue between the Executive and Legislative branches since the birth of the nation. Alexander Hamilton, James Madison, and John Jay, having had a significant hand in the framing of the Constitution, left us with a number of incredibly valuable insights into the specific meaning and intent of the framers of the Constitution in the form of the Federalist Papers. In Federalist 23, Hamilton addresses the framers' intent behind the delegation of specific powers:

The principal purposes to be answered by union are these--the common defense of the members; the preservation of the public peace, as well as against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries. The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense (Hamilton, 1787, p. 153).

Hamilton understood in the eighteenth century what organizational theorist Henry Mintzberg confirmed through his research and writings two centuries later: that in any significant crisis or emergency, an organization will naturally and automatically centralize its power and decision-making authority to its leader/chief executive in order to

simplify communications and unify the response effort until resolution of the crisis (Mintzberg, 1981). The primary point of contention has not been that such a process occurs or is necessary; rather the struggle has been to what degree such power and authority should be vested in a single executive, namely the president. Although Hamilton and the other framers of the Constitution left future American governments with good instructions, these instructions did not resolve all the issues. One of the most contentious issues between the Congress and the President has been over which branch has primacy in war powers.

Congress has declared war only eleven times for American participation in just five armed conflicts (Wikipedia, 2005). Congress has also authorized the President to use military force, short of a declaration of war on a great many more occasions throughout U.S. history, to include extended deployment of combat troops for intervention in the Russian Civil War, for the protection of Lebanon, for the defense of South Vietnam against Communist aggression, for the liberation of Kuwait, and for regime change in Iraq (Wikipedia, 2005). As a result, precedent and premise derived from Congress' 'necessary and proper' powers and from the President's implied powers, "which may be invoked in order to respond to an emergency situation" (Relyea, 2006, p. 2). "Until the crisis of WWI, Presidents utilized emergency powers at their own discretion. Proclamations announced the exercise of exigency authority" (Relyea, 2006, p. 1). Thereafter, Congress developed a growing body of statutory delegations of "stand-by emergency authority," (Relyea, 2006, p. 1) which Presidents used at their discretion until the end of the Vietnam War. Congress statutorily limited Presidential discretion in his use of military forces through the War Powers Resolution in 1973. The purpose of the War Powers Resolution was "to insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities" (War Powers Resolution, 1973), and to frame the Constitutional powers of the President as Commander in Chief.

In 1976, Congress further curtailed Presidential discretion for use of the armed forces with the passage of the National Emergencies Act (Relyea, 2006, p. 1). However, the passage of these laws failed to resolve the struggle for political primacy during national emergencies. One relevant question derives from this struggle, namely do

Executive Powers during national emergencies differ from those during war? Not necessarily. “An eminent constitutional scholar, the late Edward S. Corwin, explained emergency conditions as being those ‘which have not attained enough of stability or recurrency to admit of their being dealt with according to rule’” (as cited in Relyea, 2006, p. 4). “In the American governmental experience, the exercise of emergency powers has been somewhat dependent upon the Chief Executive’s view of the Presidential office” (Relyea, 2006, p. 2). The words of Albert Sturm remain as true today as the day they were written: “In the last analysis, the authority of a President is largely determined by the President himself” (Sturm, 1949, pp. 125-126, as cited in Relyea, 2006, p. 3).

B. LAWS OF WAR

In an effort to explain why the provisions on irregular forces from the 1907 Hague Conventions migrated to the 1949 Geneva Conventions virtually unchanged, the late professor Julius Stone described the provisions as “an uneasy compromise between the views of smaller land Powers liable to be overrun, and of the greater land Powers who have usually done the overrunning” (Stone, 1954, p. 565, as cited in Aldrich, 2000, p. 44). The great powers’ defense of the status quo became overwhelmingly forceful, though, when they “stressed that irregular armed forces unnecessarily endanger innocent citizens because they make it difficult and sometimes dangerous for regular armed forces fully to respect the immunity of civilians when some enemy combatants are disguised as civilians” (Aldrich, Jan. 2000, p. 44).

The United States has used the same forceful justification for its position against legitimizing irregular armed forces, especially terrorist groups such as Al Qaeda. This argument was supported particularly vigorously by both Presidents Reagan and Clinton when requesting the Senate’s advice and consent for ratification of Protocols (I & II) Additional to the Geneva Conventions. Because these Additional Protocols upset the international status quo, despite ratification by 163 and 159 states (ICRC, 4 Dec 2005) respectively, they were deemed unacceptable to those great powers who risked the most in terms of sovereignty by their ratification. President Reagan’s 29 January 1987 Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions is especially enlightening on this point:

Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law (Reagan, 29 Jan 1987).

President Reagan's message contends that international legal distinctions between international and non-international conflicts ought to be based on objective reality rather than subjective and politicized distinctions. "Yet experience ... has demonstrated beyond doubt that resistance movements will not be deterred by the law but, instead, will operate outside the law if necessary, thereby placing noncombatant civilians as much at risk as if the law did not exist" (Aldrich, Jan. 2000, p. 45). The objective reality of these Additional Protocols is that they provide a real framework within which powers great and small can more appropriately conceptualize and legally deal with insurgency, internal war, and wars of national liberation. The subjective political reality is that these protocols have been stuck amongst other pending treaties despite ratification recommendations from two Presidents for Protocol II (THOMAS, 16 March 2006).

In 1996, Osama bin Laden demonstrated beyond the shadow of a doubt that resistance movements would not be deterred by international law, but would willingly

operate outside it to achieve their objectives. “Bin Laden is an activist with a very clear sense of what he wants and how he hopes to achieve it. Those means may be far outside the norms of political activity ... but his agenda is basically a political one, though it is couched, of course, in religious language and imagery” (Burke, 2004, p. 23). “The Declaration of War” was Bin Laden’s “political manifesto” (Burke, 2004, p. 162) to the Muslim world, stressing the duty of jihad for all Muslims in order “to end the repression of the Islamic world by the hypocrite governments and the ‘Crusader-Zionist’ alliance supporting and manipulating them” (Burke, 2004, pp. 162-163). By framing his jihad as a defensive struggle, Bin Laden was able to justify, in both political and socio-cultural contexts, terrorism as a legitimate counter-attack against the West’s aggression. The most important point of this declaration is the marked shift in the political violence from local regimes to the international powers in order to indirectly weaken the support of the hegemons and to unseat the local regimes from power (Robinson lecture, 2006).

Al Qaeda’s long term strategy, released by ideologue and Bin Laden deputy Ayman Al Zawahiri in January 2005, is “based upon three foundations: 1) ‘The Quran Based Authority to Govern,’ which supports the creation of an Islamic state governed solely by sharia law; 2) ‘The Liberation of the Homelands,’ which emphasizes the liberation from oppressive regimes and control over energy resources; 3) ‘The Liberation of the Human Being,’ which articulates a duty for Muslims to overthrow rulers who violate Islamic law” (Blanchard, 2005, p. 8). Although Bin Laden’s long-term political vision is for the Caliphate to re-emerge across the Islamic world, the central and animating principle to al Qaeda’s ideology is to liberate the Muslim world from what they see as the illegitimate occupation by the West (Burke, 2004; Robinson lecture, 2006). Additionally, one of al Qaeda’s primary weapons in this war against the west, suicide terrorism, is successful because it has come to be seen as pursuing legitimate nationalist goals aimed at political coercion to end occupation of Muslim lands by non-Muslims (Pape, 2005, pp. 21-23).

Perhaps the most interesting and crucial aspect of this war is that al Qaeda is not fighting for specific territorial gain. Their central political goal is to compel the United States and other Western states to withdraw from Islamic lands. Bin Laden is not using al Qaeda to fight *for* personal political power over any particular Islamic state; rather they

are fighting *against* (Simons lecture, 2005) regimes that either control, or influence control, over specific societies and cultures. Although this warfare is to a degree non-territorial, the fighting primarily occurs in territory other than the ultimate political target. al Qaeda leaders subordinate to Bin Laden “refer to Iraq as an opportunity for the global jihadist movement to take advantage of insecurity in the heart of the Arab world and to spread into neighboring areas” (Blanchard, 2005, p. 7). In other words, al Qaeda’s lieutenants generally seek to fight the West in the West, or in some proxy state, which they seek to liberate from Western influence. They seem to regard Iraq as only a foothold, whereas Bin Laden views it as the main floor of the house. As a striking illustration of his strategic rhetoric, “Bin Laden identified the insurgency in Iraq as ‘a golden and unique opportunity for jihadists to engage and defeat the United States, and he characterized the insurgency in Iraq as the central battle in a ‘Third World War, which the Crusader-Zionist coalition began against the Islamic nation’” (Blanchard, 2005, p. 6). This statement is significant because it implies Bin Laden’s adaptability to relevant political circumstances; it identifies Bin Laden’s primary enemy and target; and though the focus is on Iraq, Bin Laden’s characterization of the struggle as a world war, despite being obvious political rhetoric, confirms his disregard for state boundaries and sovereignty. The relevant question then becomes whether this new conduct of warfare forms a necessary basis for a different definition of, and standard of treatment for, the combatants? The most appropriate answer to governing this type of warfare through limitations and inducements can be found in the existing Geneva Conventions framework, but requires conformity to the full framework and ratification by all signatories to Protocols I and II Additional to the 1949 Geneva Conventions.

Although a pseudo-state of war has arguably existed between al Qaeda and the United States since 1996, the 9/11 attacks provided the clear and unequivocal justification for Americans. The current President argues that the United States has effectively declared war against a highly irregular adversary, namely al Qaeda, its affiliates and its sponsors. Specifically, on 14 September 2001, Congress authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed,

or aided the terrorist attacks that occurred on Sept. 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 (107th CONGRESS, 2001)

Further, in his Presidential Order dated 13 November 2001, President Bush asserted, “International terrorists, including members of al Qaida (*sic*), have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces” (Bush, 13 Nov 2001). Although a state of war did not formally exist between the United States and Al Qaeda, President Bush “proclaimed a national emergency on September 14, 2001” (Executive Order 13223, 14 Sep 2001). Considering that Congress had immediately and almost unanimously granted him this power in response to the 9/11 attacks, President Bush’s proclamation served as “collective judgment” for both branches regarding the introduction of armed forces into hostilities:

Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency” (Executive Order 13223, 14 Sep 2001).

Because of Congressional deferment to Executive Powers and despite his claim to unlimited autonomy and Executive authority, President Bush met the letter and intent of the 1973 War Powers Resolution.

While this state of conflict may not rise to the level of warfare on all occasions, it was recognized as the legitimate use of force by such international bodies as the United Nations and the North Atlantic Treaty Organization, which in an unprecedented show of unity and support, invoked the provision in Article 5 stating an attack on one is equivalent to an attack on all members. Article 5 of the NATO Treaty (1949) states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defence

recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually, and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area (NATO,1949).

Such declarations for self-defense to a transnational armed threat, the use of military force on an international scale, and the unification necessary to ensure the security and stability of the international system demonstrate to a degree beyond even most other just wars, that this particular armed conflict had risen to the legitimate level of war.

Typically the laws governing why and when states go to war are distinct from how the parties to the conflict conduct themselves during the war. That line becomes blurred when states declare war against a non-state actor, such as al Qaeda, whose actions define its *raison d'être*. The tremendous emotions driving America's response to the 9/11 attacks by al Qaeda members contributed greatly to the blurring of that distinction and complicated the identification of legitimate parties to the conflict. The blurred distinction is reflected in three American policy decisions: 1) the decision to go to war against groups operating beyond the accepted margins of legitimacy, 2) the linkage of al Qaeda to the Taliban to justify the invasion of Afghanistan, and 3) simultaneously using the same political/operational linkage to deny their legitimacy as lawful combatants. The Law of War attempts to clarify those distinctions and, when taken within its full context, provides a solid and honorable framework for the conduct of warfare between all types of belligerents. The purpose of the Law of War is to prevent an uncontrollable spiral of violence and retribution between each side. "Parties to an armed conflict retain the same rights and obligations without regard to which party initiated hostilities and whether that conduct is justifiable under international law. Otherwise, each party would routinely regard its enemy as unlawfully engaging in war and would thus feel justified in taking whatever measures might be seen as necessary to accomplish its defeat" (Elsea, 2002, pp. 10-11). In short, parties to a conflict don't automatically lose their rights and protections simply for unlawful conduct; they must be given due process under the law. However, due process is only required to take place before prosecution and punishment for war crimes, and POWs can be legally and legitimately held until the end of hostilities.

Colin Gray has written with a degree of skepticism about the conception of “war” against terrorism and Al Qaeda. He writes, “The United States declares that it is a country at war, a commitment that flatters the contemporary foe more than a little. No matter how impressed one may be by the prowess of whatever al Qaeda is today, its menace does not, and will never, bear even a remote resemblance to that posed by the Soviet Union” (Gray, 2006, FN 16, p. 50). Gray’s entire monograph reinforces the little understood fact that war and warfare (the conduct of war) is determined and driven by context. To emphasize the importance of context, Gray says “War is about politics and warfare always is about people” (Gray, 2006, p. 27). This is undoubtedly true; however, the degree of the threat does not *inter alia* determine the existence of a state of war. The degree of the threat, particularly in low intensity warfare, is neither fixed, nor definitive. Therefore, for the purpose of this analysis, the conclusion of this author is that the armed conflict with al Qaeda does in fact rise to the level of war.

The argument presented by the Bush Administration for not categorizing Al Qaeda members as Prisoners of War could therefore be considered illogical and inconsistent at a primary level. Nevertheless, the United States has presented and justified two primary reasons for treating al Qaeda members, and essentially all detainees in the War on Terror, as “unlawful enemy combatants” (Bybee, 2002): 1) al Qaeda and its affiliates are not a state, are neither signatories to, nor compliant with, the 1949 Geneva Conventions, and, therefore, not entitled to its protections, and 2) If the United States bestowed Geneva Conventions privileges and protections upon parties to conflicts with the United States who were not entitled to them, then there would be no motivation for said parties to comply with them. Yet neither of these two arguments logically stands on its own merit. Taking a historical view, the U.S. policy toward Vietnamese POWs alone renders both of the current arguments obsolete. The Viet Cong and its supporters did comprise a state, they were not lawful combatants and neither they nor the NVA, complied with the Laws of War. Despite these facts, the U.S. treated all prisoners captured in South Vietnam as privileged POWs precisely because America’s adversary did not comply with the Geneva Conventions (Aldrich, 2000).

To make a logical argument regarding whether detainees should hold protected status as POWs, one must consider the entirety of Article 4 of the Third Geneva Convention, which states:

4.A. Prisoners of war, in the sense of the present Convention (III), are persons belonging to one of the following categories, who have fallen into the power of the enemy:

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

4.A.2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

4.A.3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4.A.4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

4.A.5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

4.A.6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without

having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

4.B. The following shall likewise be treated as prisoners of war under the present Convention:

4.B.1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment (Geneva Convention III, 1949).

Applying the documented evidence of what the U.S. knew about al Qaeda and the Taliban to the complete framework of the Third Conventions (GPW), Article 4 can reasonably lead one to a different conclusion than that of the Bush Administration's policy regarding the categorization and treatment of al Qaeda and the Taliban in the War on Terror. But since the central issue regarding detainee status derives from a small portion of the Third Geneva Convention, Article 4.A(2), the question of combatant status must be answered first. The essential elements of analysis for this determination are found in the conditions of Article 4A. The four criteria established in Article 4A "are meant to ensure that only persons authorized to fight on behalf of a higher authority who is responsible for their conduct will participate, excluding civilians as both combatants and targets" (Elsea, 2005, p. 28).

Essentially, based in some immeasurable degree upon the emotional response to the 9/11 attacks, President Bush and his cadre of legal advisors appear to have prejudged America's enemies from Washington, D.C., and effectively ruled as the competent tribunal in Afghanistan by deciding that neither the Taliban nor al Qaeda were lawful combatants, and were therefore unworthy of the protections guaranteed by the Geneva Conventions. The President's decision was based on the 22 January 2002 recommendation from the Office of Legal Counsel of the U.S. Department of Justice (OLC) "that the Third Geneva Convention as a whole does not apply to al Qaeda since (1) 'Al Qaeda is not a State' and (2) the members of al Qaeda failed to satisfy the four basic criteria for POW status for persons who are no part of a regular armed force"

(Murphy, 2004, p. 821). On 7 February 2002, Assistant Attorney General Jay Bybee further “asserted that a Presidential determination that members of the Taliban as a whole fall outside the Third Geneva Convention would remove any doubt as to their status, thus obviating the need for individualized determinations by a competent tribunal (Murphy, 2004, p. 823). This was a bold move, but arguably not in accordance with the law, since the President could never know, with any degree of legal certainty, that every member of both Al Qaeda and the Taliban was culpable to the same degree. Further, it was impossible for the President to determine that every person captured on the battlefield, or in the theater of war, was actually a combatant. These are precisely the situations for which Geneva requires a competent tribunal -- to make those individual determinations of combatant status whenever there is “doubt.”

Although the Congressional Authorization to Use Military Force (AUMF) did not specifically identify against whom the United States would go to war, Congress did authorize the President to “use all necessary and appropriate force” for reprisals against those the President identified as responsible, and for the purpose of preventing future attacks against the United States. President Bush, in his 13 November 2001 Presidential Order, specifically identified al Qaeda as the primary party responsible for creating “a state of armed conflict requiring the use of United States Armed Forces” (Presidential Order, 13 Nov 2001). The Taliban were involved only because they had “knowingly harbored one or more of the individuals described” (Presidential Order, 13 Nov 2001.), and because they refused to turn them over to the United States. Hence the war against al Qaeda came to be inextricably linked with the Taliban.

Whether because of misconstrued moral certainty or inaccurate legal counsel, “the President maintained that the Taliban’s actions in violating the laws of war and closely associating itself with al Qaeda had the effect of stripping Taliban members of their rights to POW status” (Decision Not to Regard, 2002, p. 477). The Taliban became the focus of military force for several reasons within the political context. First, as the de facto government of Afghanistan, the Taliban, though not diplomatically recognized internationally, were held responsible for supporting the murderous actions of its “guests.” However, as both Ruth Wedgwood and George Aldrich note, “Providing sanctuary to al Qaeda and sympathizing with it are wrongs, but they are not the same as

failing to conduct their own military operations in accordance with the laws of war. A nation that assists an aggressor thereby commits a wrong, but its armed forces should not, as a consequence, lose their entitlement, if captured to POW status” (Aldrich, 2002, p. 895).

Second, Afghanistan was a “High Contracting Party” to the Geneva Conventions; al Qaeda was not. Additionally, President Bush concluded “By its terms, Geneva applies to conflicts involving ‘High Contracting Parties,’ which can only be states” (Bush, 7 Feb 2002). Because al Qaeda was not considered either to be part of the Taliban or the Armed Forces of Afghanistan, and because they were characterized as a terrorist organization, they were not considered to be a formal party to the conflict. However, Douglas Cassel, in his Feb. 3, 2002 Chicago Tribune article *Case by Case: What Defines a POW?*, “notes that at least one al Qaeda battalion was reportedly incorporated into the Taliban armed forces, possibly entitling those soldiers to POW status upon capture” (Elsea, 2002, FN 127, p. 24). If true, this report further demonstrates the need for an Article 5 Tribunal to determine the appropriate status of detainees as soon as practicable after capture.

These were the primary reasons for President Bush’s conclusion that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world” (Bush, 7 February 2002). In order to justify the conflict as one of an international character, the United States felt compelled to acknowledge the de facto sovereignty of the Taliban as the government of Afghanistan, rather than declare the separate belligerency of al Qaeda (Elsea, 2002, p. 15). However, President Bush described the War on Terror as part of a “new paradigm”—acknowledging the belligerency of armed, transnational groups—and which “requires new thinking in the law of war” (Bush, 7 February 2002). Michael Schmitt and Jennifer Elsea describe this paradigm as:

forging new international law by recognizing or creating a new form of armed conflict, in which a state is authorized to use armed force against members of a para-military group in self-defense outside its own territory Under this view, the traditional nexus between the rights and the

obligations of belligerents appear to be severed, so that a state may wage a full-fledged war against persons not entitled to participate” (Elsea, 2002, p. 15)

In seeking to give the President the broadest possible authorities to combat what they perceived as a new paradigm, the Department of Justice and White House Legal Counsel failed to properly account for the fact that the Geneva Conventions already account for this paradigm, supported by judicial decisions and customary international law (Elsea, 2005, FN 26, pp. 7-8). Common Article 3, although expressly applicable only to conflicts “not of an international nature,” and Article 75, Protocol I Additional to the 1949 Geneva Conventions (1977) are now “widely considered to embody the minimum set of rights applicable to persons in international armed conflicts ... and to be universally binding as customary international law” (Elsea, 2005, FN 26,28, pp. 7-8). Further, the International Committee of the Red Cross Commentary on the Geneva Conventions notes “This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts” (Pictet, 1960, p. 14). Had the U.S. ratified the 1977 Additional Protocols to the Geneva Conventions, the complete framework for conceptualizing and acting on this new paradigm would have been available.

As historian John Vincent noted, “History is about evidence. It is also about other things: hunches, imagination, interpretation, guesswork. First and foremost, though, comes evidence: no evidence, no history” (as cited in Gray, 2006, p. 29). The process by which OLC analyzed the first criteria for defining whether either the Taliban or al Qaeda met the standard for a regular armed force or militia seems to have been made in the absence of evidence. The 22 Jan OLC Memorandum noted “that the Justice Department has not been appraised of how the Taliban units were organized and operated, and thus the Department was not in a position to apply its legal analysis to the Taliban” (Murphy, 2004, p. 822). OLC finally did consider the issue after the Defense Department provided “facts” regarding the Taliban’s modus operandi to the Justice Department (Murphy, 2004, p. 823). Assistant Attorney General Bybee subsequently recommended to the President in his 7 February 2002 Memorandum “that no members of the Taliban militia were entitled to POW status” (Murphy, 2004, p. 823). Because the Taliban described

themselves as militia, rather than the armed forces of Afghanistan, Mr. Bybee's analysis appeared to be mostly guesswork based on the four criteria listed in the Third Geneva Convention, Article 4A(2). In his own memorandum of 7 February 2002, President Bush proclaimed that he accepted the legal conclusions of the Office of Legal Counsel and that neither the Taliban nor al Qaeda qualify as lawful combatants and Prisoners of War, but that as a matter of policy, they would be treated humanely and "in a manner consistent with the principles of Geneva (Bush, 7 Feb 2002).

Regarding the organizational effectiveness and capability of al Qaeda, the 9/11 Commission reported several interesting facts that contradict one of the key elements in the Bush Administration's justification not to treat al Qaeda as POWs. According to the 9/11 report, bin Laden drove the creation and development of an organization whose "9/11 attacks ... were far more elaborate, precise, and destructive than any earlier assaults" (9/11 Report, 2004, p. 3). Having built a dynamic, sophisticated, and lethal organization upon an ambitious political and radical Islamist ideological foundation, Bin Laden forged a close alliance with the Taliban, a regime providing sanctuary for al Qaeda (9/11 Report, 2004, p. 4). More importantly, the 9/11 Commission reports that by September 11, 2001, al Qaeda possessed:

- Leaders able to evaluate, approve, and supervise the planning and direction of a major operation;
- A personnel system that could recruit candidates, indoctrinate them, vet them, and give them the necessary training;
- Communications sufficient to enable planning and direction of operatives and those who would be helping them;
- An intelligence effort to gather required information and form assessments of enemy strengths and weaknesses;
- The ability to move people great distances;
- The ability to raise and move the money necessary to finance an attack (9/11 Report, 2004, p. 4).

"Between 1996–2001, Al Qaeda acted in a similar way to a venture-capitalist firm, sponsoring projects submitted by a variety of groups or individuals in the hope that they would be profitable. Together these links ... allow us to speak of a loose 'network of networks'" (Burke, 2004, p. 13). Clearly then, al Qaeda were more capable, sophisticated, and formal an organization than the Taliban. Taking the idea a step

further, Bin Laden and Zawahiri have always ensured that al Qaeda claimed responsibility for an attack that al Qaeda either executed or sponsored. Doing so was in their best political interest because they generated recruits, funding, support, and even more options for future attacks. The implication of this analysis is that the bureaucratic team of legal advisors, tasked to make sure the President had the best information possible, made an arbitrary legal determination that al Qaeda had no formal chain of command primarily because they failed to understand it.

With regards to the three other conditions that must be fulfilled to receive protections as POWs under Geneva, namely having a fixed or distinctive insignia, of carrying arms openly, and of complying with the laws of war, “it seems insufficient for the United States merely to assert an absence of distinction without adducing evidence, and it appears most unlikely in any event that all units of the Taliban’s armed forces were indistinguishable from civilians” (Aldrich, 2002, p. 895).

As a matter of record, Secretary of State Colin Powell did ask President Bush to reconsider his position on the combatant status and POW issue. In a draft Memorandum from Secretary of State Powell to White House Counsel Alberto Gonzales on 26 January 2002, Secretary Powell’s opinion was that the President’s policy would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general, would have a high cost in terms of negative international reaction, and would be challenged in international forums, such as the International Court of Justice” (Powell, 26 Jan 2002, as cited in Murphy, 2004, p. 822).

Analyzing Secretary Powell’s concerns beyond their bounded legal parameters, there is no historical basis for the assertion that other Parties to Conflict with the United States will treat U.S. prisoners in contravention to the Geneva Conventions based solely on whether or not the United States grants those protections to the prisoners it captures in combat. The treatment other states have afforded U.S. POWs has been dependent primarily upon the political and strategic contexts (Gray, 2006, pp. 17-19) within which the war is fought. While context matters, state practice has also played an important role in terms of international legitimacy. Specifically:

State practice does not appear to support the conclusion that the armed forces of states have been categorically denied eligibility for POW status on the basis that the army did not comply completely with the law of war. Indeed, U.S. practice has been to accord POW status generously to irregulars, to support such status for irregular forces at times, and to raise objections whenever an adversary has sought to deny U.S. personnel POW status based on a general accusation that the U.S. forces were not in compliance with some aspect of the law of war (Elsea, 2005, pp. 8-9).

One of the most defining wars for the U.S. Army, among the multitude of low intensity conflicts throughout America's history, was the Vietnam War. Even though the Viet Cong (VC) guerrillas and their civilian sympathizers were not technically lawful, or privileged, combatants, and although neither the VC nor the North Vietnamese Army (NVA) complied with the laws of war, United States policy was to treat all detainees in the Vietnam War as privileged POWs (Aldrich, 2002). The political objective behind that decision was arguably to demonstrate the contrast between the legal and customary treatment of Vietnamese prisoners by the U.S. with the illegal and torturous treatment of American POWs by the North Vietnamese. However, because of the increasing complexity of irregular warfare, the Vietnam conflict marked the first implementation of written procedures for the Third Geneva Convention (GPW) Article 5 tribunals designed to categorize and adjudicate POW status (Elsea, 2005, p. 35). They were not needed previously, because U.S. policy was that all captives were afforded POW status upon capture. Vietnamese captives were also treated as POWs until and unless the Article 5 Tribunal soon after adjudicated their status based on three categories of irregular enemy combatants: guerrillas, self-defense forces, and secret self-defense forces (Elsea, 2005, p. 35). These combatants were denied privileged POW status if they were captured performing acts of terrorism, sabotage, or espionage, but "those not treated as POWs were treated as civil defendants, and were accorded the substantive and procedural protections of the Fourth Geneva Convention (GC). This approach met with the approval of the ICRC" (Elsea, 2005, p. 35).

In the Philippines during the Spanish-American War (1898-1902), "U.S. policy was to accord POW status to members of the insurgent army, recognized by the Philippine government, who complied in general with the four conditions required by Geneva Conventions" (Elsea, 2005, p. 27). In Grenada, where U.S. forces fought Cuban

and Grenadian armed forces, the conflict was characterized as international in nature and all captives were treated as POWs until or unless a more accurate determination was made (Elsa, 2005, p. 35). “In U.S. operations in Somalia and Haiti ... captured persons were termed ‘detainees’ and were treated ‘in accordance with the humanitarian, but not administrative or technical standards of the GPW’” (Elsa, 2005, p. 37). In Panama during Operation JUST CAUSE, members of the Panamanian Defense Forces were categorized as “detainees,” but were treated as POWs (Elsa, 2005, p.37). After hostilities terminated, a three-officer Tribunal conducted more than 4,000 detainee classifications and turned over all but 100 to the new Panamanian government (Elsa, 2005, p. 37). And finally, during the 1991 Gulf War, the United States did not set up any POW camps; rather they processed the thousands of POWs who either surrendered or were captured, and turned them over to the Saudi Arabian Army for detention (Elsa, 2005, p. 38). After Saddam capitulated, the Army conducted 1,191 Article 5 Tribunals (Elsa, 2005, p. 38). Logically and legally then, historical precedent provides that should the United States declare “war” against an irregular enemy (an individual, such as bin Laden, a group such as the Taliban, or a networked organization such as al Qaeda), that as a matter of policy, the U.S. also should treat the captives taken in that complex, irregular conflict as POWs.

In another example during the Korean War, while the North Koreans brutalized American POWs, the Chinese Communist forces, “specifically avoiding the appearance of brutality, engaged in what they termed their ‘lenient policy,’ which was in reality a concerted and sophisticated psychological assault on their captives” (Cialdini, 1993, p. 70). “It is important to understand that the major intent of the Chinese was not simply to extract information from their prisoners. It was to indoctrinate them, to change their attitudes and perceptions of themselves, of their political system, of their country’s role in the war, and of communism. And there is evidence that the program often worked alarmingly well” (Cialdini, 1993, pp. 74-75).

Why did the Chinese and North Koreans treat American POWs so differently? Because they each had different political and strategic goals, for which the American prisoners had a role. The North Koreans were fighting for survival and political domination over the whole of the peninsula, so they treated American prisoners as

leverage with which to gain political concessions after the war. The Chinese, however, were fighting for ideology and their strategic reputation. As a result, they took a long-term approach knowing that the small concessions they convinced American POWs to make served to slowly indoctrinate those prisoners who would carry home a more positive view of China and of communism (Cialdini, 1993, p. 71, 75).

Further evidence for the “sovereignty of context” (Gray, 2006) regarding POW treatment can be found by examining the treatment of American POWs by its enemies in wars since ratification of the Geneva Conventions in 1949. Although this analysis is based somewhat on anecdotal evidence, it is strikingly evident that virtually none of America’s adversaries have complied with the legal and customary rules for the conduct of warfare and the protections afforded prisoners of war. During the Cold War,

all of the then-Communist states made a reservation to Article 85 of Geneva Convention No. III to the effect that they refused to accept continued POW status for prisoners of war who were tried and convicted of war crimes or crimes against humanity. North Korea and North Vietnam, however, denied POW status to all American prisoners solely on the basis of the allegation that they were all war criminals (due to American military aggression) (Aldrich, 2000, p. 896).

Further, none of the American service-members who were captured in the Persian Gulf War, Somalia, Bosnia, Afghanistan, or the War in Iraq received Geneva Conventions protections expected for lawful combatants. Rather, they have been subjected to torture, rape, mutilation, disappearance, and murder, among other inhumane treatment and humiliation. In every one of those conflicts, one could argue, the treatment of prisoners was based on the political, strategic, or socio-cultural context of the fight. Finding a direct correlation between American treatment of enemy prisoners and the enemy’s treatment of our prisoners would be difficult. Therefore, Secretary Powell’s argument that the U.S. cannot afford to provide Geneva Conventions protections to illegal enemy combatants because no one else will comply with them contradicts the evidence and fails to interpret or understand the different contexts of each and every war; however, it does demonstrate his unwavering support for the moral principles upholding the GPW.

The irony of President Bush’s policies toward al Qaeda, Afghanistan, and Iraq is that they seem only to represent a symptom of a larger political problem. The

fundamental disagreement that a growing number of Americans have with the Bush Administration's policies seems to be less focused on the intended political outcomes of the wars against al Qaeda, Afghanistan, and Iraq, but rather more focused the governmental structures and processes developed to achieve those outcomes. In other words, Americans seems to understand that how we fight is as important to identity and ideology as winning the fight. One of the underlying concerns felt by many citizens is that we likely risk losing the very things that make us uniquely "American" by pursuing the wrong policies, or by pursuing the right policies wrongly. It may be somewhat easier to relate this irony to the most recent American military experiences by reflecting once again on Clausewitz:

In short, at the highest level the art of war turns into policy—but a policy conducted by fighting battles rather than by sending diplomatic notes. . . . No major proposal required for war can be worked out in ignorance of political factors; and when people talk . . . about harmful political influence on the management of war, they are not really saying what they mean. Their quarrel should be with the policy itself, not with its influence. If the policy is right—that is, successful—any intentional effect it has on the conduct of the war can only be to the good. If it has the opposite effect, the policy itself is wrong (Clausewitz, 1976, p. 168).

This particular quote is relevant to our analysis because Senator Inouye's warning to President George H.W. Bush about the political effects of a drawn out conflict seem especially prescient given the drawn-out, open-ended nature of both the Iraq War and the War on Terror. A clear illustration of this effect is provided by the multitude of daily polls reporting, as of this writing, that the President's approval rating has reached a new low. Each new poll, whether from Pew, Gallup, or Zogby, is striking for the increasing contrast of the results of American approval for the war at its outset. In his article, "Notes on Low Intensity Warfare," Edward Luttwak makes a convincing case for a causal link between the manner in which a war is fought and the subsequent increase or decline in public support (Luttwak, 1983, p. 334). Adding his own considerable weight to this notion is Colin Gray, who wrote "revolutionary change in warfare may be less important than is revolutionary change in attitudes toward war and the military. The future American way(s) of war, singular or plural, will be shaped by the social and cultural context which defines the bounds of acceptable military behavior ..." (Gray,

2006, p. 33). Each of these ideas can be cause for concern if, at some point in the future, the American public deems the U.S. military's prosecution of war against both transnational and sub-national insurgents, as being beyond the boundaries of acceptable, American behavior.

Particularly in its second term, the Bush Administration encompasses not only the Executive Branch, but it also seems to have been able to exert significant political control over the Republican-controlled Congress, and has, through the Republican majority in Congress, shaped the future decisions of the Supreme Court through the confirmation of avowedly conservative Justices, to include the Chief Justice. In short, the backlash of public opinion against the President and his wielding of Executive power and political influence seem to reflect the perception of his increasingly unchecked power in what could be described as developing into what James Madison warned Americans about ... "a tyranny of the majority." Madison wrote in Federalist # 47, "The accumulations of all powers in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (Madison, 1788, p. 301). "The problem of majority tyranny arises, however, when the self-interested majority does not need to worry about defections. When the majority is fixed and permanent, there are no checks on its ability to be overbearing. A majority that does not worry about defectors is a majority with total power" (Guinier, 1994, p. 560). Madison's solution to this danger was through a diverse system of checks and balances intended "not to transcend different interests but to reconcile them" (Guinier, 1994, p. 560). The problem has seemed, at least intuitively to some Americans, to be precisely that the system of checks and balances was no longer able to reconcile interests; instead the system appeared to be united by common ones. The problem, in a word, is factions.

In Federalist # 10, Madison also warned about the dangers of factions, which he described as "a number of citizens ... who are united and actuated by some common impulse of passion, or interest, adverse to the rights of other citizens, or to the permanent or aggregate interests of the community" (Madison, 1788, p. 78). There are a number of Congressional representatives, in both the House and the Senate, who have worked hard to align their political platforms to appeal to the growing number of radical Christian factions which have increasingly intruded into government and politics (Brinkley, 2006).

This relationship was made clear recently in a speech to the Georgetown University Law School by retired Supreme Court Justice Sandra Day O'Connor, who spoke about the "direct threat posed to our Constitutional freedoms and the independence of the judiciary from attacks by some Congressional Republicans ... motivated by nakedly partisan reasoning" (O'Connor, 2006, as cited in Totenberg, 2006). O'Connor implied that the partisan reasoning may have much to do with campaign monies received from religious political action committees. She supported her warning by quoting a Texas Congressman who called for mass impeachments of the Judiciary at a meeting of a conservative Christian group last year because of rulings on a number of issues with which religious factions have vigorously disagreed (O'Connor, 2006, as cited in Totenberg, 2006). One Texas Senator even spoke of a connection between violence against judges and court decisions the Senator disagreed with (O'Connor, 2006, as cited in Totenberg, 2006). Justice O'Connor concluded her remarks with a definitive warning against permitting a rise in the power of factions:

I am against judicial reforms driven by nakedly partisan reasoning. Pointing to the experiences of developing countries and former communist countries where interference with an independent judiciary has allowed dictatorship to flourish, we must be ever-vigilant against those who would strongarm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, she said, but we should avoid these ends by avoiding these beginnings (O'Connor, 2006, as cited in Totenberg, 2006).

Although an apparent majority tyranny appeared to be developing across the highest levels of American government, two external events seem to have provided sufficient fuel for an effective competition to regulate and reconcile American political power. The first was the destruction of the Golden Dome Mosque in Samarra, Iraq and the second event was the Republican initiation of the 2008 Presidential election campaign.

The destruction of the Golden Dome Mosque by sectarian forces represents a "tipping point" (Gladwell, 2002) in the Iraq War, potentially as politically potent as the 1968 Tet Offensive was to President Lyndon Johnson's term during the Vietnam War. The loss of the Golden Dome Mosque is important politically because it clearly demonstrated to the American public and the world that the situation in Iraq was much worse than was being reported and portrayed by America's political and military

leadership. The public has developed a healthy skepticism of government officials due primarily to the Tet Offensive, Watergate, the Iran-Hostage (and failed rescue) Crisis, Iran-Contra Affair, Somalia, Bosnia, and Clintongate/Monicagate. America has developed this skepticism of its political leaders because of their periodic misrepresentation of the facts regarding individual leadership and policy failures. The “spin” has frequently failed to match the facts.

Equally important, the destruction of the Golden Dome Mosque seems to mark the beginning of a sectarian civil war. Regardless of the Coalition success in building the framework of a legitimate and functioning Iraqi democracy out of the vacuum left by toppling the Saddam Hussein regime, the basic fact is that neither the armed forces nor the police have been able to provide the first and most basic need for the Iraqi people – security (McCormick lecture, 2005). Whether the increasing violence in Iraq is directly related to a regional security situation that seems to be spiraling out of control has yet to be seen. But the common thread that many seem to be weaving into this nightmare scenario is that it has been directly caused by U.S. intervention. Further, and even more disturbing, the power vacuum created by regime change in Iraq seems to have created an opportunity for Iran to act on both its nuclear aspirations and its drive to become the regional hegemon. The problems associated with regime change were precisely the reason that President George H.W. Bush did not invade Iraq in 1991. Says former National Security Advisor Brent Scowcroft of the decision:

Going in and occupying Iraq, thus unilaterally exceeding the United Nations’ mandate, would have destroyed the precedent of international response to aggression that we hoped to establish. Had we gone the invasion route, the United States could conceivably still be an occupying power in a bitterly hostile land. It would have been a dramatically different – and perhaps barren – outcome (Bush and Scowcroft, 1998, p. 489).

However, the current political reality seems to stem primarily from the resultant permissive political context in the aftermath of the 9/11 attacks. That political reality today reflects the clear political mandate that was given in 2004 to both the President and the Republican-controlled Congress to continue the policies implemented in reaction to 9/11.

The second event that has begun to fuel the competition for power and influence in Washington, DC and beyond, was the initiation of the 2008 Presidential Election campaign by the Republican caucus in Memphis, Tennessee. Perhaps by coincidence, this event followed soon after the destruction of the Golden Dome Mosque. Of all the top issues to be addressed in the upcoming campaign, it seems both logical and likely that one of the most crucial to victory will be the continued struggle for primacy of constitutional powers of each branch. In the wake of these two events, Congress seems to be attempting to assert greater control, or at least oversight, over the conduct of both U.S. national security policy and foreign policy, both of which have traditionally been within the realm of Executive powers.

What should be clear in the context of this broad swing in public support, particularly within Congress, is that the constitutional system of checks and balances works. Whether or not there was a credible attempt to establish governmental tyranny may never be known because the stability of American government has succeeded once again due to the homeostatic process of republican democracy, which ensures a return to equilibrium whenever disruptive factors influence the values or environment in society (Johnson, 1982, p. 55). James Madison would likely agree, but would contribute this political homeostasis to “controlling the effects of faction” (Madison, 1787, p. 78). Although the initial political context of the War on Terror and the Iraq War reflected a broad unity across all branches of government, the conduct and prosecution of the war has eroded that support (Luttwak, 1983, p. 334). What should be clear at this point is that the conflict with Al Qaeda is not a law enforcement enterprise. It is war, with political objectives dominating the policies of both sides. Within the framework of American policy, two issues are at the forefront of the political and socio-cultural context: war powers and human rights. With respect to these issues, as public support goes, so goes political support for policies by elected officials, particularly in preparation for elections. The reason for these changes, says Bernard Brodie, is “The only empirical data we have about how people conduct war and behave under its stresses is our experience with it in the past, however much we have to make adjustments for subsequent changes in conditions” (Brodie, 1976, as cited in Gray, 2006, p. 1).

IV. STRATEGIC DECISION-MAKING ANALYSIS OF UNITED STATES DETAINEE POLICY

A. INTRODUCTION

The *essence of ultimate decision* remains impenetrable to the observer – often, indeed, to the decider himself . . . There will always be the dark and tangled stretches in the decision-making process – mysterious even to those who may be most intimately involved.

John Fitzgerald Kennedy (as cited in Allison, 1971)

Communicated in the aftermath of the Cuban Missile Crisis, considered by many to be the most dangerous moment in all of human history, President Kennedy’s words remain an appropriate reminder that the ways and means of the strategic decision-making process at all levels of government are neither always rational, nor are they clearly always consistent with the ends broadly believed to define the national interest. “It has been noted that national security decisions are so important that they ought to be ‘above’ politics, personalities and organizational self interests . . . Careful study of the national security decision-making process reveals, however, that this ‘ideal’ is not always achieved” (Naval War College, *An Introduction to the Input-Output Model*).

Particularly when nations are at war, history notes the failures of policy to achieve the “ideal.” In associating wartime policies to the national interest, the wisdom of Clausewitz’ words retain their historic eloquence, relevance and truth:

War is more than a true chameleon that slightly adapts its characteristics to the given case. As a total phenomenon its dominant tendencies always make war a remarkable trinity—composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy, which makes it subject to reason alone (Clausewitz, 1832, as cited in Gray, C., 2006, p. 1).

One could argue that the subordination of war as an instrument of policy derives from the other parts of the trinity. Policy must be subject to reason alone precisely because the influence of such “blind natural forces,” combined with the interplay of randomness and probability, would cause the conduct of warfare in pursuit of the superior policy to

devolve into the kinds of primordial violence that the Geneva Conventions and the other customary laws of war were supposed to prevent. Subordination of these “dominant tendencies” in war must be accomplished by some stronger force(s) which can control the public’s “noncognitive passion, guided by an instinctive faith that a population invests in the intellectual judgment and wisdom of its trusted political leaders” (Darley, 2005, p. 126). These “dominant tendencies” are controlled, and successful political conditions established, by what Clausewitz called the moral elements:

The moral elements are among the most important in war. They constitute the spirit that permeates the war as a whole, and at an early stage, they establish a close affinity with the will that moves and leads the whole mass of force. . . . One might say that the physical seem little more than the wooden hilt, while the moral forces are the precious metal, the real weapon, the finely-honed blade. . . . So policy converts the overwhelming destructive element of war into a mere policy instrument. It changes the terrible battle-sword that a man needs both his hands and his entire strength to wield, and with which he strikes home once and no more, into a light, handy rapier—sometimes just a foil for exchange of thrusts, feints, and parries (Clausewitz, 1832, pp. 184-185, 606).

Thus, Clausewitz equated superior policy with strong and clear moral elements, both of which served to control the instrument of war with intentional precision. He conversely warned that weak policy mirrors a weakness of the moral forces of a state, ultimately leading to lack of public support and national will (Darley, 2005, p. 127). What this chapter intends to show is that the decision not to regard the Taliban and Al Qaeda as protected under the Geneva Conventions was a causal variable in the reprehensible abuses that happened to detainees at Abu Ghraib. Specifically, the United States’ detainee policy was constructed seeking “actionable intelligence” as “an antidote” (Gray, 2006, p. 45) to the revolutionary transnational insurgency led by Al Qaeda; and applied in the permissive political environment after 9/11, this specific policy decision drove a fundamental change in the core tasks of the military, which were unsuitable for producing the desired “antidote” within the existing organizational structure. The implications of this policy decision are far-reaching, opening a Pandora’s Box of moral and legal pitfalls that run the risk of eroding the sense of obligation which drove America, as a nation of laws, to become the world leader in establishing and protecting human rights.

B. PROCESS

Anyone familiar with the process of coordination between and within government bureaucracies will immediately recognize the improbability of accurately predicting the final results of any intra-governmental coordination. More to the point, a careful examination of the detainee policy decision-making process only reinforces the unpredictability of these final policy outcomes in consonance with each other. Rather than picking any particular element of the process for examination in order to reduce the process to a single causal variable, this model embraces the complexity of the correlating factors influencing the President's ultimate decision. And while the bureaucrats utilize the weight, influence, and processes of the organizations to which they belong to battle the President over the structure, participants, and intended outcomes of policy decisions, what has become apparent through exhaustive study of American bureaucracy is "People matter, but organization matters also, and tasks matter most of all" (Wilson, 1989, p. 173). In the end, however, "The best analysts of . . . policy manage to weave strands of each of the . . . conceptual models into their explanations" (Allison, 1971, p. 259). The adaptation of Amy Zegart's National Security Agency Model to explain national security policy will attempt to weave together just such a conceptual model.

According to the Schlesinger Panel Report, "Although there were a number of contributing causes for detainee abuses, policy processes were inadequate or deficient in certain respects at various levels: Department of Defense (DoD), CENTCOM, Coalition Forces Land Component Command, and the individual holding facility or prison" (Schlesinger Panel, 2004, p. 33). As this Independent Panel was chartered to review only DoD policy and operations, they declined to examine the origins of the policy at its source. However, because this was a presidential policy, one can only achieve a true understanding of the decision-making process by examining the actual decision which caused the action to occur. A crucial aspect of Abu Ghraib is not that torture and/or cruel, inhuman and degrading treatment of prisoners can actually happen. The experiments of both Dr. Stanley Milgram and Dr. Philip Zimbardo, as well as a host of real-world cases demonstrates the proclivity of human nature to perpetrate such abhorrent acts, whether done under authority, or in order to gain some perverse sense of pleasure or power. What their experiments also demonstrate is that people will exponentially

increase the intensity of this cruel and degrading treatment in the absence of accountability. These facts are not of primary concern. Rather, the critical aspect for one to consider is that a specific policy was developed for the purpose of degrading the individual as the means toward the political, military, and strategic end of gathering information. This policy was developed using limited analysis and a flawed decision-making process, which permitted and encouraged the notion that these “unlawful combatants” (Detter, 2000, p. 987, as cited in Bybee, 7 Feb 2002, p. 6) had somehow forfeited their unalienable rights as human beings for their association with sworn terrorist enemies of the United States, and further, that upon capture, they should be treated at some level below the standard set by the Constitution and the entire body of international human rights and humanitarian law. What this section will show, through the detailed analysis of the national security policy-making process, is that the legal opinions used to justify the President’s decision to withhold the application of Geneva Conventions protections from al Qaeda and Taliban detainees as a matter of policy may have been insufficiently reasoned and may have created significant legal and moral consequences for the military and the country.

1. National Security Agency Model Framework Adapted for National Security Policy Analysis

The development of national security policy, much like the development of national security agencies, is simultaneously a matter of organization, ongoing interests of relevant political actors, and exogenous events (Zegart, 1999, pp. 7, 42-44). In her National Security Agency Model, Amy Zegart asserts that “*national security organizations are not rationally designed to serve the national interest*” (Zegart, 1999, p. 8) (defined as “an objective that is expected to contribute to the national security or general welfare of the nation” (Zegart, note 5, p. 248)). She derived her assertion from the development of five propositions that explain the design and evolution of three national security agencies which “grew out of political conflicts and compromises among self-interested players” (Zegart, 1999, p. 8). The five propositions of Zegart’s National Security Agency Model are:

- 1) The Executive Branch drives initial agency design.
- 2) Agencies reflect conflict between contending bureaucrats and the president. As a result, agencies are not well designed to promote the national interests.
- 3) The executive branch drives agency evolution.
- 4) Congress exercises only sporadic and ineffectual oversight; legislators have weak incentives and blunt tools.
- 5) An individual agency's evolution can be explained by three factors. They are, in order of descending importance: initial agency structure, the ongoing interests of relevant political actors, and exogenous events (Zegart, 1999, p. 10).

The reasons, Zegart contends, that national security agencies are not designed to serve the national interest are perfectly rational: The key players have more incentive to consider their own organizations than the national interest; only presidents have the incentive to think primarily of the national interest (Zegart, 1999, p. 8). As a result, the national security apparatus within the political context of the executive branch is a suboptimally performing bureaucracy, within which the incentives, interests, and capabilities of its major players, among whom national security policy is primarily developed, are designed to serve the bureaucratic organizations they represent and lead (Zegart, 1999, p. 9). Because the development of national security agencies and national security policy occur at the same political level and amongst the same self-interested players, applying Zegart's National Security Agency model to national security policy, the output of these agencies, is the next logical step in analysis.

a. Proposition 1: The Executive Branch Drives Initial Policy Design (Zegart, 1999, p. 10).

President Bush's Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Bush, 2001) defined the parameters of the war against members of al Qaeda and set the conditions for detainee treatment as "unlawful combatants" (Detter, 2000, pp. 136-137, as cited in Bybee, 7 February 2002, p. 6) in the war in Afghanistan, or wherever in the world this war against terror would take them. The impact and implications of this Military Order have been extensive. This order, and the policy that proceeded, initiated changes and

backlash in political, military, and socio-cultural contexts that, because of the innate fear inspired by both the 9/11 attacks and America's response, have been heretofore incomprehensible. For President Bush, and for much of America, al Qaeda really had ushered in a "new paradigm" (Bush, 2002), and presented a significant challenge to the means by which America was bound to respond. The President sought a way to transcend those bounds in order to overcome the terrorists opening advantage.

In his book, *Bureaucracy: What Government Agencies Do and Why They Do It*, author James Q. Wilson presents an extraordinary explanation of the role of executives within a bureaucracy and the influence they wield in their leadership over it. What is of particular relevance to this model is the primacy of what he calls "Turf" (Wilson, p. 179), and an executive's autonomy, defined in two aspects as both "independence of action and jurisdiction within their domain" (Wilson, p. 182), and "identity or mission—a widely shared and approved understanding of the central tasks of the agency" (Wilson, p. 182). Because organizational maintenance is the "special domain of the executive" (Wilson, p. 181), he or she has a different relationship with the organization than every other member within it. "To a government executive, an increase in autonomy lowers the cost of organizational maintenance" (Wilson, p. 183) in both aspects of his or her domain. This is particularly true for the President.

While domestic policy is often developed using a bottom-up process, "national security policy is presidential policy. And bureaucrats—from soldiers to diplomats to spies—have a stake in how the overall national security apparatus is designed" (Zegart, 1999, p. 39). Zegart further explains the inter-relationship of these stakeholders: "But in national security affairs, presidents and bureaucrats are the primary players, battling over agency structure . . . suggest[ing] that the politics of bureaucratic structure takes place even in the absence of interest groups" (Zegart, 1999, p. 7).

(1) Bounded Rationality. In order to "understand the basic features of organizational structure as they derive from the characteristics and human problem-solving" (Allison, 1971, p. 71), one needs first to understand at least some of the basic theory underlying organizational processes. For this Graham Allison sheds some light on the concept of "bounded rationality" developed by organization theorist, Herbert Simon. Bounded Rationality, by simplifying the variables comprising human problem-

solving capacity, explains why “the physical and psychological limits of man’s capacity as alternative generator, information processor, and problem solver constrain the decisionmaking (sic) processes of individuals and organizations” (Allison, 1971, p. 71). Simon defined five human bounds which limit the “powers of prescience and capacity for computation” (Simon, 1957, p. 3, as cited in Allison, 1971, p. 71):

Factored Problems. Problems so complex that only a limited number of aspects of each problem can be attended to at a time. The structure of an organization thus reflects the problems that its subunits factor (Simon, 1957, p. 3, as cited in Allison, 1971, pp. 71-72).

Satisficing. Maximization or optimization is replaced by satisficing. In choosing, human beings do not consider all alternatives and pick the action with the best consequences. Instead, they find a course of action that is good enough—that satisfies (Simon, 1957, p. 3, as cited in Allison, 1971, p. 72).

Search. Where satisficing is the rule—stopping with the first alternative that is good enough—the order in which alternatives are turned up is critical (Simon, 1957, p. 3, as cited in Allison, 1971, p. 72).

Uncertainty Avoidance. People in organizations are quite reluctant to base actions on estimates of an uncertain future. Thus choice procedures that emphasize short-run feedback are developed. . . . with alternate consequences of action by estimating probabilities of possible outcomes (Simon, 1957, p. 3, as cited in Allison, 1971, p. 72).

Repertoires. These constitute the range of effective choice in recurring situations (Simon, 1957, p. 3, as cited in Allison, 1971, p. 72).

What makes this particular national security policy decision, not to regard detainees as POWs, so unique is that virtually every element described in this synthesis of conceptual models was demonstrated in the decision-making process; yet bound within the traditional rationality of *realpolitik*. Perhaps within this political context, then, the permissive political environment in the aftermath of 9/11 enabled a rapid consolidation of the President’s political power as the entire nation turned to George W. Bush for leadership to see it through the crisis. As noted by organization theory icon Henry Mintzberg, during a crisis, organizations tend not to be bureaucracies. Rather, as environmental hostility increases, along with complexity and instability, organizations tend to systematically centralize information flows, control, and decision

making to the organization's leader (Mintzberg, 1981). Even in a bureaucracy as massive as the United States Government, the fact that this dynamic held true in the aftermath of the 9/11 attacks by al Qaeda created a temporary opportunity for the President and the Secretary of Defense to implement radical changes to the core tasks of the organizations responsible for combating al Qaeda and the Taliban. Until that point in the Bush Administration's term, any such attempts to change the Department of Defense had been effectively rejected. Since that point in his term, it could be argued that the President has been reluctant to release his grasp on the reins of power and authority he wielded (admittedly by design) during the legitimate national emergency in the aftermath of the 9/11 attacks.

b. Proposition 2: Policy Decisions Reflect Conflict Between Contending Bureaucrats and the President. As a Result, Policies May Not Be Well Designed to Promote the National Interest (Zegart, 1999, p. 10).

“Struggles over autonomy are visible when the organizations involved have similar tasks” (Wilson, 1989, p. 185). Within the executive branch, these struggles over autonomy within the realm of both national security, foreign policy, and compliance with international law and treaty obligations were uncommonly intense between the Department of Defense, Department of State, and Department of Justice in the months following the 9/11 attacks. However, because agency executives are most often selected to serve the political needs of the President (Wilson, 1989), the weight of political influence is not equal between them. Those who wield the greatest influence on policy decision-making have developed their constituency with the primary action channels (Allison, 1971) within the Administration and seek primarily to align their organization's mission with the jurisdiction of those key players within those action channels, while simultaneously defending their niche against outside intrusions. As noted by both Graham Allison and Amy Zegart, “The key to understanding this process (policy development) is to realize that no one, not even the president, has a monopoly on power” (Zegart, 1999, p. 19).

The result of this bureaucratic and political “pulling and hauling” (Zegart, 1999, p. 20) is what organization theorists call the principal-agent problem, which explains why presidents are frequently unable to get the policy or agency they desire.

“Presidents (principals) have no choice but to rely on bureaucrats (agents) who do not completely share their interests; this necessity, coupled with the president’s inability to monitor agency activity fully, provides fertile ground for bureaucratic non-compliance” (Zegart, 1999, p. 47).

The implication of “pulling and hauling” (Zegart, 1999) between the principal and his agents on the policy outcome is that “process matters” (Zegart, 1999, p. 19). The lessons about the “inherently chancy” outcomes of organizational processes which Graham Allison drew from his extensive study of the Cuban Missile Crisis are as follows:

The information and estimates available to leaders about the situation will reflect organizational goals and routines as well as the facts. The alternatives presented to the leaders will be much narrower than the menu of options that would be desirable. The execution of choices will exhibit unavoidable rigidities of programs and SOPs. Coordination among organizations will be much less finely tuned than leaders demand or expect. The prescription: considerable thought must be given to the routines established in the principal organizations before a crisis so that during the crisis organizations will be capable of performing adequately the needed functions. In the crisis, the overwhelming problem will be that of control and coordination of large organizations (Allison, 1971, p. 260).

In trying to understand the process of coordination and decision making within a bureaucracy, one first must grasp that a bureaucratic organization’s success depends on how well it managed three key issues from the beginning of policy coordination. “First, each had to decide how to perform its *critical task*. By critical task, I mean those behaviors which, if successfully performed by key organizational members, would enable the organization to manage its critical environmental problem” (Wilson, 1989, p. 25). For President Bush and the relevant senior members of his administration, the critical task in the War on Terror was to generate actionable intelligence in order to kill or capture international terrorists. As stated in his 13 November 2001 Military Order, Section 1, paragraph (d),

The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify

terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks (Bush, 2001).

The critical task upon which the ability to protect American citizens depended was to identify terrorists and their supporters; and identifying the terrorists required intelligence.

Another critical task within the executive branch, which influenced the initial design and evolution of American detainee policy, hinged not on intelligence collection, but rather on interpreting the law. According to former Counsel to the President and current United States Attorney General, Alberto Gonzales, “The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law. He has, in turn, delegated this role to OLC” (Gonzales, 2002). One should recognize in his statement, “OLC’s interpretation of this legal issue (that GPW does not apply to the conflict with al Qaeda) is definitive” (Gonzales, 2002), Gonzales is clearly attempting both to protect the Attorney General’s turf and OLC’s core task of interpreting the law for the President. Not only does Alberto Gonzales represent a key action channel (Allison, 1971) within the Bush Administration through which critical information flowed to the President as “the decider” (Bush, 2006), he also sought to overcome the President’s principal-agent problem in trying to combat this “new paradigm” (Bush, 2002) introduced by al Qaeda. Through this specific example, we can see and understand how Mr. Gonzales sought to serve the political needs of the President by justifying an increase in the political autonomy of the Office of the President by minimizing his rivals (Congress) and constraints (international law and treaty obligations) (Wilson, 1999, p. 188).

The second key issue of bureaucratic coordination is the organization must agree and endorse the way the critical task is defined. . . . “When that definition is widely accepted and endorsed, we say the organization has a sense of mission” (Wilson, 1989, p. 26). As a matter of United States’ policy, President Bush directed Secretary of Defense Donald Rumsfeld to “take all necessary measures” (Bush, 2001) in the prosecution of “effective military operations in the prevention of terrorist attacks” (Bush, 2001). Additionally, the President obligated, “to the maximum extent permitted by law . . . all other departments, agencies, entities, and officers of the United States to provide such assistance as the Secretary of Defense may request to implement this order” (Bush,

2001). There can be little doubt that the Department of Defense, at least, had the broadest possible support, endorsement, and flexibility to perform its critical task in the War on Terror.

The problem Secretary Rumsfeld realized in trying to match the new and complex critical tasks with the recently expanded jurisdiction was that he violated nearly all the necessary conditions for achieving increased autonomy for an existing organization. The first rule is, “Avoid tasks that are not at the core of the organization” (Wilson, p. 190). The military’s task of detaining combatants was changed to make the Iraqi prison system more focused on interrogation by adopting Major General Geoffrey Miller’s recommendation that “detention operations must act as an enabler for interrogation” (Miller, 2003, as cited in Taguba, 2004, p. 8).

The second rule is, “be wary of joint or cooperative ventures” (Wilson, p. 190). In striving to better coordinate the increasing demand for actionable intelligence, the military formed an uneasy joint venture between military intelligence, military police, Special Forces, the National Security Agency, and the Central Intelligence Agency (CIA) in the effort to produce such information (Hersh, 2004). As a result of this poorly controlled joint venture without the right focus on high value targets, the senior leadership of the CIA ended its involvement at Abu Ghraib (Hersh, 2004).

Third, an organization should “avoid tasks that will produce divided or hostile constituencies” (Wilson, p. 191). Instead, Secretary Rumsfeld changed the rules on how the United States deals with terrorism and terrorists, and “created the conditions where the ends justify the means” (Hersh, 2004). As a result, the senior officers of each military service’s Judge Advocate General Corps challenged the “atmosphere of legal ambiguity being created as a result of a policy decision at the highest levels of the Pentagon” (Horton, 2003, as cited in Hersh, 2004).

The final rule which the Pentagon disregarded is, “avoid learned vulnerabilities” (p. 191). Lieutenant General Ricardo Sanchez, Commander, Combined Joint Task Force Seven, accepted Major General Miller’s recommendation that “it is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees” (Miller, 2003, as cited in Taguba, 2004, p. 8). By

approving and then importing a series of coercive interrogation techniques from the detention facility at Guantanamo Bay to Abu Ghraib in Iraq, the United States ignored the outcome of *Ireland v. United Kingdom* (1977), the first interstate case ever brought before the European Court of Human Rights (Heymann and Kayyem, 2005, p. 132). Despite the United Kingdom's (disputed) claim that the "five techniques" employed by the British during coercive interrogations produced "a considerable quantity of actionable intelligence" (Heymann and Kayyem, 2005, p. 132), the European Court found in December 1977 that these "five techniques," all of which were approved by both Secretary Rumsfeld and Lt. Gen. Sanchez for use in American interrogations, to be "cruel, inhuman and degrading," and thus breaches of Article 3 of the (Geneva) convention" (Heymann and Kayyem, 2005). With careful consideration given both to Article 3 of the Convention and a February 1976 report to the Committee of Ministers of the Council of Europe (Heymann and Kayyem, p. 131), the British Attorney General announced in February 1977, prior to the European Court's decision, that his government made a commitment that the "'five techniques' will not in any circumstances be reintroduced as an aid to interrogation" (Jackson, 1994, as cited in Heymann and Kayyem, 2005, p. 132).

The third key issue involved in bureaucratic coordination which an organization must solve is how to acquire sufficient autonomy, defined as "freedom of action and external political support (or at least non-opposition) to permit it to redefine its tasks as it saw best and to infuse that definition with a sense of mission" (Wilson, 1989, p. 26). In this respect, the Department of Defense was given the broadest possible autonomy under the law to implement the provisions of the President's Military Order of 13 November 2001. In Section 6, President Bush determined that the Secretary of Defense "shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order" (Bush, 2001). With the exception of reserving the right of final review and decision for himself (Bush, 2001), President Bush granted Secretary Rumsfeld full, and essentially unchecked, authority and autonomy to prosecute the war against al Qaeda and the Taliban, wherever in the world he took the fight. Despite the successful resolution of each of these three critical organizational issues, however, as the

delegated principal executive in this war, the Secretary of Defense found himself facing several constraints for which he lacked the capability, or support, to overcome.

The foremost constraint faced by Secretary Rumsfeld was the principal-agent problem. In this constraint, “Presidents (principals) have no choice but to rely on bureaucrats (agents) who do not completely share their interests; this necessity, coupled with the president’s inability to monitor agency activity fully, provides fertile ground for bureaucratic non-compliance” (Zegart, 1999, p. 47). Particularly in the coordination and integration of the military, the CIA, and the FBI as the primary bureaucracies and front-line “operators” (Wilson, 1989), the interests of the President and Secretary of Defense in the production of actionable intelligence as a common core task to all three organizations did not appropriately correlate to each organizations’ standard operating procedures, rules, and cultures. As a result, organizational interests took primacy over national interests and resulted in significant pulling and hauling for compliance. Demonstrating a nearly flawless example of Governmental Politics (Allison, 1971), Secretary Rumsfeld reportedly used the authority granted him by the President to win one of the most intense fights of the war, which occurred within the Pentagon over critical military tasks.

Rumsfeld and Franks stifled the free exchange of ideas, and shut out the National Security Council. They dismissed concerns about the insurgents and threatened to fire the one general, William Wallace, who dared to state the obvious in public. . . . Debate inside any administration is less sophisticated and realistic than the debate among experts outside. The people inside have access to a bit more information. But they are more likely to self-censor for fear of endangering their careers. Debate inside is much more likely to be warped by the egotism, insecurity, power lust and distracting busyness of people at the top (Brooks, 2006).

This problem of stifled debate and the free flow of ideas and information became more significant with the passage of time, and the further removed each of the organizations noted above became from the 9/11 attacks.

The second constraint faced by the Bush Administration was time. The maximum amount of time President Bush has to achieve victory in Afghanistan and Iraq is until the end of his term as President (Zegart, 1999, p. 48). However, in many ways, the clock began ticking away at an accelerated rate in the aftermath of Abu Ghraib, and because of his Administration’s lost credibility with the nation and the world over the

specific justifications used to invade Iraq. This phenomenon is consistent with Dr. Gordon McCormick's Zen Principle of Insurgency, which states how much time a government has to fight a guerrilla war or insurgency is a function of cost: the higher the cost, the less time allowed (McCormick lecture, 16 Aug 2005). In other words, if counterinsurgency is done correctly, it costs less, and the government is allowed more time, but needs less to win; if counterinsurgency is done wrong, it costs more, the government is allowed less time, but it needs more time to win (McCormick lecture, 12 July 2005).

The third constraint, which magnified the impact of time limits, was bureaucratic drift. The Department of Defense has developed its rules, regulations and procedures since 1949, always keeping the Geneva Conventions and Law of War as primary justifications. The United States has always acted in compliance with the Law of War as a matter of principle, policy, and law. However, the harsh reality of political time restraints in the War on Terror did not permit President Bush equal time to justify his "new paradigm (Bush, 7 Feb 2002). Rather, he and Secretary Rumsfeld chose to change the military's core tasks with respect to taking prisoners and extraction of intelligence as previously defined by law, policy, and practice.

c. Proposition 3: The Executive Branch Drives Policy Evolution (Zegart, 1999, p. 10).

As the branch of government constitutionally vested with the responsibility to execute the laws created by the Congress, the executive branch has an obligation to develop policies that do not derive from the first course of action that is "good enough" (Allison, 1971, p. 72). As a legal standard and judgment, then, if based upon Kant's Categorical Imperative, the Office of Legal Counsel (OLC) may have failed to fully consider the relevant legal standards of "abuse" or "cruel, inhuman or degrading treatment" available under United States common law. Rather they demonstrated a "bounded rationality" (Simon, 1957, as cited in Allison, 1971, p. 71), by "Satisficing" in their "Search" for sufficient legal interpretation and justification within the context of this "new paradigm" (Bybee, 22 Jan 2002) of war. Specifically, OLC did not seek to establish or define the lower threshold of cruel, inhuman and degrading treatment by

considering the appropriate level of physical and mental suffering as defined in U.S. common law regarding domestic violence/abuse.

Interestingly, OLC does reference U.S. common law in defining and justifying its interpretation of “specific intent” (Bybee, 1 Aug 2002, p. 4). Further, OLC had no reservation in referencing and citing U.S. common law and medical law in the process of defining what constitutes “severe pain and suffering” (Bybee, 1 Aug 2002, p. 5), as well as in each of the physical and mental elements contributing to that suffering. Additionally, in defining torture, or in establishing a threshold level of violence and suffering necessary to be considered torture, OLC directly cited state law (from Idaho, North Carolina, Maine, Delaware, Georgia, Massachusetts, Missouri, Nevada, New Jersey, Tennessee, Alaska, and specifically California) (Bybee, 1 Aug. 2002, p. 13). Finally, OLC declined to decisively interpret what differentiates the lowest threshold for torture with the threshold range of what is considered as “cruel, inhuman and degrading treatment.” This omission is significant, as both types of treatment are explicitly forbidden under both international law and United States federal law. OLC does attempt to define the lower legal threshold for torture as established by U.S. judicial and legislative interpretation, as found in the Torture Victim Protection Act (TVPA) and in a U.S. District Court opinion for *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, (N.D. Ga 2002) (Bybee, 2002, August, p. 24). Content to abide by the court’s analysis and categorization of cruel, inhuman and degrading treatment as acts “that do not rise to the level of torture” and “do not have the same purposes as ‘torture’” (*Mehinovic v. Vukovic*, as cited in Bybee, 1 Aug 2002, p. 25), OLC never attempted to define a specific lower threshold for what acts would rise to the level of cruel, inhuman and degrading treatment. Such a threshold can and should be established through a rigorous legal and ethical analysis of U.S. domestic violence laws, military law and judicial decisions.

If one agrees with the principle that one ought to treat all humans with an inalienable dignity and respect, then applying the U.S. common law standard of physical and mental suffering from domestic violence/abuse legislation should be acceptable for establishing the minimum threshold for cruel, inhuman and degrading treatment. A more uncomfortable, though equally reasonable, way of resolving the problem of defining the lowest threshold of such treatment is to refer to the deontological approach of Immanuel

Kant's Categorical Imperative: "act in such a way that I can also will that my maxim should become a universal law" (Kant, 1785, as cited in Lober, 2000), and as a "supreme practical principle . . . act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (Kant, 1785, as cited in Lober, 2000). In accordance with Kantian thinking, in setting the standard for all of humanity for perpetuity, one must be prepared to apply the same standard of treatment to oneself, one's mother, or one's own child as to a member of al Qaeda or the Taliban. Kant's bottom-line criteria for evaluating the moral worth of a contemplated action: "Is there a principle that I would want everyone to follow regardless of its consequences?" (Lober lecture, 2006). Assessing the threshold level through the Kantian lens would thus never deprive another human being of his or her dignity through cruel, inhuman or degrading treatment as a matter of principle.

Although a definitive lower threshold could be established by such analysis, applying domestic violence laws within the context of the military social contract of combat (French, 2005) may not provide the most relevant basis for establishing a baseline. Perhaps the best place to begin such an analysis within the context of the military social contract is with the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial of the United States (MCM). The Uniform Code of Military Justice (UCMJ) prohibits cruelty and maltreatment and bars physical assault and threats of injury. Article 93, Cruelty and Maltreatment, of the UCMJ specifies the nature of the offense as:

Nature of act. The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both (MCM, 2005, pp. IV-25).

In seeking to develop a legal standard for general conduct, the context and social contract within which that conduct is evaluated becomes very important. However, in developing human rights standards, one finds that the context and social

contract may play much less of a role in determining right and wrong . . . many argue that since human rights are unalienable, there can never be a context in which the violation of those rights is permissible. In accordance with this Kantian viewpoint and the rule of law, a government and its leaders ought to identify what limits of conduct are considered acceptable, and clearly define the boundary of acts and intentions that would justify a state's violation of a person's human rights. Identifying the upper limits of the boundary between cruel, inhuman and degrading treatment and torture is necessary and useful, but it is equally necessary and useful to determine when conduct crosses the line into cruel, inhuman and degrading. Using the legal standard for Cruelty and Maltreatment in the UCMJ would be an appropriate place to begin such a determination.

d. Proposition 4: Congress (and the Supreme Court) Exercise Only Sporadic and Ineffectual Oversight; Legislators Have Weak Incentives and Blunt Tools (Zegart, 1999, p. 10).

While President Bush and his Administration have asserted quite forcefully that Presidential authority, as Commander-in-Chief, during wartime is essentially unlimited under the Constitution and unhampered by international law (Bybee, 22 Jan, 7 Feb 2002), this position is neither entirely true, nor entirely false. The struggle over Constitutional authority within government is described as something of a political zero-sum game: "The president's gain is the legislature's loss; the growth of presidential preeminence in foreign affairs has helped to ensure that congressional oversight of foreign policy agencies and their outputs remains sporadic and relatively weak" (Zegart, 1999, p. 31). Amy Zegart notes that Congressional oversight powers are often overstated. In reality, she says, "Evidence suggests that, like the national security intellectuals, most average legislators feel strongly that national security . . . fall(s) within the president's purview" (Zegart, 1999, p. 33). She further contends that even if legislators felt the need to challenge the president's national security turf, they would be unlikely to do so. There are two key reasons they would decline to assert such authority. Primarily, "Voters hold the president, not their local representative, accountable for the successes and failures of American foreign policy" (Zegart, 1999, p. 31). Secondly, but directly resulting from the first reason, "the political system naturally favors any political actor who defends the status quo" (Zegart, 1999, p. 34). This Nietzschean perspective within Congress prevents most legislators from transcending the conventional

and contemporary morality (Lober lecture, 2006) because by so doing, they submit themselves to greater risk of losing elections and of losing political capital within the system. As a result, although there are systemic constitutional checks and balances, “foreign policy has become the president’s turf” (Zegart, 1999, p 30). “Whereas the ultimate power to formulate domestic policy resides in Congress, the primary responsibility for the formulation and implementation of national security policy falls on the president” (Tower Commission Report, 1987, p. 87, as cited in Zegart, 1999, p. 31).

Nowhere does the president defend this turf more vigorously than in the exercise of his Commander in Chief authority. Though the Constitutional authority granted to presidents in this domain is largely implicit, “the Constitution gives presidents the unified office, information, and potential to develop a broad foreign affairs role” (Zegart, 1999, p. 29), the advantages of which presidents throughout American history have utilized in order to advance the strength and flexibility of this authority. Although presidents have the strongest incentives and the track record to defend their foreign policy turf, they do not always succeed in asserting or expanding that authority. Congress has not been completely impotent in checking and balancing the President; however, it achieved a significant limitation on the president’s commander-in-chief authority in November 1973 with the passage of the War Powers Resolution. In the political context of American withdrawal from Vietnam, it was “the purpose of this joint resolution to . . . insure that the collective judgment of both the Congress and the President will apply to the introduction, involvement, and continued use of United States Armed Forces into hostilities” (War Powers Resolution, 1973). In addition to requiring consultation with Congress and imposing reporting deadlines on the President, this legislation also defined the bounds of the President’s authority as Commander In Chief as “exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces” (War Powers Resolution, 1973).

Despite the overwhelming passage of this Joint Resolution of Congress, the executive branch has continued to fight for the powers gained by the Office of the President since George Washington first held and established the office. The Bush Administration has fought harder than most, seeking the maximum authority possible for

the Office of the President. OLC has served this purpose with more vigor than other agencies, and “has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war” (Bybee, 1 August 2002, pp. 34-35). This perspective may not be consistent with the Constitution, with federal law and with judicial interpretations of each. Under Article I, Section 8, Congress is charged with making the rules concerning captures on land and water; making rules for the government and regulation of the land and naval forces; and to provide for the calling forth of the militia (in terms of organizing, arming, and disciplining) to execute the laws of the union, suppress insurrections, and repel invasions (Federalist 41, 1961, p. 256; Federalist 29, 1961, pp. 182-187). Even to someone who is not a Constitutional law scholar, the credibility of OLC’s interpretation of the law seems questionable not only in this particular case; in justifying elements of the detainee policy, they routinely cite Supreme Court opinions out of context in order to present an interpretation consistent with assertions of executive authority.

For example, in making their case that the “Supreme Court has recognized . . . the President’s complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces” (Bybee, 1 Aug.2002, p. 33), OLC cites the 1874 opinion rendered in *Hamilton v. Dillin* as identifying “*the President alone* who is constitutionally invested with the *entire charge of hostile operations*” (emphasis added by Bybee) (88 U.S., 1874, (21 Wall.) pp. 73, 87 as cited in Bybee, 1 August 2002, p. 33). This citation presents a false justification of executive authority by taking both the case and the specific reference out of context. Mr. Justice Bradley delivered the actual opinion of the court, abbreviated below:

The war was a public one. The government in prosecuting it had at least all the rights which any belligerent power has when prosecuting a public war. That war was itself a suspension of commercial intercourse between the opposing sections of the country. . . . The war power vested in the government implied all this without any specific mention of it in the Constitution. In England this power to remit the restrictions on commercial intercourse with a hostile nation is exercised by the crown. . . . By the Constitution of the United States the power to declare war is

confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject (88 U.S. 73, 1874).

It seems from the context in which OLC selectively presented their justification, they interpreted that executive authority is exercised as the equivalent of the crowned sovereign of England. In reality, the case as decided by the Supreme Court regards the extent of the government's authority to regulate commerce in time of war.

In another seminal case, *Youngstown Co. v. Sawyer* (1952), the United States Supreme Court did, in fact, both recognize and implement Constitutional limits on Presidential authority to act as Commander in Chief during wartime. While American forces were engaged in combat in Korea, "To avert a nation-wide strike of steel workers in April 1952, which he believed would jeopardize national defense, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills" (343 U.S. 579, p. 580). Although the action and context of President Harry S. Truman's Executive Order did not mirror President George W. Bush's 13 November 2001 Executive Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, the assertion of unlimited, if implied, Presidential authority as Commander-in-Chief, was almost identical. In fact, the Court's record in 1952 shows "The Order was not based upon any specific statutory authority but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander in Chief of the Armed Forces" (343 U.S. 579, 580). President Bush relied on the interpreted opinion of the Office of Legal Counsel, which cited the same powers granted in Article II of the United States Constitution (Bybee, 22 January 2002, pp. 11-13); however, OLC drew a different conclusions regarding this particular judicial decision. In the *Youngstown Co. v. Sawyer* opinion written by Justice Black, the Supreme Court concluded:

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The

contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States." The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States" After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress - it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions

in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. [343 U.S. 579, 588-589]

There should be little doubt in reading the above opinion of the Supreme Court that presidents are vested neither with complete discretion, nor unbound authority in the exercise of the duties of the office. In the process of executing the laws of the United States, the President is also bound by them. Although one can find specific cases of both congressional and judicial limitations on presidential authority, the reason they demonstrate ineffectual oversight is inconsistent application and because of political realities and incentives in the exercise of power. The advantages of the unified office, control of information, and maneuverability in the foreign policy domain (Zegart, 1999, p. 29) give the Office of the President the "institutional upper hand" (Zegart, 1999, p. 29).

e. Proposition 5: An Individual Policy's Evolution Can Be Explained by Three Factors: Initial Policy Structure, the Ongoing Interests of Relevant Political Actors, and Exogenous Events (Zegart, 1999, p. 10).

(1) Initial Policy Structure. During the transition of an organization's core tasks, the principal challenge during implementation is to carefully define these tasks and to find the right "incentives that will induce operators to perform those tasks as defined" (Wilson, 1989, p. 174). One of the most crucial ways the Bush Administration has succeeded in managing the intentional "performance ambiguity" (Ouchi, 1980, as cited in Wilson, 1989, p. 174) has been to assign new and specific tasks to military units or government agencies that have been formed by an intense socialization and that correspondingly have developed a strong sense of mission, such as

Special Forces, Military Intelligence, Military Police, and the Central Intelligence Agency. Changing these tasks and demanding immediate results required innovation by members of the military. By innovation, I refer specifically to the alteration and adaptation of critical or core tasks (Wilson, 1989). The reason the military was forced to innovate is because the procedural Standard Operating Procedures (SOPs) for the categorization and treatment of combat prisoners, which had been so pervasive in U.S. military culture since Francis Lieber developed the first codified law of land warfare in 1863 for President Lincoln (Donald, 1996, pp. 531, 537), actually got in the way of producing the outcomes desired and rewarded by President Bush and Secretary Rumsfeld. Because military innovation in support of the President's detainee policy has had little, if any, measurable benefit toward victory in the Global War on Terror, Afghanistan, and Iraq, and with increasingly negative implications of the policy, the degree of political and bureaucratic dissent with the policy is increasing in both breadth and depth.

(2) Ongoing Interests of Relevant Political Actors. The result of this increase in bureaucratic and political dissent for the war in Iraq overall, and for detainee policy in particular, has been the steady erosion of public support for each. According to a May 10, 2006 New York Times/CBS News poll of 1,246 people randomly selected from a sample of 42,000 Americans nationwide, only 31 percent of Americans now approve of the way President George W. Bush is handling his job as President (Nagourney and Thee, 2006). His approval has declined from just over 50 percent at the beginning of his second term as President, and has declined from an approval rating of nearly 90 percent since late 2001 (Nagourney and Thee, 2006). In many Americans' minds, political rhetoric has not been reconciled with the visible effects of policy. Perhaps because the ideas of peace, democracy and free markets have functionally conquered significant portions of the world, the two key tasks necessary for succeeding in this grand strategy render the unparalleled American military might both irrelevant and inadequate (Mandelbaum, 2002). The domestic task is to convince the public that the value gained by fulfilling our responsibility is worth the expenditure in blood and treasure (Erdmann, 1986, p. 62). The international task is to convince both our allies and enemies that the accomplishment of peace, democracy, and free markets is in

everyone's best interests. The use of the military as the primary pillar of this strategy contradicts the strategy's intended message. The domestic public fails to benefit from the military's use because the cost in blood and treasure exceeds the benefit and the international public rejects the justification for action and questions the legitimacy of the message when the attempt to impose peace, democracy, and free markets is through the use of force. As a result, the U.S. has fallen short in convincing these key stakeholders that their interests are best served in the accomplishment of these two tasks (Mandelbaum, 2002).

(3) Exogenous Events. In the aftermath of the Abu Ghraib scandal, the failure to find weapons of mass destruction, the growth of both the Iraqi and Afghan insurgencies, the inability to capture or kill Osama bin Laden, the international furor over the alleged secret CIA prison system and the practice of extraordinary rendition, the National Security Agency's warrantless wiretapping program and domestic telephone database, the emerging nuclear threat and potential military showdown in Iran, the explosion of the budget deficit, Congressional corruption, the immigration and border control debates, the CIA leak investigation, the failed response to Hurricane Katrina, and a massive shuffle of Presidential staff members, among the most recent political bombs, the major challenge for the Bush Administration to overcome in reconciling rhetoric with policy, particularly with regard to the misuse of military power, is to concentrate less on its own actions and more on the likely reactions of the enemy (Bernstein, 1989), or the intended policy target. Some of the most significant reasons Americans are dissatisfied with the President's performance is his incapability to effectively communicate his policy decisions to the public, his nearly total absorption with the war in Iraq, and his seemingly continuous drive to gain more and more authority for the Office of the President. Many Americans perceive a distinct disconnect between the President's goals and the goals of the American public, and it is one he apparently does not feel the need to address.

The reason America has fumbled the use of its military power in low intensity wars, particularly since Vietnam, is because its self-absorption has rendered it incapable of accurately gauging the perceptions and determinations of those it is trying to influence/coerce (Bernstein, 1989). As a result of using the military as the first choice tool of coercive diplomacy, the U.S. often overestimates its impact on the enemy by

wishful thinking; it focuses more about the negative diplomatic effects of military operations on friendly or unaligned regional powers; and too often focuses on being loved rather than being feared (Bernstein, 1989). Unfortunately none of these choices of action will be successful in achieving grand strategy objectives. Rather, says noted historian and professor Alvin Bernstein, “The cornerstone of success in coercive diplomacy and limited conflict is the demonstration of America’s will and ability to use its power effectively in support of its interests and the larger interests of international decency and order. . . . The very best psychological operation, we should remind ourselves, is the reputation of a great power for acting like one” (Bernstein, 1989, pp. 155, 158).

C. CHOICE

I have come across men of letters who have written history without taking part in public affairs, and politicians who have concerned themselves with producing events without thinking about them. I have observed that the first are always inclined to find general causes, whereas the second, living in the midst of disconnected daily facts, are prone to imagine that everything is attributable to particular incidents, and that the wires they pull are the same as those that move the world. It is to be presumed that both are equally deceived.

Alexis de Tocqueville, as cited in Allison, 1971

The choice to act like a great power does not come without a great number of dilemmas. The strategic dilemma faced by President Bush and the United States is simply “either to release militant detainees who pledge to kill Americans and whom the United States cannot convict, or confine them for life without trial. America’s ability to find alternatives will shape the future” (Norwitz, 2005, p. 82). On the one hand, it is a practical dilemma in terms of deciding what rules to apply to detainees and what to do with them if continued detention holds no strategic value. On the other hand, it is an ethical dilemma in terms of how to treat detainees with respect to the existing laws and what means to use in order to overcome our enemies’ “asymmetry of morality” (Ignatieff, 2001, p. 7). The inability to find alternatives to the problems of a dilemma often results in resolution by force. Much like driving a car or flying an airplane, the paradox of the exercise of power is that the more force one applies to a political problem, the faster the

masses upon whom force is applied will accelerate toward an outcome that cannot necessarily be controlled by the state. The outcomes of the exercise of power depend on the choice of policy governing the use of that force and also the goals and expectations of the target of that force. If the inclinations and choices of politicians as decision-makers are influenced by flawed recommendations drawn from an insufficient analysis of the causes and effects of a problem, then the policy itself will be disconnected from the relevant context within which the state's power should be applied. As discussed earlier, identifying the elements of the problem is both a variable and a product of the process oriented approach. The strategic consequences of political choice often begin with the application of the decision-making process.

While the national security policy decision-making process is best described through the adjusted lens of Amy Zegart's National Security Agency Model, the actual policy decision, the Choice, represents the rational actor (Allison, 1971) within this synthesized model and is based on the President's desire, at the grand strategy level, to achieve both power and security (Gustaitis lecture, 2006). The President, as the unitary, rational actor, is the only agent within the governmental bureaucracy who has the most incentive to act in the national interest (Zegart, 1999, p. 8) and relies on a consistent set of preferences, value maximizing actions and known constraints in order to make his or her decision (Allison, 1971, p. 30). This value maximizing approach can help the President to rationally reject the known constraints of international law, moral principle and treaty obligations in favor of grand strategic choice and selected national interest. Because the principal-agent problem limits a president's ability to get the results he or she may want from the national security policy apparatus, "all presidents will seek to overcome the principal-agent problem in ways that minimize their political costs" (Zegart, 1999, pp. 48-49). In simplest terms, presidents seek to overcome this problem by bypassing the normal bureaucratic process.

Bypassing institutional steps in the process invariably result in consequences to a greater or lesser degree. In order to bypass the traditional bureaucratic hurdles encountered whenever a president attempts to introduce significant change to the agencies of government, executives often resort to work-arounds, avoiding the institutional obstacles by creating either new bureaucratic organizations or new processes

by which to achieve most directly the results they want. In seeking legal justification for dealing with the manifest threat of al Qaeda, beyond the normal and accepted bounds of the Law of War, the President and his closest cabinet members could not afford to be constrained by military lawyers and conservative commanders whose sense of mission was vested in the “purpose, status, and solidarity” (Wilson, 1989, p. 158) of the traditional paradigm reinforced by the Geneva Conventions. From the process by which President Bush came to the decision that the Geneva Conventions would not apply to members of al Qaeda and the Taliban in the war in Afghanistan, one can conclude that the recommendation provided by OLC was the product of a work-around to the institutional principal-agent problem. As reported by the Independent Panel to Review DoD Detention Operations,

The Attorney General and the Counsel to the President, in part relying on the opinions of OLC, advised the President to determine the Geneva Conventions did not apply to the conflict with al Qaeda and the Taliban. The Panel understands DoD General Counsel’s position was consistent with the Attorney General’s and the Counsel to the President’s position. Earlier, the Department of State had argued that the Geneva Conventions in their traditional application provided a sufficiently robust legal construct under which the Global War on Terror could effectively be waged. The Legal Advisor to the Chairman, Joint Chiefs of Staff and many service lawyers agreed with the State Department’s initial position. They were concerned that to determine otherwise would be inconsistent with past practice and policy, jeopardize United States armed forces personnel, and undermine the United States military culture which is based on a strict adherence to the law of war. At the February 4, 2002 National Security Council meeting to decide this issue, the Department of State, Department of Defense, and the Chairman of the Joint Chiefs of Staff were in agreement that all detainees would get the treatment they are (or would be) entitled to under the Geneva Conventions (Schlesinger Panel Report, 2004, pp. 33-34).

But because President Bush was significantly constrained by time and America’s demand for a forceful response to this stain upon the nation’s honor, he could not afford to wait for the coordination of institutional consensus across the Executive Branch. Taking advantage of both the environmental hostility and the organizational focus of government, President Bush initiated the process of change by issuing his Military Order for the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against

Terrorism on 13 November 2001. This order served as the pretext for changes in the military's core tasks of intelligence collection, counter-terrorism, counterinsurgency, and detention operations.

The U.S. government's shift in perspective, described as a "new paradigm" in a memo written by Alberto Gonzales, then the Counsel to the President, "places a high premium on . . . the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians," (Gonzales, 2002) giving less weight to the rights of suspected belligerents. By questioning, and ultimately rejecting, the applicability of the traditional international laws of war within the context of this "new paradigm," the effect of the President's work-around was to eliminate the institutional due process protections guaranteed by the Geneva Conventions.

1. Analysis of a Presidential Decision

In his 7 February 2002 Decision Memorandum, "Humane Treatment of al Qaeda and Taliban Detainees," President Bush communicated four crucial determinations which influenced not only the war against unlawful combatants in Afghanistan, but also had a significant influence on the treatment of "security detainees" in Iraq (personal correspondence with Capt Kisner, C., MNF-I TF-134 legal attorney, 13 May 2006). It is worth noting that even after considering the legal arguments presented by the key and relevant members of his Cabinet, the President's four decisions also demonstrated an uncommon consistency with his 13 November 2001 Military Order.

The four determinations made by President Bush, "relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002" (Bush, 2002) are as follows:

- a) That none of the provisions of Geneva apply to our current conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
- b) That the provisions of Geneva will apply to our present conflict with the Taliban.

- c) That common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'
- d) That the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

One should note that by using the word “determination” or “determine,” President Bush is heeding the advice of the Attorney General and invoking a reference to the “Supreme Court’s opinion in *Clark v. Allen* (1947) providing that when a President determines that a treaty does not apply, his determination is fully discretionary and will not be reviewed by the federal courts” (Ashcroft, 2002). Contrasted with an interpretation of treaties “which are confessed to apply, courts occasionally refuse to defer to Presidential interpretation” (Ashcroft, 2002). As a matter of no small importance, the President was informed that such a distinction would provide

the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Conventions rules relating to field conduct, detention conduct, or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States (Ashcroft, 2002).

Despite the potential for subsequent criminal liability for American officials acting under this policy, the President appears to have decided upon a compromise between the two semantic extremes: he invoked the strength of the word determination to describe his interpretation that the Geneva Conventions would categorically not apply neither to al Qaeda nor the Taliban. A possibility suggested as likely by Attorney General John Ashcroft, the courts have refused to defer to this interpretation. The ironic result of the President’s determination is that in attempting to compromise between the extremes, he chose the worst elements of the two options presented to him, thereby implementing a policy with the greatest legal liabilities for the broadest potential breach of the Geneva Conventions.

A significant reason why Assistant Attorney General Jay Bybee's legal interpretation could be considered "inadequate and deficient" (Schlesinger Panel, 2004, p. 33) is that throughout both the 22 January 2002 and 1 August 2002 Memorandums, the opinions he renders routinely, and often primarily, reference previous opinions of the Office of Legal Counsel. Further, among the Supreme Court decisions selectively cited by members of OLC in support of essentially unlimited executive authority were *Youngstown Co. v. Sawyer* (1952), *Hamilton v. Dillin* (1874), and *Johnson v. Eisentrager* (1950). When Mr. Bybee and OLC do make reference to these and other Supreme Court or federal court decisions, they frequently cite concurring or dissenting opinions which were not accurate representations of the definitive opinions of the Court. It could be interpreted that both the OLC and the Attorney General recommended an approach to achieve the President's desired outcome, which was based on insufficient information considered in relative isolation (Schlesinger Panel Report, 2004). Predictably, flawed judgments resulted from such an insufficient analysis within a limited range of opinion and expertise. This kind of cherry picking for evidence tends toward a practice of deception in justifying a legal interpretation under which, thus far between 50,000-70,000 persons have been apprehended since the beginning of combat in both Afghanistan and Iraq (Schlesinger Panel Report, 2004, p. 5). This number alone is staggering when one considers that there were less than 500 hardcore al Qaeda (Sageman, 2004), and between 10,000 – 15,000 Taliban militia (www.Answers.com). Given that only "759 captives have been held at Guantanamo since the detention operation opened in 2002, and nearly 300 have been released or transferred to their home nations for continued detention" (Sutton, 2006), the number apprehended in Iraq alone illustrates either a much more robust and growing insurgent movement than anticipated, or the somewhat broad and random net cast during cordon and sweep operations. Even more disconcerting is the fact that "only one-fourth of the prisoners held at the Guantanamo naval base are interrogated regularly because there are not enough interrogators or translators to interrogate them all" (Sutton, 2006). The situation in Iraq is worse by an order of magnitude, although the percentages are similar. "Detainees being held for crimes against the coalition . . . Iraqi criminals not believed to be international terrorists or members of Al Qaeda (sic), Ansar Al Islam, Taliban, and other international terrorist organizations . . . make up more than

60% of the total detainee population, and is the fastest growing category” (Taguba, 2004, pp. 8, 25). Either way, the outcomes suggest the current American policy regarding detainees is more likely producing more enemy combatants than it is reducing or removing from the proverbial battlefield.

Examples of this type of flawed, inadequate or misleading analysis abound in the legal interpretations produced by the Department of Justice regarding or influencing U.S. detainee policy. In developing their legal interpretation for the President, OLC did not fully consider the facts from the context of the “new paradigm.” Admittedly, very few at the time truly understood the nature of the relationship between al Qaeda and the Taliban, or even the level of social control exercised by the Taliban over Afghan society. However, in their “Search” for alternatives, they stopped at the first one that “Satisfied” (Simon, 1957, as cited in Allison, 1971, p. 72) their needs. Instead of admitting the relative organizational sophistication and strategic success of the relationship between al Qaeda and the Taliban, OLC underestimated it, writing “Al Qaeda is merely a violent political movement Because of the novel nature of this conflict, moreover, a conflict with al Qaeda is not properly included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply” (Bybee, 22 January 2002, pp. 1-2). In hindsight and in contrast, the Director of the CIA, George Tenet, recognized the asymmetric advantages held in this relationship noting, “We often talk of two trends in terrorism: state supported and people working on their own. In Bin Ladin’s case with the Taliban, what we had was something completely new—a terrorist sponsoring a state” (Tenet, 2004).

The debate over whether customary international law is binding on the President and the executive branch under the Take Care Clause of the Constitution seems to strongly reflect the adage “where you stand depends on where you sit” (Wilson, 1989). International law academics, whose intentions follow the rule-based thinking of Kant’s Categorical Imperative, seek to develop laws that would treat people always as ends and would serve as a universal maxim for others. Accordingly, under both the Take Care Clause and the Supremacy Clause of the Constitution, “A President may not violate customary international law, therefore, just as he cannot violate a statute, unless he

believes it to be unconstitutional” (Bybee, 2002, January, p. 32). George Aldrich eloquently summarizes the academics’ position as follows:

Whenever a state chooses to send its armed forces into combat in a previously noninternational armed conflict in another state—whether at the invitation of that state’s government or of the rebel party—the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all the laws governing international armed conflicts (Aldrich, 2000, p. 63).

The lawyers in the Office of Legal Counsel seem to follow more along the lines of ends based thinking of consequentialists like John Stuart Mill, seeking to develop laws which promote the idea of the greater good, and are of the notion that for the President, as the only one in government who institutionally acts in the national interest, there are consequences which just cannot be ignored, regardless of principle (Lober lecture, 2006). OLC contends that “Customary international law cannot bind the executive branch under the Constitution because it is not federal law” (Bybee, 22 January 2002, p. 32). OLC began its argument in a strong Constitutional position that disputed that customary international law had undergone the same rigorous legislative process and review as had federal law (Bybee, 22 January 2002, p. 33). This point is significant; however, Mr. Bybee’s argument denying the inclusion of international law and treaties under the Supremacy Clause loses credibility when he cites three Supreme Court cases (1842, 1877, and 1938) and states “even during this period, the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore serve as the basis for federal subject matter jurisdiction” (Bybee, 22 January 2002, pp. 34-35). During the period cited, the formal law of war did not yet even exist! The Lieber Code, or General Orders No. 100, was the first codified law of land warfare written and implemented in 1863 by the United States government. The Hague Conferences were held in 1899 and 1907 (The Avalon Project, 2006), but the Geneva Conventions were not held until 1949, and were not fully executed into U.S. federal law until the War Crimes Act was passed in 1996 (Ashcroft, 2002).

To continue the critique of OLC’s policy justifications, Mr. Bybee cites Chief Justice John Marshall’s opinion in *Brown v. United States*, 12 U.S. (8 Cranch) 110

(1814), who regarded customary international law as “a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded” (Marshall, 1814, as cited in Bybee, 2002, January, p. 34). Disregarding customary international law is not just “a bad idea” as suggested by Mr. Bybee. The Encarta English Dictionary (North America) defines obloquy as 1) censure—statements that severely criticize or defame, and 2) disgrace—a state of disgrace brought about by being defamed (Microsoft Office Word 2003). Although cited in support of a President’s authority to do so, Chief Justice Marshall opined that though a president may do so, disregarding customary international law would be a disgraceful, immoral judgment worthy of critical censure.

Afghanistan’s status as a “failed state” was another principal justification provided by OLC in concluding that the Taliban militia could be legitimately deprived of POW status under 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). Secondly, and even more detrimental to the Taliban’s status as protected POWs, was their close association with, and even dependence upon, al Qaeda for power and control within Afghanistan (Bybee, 2002, January, p. 11). This conclusion seemed satisfying to both the Executives at the policy making level and the Operators at the policy execution level, because it led them to believe they would have more jurisdictional autonomy in completing their mission (Wilson, 1989, p. 187). However, this conclusion did not represent the political reality of Afghanistan’s international status. The Secretary of State, who is statutorily responsible for making the determination for such status, informed the Counsel to the President and OLC that “any determination that Afghanistan is a failed state would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions” (Powell, 2002). The Secretary of State also identified “that OLC views are not definitive on the factual questions which are central to its legal conclusions” (Powell, 2002), with the likely result being a rejection of their opinion by foreign governments, courts, and international tribunals (Powell, 2002).

The Legal Adviser to the Secretary of State, Mr. William H. Taft, IV, reiterated the Department of State's position that the "unvaried practice of the United States in introducing its forces into conflict over fifty years" (Taft, 2002) had been to comply with the 1949 Geneva Conventions. Further, Mr. Taft reminded the Counsel to the President, Mr. Alberto Gonzales, of the United States' obligation to comply with UN Security Council Resolutions 1193 (1998), 1189 (1998), 1214 (1998), and 1267 (1999) (UNSC, 1999), condemning the Taliban for their theocratic dictatorship, continued violations of human rights and international law, and unlawful protection of Usama bin Laden, as well as "affirming that all parties to the conflict in Afghanistan are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions" (Taft, 2002). The argument that Afghanistan was a failed state never got past the rhetoric and bluster as an expedient and convenient way to explain why the Taliban and al Qaeda had cultivated such a relationship. The political reality clearly was different for U.N. Security Council member nations.

While the United States, like almost all other countries, refused to extend diplomatic recognition to the Taliban, both Afghanistan and the United States are parties to the Geneva Conventions of 1949, and the armed attacks by the United States and other nations against the armed forces of the Taliban in Afghanistan clearly constitute an international armed conflict to which those Conventions, as well as customary international humanitarian law, apply (Aldrich, 2002, October, p. 893).

Another important issue raised in both the 22 January 2002 and 7 February 2002 OLC Memoranda examines the President's authority to selectively and temporarily suspend international treaty obligations as a result of a material breach by another party to the treaty. The Vienna Convention on Treaties, article 60 (2)(b), specifies "A material breach of a multilateral treaty by one of the parties entitles . . . [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State" (as cited in Bybee, 22 January 2002, p. 23). However, "The Vienna Convention seems to prohibit or restrict the suspension of humanitarian treaties if the sole ground for suspension is material breach" (Vienna Convention on Treaties, article 60(5), as cited in Bybee, 22 January 2002, p. 23). Therefore, even though the President has the authority under Article II of the Constitution to interpret and suspend treaties (Bybee, 7 February 2002, p. 2), a decision to suspend

GPW “with regard to Afghanistan might put the United States in breach of customary international law” (Bybee, 22 January 2002, p. 23). OLC rejected this provision of the Vienna Convention as incorrect (Bybee, 22 January 2002, p. 24) as well as the clearly defined provisions in GPW that the Convention will apply to High Contracting Parties in all circumstances (GPW, 1949, Article I), and that the Convention

shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof (GPW, 1949, Article II).

Fortunately, President Bush declined to suspend the GPW, although he did accept OLC’s legal conclusion and reserved the right to do so in this or future conflicts (Bush, 2002). Unfortunately, the Office of Legal Counsel got caught in a legal conundrum of their own making. Arguing process versus principle over whether humanitarian and human rights principles transcend traditional laws of nations, Mr. Bybee states

A blanket non-suspension rule makes little sense as a matter of international law and politics. If there were such a rule, international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions. Apart from its unfairness, that result would reward and encourage non-compliance with the Conventions (Bybee, 22 Jan 2002, p. 24).

In a subsequent opinion some three weeks later, Mr. Bybee opined “Thus, the President may interpret GPW . . . to find that all of the Taliban forces do not fall within the legal definition of POW. A presidential determination of this nature would eliminate any legal ‘doubt’ as to the prisoners’ status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals” (Bybee, 7 February 2002, p. 2). Apparently OLC did not interpret the same sense of unfairness and the systemic lack of remedy to a material breach would apply to a blanket suspension of status for an adversary under the same international treaty. In theory there should be no conflict between principle and practice. However, OLC as a bureaucratic organization seeks to find and protect

maximum autonomy for the President within his jurisdiction, and often even beyond. Being bound by law other than the Constitution makes the critical task of OLC more difficult, even though the bedrock principles of the Constitution are represented and protected by the basic due process requirements of the Geneva Conventions.

The reason application of the Geneva Conventions is essential to the social contract in combat is because it is the only legal framework that provides a system of due process relevant to the context of war. In this respect it is every bit as important as the due process requirement of the judicial system within the context of the civilian social contract. Due process is the critical determinant, both ethically and legally, for the legitimacy of a government's restriction or deprivation of an individual's unalienable rights. In order for the governmental authority to demonstrate its Standing to Act, Reason to Act, and Right Intention in Acting (Kennedy, 2003), according to some measurable and accountable standard, the state must recognize both the right of the individual and the conditions under which the state has the authority to deprive the individual of those rights. Doctor Robert Kennedy explained the difference between the existence of human rights and the extent of human rights as follows:

As regards its existence only, the right to own property is inalienable and inviolable; as regards its extent, the right may be justly qualified in a variety of ways and for a variety of reasons. Not least of these reasons will be the requirements of the common good of the society. This distinction between existence and extent is obscured in discussions about human dignity and human rights when the absoluteness of the first category is carelessly applied to the second. As suggested above, some human rights are absolute, but most are not. Human dignity is both protected by and governed by justice (Kennedy, 2003, p. 4).

Without undergoing the rigors of due process required by justice, the state is incapable of systematically guaranteeing the protection of individual rights in all other circumstances, in which the state does not have the authority to violate them.

Another interesting aspect of Presidential choice in the development of detainee policy is that in his 7 Feb 2002 Executive Order, President Bush cited as justification only OLC's 22 January 2002 Memorandum and the Attorney General's 1 February 2002 Memorandum, yet either rejected or was unaware of the considerable and weighted opinion of the Secretary of State and the supporting opinion of the State Department.

Reflecting the ideas of Bounded Rationality, this fact seems fairly significant, given that Secretary of State Colin Powell's objection to the condition of the President's 13 November 2001 Executive Order caused the Executive Branch to re-examine the legal justification of this policy and render a somewhat legally different (though not practically different) policy on 7 February 2002. Based on principle and consequences, Secretary of State Powell's interpretation of both the law and of the political climate resulting from U.S. implementation of the policy turned out to be accurate. In contrast, OLC's recommendation could be interpreted as the selective interpretation of precedent and fact resulting in little more than a technical justification of a pre-determined means to an end. Although the majority of judicial precedent and legislative statutes referenced by OLC are legitimate sources as a legal basis for examination of U.S. detainee policy, what troubles many Americans and internationals alike is whether the U.S. should pursue such a policy as opposed to whether it is strictly able to do so under the law. Because American detainee policy violates the Kantian maxim to "never treat people as a means, but always at the same time as an end" (Kant, 1785), one must examine whether or not such a policy can be ethically justifiable.

2. Ethical Decision-making

William Shakespeare wrote, "O, it is excellent to have a giant's strength, but it is tyrannous to use it like a giant" (Shakespeare, 1604-1605). The abuses perpetrated at Abu Ghraib clearly provide an illustration of Shakespeare's intended context. The solution to this ancient moral dilemma can be resolved through applied ethics. In the process of applying reason to "well-based standards of right and wrong that prescribe what humans ought to do" (Markula Center for Applied Ethics, 2005), there are three types of principles upon which ethical thinking is based. Rule-based thinking is associated with Immanuel Kant's Categorical Imperative; Ends-based thinking is associated with John Stuart Mill's utilitarian, or consequentialist, thinking; and Care-based thinking is most closely associated with the Golden Rule (Kidder, 2003, pp. 24-25). Since Kant's Categorical Imperative is described in some detail in the previous section on *Process*, the focus here will be to examine how ends-based thinking and care-based thinking influence decision-making. Suffice it to say that the Categorical

Imperative is a principle-driven approach that requires one to act as a universal maxim for others and always treat people as an end, never as means.

Ends-based thinking, or Utilitarianism, focuses on an evaluation and assessment of acting in accordance with the greatest good. The moral worth of an act, then, depends on the results, or consequences, it produces, in accordance with the Greatest Happiness Principle, defined by Mill as “an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in the point of quantity and quality” (Mill, 1861, as cited in Lober, 2000). In other words, “Utilitarianism examines possible results and picks the one that produces the most blessing over the greatest range” (Kidder, 2003, p. 24). As the end of human action, the Greatest Happiness Principle is “necessarily also the standard of morality” (Mill, 1861, as cited in Lober, 2000).

Examined through ends-based thinking, President Bush’s decision that al Qaeda and the Taliban would not receive Geneva Conventions protections as a matter of policy can be understood as a matter of loyalty. Loyalty given to, and received from, President Bush is a much-discussed issue in the mainstream media and is known to have a significant impact on the utility value of his decisions. Applying that same value scale, the President may have viewed the conflict between the constraints of both U.S. and International Law with what he apparently viewed as his higher moral duty. His loyalty to the American people, and in his role as father figure to protect Americans as his own children (personal correspondence with Wyckoff, C., 2006), demanded greater obligation than his duty imposed by, as Kant described it, “his reverence for the law” (Kant, 1785). In light of his possible assessment of consequences, one would find the obligation to act in ways that maximize the protection of the American people to far outweigh the consequences of violating his duty to obey both domestic and international law. This obligation would also exceed the consequences of mistreating enemy detainees in order to gain information about the larger enemy organization to prevent additional attacks on the American people and homeland. It is at this point in the moral reasoning, however, that one must recognize the value in not just quantity, but also in quality. Mill recognized that certain actions exist which are evil and never done for good. There are also actions which, “though the consequences in the particular case might be beneficial, if practiced generally, would be generally injurious, and that this is the ground of the obligation to

abstain from it” (Mill, 1861, as cited in Lober, 2000). Such are the circumstances under which President Bush had to determine the nation’s course of action in the War on Terror.

Care-based thinking is the embodiment of the Golden Rule: “Do unto others what you would like them to do to you” (Kidder, 2003, p. 25). Perhaps the simplest of all philosophies, the Golden Rule applies the feature of reversibility. Reversibility “asks you to test your actions by putting yourself in another’s shoes and imagining how it would feel if you were the recipient, rather than the perpetrator of your actions” (Kidder, 2003, p. 25). In his 26 January 2002 Memorandum to Alberto Gonzales, Counsel to the President, Secretary of State Colin Powell made the utmost use of the Golden Rule in his attempts to convince the President that one significant risk of determining that Geneva Conventions do not apply to the conflict in Afghanistan would be to “provoke some individual foreign prosecutors to investigate our officials and troops” (Powell, 2002, p. 3). Similarly, if the President determined Geneva Conventions applied to the conflict, not only would it preserve the strongest moral and legal foundations for U.S. credibility, but also “it maintains POW status for U.S. forces, reinforces the importance of the Geneva Conventions, and generally supports the U.S. objective of ensuring its forces are accorded protection under the Convention” (Powell, 2002, p. 4). It is significant to note that because of the clarity and simplicity with which Secretary of State Powell laid out the foreseen consequences of his argument for the application of the Geneva Conventions to the conflict in Afghanistan, many of his predicted consequences have come to pass almost exactly as he predicted in 2002.

The purpose of examining these three different approaches to ethical decision-making is not to make a value judgment of one over another. It is simply unrealistic to expect to arrive at the perfectly moral solution by applying any or all of these principles. Rather, “The point is to reason. . . .the principles are useful because they give us a way to exercise our moral rationality. They provide different lenses through which to see our dilemmas, different screens to use in assessing them” (Kidder, 2003, p. 26).

For all the philosophical ways upon which President George W. Bush could have based his thinking and decision-making, he appears to have demonstrated a Nietzschean

morality in one of the defining moments of his presidential term. Friedrich Nietzsche proposes that “the decisive value of an action lies precisely in what is unintentional in it” (Nietzsche, 1886, as cited in Lober, 2000). He argues that intentions weaken the determination of morality to the point it becomes indiscernible. Because much of the conventional morality is fear-based, Nietzsche was suspicious of intentions and felt that the “morality of intentions . . . must be overcome” (Nietzsche, 1886, as cited in Lober, 2000). However, the individual who is able to overcome the conventional morality, judged “solely on the utility of the herd” (Nietzsche, 1886, as cited in Lober, 2000), understands there is a higher moral code and acts beyond that traditional fear to do what he thinks is right. The danger in attempting to transcend the community conscience is that the individual must be prepared to take responsibility for his actions and pay a high price for such a challenge to the status quo. In his decision not to apply the provisions of the Geneva Conventions to either al Qaeda or the Taliban, President Bush attempted to transcend the conventional morality of the United States Armed Forces, the United States government, and the international framework established by the United Nations, by recognizing “the new paradigm--ushered in not by us, but by terrorists” (Bush, 2002) and responding with “new thinking in the law of war” (Bush, 2002). For President Bush, this new thinking must be rooted in strength. “Strength is necessary because tidily rational systems of morality will have to be discarded, and the darker, more dangerous, more passionate and mysterious aspects of human existence plumbed to the depths” (Nietzsche, 1886, as cited in Lober, 2000). It is in this context one can best understand from which Vice President Richard Cheney spoke of the strength it would require for how the United States would choose to respond to the new paradigm ushered in by al Qaeda’s attack:

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective. It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission (Cheney, 2001).

There can be no doubt in Vice President Cheney's words about the strength necessary to overcome the moral forces in war. However, one may find little moral worth in using any means necessary to achieve success within this mean, nasty, dangerous dirty "new paradigm." How is it possible to transcend conventional morality by sinking to the fear-infested depths of the world in which terrorists operate? President Abraham Lincoln was less concerned about transcending conventional morality than he was about preserving it, in choosing how save the United States from a new paradigm in his own time: secession. In weighing the consequences of his choice, Lincoln asked "[is] it possible to lose the nation and yet preserve the Constitution?" (Justice Clark, 1952, p. 662 as cited in Yoo, 2001). In weighing the consequences of choosing how to fight the "new paradigm" of transnational insurgency and terrorism, President Bush needs to answer rather, whether it is possible to preserve the nation and yet lose the Constitution.

D. OUTPUTS

The Vice President's determination to work through what he called the "dark side of the intelligence world" (Cheney, 2001), without first seeking alternative forms of action and resorting to the practice of lying and deceit (Bok, 1999, p. 105) has not been borne without consequences. Despite the President's apparent intention that the policy he communicated in his 7 February 2002 Memorandum may have met the spirit and intent of U.S. obligations under the Geneva Conventions, it is only through the caveat included in paragraph three of that memorandum, that the United States essentially withheld a complete derogation of its obligations as a High Contracting Party to the Geneva Conventions. Therein, President Bush declares, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva" (Bush, 2002). America's word that it would treat detainees humanely was intended to satisfy international allies, partners and the United Nations, but its actions and intentions have been seen as inconsistent with its word thus far.

This section will examine two subsequent policies which governed the conduct of American military forces and which derived directly from the President's determination not to regard members of al Qaeda and the Taliban as lawful combatants under the Third

Geneva Convention. The two specific policies in question are 1) Secretary of Defense Rumsfeld's decision to authorize coercive interrogation techniques at Guantanamo Bay, Cuba (GTMO) (Murphy, 2004, p. 826); and 2) the cooperative decision to import coercive interrogation techniques from GTMO into Iraq and Afghanistan (AJIL, 2004, pp. 827-828). From examination of these policies, one will be able to see a kind of Gresham's Law: "work that produces measurable outcomes tends to drive out work that produces unmeasurable outcomes" (Wilson, 1989, p. 161). In other words, the interrogation work that produced actionable, exploitable intelligence from detainees became more highly valued than the mere task of detention. As a result, the bureaucratic personality that developed came to value the means over the ends in a process that sociologist Robert K. Merton called "'goal displacement,' a process by which institutional values become terminal values" (as cited in Wilson, 1989, p. 69).

The impact of these policies, whether intended for well or ill, has been to degrade the credibility of the United States government by promulgating an officially sanctioned practice of deception, and to justify the application of one legal standard for our enemy, while rejecting that standard for ourselves.

1. Decision to Authorize Coercive Interrogation Techniques at GTMO

The purpose of the four Geneva Conventions of 1949 is to mitigate the harmful effects of war on all persons who find themselves in the hands of a belligerent party. . . . Whatever status a particular detainee may be assigned, the Geneva Conventions prohibit torture and inhumane or degrading treatment in all circumstances, including for purposes of interrogation (Elsea, 2005, p. 2).

The Geneva Convention's protections of belligerents on both sides of the conflict, however, did not fit within the framework of the Bush Administration's "new paradigm." As Counsel to the President, Alberto Gonzales, interpreted the conflict, "It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW" (Gonzales, 2002). The Bush Administration believed that the primary danger in the War Against Terrorism was the harmful effects to society at the hands of belligerent individuals and terrorist groups. "The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American

civilians” (Gonzales, 2002). The impact of this judgment reflected the Vice President’s belief that the American intelligence community had to quietly get its hands dirty to be successful against its enemies. But this belief that the new intelligence means were justified by the ends did not begin and end within the Bush Administration.

Part of the emphasis on this need for actionable intelligence comes from a bipartisan imperative among American leaders not to use their military to its full power, not to kill a lot of people or suffer any casualties. So instead, we’ve reduced the intelligence process to try to find the silver bullet, the one piece of intelligence from one of these captives that will allow us to kill bin Laden and make all of this bad stuff go away (Scheuer, 2005).

Consistent with the advice of Counsel to the President Gonzales, in order to “avoid foreclosing options for the future, particularly against non-state actors . . . this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners” (Gonzales, 2002). In accordance with the new thinking within the context of the Bush Administration’s “new paradigm,” information was the new currency of power and success. In terms of finding the so-called silver bullet, “Interrogation was key, the Bush administration believed, to getting immediate intelligence. Getting immediate intelligence was key to protecting the United States from further terrorist attacks. Therefore those rules on interrogation had to be loosened” (Danner, 2005).

Upon a more rigorous examination of the “standards of conduct under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code” (Bybee, 1 August 2002, p. 1), the Office of Legal Counsel found a narrow legal justification for such conduct as required in the “new paradigm.” OLC concluded “that the treaty’s text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for ‘cruel, inhuman, or degrading treatment or punishment’” (Bybee, 1 August 2002, pp. 1-2). OLC further opined that a wide range of interrogation techniques “do not produce pain or suffering of a necessary intensity to meet the definition of torture” (Bybee, 1 August 2002, p. 2) and thereby cleared a legal path for the introduction of coercive interrogation techniques.

The central output desired from the “new paradigm” was actionable intelligence. The Independent Panel to Review DoD Detention Operations was certain that the desire for actionable intelligence was a causal variable in the resultant treatment of detainees:

It is clear that pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense memorandum resulted in stronger interrogation techniques. They did contribute to a belief that stronger interrogation methods were needed and appropriate in their treatment of detainees” (Schlesinger Panel Report, 2004, p. 36).

In October 2002, the commander of the joint task force at GTMO sent a request up the chain of command for permission to use three categories of interrogation techniques, each category more intense and severe than the last, which he believed would result in more exploitable intelligence (Dunleavy, 2002, as cited in Murphy, 2004, p. 826). As a result of significant legal uncertainty across the DoD, Secretary Rumsfeld commissioned a working group of Defense Department lawyers to provide “more broadly regarding legal constraints on the interrogation of persons detained by the United States in the war on terrorism” (Murphy, 2004, p. 827). Relying heavily on the 1 August 2002 OLC Memorandum, which this paper has already shown to be of dubious legal value, and splitting hairs over the different standard of reasonableness between specific intent and general intent (Murphy, 2004, p. 828), the DoD working group determined that “the Convention [Against Torture] did not impose any greater requirements than already existed under U.S. law” (Murphy, 2004, p. 827). Secretary Rumsfeld subsequently approved the use of twenty-four interrogation techniques for use at GTMO (Murphy, 2004, p. 828).

2. Decision to Import HCI from GTMO into Iraq and Afghanistan

In September 2003, the insurgency in Iraq spiked in intensity and reached a level of violence which demanded recognition by the Bush Administration. At this point in time, however,

the United States has essentially no idea where this insurgency is coming from. They have no good intelligence. . . . So part of the migration came about largely because of the urgency, the extreme urgency at the highest levels of the American government to get intelligence and to get it any which way you can. And that kind of pressure came down and eventuated in these procedures going from one place to another (Danner, 2005).

Major General Geoffrey Miller, commander of the joint task force running GTMO, reviewed the prison system in Iraq “in order to exploit internees rapidly for actionable intelligence” (Schlesinger Panel Report, 2004, as cited in Murphy, 2004, p. 828). “His recommendation was radical: that Army prisons be geared, first and foremost, to interrogations and the gathering of information needed for the war effort” (Hersh, 2004). The need for such information was demanded not only by Secretary Rumsfeld, but also by the combat commanders in Iraq. “This is a fight for intelligence . . . to try to figure out how to take all this human intelligence as it comes in to us and turn it into something that’s actionable” (Dempsey, 2003, as cited in Hersh, 2004). As a result, the demand drove the supply, and the process to import coercive techniques into Iraq was begun.

The migration of interrogation techniques to Iraq and Afghanistan was neither as strictly controlled nor as specifically targeted as they had been within the confines of the GTMO detention facility. Even before the final and amended list of interrogation techniques had been approved by Secretary Rumsfeld for use only at GTMO, the Fay Report found that by December 2002, interrogators in Afghanistan were using many of the same coercive interrogation techniques used at GTMO (as cited in Murphy, 2004, p. 827). Within Iraq, by the summer of 2003, “the procedures actually used on the ground became a combination of Field Manual (FM) 34-52 and additional interrogation techniques that had ‘migrated’ from earlier use at Guantanamo Bay and in Afghanistan” (Murphy, 2004, p. 828). Lieutenant General Ricardo Sanchez, commander of all ground forces in Iraq, did not formally approve the use of these 29 techniques, modeled after those used at Guantanamo Bay, until 14 September 2003 (Sanchez, 2003).

Needless to say, there was a great deal of confusion over which policies and techniques were considered acceptable and legal for use in the field as a result of the different application of GPW between Iraq and Afghanistan, use of different versions of FM 34-52, and the multiple changes within the first 30 days the interrogation policy was approved for use in Iraq (Murphy, 2004, p. 829). The confusion was further fed by combat veterans

who had operated and deployed in other theaters in support of the global war on terrorism, who were called upon to establish and conduct interrogation operations in Abu Ghraib. The lines of authority and the

prior legal opinions blurred . . . and is significant in that it likely contributed to an escalating ‘dehumanization’ of the detainees and set the stage for additional and more severe abuses to occur (Fay Report, 2003, p. 28, as cited in Murphy, 2004, p. 829).

Further contributing to the confusion over which detainees were subject to these coercive techniques was the inability (or failure) to adequately segregate POWs from unlawful combatants, and from civilian internees and criminals. Much of the problem of improper classification and segregation arises from the simple fact that the United States does not conduct Article 5 Tribunals as required by the Geneva Conventions. It states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protections of the present Convention (GPW) until such time as their status has been determined by competent tribunal (GPW, Article 5, 1949).

Article 5 Tribunals are intended to be held for any person captured (or collected) on the field of battle, in order to determine their actual status under the Geneva Conventions and to what degree they are protected by them. The requirement ensures the application of such competent tribunals to those non-regular armed forces listed in Article 4; however, it is not limited to those listed under Article 4. It is written to apply to anyone who committed a belligerent act and who was captured. Taken, as designed, in combination with the Fourth Geneva Convention, for the protection of civilians in war, which requires segregation from combatants, spies, saboteurs, and mercenaries, one should reasonably conclude that in a war in which the enemy combatants routinely live with and hide in and among the population, that the Detaining Power "ought" to feel compelled to convene tribunals for all persons captured in order to ensure the proper categorization, segregation, and safeguarding of each type of detainee under the Convention. The practical purpose of this policy would also prevent unnecessary effort and the risk of violations during interrogations of detainees incorrectly categorized, or who otherwise have little or no intelligence value.

Although the United States has not convened Article 5 Tribunals, it does conduct multiple reviews of each detainee’s status as a security risk within the first two weeks of captivity. Upon capture, the detainees are held at the brigade interment facility (BIF).

Within 72 hours, an initial review must be done by a detention review authority (DRA) to determine whether there is sufficient evidence to keep the detainee. If determined to be a security threat, the detainee is then to be transferred to a division interment facility (DIF). The detainee can be held up to 14 days at the DIF, at which time another review will be performed. If the determination is again made that the detainee is a security threat, he is transferred to the theater internment facility (TIF). At the TIF, the detainee can be kept for a period of up to 18 months. During that time, the detainee's case will either be presented to a Combined Review and Release Board (CRRB), or will be taken to the Central Criminal Court of Iraq (CCCI). With regard to evidentiary standards, the capturing unit is required to provide witness statements and a CPA apprehension form, and will include interrogation reports and photos of any evidence found at the time of apprehension (weapons caches, cell phones, etc.) (procedures obtained from personal correspondence with Capt Kisner, MNF-I TF-134 legal attorney, 2006).

Because the United States has not convened Article 5 Tribunals either in the war in Afghanistan or the war in Iraq, U.S. forces have acted in contravention of DoD Directive 5100.77, the DoD Law of War Program, AR-190-8, the Armed Forces Joint Instruction on Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees and the U.S. Army's Operational Law Handbook. These regulations state that

U.S. forces will comply with the [law of war] regardless of how the conflict is characterized. . . . all enemy personnel should initially be accorded the protections of the [Third Geneva Convention], at least until their status may be determined. . . . When doubt exists as to whether captured enemy personnel warrant continued [POW] status, Art. 5 [of the Third Geneva Convention] Tribunals must be convened (as cited in AJIL, 2004, p. 476).

Instead, the Army categorically classifies its detainees in Iraq as "security detainees" (MNF-I ROE, 2005), which seems to be a convenient catch-all category that includes unlawful combatants, civilian internees, criminals, and other detainees the Army determines to be a security threat to Coalition Forces and the government of Iraq. "Some

observers have argued that this apparent inconsistency is at least partially to blame for the confusion with respect to the permissibility of harsh interrogation techniques in detention facilities in Iraq” (Elsea, 2005, pp.5-6).

The one fact that mitigates the Bush Administration’s justification for coercive interrogation techniques in the urgent and continuous pressure for soldiers to produce actionable intelligence is that the high value prisoners – the senior members of al Qaeda, the Taliban, or Saddam’s regime – those who held the strategic-level intelligence, were never sent to the general detention facilities like GTMO, Abu Ghraib, Camp Bucca, or any of the standard internment facilities (Hersh, 2004; Priest, 2005). Rather, “all of the high value people went into CIA hands, even the few . . . that started out in military hands” (Priest, as cited in PBS Frontline interview, 2005). This assertion has been confirmed by the former commander of detentions at GTMO, Brigadier General Rick Baccus, who told PBS Frontline that he had real concerns with who was getting sent to Guantanamo Bay, to the degree that Major General Michael Dunleavey, a former Joint Task Force Guantanamo Commander, traveled to Afghanistan to sort out the vetting process of who was being sent to GTMO (Baccus, as cited in PBS Frontline interview, 2005). Lieutenant Colonel Thomas Berg, a military lawyer stationed at GTMO at the time, also confirmed that “we had a bunch of people there [GTMO] that had little or no intelligence value . . . maybe some of them aren’t quite the worst of the worst, and some of them are just the slowest guys off the battlefield” (Berg, as cited in PBS Frontline interview, 2005). Recent admissions by Rear Admiral Harry Harris, the current Commander, Joint Task Force Guantanamo, confirmed only 25 percent of the detainee population at GTMO are actively interrogated due to lack of trained interrogators and interpreters; others may have gone years without being questioned (Sutton, 2006). Further, nearly 300 of the 759 detainees ever held at GTMO “have been released or transferred to their home nations for continued detention” (Sutton, 2006), indicating that almost half of whom Secretary Rumsfeld once called the worst of the worst had no intelligence value at all. When one considers these facts along with Major General Antonio Taguba’s confirmation that more than 60 percent (and growing quickly) of the detainees held in Iraq are criminals “of no intelligence value and who no longer pose a significant threat to Coalition Forces” (Taguba, 2004, p. 25), one is compelled to question

why coercive interrogation techniques were authorized as official policy and why the United States reversed “over a century of U.S. policy and practice in supporting the Geneva Conventions” (Powell, 2002, p. 2).

E. OUTCOMES

Socrates: There are these two evils, the doing of injustice and the suffering of injustice—and we affirm that to do injustice is a greater, and to suffer injustice a lesser evil.

Plato, *Gorgias*, 509c, as cited in Kennedy, 2005

The ultimate outcome of the U.S. policy toward detainees in its wars against terrorists and insurgents may be another test of America’s belief in the principles of the Constitution; whether we ultimately do believe in the opening proclamations of the Declaration of Independence—that all men are created equal—or at least have equal protection under the law. As a nation governed by the rule of law, Americans have put great consideration and weight of opinion behind the Golden Rule, which advises: “Do unto others as you would have done to you” (Kidder, 2003). One of the biggest difficulties many Americans have with the Bush Administration’s categorical refusal to comply with the full framework of the Geneva Conventions is that the policy expects and demands a certain standard of conduct by the enemies of the United States, but seems to reject the application of the same standard for itself.

It's almost a royalist idea of power; that the president, if he wants to interrogate a prisoner in whatever way he wants, he cannot be stopped, neither by the other institutions of government nor by international treaty nor by domestic statute, because these are under his war powers. So you see an untrammled notion of executive power that's very radical in American history, but that happens to come forward at this time because of the particular administration you have in power and the event that has happened (Danner, 2005).

The notion of a Presidential mandate in the aftermath of the 9/11 attacks was very real, to the degree that President Bush was obligated by duty to take decisive action not only to protect Americans from future attacks, but to restore our honor as a nation. However, the President’s mandate was not a blank check from Congress and the American people to react and fight in such a way as to diminish the notion, in our own minds and across the

globe, of what it means to be American. Ironically, the President's policy for "Humane Treatment of al Qaeda and Taliban Detainees" (Bush, 2002) serves as sort of an anti-Golden Rule and one of its outcomes has been to diminish the prestige of American democracy rather than to strengthen it.

Jane Mayer wrote in the *New Yorker*, "Since September 11th, as the number . . . terrorist suspects have been deposited indefinitely in places like Guantánamo Bay, the shortcomings of this approach have become manifest (Mayer, 2006). She continued by quoting former CIA operative Michael Scheuer, who said,

Are we going to hold these people forever? The policymakers hadn't thought what to do with them, and what would happen when it was found out that we were turning them over to governments that the human-rights world reviled. Once a detainee's rights have been violated, you absolutely can't reinstate him into the court system. You can't kill him, either. All we've done is create a nightmare.(Scheuer, as cited in Mayer, 2006).

Dana Priest, who recently won a Pulitzer Prize for her reporting on this issue, quoted a former senior intelligence officer who said, "We never sat down, as far as I know, and came up with a grand strategy. Everything was very reactive. That's how you get to a situation where you pick people up, send them into a netherworld and don't say, 'What are we going to do with them afterwards?'" (Priest, 2005). The implication of this comment is that the United States, beyond the point of killing or capturing and interrogating members of al Qaeda, the Taliban, or participants in the Iraqi insurgency, has found itself in a dilemma. By rejecting the institutional due process provided by the Geneva Conventions to all parties to the conflict, the United States could ultimately end up unable to exact justice on those truly responsible for the murder of nearly 3,000 Americans and allies in the 9/11 attacks.

Thus far, this thesis has focused on the procedural and organizational explanations for why and how the atrocities perpetrated at Abu Ghraib could happen at the hands of American soldiers in the performance of their assigned duties. While systemic analysis can help to explain the conditions under which these abuses were permitted to happen, it is insufficient to explain why individual "GIs" were capable and enthusiastic participants in the abuses committed. For an analysis of individual motivations, one must turn to the social sciences of psychology and sociology and the work of Doctors Stanley Milgram,

Philip Zimbardo, and Robert Cialdini. In seeking to understand the motivations of the individuals involved, one can also hope to predict when such abuses are more likely to occur and to prevent the relapse of such horrific cruelty.

In the 1960s, Doctor Stanley Milgram conducted a series of more than a dozen experiments on over 1,000 subjects in order to study the effects of authority on human behavior (APA, 2004). Doctor Milgram concluded that ordinary people are capable of extraordinary acts of evil.

This is, perhaps, the most fundamental lesson of our study: ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority.

The essence of obedience is that a person comes to view himself as the instrument for carrying out another person's wishes, and he therefore no longer regards himself as responsible for his actions. Morality does not disappear. . . . loyalty, duty, discipline are all terms heavily saturated with moral meaning and refer to the degree to which a person fulfills his obligations to authority. . . . The most frequent defense of the individual who has performed a heinous act under command of authority is that he has simply done his duty. (Milgram, 1974)

Doctor Philip Zimbardo also conducted experiments investigating the influence of authority on human behavior. What he discovered about human nature was equally as disturbing as Doctor Milgram's conclusions. In the Stanford Prison Experiment, Doctor Zimbardo "randomly divided 24 normal students into groups of guards and prisoners within a simulated prison. Within days, all hell broke loose, as the faux guards turned to abuse to control the faux prisoners, stripping them, hooding them and ultimately forcing them to simulate sodomizing one another" (Stannard, 2004). Although he had to shut down his experiment only a few days into his planned two week experiment Doctor Zimbardo was able to reach some important conclusions about the totality of the power differential between the guards and the prisoners:

Human behavior is much more under the control of situational forces than most of us recognize or want to acknowledge. In a situation that implicitly gives permission for suspending moral values, many of us can be morphed

into creatures alien to our usual natures. Some of the necessary ingredients for stirring the crucible of human nature in negative directions are: diffusion of responsibility, anonymity, dehumanization, peers who model harmful behavior, bystanders who do not intervene, and a setting of power differentials.

Those factors were apparently also operating in Iraq. But in addition there was secrecy, no accountability, no visible chain of command, conflicting demands on the guards from the CIA and civilian interrogators, no rules enforced for prohibited acts, encouragement for breaking the will of the detainees, and no challenges by many bystanders who observed the evil but did not blow the whistle (Zimbardo, 2004).

Doctor Zimbardo also offers good advice on how to safeguard against losing control over the necessary power differential in prisons or similar type institutions: “When there is accountability, transparency, a clear chain of command and a respect for the enemy as a human combatant, this will prevent future atrocities like Abu Ghraib” (APA, 2004). He also identified a number of social forces that enabled the type of abuses at Abu Ghraib and in the Stanford Prison Experiment:

It can start with a failure of leadership, but includes a host of social psychological processes, such as, diffusion of responsibility, dehumanization of the enemy, secrecy of the operation, lack of personal accountability, conditions facilitating moral disengagement, relabeling evil as “necessary” and developing justifications for evil, social modeling, group pressures to conform in order to fit a macho cultural identity, emergent norms that establish what is acceptable to the group in that setting and obedience to emergent authorities or group leaders (APA, 2004).

If the proper safeguards are put in place to minimize or eliminate the influence of these social forces on the guards, and then are carefully attended to, Doctor Zimbardo would disagree with OLC’s justification of the need for premeditated legal defenses. In his mind, the types of justifications explained by Mr. Bybee would indicate intent to develop justifications for wrongdoing. While the forces of authority, secrecy and lack of accountability can have a powerful influence to do wrong, these kinds of abuses are by no means inevitable.

Another psychologist whose research on the power of persuasion can help describe why the military guards at Abu Ghraib perpetrated their infamous acts of

depravity and abuse against the prisoners there is Doctor Robert Cialdini. In his book *Influence: The Psychology of Persuasion*, Doctor Cialdini explains the six principles of psychological influence he identified during his three years of “participant observation” in numerous “compliance professions” (Cialdini, 1993). What is truly fascinating about these principles is their “ability to produce a distinct kind of automatic, mindless compliance from people, that is, a willingness to say yes, without thinking first” (Cialdini, 1993, p. xiv). Of Doctor Cialdini’s six principles, it appears that four were in effect at Abu Ghraib.

Authority describes a deep sense of obedience and a boundless potential to compel peoples actions (Cialdini, 1993). In the social context, Milgram’s experiment is an example of the compelling influence of authority in and of itself. Compliance with authority was a common influence in the Abu Ghraib incident throughout the entire chain of command, and even describes the deference of the guards to the interrogators and military intelligence officers, whose identity was often hidden during the course of their duties.

Reciprocation describes a rule “established to promote the development of reciprocal relationships so that one person could initiate such a relationship without a fear of loss” (Cialdini, 1993, p. 30). The rule of reciprocation is “An obligation to give, an obligation to receive, and an obligation to repay” (Cialdini, 1993, p. 31). Reciprocation was the primary means by which the Military Intelligence officers influenced the Military Police noncommissioned officer in charge (NCOIC) to participate in the softening up of detainees for interrogation. After he had first done it for them, the interrogators complimented the NCOIC for the success they had achieved as a result of his actions to soften up the detainees. It was natural for the NCOIC to continue to soften up the detainees in order to continue receiving positive reinforcements for the job he and his soldiers were doing. The MP’s sense of mission was strong at that point, matching this informal task with a high degree of autonomy and coupled with praise.

Consistency is a very strong psychological drive that attempts to correlate one’s actions with one’s commitments. Getting someone to make a commitment is the key and sets the stage for an automatic and ill-considered consistency with that commitment

(Cialdini, 1993). Once the NCOIC and his guards had begun to perform these abuses and coercive techniques in order to soften up the detainees, they felt an obligation to continue to act in ways that were consistent with the commitment they had made to the Military Intelligence officers.

Social Proof provides an opportunity to use role models and key communicators to manipulate and shorten the decision-making process of the group. A very powerful group dynamic, social proof emphasizes the similarity between the subject and the behavior of the role model to link consistency of the desired action between the target and the role model (Cialdini, 1993). This extreme case of “everybody’s doing it” served to reinforce the heinous behavior the group of guards observed because their leader and their role model had started to abuse the detainees and the majority of the guards decided it would be appropriate for them to abuse the detainees as well because their individual decision processes were manipulated by the actions of the group. The Military Police judged whether it was okay for them to abuse detainees by observing their leader and other MPs doing it. Nobody spoke out against the abuses, so they each decided it was okay to participate. From there, the principles of consistency and reciprocation only served to reinforce the MPs behavior as time went on.

After considering the process by which this detainee policy was developed, how the President chose the nation’s course of action, and what caused the broader policy to produce specific outputs and why, the reasonable person may pause to consider whether such treatment, as is overtly authorized or secretly permitted, is worth it. Can such a consequential course of action be value-maximizing for the rational actor, or does the Categorical Imperative obligate one to abstain from subjecting detainees to such cruel treatment? While there is a pretty wide range of professional opinion on this question, in his paper to the Joint Services Conference on Professional Ethics, Dr. Robert Kennedy presented five reasons why the United States should never resort to torture, and arguably such cruel, inhuman and degrading treatment that fails to rise to the level and severity of torture.

First, the United States has entered into a number of international agreements prohibiting the use of torture as well as cruel, inhuman and degrading treatment. Not

only are these agreements consistent with the Constitution, one could argue that America is compelled to comply out of duty to an honorable obligation it entered into in good faith. Kant would agree that the highest principle by which one can make a decision is based on duty or the law. “Fidelity to international law and agreements may be a reason to avoid all uses of torture” (Kennedy, 2003, p. 10).

Second, America should not employ torture due to the force of our example. Following the reasoning of Kant’s Categorical Imperative, the U.S. should act as though its actions were a universal maxim for others. “For the United States to employ torture, even in sharply limited cases, might set an example that would encourage less restraint in other parts of the world” (Kennedy, 2003, p. 11).

“A third reason, and one that should not be dismissed lightly, is the effect of employing torture on both the interrogator and the character of the nation” (Kennedy, 2003, p. 11). This reason applies the second part of the Categorical Imperative, “Never to treat people as means, always as ends” (Kant, 1785). “The employment of torture cannot fail to affect the interrogator, regardless of how clearly he or she sees the good to be achieved. Furthermore, the lines between interrogation and revenge or punishment can easily be blurred, both by the individual and by the nation (Kennedy, 2003, p. 11).

“A fourth reason to avoid torture is that it may lead the nation and its leaders to be more willing to employ immoral uses of force, both within and without the context of war” (Kennedy, 2003, p.). The paradox of using “any means necessary” to protect what one values may cause the loss or destruction of whatever is valued (Kennedy, 2003, p. 11). Flawed analysis in support of the justification for torture, such as that presented by the Office of Legal Counsel to the President, may provoke an unnecessary escalation of violence (Kennedy, 2003, p. 11).

“Finally, it may be that interrogatory torture is simply doesn’t work. If this were to prove to be so, then the use of torture in interrogations would fail the criterion of Prospect of Success, and its use would therefore be unjustified and immoral” (Kennedy, 2003, p. 11).

F. STRATEGIC DECISION-MAKING CONCLUSIONS

In his classic treatise, *On War*, Clausewitz wisely considered the importance of a state's intent on the overall outcome of policy:

In short, at the highest level the art of war turns into policy—but a policy conducted by fighting battles rather than by sending diplomatic notes. . . . No major proposal required for war can be worked out in ignorance of political factors; and when people talk . . . about harmful political influence on the management of war, they are not really saying what they mean. Their quarrel should be with the policy itself, not with its influence. If the policy is right—that is, successful—any intentional effect it has on the conduct of the war can only be to the good. If it has the opposite effect, the policy itself is wrong (Clausewitz, 1832, as cited in Darley, 2005, p. 133)

In order for a strategy to be good, the ways, ends, and means all must be balanced with respect to the risk associated with the pursuit of each. The Bush Administration strategy clearly is not balanced in a way that will engender broad-based support, as can be shown by the President's plummeting approval ratings in the polls (Gallup, Zogby, Pew, New York Times, etc.) as well as by the coordinated, international protests against the first pillar of the strategy, thwarting terrorists and rogue regimes. Rather, the U.S. strategy is rooted in the application of its unparalleled military might. Echoing the assertions of Clausewitz, the best form of public diplomacy is good policy and good policy execution; as a result, good public diplomacy cannot correct bad foreign policy (Blackburn, 1992). The feedback from the target audiences regarding the administration's strategy and its rhetoric is clear: it isn't working, at least in the short term.

As historian John Vincent explained, "History is about evidence. . . . no evidence, no history" (as cited in Gray, 2006, p. 29). Against the tyranny of terrorism, much as it overcame the tyranny of fascism, communism, and racism, America has the opportunity to write history, not just participate in it. If the evidence leads to outcomes that demonstrate moral intentions, just actions, and by proving that every person is truly equal under the law, then terrorism hasn't a chance. If the evidence leads to the kinds of outcomes illustrated by Abu Ghraib, secret prisons, torture, and rule by law instead of the rule of law, then the history that will be written is less certain.

V. CONCLUSIONS

In trying to define the essence of war, Colin Gray wrote, “Warfare is all about human behavior, ours and theirs” (Gray, 2006, p. 28). The purpose of war is generally regarded as the political coercion of one state by another. More specifically, war is about controlling an adversary’s will to the degree that he can be persuaded he is defeated (Gray, 2006, pp. 27-28). In other words, “War is about politics and warfare always about people” (Gray, 2006, p. 27).

If warfare is ultimately about the political coercion of the will of a people, then how is it possible that the coercion of a single person, in captivity as an official representative of an adversarial state or organization, is not only illegal, but also immoral? Particularly when prisoners continue to resist while in captivity by any and all means available, to the degree that prisoners sustain a defiant atmosphere of combat, how is the detaining power to persuade the prisoner that he is defeated if not through the coercive control of his will? As noted above, the answer is that “warfare is all about human behavior, ours and theirs” (Gray 2006, p. 28).

Professor Philip Zimbardo, who conducted the Stanford Prison Experiment in 1971, is an expert on certain aspects of human behavior. Zimbardo makes clear that “prisons offer an environment where the balance of power is so unequal that even normal people without any apparent prior psychological problems can become brutal and abusive unless great efforts are made by the institution to control the expression of guards' hostile impulses” (APA, 2004). Ironically, Doctor Zimbardo’s description of the power differential in the relationship between detaining power and captive by is also an apropos description of the relationship between the United States and almost every second and third world civilization in the world today. Much as laws and regulations govern the conduct of the guards holding almost total power over the prisoners, so do the Geneva Conventions represent “an uneasy compromise between the views of smaller land Powers liable to be overrun, and of the greater land Powers who have usually done the overrunning” (Stone, 1954, as cited in Aldrich, 2000, p. 44).

Terrorism, guerrilla warfare, and insurgency are ancient styles of fighting by which those on the short end of the power differential have challenged the status quo imposed by those in control of the political and social context. Throughout history, great nations have been vulnerable to those who have found ways to wield the state's own power against it. As described by Mark Danner, "Terrorism really is a kind of jujitsu. [It] begins with the recognition that the party you're attacking is much stronger . . . and you have to use the strength of that party against himself. So you have to make him act in a way and do things that you do not have the power to do" (Danner, 2005). Terrorists aim to provoke a regime into overreaction and repression of the entire population because the regime does not know exactly who the terrorists are. The political outcome of the state's repression can be the unification of the population against it, whereby the state's use of its strength against itself can result in the downfall of its policy or worse (Johnson, 1981; DeNardo, 1985). The 9/11 attacks on the United States by al Qaeda demonstrated that the smaller countries, fringe groups, and even individuals, were capable of utilizing the asymmetric advantage of terror to a degree previously incomprehensible, and served, in a fashion, to mobilize and unify radical groups across the globe who, in possession of a different vision for governance, would no longer allow themselves to be "overrun" by the great powers.

In a strategic sense, the American detainee policy, unfortunately made infamous at prisons like Abu Ghraib and Guantanamo Bay, represents the ideal manifestation of the asymmetric jujitsu contest between the world's strongest nation and a transnational network of radical Islamic terrorists who are too weak to seize power in their own countries. By provoking the United States to overreact with disproportionate force, al Qaeda is cleverly working to disrupt the balance of the status quo in the Middle East by manipulating the policies of the regimes in power to the degree they de-legitimize themselves in the eyes of the population. If the most significant experience Afghans, Iraqis, and other Arabs have with American democracy is gained by their experience and treatment at confinement facilities like Abu Ghraib and Guantanamo Bay, then al Qaeda's strategy may have a reasonable chance at success. What the United States needs most at this point in time is to revise its foreign policies with respect to the Islamic world, first so that these policies are consistent with the fundamentally American principles of

Liberty, Equality, and Due Process, and second, to relate those principles to the specific socio-cultural context (Gray, 2006) of Islam. If these changes are not made to the American National Security Policy, then the risks, as noted by Colin Gray, are of an historic proportion:

The effectiveness of a revolutionary American way of war will not be wholly within America's competence to ensure. Americans may wage the wrong war the wrong way, or the right war the wrong way, because they failed to recognize and understand the political and cultural context of the conflict at issue (Gray, 2006, pp. 38-39).

In order to ensure the ability of American national security policy to achieve its intended outcomes, particularly in the Global War on Terror and the type of low intensity war that has thrived in the post-WWII era, the United States should pursue three changes with respect to its professed policy objective to eradicate terrorism as a national security threat. Within the framework of American national security policy, two issues are at the forefront of the political and socio-cultural context: war powers and human rights. "Fighting terrorism . . . does not require wholesale abandonment of national principles and traditions – foregoing the legitimacy that only legislative and judicial powers can provide and leaving individual rights to the executive branch's discretion" (Heymann and Kayyem, 2005, p. 2). Adoption of specifically ratification and adoption of Additional Protocols I & II (1977) combined with application of the full framework of the Geneva Conventions, will provide the best available framework to combat wars of transnational insurgency, national liberation, and terrorism while retaining the moral and legal high ground required of the world's only superpower.

A. RATIFY ADDITIONAL PROTOCOLS I AND II TO THE 1949 GENEVA CONVENTIONS

In his letter to the Senate requesting their advice and consent for his recommendation not to ratify Additional Protocol I to the Geneva Conventions, President Reagan's opposition to ratification focused on the legitimacy he believed would be conferred upon terrorists if the Protocol were adopted. In his intense opposition to terrorist organizations and their supporters, President Reagan specifically believed, "The repudiation of Protocol I is one additional step, at the ideological level so important to

terrorist organizations, to deny these groups legitimacy as international actors” (Reagan, 1987). As a result, Additional Protocols I and II to the 1949 Geneva Conventions remain pending action with the Senate Committee on Foreign Relations (Library of Congress, 2006). Despite the political reservations of two American Presidents and the U.S. Senate, Additional Protocols I and II to the 1949 Geneva Conventions remain the most relevant and practical legal framework by which States can combat wars of insurgency, national liberation, and terrorism. 163 out of 191 member states in the United Nations have ratified Additional Protocol I and 159 U.N. member states have ratified Additional Protocol II (ICRC, 2005). It is time for the United States to ratify both Additional Protocols as a more effective framework within which to fight the Global War on Terror.

In 1863, the Lieber Code described the relationship between a State and a rebellious people with respect to the laws of land warfare. For both political and practical reasons, the Lieber Code noted no special relationship conferred by the application of the laws of war or the treatment of captured rebels as prisoners of war.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power.

153. Treating captured rebels as prisoners of war . . . neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties (General Orders No. 100, 1863).

This distinction between sovereign and rebel insurgent got blurred somewhat with the creation of the Third Geneva Convention. In addition to the desire of the colonial powers to retain their full autonomy and sovereignty to deal with colonial insurrections without international interference, there are two defects of traditional categorization of combatants which proved insoluble to the major land powers: first, it is difficult to distinguish between combatant rebel forces and the civilian population, thereby putting the population directly at risk, and second it ignores major differences among participants

within each category (Bond, 1974, p. 151). In their Commentary to Additional Protocol I, the International Committee of the Red Cross clarified the impact of the problems posed by the imprecise recognition of guerrillas:

While Article 5(2) of GC III was an important development in 1949 for the protection of people taking part in hostilities, the rule remained “rather imprecise and at an embryonic stage”. The problems of legal recognition of combatants of guerrilla warfare highlighted the insufficiency of Article 5(2). Article 45 of Protocol I was designed to remedy this insufficiency. The objective was to establish procedures which were more likely to guarantee that prisoner-of-war status would be granted. In effect, the provision lists the cases in which doubt regarding the status of a combatant must give way to a presumption of prisoner-of-war status: (1) if he claims that status; (2) if he appears to be entitled to such status; and (3) if the Party on which he depends claims such status. Where doubt remains notwithstanding the said presumption, the question then goes to the competent tribunal. The series of presumptions in Protocol I are a development of Article 5(2) of GC III, but in contrast to the latter provision the burden of proof clearly lies with the captor. By implementing a system of presumptions, Protocol I reverses the burden of proof so that it is the competent tribunal which must provide evidence to the contrary every time the presumption exists and is contested. It would thus appear that Article 45 of Protocol I reaffirms the interpretation of “any doubt arises” in Article 5(2) as including instances when a claim of prisoner-of-war status is made either by the detainee or by the Party on which he or she depends. It may be concluded, on the basis of the interpretation of the rule in military manuals, that doubtful prisoner-of-war status under Article 5(2) of GC III may arise where serious doubt exists as to whether a captured person fits within the Article 4 categories despite a general (unwritten) presumption of prisoner-of-war status for those taking part in hostilities (Naqvi, 2002, pp. 576-577).

The operational benefit resulting from the adoption of the Additional Protocols to the Geneva Conventions (1977) would be not only to provide an adequate resolution to the two traditional defects of combatant categorization noted by Mr. Bond, but also to simplify the definition of combatants and the rules for their treatment as POWs when they fall into the captivity of a detaining power. Just as it was recognized in the Lieber Code that applying the laws of war to a rebellious people does not confer any special relationship or legitimacy upon them, neither would the adoption of the Additional Geneva Conventions Protocols serve to legitimize terrorism and insurgency to any degree greater than they are already accepted and used by the weak against politically and

militarily strong states. To that end, asymmetries of power are not the only concerns regarding the relationship between the State and the terrorists/insurgents. The essence of “the asymmetry between the morality of the warrior and the morality of the terrorist . . . is ethical discrimination. That is what distinguishes a warrior from a bandit, a mere killer, a terrorist” (Ignatieff, 2001, p. 7).

One implication of the continued implementation of U.S. detainee policy in the aftermath of Abu Ghraib has not been to change the policy framework or intent; rather the impact has been borne by the soldiers, sailors, airmen and Marines on the ground. The rules imposed on them to justify taking, processing and holding a detainee have become restrictive to the point as to potentially be operationally prohibitive (Personal correspondence with McCormick, 2005; Dyke, J., 2006). Instead of enabling an efficient process to search, silence, secure, segregate and speed to the rear (AR 190-8) any combatant captured in hostile actions toward Coalition forces, the detainee process has become mired in legal determinations, the chain of custody process, and requirements for strict rules of evidence. There is no small degree of irony that such strict law enforcement rules have been imposed upon U.S. forces who are routinely ordered to conduct so-called “cordon and sweep” operations, during which they accomplish what would amount to an unlawful search and seizure under U.S. law, yet are held to essentially a strict legal process by which to categorize, process, and justify holding the persons they capture during these raids. Rather than change the policy to be an enabler for operational effectiveness for forces in theater, the policy has hamstrung soldiers’ efforts both to remove hostile forces from the battlefield, and to extract and utilize operationally relevant intelligence. Further, as discussed throughout this thesis, the policy has actually been counterproductive, both in terms of efficiency and its effects on the insurgency.

B. ADOPT THE ENTIRE FRAMEWORK OF THE GENEVA CONVENTIONS FOR UNWAVERING APPLICATION DURING WAR

Ratification of the 1977 Additional Protocols I and II and acceptance of the complete framework of the Geneva Conventions should serve as the appropriate moral and legal standard for nation states to effectively and legitimately combat wars of

transnational insurgency, national liberation, and terrorism. “The driving motive for ethical restraint is the obligation we have for our own moral identity and principles. You cannot fight a war on terror and hope to win if you betray your own moral identity” (Ignatieff, 2001, pp. 9-10).

Two key principles regarding the application of the Geneva Conventions relative to International Humanitarian Law are that 1) “Captivity is not a punishment, but only a means of keeping an adversary from being in a position to do harm; and 2) The State must ensure the protection, both national and international, of persons fallen into its power” (Bond, 1974, p. 76). If, in fact, the Bush Administration’s “new paradigm” recognizes that the official U.S. position was that Afghanistan was not a failed state, and also, as former CIA director, George Tenet, recognized, that al Qaeda was a terrorist organization supporting the state of Afghanistan, then the notion that the Taliban were ruling over a *de facto* state is acceptable. If so, then international law prescribes applying the law of war to al Qaeda and the Taliban as the *de facto* armed forces of that state. Specifically:

Nations holding such beliefs (leery of international interference in internal affairs) would naturally reject the idea that the laws of war—international law—should dictate how they could treat insurgents. Once the rebels had achieved the status of belligerents, however, they had become in effect a *de facto* state; as a state they were entitled to all the incidents of that privileged status, one of which was being accorded the benefits of the laws of war. . . . The doctrine of the sovereign equality of states, which remains a fundamental building block of the international legal order, rather than the demand of humanity, dictated applying the laws of war to belligerencies (Bond, 1974, p. 51).

The benefit of the Geneva Conventions framework, to both states and individuals, is that it provides an internationally accepted and legitimized system of due process, so that, if and when it becomes necessary for the state to deprive combatants of the rights generally believed to be inalienable, the state can do so in a just and ethical manner. The Geneva Conventions provide a legitimate due process system for those combatants whose fundamental rights have been withheld by the detaining power as a result of their official captivity. “The GPW permits long-term detention without criminal charges” (Powell,

2002, p. 3). No such permission exists under other international, humanitarian, or human rights laws, and such detention is not otherwise legal under U.S. federal law.

If the GPW is determined not to apply, then detainees are required to receive due process in accordance with violations of criminal law. The Supreme Court ruled in *Rasul v. Bush* (2004) that “the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing” (Justice Stevens, 2004). Citing the Supreme Court’s determination in *Eisentrager v. Forrestal* (1949), Justice Stevens summarized six critical facts in the case:

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.” 339 U.S., at 777. On this set of facts, the Court concluded, “no right to the writ of *habeas corpus* appears. *Id.*, at 781.

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control (542 U.S. 466, 2004).

In light of both the principles of the Geneva Conventions and the Supreme Court decisions cited above, Mr. Gonzales’ 25 January 2002 policy recommendation presents a contradiction in desired outcomes. On the one hand, the U.S. needs to try terrorists and insurgents for war crimes in order to avoid further atrocities against Americans; on the other hand, however, since Mr. Gonzales believes the “new paradigm” renders obsolete Geneva’s strict limitations on questioning prisoners, it also practically prohibits the U.S. from ever bringing terrorists to trial for war crimes. The evidence obtained from the

tainted tree of such relatively unrestricted interrogations during an indefinite detention of an unlawful combatant, may never be used in any kind of trial. The irony is thick in the dilemma over the need to try detainees for war crimes, yet lacking the appropriate legal framework because of the blanket suspension of application and, therefore, the legitimacy of indefinite detention. For these reasons, the United States should commit to full compliance with the Geneva Conventions, complete with the ratification of the two Additional Protocols.

The practical effect of the detainee policy that President Bush implemented was that it managed to adopt the worst elements of both options presented to him. By applying the Geneva Conventions to the conflict, yet categorically withholding its protections from the participants, the United States preserved the least flexibility under the law, maximized the legal liability for criminal prosecutions of its officials, undermined public and allied support, and abdicated the legal credibility and moral authority the U.S. maintained in its international relations (Powell, 2002, p. 3).

C. DEVELOP A LEGITIMATE DUE PROCESS FRAMEWORK FOR THE LIMITED USE OF COERCIVE INTERROGATION TECHNIQUES

According to their findings reported in the Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism (LTLSP) sponsored by Harvard University, “Far too much of the present ‘war on terror’ has come to rely on a single weapon – interrogation – from what should be an array of intelligence techniques” (Heymann and Kayyem, p. 31).

The bottom line for the lawyers and academics involved in this Harvard University-sponsored project is that “The President cannot legitimately violate a treaty or statute which was passed and is in effect. . . . there must be – without exception – a commitment to our treaty obligations under Article 1 against torture” (Heymann and Kayyem, 2005, p. 28).

[Common] Article 3 [of the 1949 Geneva Conventions] does not forbid interrogation, but it does prohibit “torture.” . . . Article 17 [of the Third Geneva Convention] does not bar all questioning. It does, however, forbid “any physical or mental torture” as well as “any form of coercion” (Bond, 1974, p. 127).

The prohibition on coercion does not tie the hands of the skilled interrogator. He can exploit the understandable fears of the prisoner through a variety of psychological techniques of interrogation. As one scholar put it: “Article 17 . . . does not protect the prisoner against the wiles and cunning of enemy interrogators” (Bond, 1974, p. 128).

As a result of extensive research and analysis by this international task force of legal experts and government officials into international humanitarian and human rights laws, the LTLSP “recommend[s] a regulated system of highly coercive interrogation (HCI) that will be consistent with [U.S.] obligations under Article 16 of the Convention Against Torture to ‘undertake to prevent’ cruel, inhuman, or degrading treatment with only one extremely limited exception . . . that would require presidential authorization” (Heymann and Kayyem, 2005, p. 29). They describe the authorization process for this singularly extreme exception by analogizing it to presidential or legislative decisions authorizing covert action (p. 31).

Recognizing the criticality of the bureaucratic oversight process, Heymann and Kayyem write that “Inadequately monitored and regulated coercion against prisoners has the potential to prove a setback for our foreign and military policies and goals” (Heymann and Kayyem, 2005, p. 27). They further contend that without a strict oversight process, the checks and balances on a President’s authority and actions essentially would not exist.

With no public rules or accounting, the President’s discretion has been absolute and wholly delegable to any level. This means, of course, that the President is not formally accountable for the decisions actually made. . . . Oversight in any event is essential to ensure that there is a more public check on the President’s determination as to what is legal and permissible in the way of coercive interrogation and, on lower level decisions applying to statutory standards, as to when coercive techniques can be used on prisoners. . . . Thus, we recommend that senior officials in the field must find probable cause that a specific plan threatens U.S. lives or that the capacity of a group or organization making such plans could be significantly reduced by exploiting the information, that there is no reasonable alternative to obtain the information, and that the person being interrogated under HCI tactics, is in possession of the significant information. (Heymann and Kayyem, 2005, pp. 30-32).

As a means for interrogation, if governed by due process, HCI has the potential to aid the State in the collection and extraction of valuable tactical and strategic intelligence

for such long-term low intensity wars. The important thing to understand about these highly coercive interrogation techniques is that they can work; however, there can be no guarantee that they will work. These techniques would very likely be most useful only by exception. Therefore, the justification to employ such techniques, temporarily depriving the terrorist of his or her fundamental human rights, must be based on a regulated system of due process and strict oversight. However, the oversight will only be as effective as the rules in place by which to evaluate the process. The difficulty in making the determination about when such techniques would be justifiably expected to work is the essence of the moral dilemma that must be resolved. For the development of these implementation and oversight rules, one must return to the realm of moral reasoning.

Because human nature is prone to evil or cruel plans that seek to harm the dignity and property of others, Doctor Robert Kennedy contends that “the use of force, not excluding the imposition of pain, injury, or even death, can be justifiable according to the following principles” (pp. 7-8):

Standing to Act: This means that the person or group [employing force] must have some responsibility for the good to be protected by the use of force (Kennedy, p. 7)

Sound Reason to Act exists when real harm may be done . . . and when at least four additional criteria are met (Kennedy, p. 7):

Discrimination: force may only be directed against a person who is known to be acting badly or to be planning to act badly . . . against the person or property of others

Necessity is satisfied when there is a legitimate need for action to be taken and no non-coercive means are reasonably available

Proportionality requires that the potential or actual harm to others or their property is sufficiently serious that the use of force is warranted, and also that any force employed be reasonably proportioned to the harm caused and to the status of the perpetrator

Prospect for Success limits the use of force to situations in which there is ample reason to believe that the force employed will bring about the hoped-for change in plans or behavior

Right Intention in Acting: In general, this means that the person or group must intend primarily to prevent the harm being caused or about to be caused by the perpetrator. The principle is violated if the prevention of harm takes second place to a desire to exact vengeance, to exercise power, or to obtain some sort of advantage over others (Kennedy, p. 8).

If the State thus determines it can sufficiently justify the use of coercive interrogation techniques through the application of the principles of standing, reason, and right intention, then as a final test to determine whether such action would be morally permissible, the President, as the approval authority, would need to satisfy three additional requirements under the principle of veracity. The principle of veracity gives an initial negative weight to such an act according to the moral balance, and only where coercive interrogation is a last resort could the President morally justify the act (Bok, 1999, p. 31). To satisfy these requirements, the President ought to answer three questions: "first, whether there are alternative forms of action; second, what might be the moral reasons brought forward to excuse the [act], and what reasons can be raised as counter-arguments; third [he] must ask what a public of reasonable persons might say about such [acts]" (Bok, 1999, pp. 105-106).

The outcomes of Abu Ghraib and the widespread abuse of detainees in Iraq and Afghanistan were largely the result of flawed strategic decision-making in a "permissive environment" (personal communication with Treverton, G., 2006) (referring to the domestic and international political context), and an improper application of bureaucratic/organizational structure relative to the established core tasks and Standard Operating Procedures of the United States Armed Forces. However, understanding when and where the process failed has important ramifications both for the institutional decision-making process and the bureaucratic/organizational structure of the national security agencies responsible for developing and executing policy. Knowing the decision-making process failed means that complex and radical organizational changes are not necessary in order to correct the results of bad policy. Instead, smaller, less radical changes to variables within the bureaucratic process of coordination between national security agencies are likely to produce less costly options for the decision-maker, outputs less constrained by the limits of time, expertise, and political capital (Gustaitis lecture, 2006), and outcomes that ultimately support the national interest.

For Americans throughout the history of the United States, the truths associated with the national interest have been uniquely tied to those unalienable rights we hold to be self-evident: Life, Liberty, and the Pursuit of Happiness (Jefferson, 1776). Much of the rhetoric and principle of the American political system has been centered upon these rights, and with America's self-realized obligation to bestow the gift of these rights upon the rest of the world. The evangelical nature of America itself has ever played a dominant role its foreign policy. Although America has never been, and never will be, a perfect nation, one need only to read the prophetic words of John L. O'Sullivan to understand the grander purpose of American policy:

Yes, we are the nation of progress, of individual freedom, of universal enfranchisement. Equality of rights is the cynosure of our union of States, the grand exemplar of the correlative equality of individuals; and while truth sheds its effulgence, we cannot retrograde, without dissolving the one and subverting the other. We must onward to the fulfillment of our mission – to the entire development of the principle of our organization – freedom of conscience, freedom of person, freedom of trade and business pursuits, universality of freedom and equality. This is our high destiny and in nature's eternal, inevitable decree of cause and effect, we must accomplish it. All this will be our future history, to establish on earth the moral dignity and salvation of man.

John L. O'Sullivan (1839) *The Great Nation of Futurity*

Whenever America has fallen short in the pursuit of these principles, it has, over time, admitted its faults, rolled up its sleeves, and worked hard to refocus its government on achieving the end affirmed by William Shakespeare, "Be great in act, as you have been in thought" (Shakespeare, 1564–1616).

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