“How did we start torturing people?
Isn’t there a law against that?”
Law, Torture, and Informal Institutions

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Abstract
How could a country that has an extensive set of laws—the Anti-Torture Statute, the Torture Victims Protection Act, the Uniform Code of Military Justice—and ratified treaties—the United Nations Convention Against Torture, the Geneva Conventions—that forbid and criminalized torture suddenly decide to inaugurate the practice and, further, to attempt to carve out a place for torture in US law? Obviously, there had to be a process that undermined the usual force of the law so completely that both assumed legal constraints and regular practices based on them were thrown to the wayside. I suggest that the process in question was the establishment of an accommodating informal institution (Helmke and Levitsky 2004) that bent both the legal interpretation of limitations on torture and the regulation of interrogations to allow the establishment of torture. In this paper I will describe how the process worked and show how legal and administrative interpretations were changed to allow a presumably criminal practice to become widespread. I will discuss the implications of this episode for presumptions concerning the capability of both law and regulation to control executive behavior. I will conclude with some thoughts on the use of institutional theory in the law and on how effective legal constraints can be established in the face of informal institutionalization.¹

Introduction
On 28 April 2004 viewers of the CBS television newsmagazine 60 Minutes II were probably asking themselves these questions after viewing photos taken at the infamous Abu Ghraib prison west of Baghdad. Two days later, Seymour Hersh published an article in The New Yorker giving further details about abuses at Abu Ghraib and followed by a more detailed report on 14 June. Hersh’s articles referred extensively to the then still secret AR - 15 criminal investigation of the 800th Military Police Brigade conducted in January of that year by Major General Anthony Taguba (Hersh 2004a, 2004b, Taguba 2004). After that the story mushroomed, as it became apparent that the commanders of Coalition Forces in Iraq had been informed of possible problems by the International Committee of the Red

¹Some of this paper was delivered in a different form at the Left Forum, Pace University, New York, New York, 7 April 2009.
Cross (hereinafter ICRC) during the previous year and that accounts of detainee treatment that had been widely discounted before appeared to have been confirmed by the subsequent investigations (ICRC 2004, Ricchiardi 2004). It further developed that the Department of Defense had launched multiple investigations of potentially criminal abuses of detainees not only in Iraq but also in Afghanistan and Guantanamo Bay, Cuba (Jones and Fay 2004, ACLU 2006c, Schlesinger 2004). Subsequently, continuing requests under the Freedom of Information Act by the American Civil Liberties Union (hereinafter ACLU) and others as well as independent investigations showed a disturbing similarity in patterns of abuse, patterns that suggested an overall scheme of interrogation and incarceration that departed radically from past U.S. policy on both matters (Physicians for Human Rights 2005, Center for Constitutional Rights 2006, ACLU 2006). Subsequent evidence showed that there had been extensive policy decisions by administration officials, particularly at the Office of the Vice President, the Office of the National Security Advisor, and the Department of Defense, that set the stage for the new interrogation regime (Cole 2015). Further, the “hands-on” involvement of high government officials in planning the interrogations of detainees was admitted by all involved parties, including the President himself (Greenberg, Rosenberg, and De Vogue 2008). The evidence now at hand indicates that the interrogation practices adopted by military and civilian intelligence agencies clearly contravened international standards proscribing torture and cruel, inhuman, and degrading treatment of prisoners taken during wartime that the United States has sponsored and officially supported for much of modern history.

As might be expected, this state of affairs has led to a spate of attempts to both explain what happened and to offer predictions about the likelihood of torture becoming a fixture in America’s future. First, the abuse of detainees has been tied to the past experience of the United States and other developed nations involved in guerrilla wars in developing world either through the continuation of imperial attitudes and methods in now “neo-colonial” environments (see Historians Against the War 2006 or Harbury 2005) or to the degrading effects of guerrilla warfare on constraints on treatment of prisoners of war (Forsythe 2006). From Indian wars to the Philippine insurrection to Vietnam and the COIN wars in Latin America, U.S. armed forces and, in more modern times, intelligence agencies have treated prisoners with no more and often less regard than has been shown in the war on terror (Jackson 2006, McCoy 2006, Harbury 2005).

A second body of research is built around large N quantitative comparative studies of torture. Davenport and Armstrong (2005) and Davenport, Armstrong, and Moore (2006) have examined torture practices in regimes under various levels of threat from civil war, political dissent, and guerrilla war. Their research leads them to conclude that, given a high enough level of threats to regimes, there is a strong propensity for governments of all kinds to revert to torture, a propensity strengthened by any prior experience using torture. Further, while democracies are marginally less likely to engage in torture, the incidence of abusive practices under conditions of threat is surprisingly high. Indeed, like the more qualitative critiques cited above, these studies remark how unusual it would be if torture of detainees did not happen, given the circumstances leading to the War on Terror.

These perspectives have something to offer the interested scholar, but all have weaknesses as explanations for the current situation. As the various official reports on these matters have shown, both organizational failures and administrative decisions have had a role to play in the recent widespread use of torture in interrogations by the United States. But this
observation begs the important questions. Why did the organizational failures occur? Why were official decisions made that facilitated the torture of detainees? It is also true that the United States has a long history of prisoner abuse and remains faced with substantial threats. However, the abuses visited on America’s enemies in the past were never the result of anything like the systematic deliberations and careful vetting of decisions that led to the tortures in Iraq, Afghanistan, and Guantanamo Bay. Why did American officials suddenly allow abusive behavior to become part of a wide ranging policy debate?

In each instance here the missing component is an institutional perspective. Indeed, most of the explanations above resolve themselves into various species of the “bad apples” argument used by American officials to explain the abuses at Abu Ghraib. Organizational failures are the result of administrative incompetence and neglect. Official decisions were made to facilitate torture because of the bad intent of decision-makers under stress determined to retrieve a deteriorating situation in Iraq. Dehumanizing narratives were promulgated to allow officials to use fear to manipulate their constituents. In all of these attempted explanations, the same question emerges: how did the institutional constraints in U.S. law decay to such an extent that torture and abuse American detainees resulted?

This study is an attempt to answer this question. I postulate that the development of torture in interrogations was the result of the establishment of an “accommodating informal institution” (Helmke and Levitsky 2004) initiated by political elites in the Bush administration and allowing the existing formal constraints in both U.S. law and treaty obligations to be circumvented. In the following sections, I will present an argument in three parts. First, I will present a theory of informal institutions that will form the framework of the subsequent analysis. Second, I will define and outline the extent and scope of the use of torture and cruel, inhuman, and degrading treatment by United States armed forces and intelligence agencies in the “War on Terror”. After these preliminary steps, I will present a case study using process tracing to show the sequence of development of the informal institutionalization of torture during the War on Terror. I will conclude with a discussion of the dangers of informal institutionalization in modern developed states and of some proposed methods of combatting them.

**Informal Institutions and Institutional Theory**

Informal institutions have a strange role in institutional theory. Formal and informal institutions are usually defined using North’s (1990, 4) formulation:

> Institutions include any form of constraint that human beings devise to shape human interaction. . . . I am interested both in formal constraints – such as rules that human beings devise – and informal constraints – such as conventions and codes of behavior. . . . they consist of formal written rules as well as typically unwritten codes of conduct that underlie and supplement formal rules . . .

His view of informal institutions has been pervasive in its influence; they are informal codes based tradition, custom, religion, or local agreements that ease the application of more formal constraints. By analogy, informal institutions might be looked at as the “helper T-cells” of the immune system of legal regimes and organizational rules; they enable the formal rules to work more effectively by smoothing out the interstices of formal procedures through
cooperative action by those trying to cope with legal or organizational constraints. This perspective immediately privileges and directs attention to formal institutions. The more comprehensive the scope of formal institutions and the more legitimate their application, the less scope there is for informal institutions and less they can claim analytical prominence. This is often described by the shorthand concept, the rule of law; i.e.:

“... the rule of law prevails where i) the government itself is bound by the law, ii) every person in society is treated equally under the law, iii) the human dignity of each individual is recognized and protected by the law, and iv) justice is accessible to all (Golub 2003).”

At the bottom of this formulation is an assumption of a dense network of enforceable rules and laws established by mutual consent and basic to obtaining social cooperation and order. Informal institutions are not unimportant, but the scope they have for influencing cooperative behavior is limited when the rule of law is strong. Further, since formal institutions are strong, the cooperative behavior fostered by informal institutions becomes even more supplemental to formal norms (see Ellickson 1991 or Azari and Smith 2012).

As might be guessed, these ideas proved problematic as analysts concerned with developing countries began to use them. The scope of formal institutions in many of parts of the world was (and is) limited and the capacity of either governments or organizations to enforce them lacking. The consequence is that informal institutions can have a much larger role to play in coordinating behavior. Some scholars see this as useful; people use the institutions they have to either fill in the blanks left by a weak formal environment (Migdal, 1988, de Soto 1989) or, in some cases, use informal networks that directly contradict formal rules, but deliver results that paper over the institutional weakness around them and allow cooperation to emerge (Darden 2008, Tsai 2007).

Moe (2005) reveals the problem with all of this research: it overlooks the role of power. As he points out concerning the domestic administrative structures of states:

It is easy to see that these most common of democratic institutions are often not cooperative or mutually beneficial for many of the people affected by them. They involve the exercise of power. ... A prime reason is that the public authority employed to create and design them can be exercised by whatever coalitions gain the necessary support in the legislature ... Whoever wins has the right to make decisions on behalf of everyone, and whoever loses is required by law—backed by the police powers of the state—to accept the winner’s decision (Moe 2005, 218).

This is a useful corrective in many ways. Moe points out that the basis for political institutions remains cooperation, but that cooperation should not be presumed to be general. In politics there are winners and losers; winning coalitions can use the power of the state to cement advantages for themselves in policy implementation that shape the choices that losers have. Consequently, the side bargains leading to efficient results assumed by cooperative institutional theory are questionable when political choices have been made.

Moe’s perspective also fits more closely with some of the evidence concerning informal institutions in developing countries as well. Weak formal institutions can allow informal institutions to develop that achieve efficient results, but it is just as likely that informal institutions can interfere with the evolution of more formal norms. These studies have a
paradoxical outlook. Indeed, the actions of elites are seen often as specifically subverting and replacing formal rules, establishing the “(un)rule of law (O’Donnell 1999)” (Gel’man 2004). And what of informal institutions when the environment of strong formal institutions? Moe does consider this, but he relegates the role of elite initiated informal institutions in such situations to the anarchy of the international system, essentially denying the possibility of the “(un)rule of law” in environments where strong formal institutions exist (Moe 2005).

But it is just this denial of the presence and effectiveness of elite initiated informal institutions in environments with strong formal institutions that I want to call into question here. I think this perspective, widely shared by neo-institutional thinkers, stares directly into the face of two of the consequences of strong formal institutions: increased state autonomy and capacity. That the capability of states to affect policy formation autonomously grows as the web of formal institutions grows in strength is now well established (Skocpol 2008, Hacker and Pierson 2005). Further, as state resources grow, the capacity to put policy into action with real effects grows as well. In this paper, I will attempt to show that elite initiated informal institutions—in this case, the establishment of torture—can be found in developed countries with strong formal institutions that serve much the same political purposes as those found in states with weak formal foundations. The basic framework for how these ideas fit together can be found in the typology in Figure 1.

**Figure 1: Institutional Theory and Informal Institutions**

<table>
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<tr>
<th>Cooperative Basis</th>
<th>Strong Formal Institutions</th>
<th>Weak Formal Institutions</th>
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<tbody>
<tr>
<td>Tradition, custom, religion, trucking and bartering</td>
<td>Caste, religion, tribe</td>
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<tr>
<th>Power Basis</th>
<th>International relations</th>
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**Torture and the War on Terror**

The first step in any paper concerning recent uses of torture by the United States is to establish the scope of the problem; i.e. the dependent variable. This causes immediate problems. First, there is the matter of defining torture itself. For the purposes of this study, I use the definition in the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (hereinafter UNCAT). It is:

... (a)ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of one with the consent or acquiescence of a public official or person acting in an official capacity (United Nations 1984).
It is instructive to know that this definition was not agreed to completely by the United States and is not included in the anti-torture statute (18 USC 113C) that is part of federal law. It has become, however, a main source of the policy debate on interrogations and has since been incorporated indirectly into law when the Supreme Court’s decision in *Hamdan v. Rumsfeld* (548 US 557 2006) held that the protections against torture and cruel, inhuman, and degrading treatment in Common Article 3 of the Geneva Conventions (hereinafter GC) are justiciable in U.S. courts. It is sufficient for the illustrative purposes in this presentation.

The second problem for this paper is more complicated. Determining whether interrogation techniques involve torture demands a comparative basis; a string of anecdotal accounts concerning a single case will not tell us much. Perhaps the most straightforward way to do this is to compare the interrogations conducted by U.S. armed forces and agencies with a past record that is generally conceded to represent an interrogation regime using torture. Table 1 presents a comparison of the interrogation techniques used by the NKVD in the Soviet Union during the Stalinist Terror from 1937 - 38 and those used by the United States from 2002 - 05. For illustrative purposes, the categories are drawn from the listings of NKVD interrogation techniques compiled by Solzhenitsyn (1973) and Conquest (1990). (See the Appendix for a discussion of the sources used in the table.) While by no means comprehensive, the table cites 44 different interrogation techniques in the order given by Solzhenitsyn, with some additional categories. Three of the techniques - persuasion, psychological contrast, and deception - are non-abusive interrogation methods commonly used by both civilian and military interrogators. Of the other 41 techniques, all involving either torture or abuse, 29 were used in both Soviet and American interrogations, five are NKVD techniques have no American parallel, and eight are American techniques that have no Soviet counterpart. These results show substantial agreement in the torture techniques used by both countries; 70% of all methods listed were used by both Soviet and American interrogators (Lightcap 2011). For the coding methods used in the table, see the Appendix of this paper.

In both cases, the actual styles of interrogation combine many of the techniques used, albeit in slightly different ways. Both the NKVD and American military and civilian interrogators have favored what Conquest (1990, 124) refers to as the “long interrogation”. Long interrogations involve prolonged questioning interspersed with torture sessions meant to break down resistance by prisoners and obtain their full cooperation. Russian interrogators in 1937 - 38 appear to have tended more toward brute force in their work; American long interrogations depend more on humiliation, induced physical stress, and solitary confinement for prolonged periods in punishment cells (see Solzhenitsyn 1973, CCR 2006, ICRC 2007, or the sworn statements in Danner 2004 for descriptions of interrogations). However, as Table 1 reveals, the basic technical means adopted in both cases are quite similar. Further,
while unlike the Soviet prisoners, the victims of American torture are, for the most part, still alive, there can be no doubt that the level and extent of abuses is uncannily similar. And both records indicate a torture regime of surprising violence and concentration. Why did something like this emerge in the United States?

**Torture as an Informal Institution**

Torture in both its physical and psychological forms has been practiced almost since the beginning of organized society. Using torture in interrogations, however, creates a major problem for modern states, no matter what their ruling ideology. Citizenship in a modern state includes the notion, no matter how honored in the breach, of individual autonomy; an autonomy that is guaranteed by, among other things, citizens equal political status as members of a community (Marshall, 1965). In other words, citizens have, in theory if not in fact, equal dignity and standing in the community. That standing is obviously and deeply undermined when the state adopts torture as an interrogation technique, to maintain prison discipline, or to quash opposition. It is this quandary that makes torture so difficult to analyze as an institutional phenomena. Since the eclipse of judicial torture in the sixteenth and seventeenth centuries, states have neither mandated or condoned torture (Langbein 2004). When torture is practiced, it is commonly done within an ad hoc framework that seldom officially describes or sanctions the actual techniques that evolve and, of course, systematic records are seldom kept. How, then, are we to approach analyzing it?

Helmke and Livitsky (2004) point the way by proposing a theoretical framework for examining informal political institutions. They define informal institutions as “… socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels (Helmke and Levitsky 2004, 727).” They further divide such informal institutions into types depending on how they fall under two dimensions. First, the outcomes favored by formal and informal institutions may agree or diverge; second, formal institutions may be be effective in constraining informal ones or ineffective in doing so. The four types of informal institution that result - complementary, accommodating, substitutive, and competing - can be characterized depending on how they combine these dimensions (Helmke and Levitsky 2004, 728-30).

I postulate in the following sections that the use of torture in interrogations by modern states is an example of an accommodating informal institution. As Helmke and Livitsky (2004, 729) say,

“Accommodating informal institutions are often create by actors who dislike

the Hamdan decision greatly increased the possible criminal liabilities involved. The decision to push for legislation to allow at least some of the abusive techniques to be used suggests that this is what happened (Bush 2006). The uncanny resemblance between the techniques used should not be taken to convey moral equivalence. Moral questions are always a matter of degree. It is true that torturing people must be considered wrong and that both states did it. On the other hand, the Soviet Union used torture as an adjunct to a process that led to the deaths, by official count, of 681,692 people in two years and to the incarceration, often on manufactured charges and in horrendous conditions, of better than one million more in the 1930s (Getty and Naumov 1999). The wars in Iraq and Afghanistan have led to a substantial number of deaths and many Afghans and Iraqis have been imprisoned, often for no more cause and in conditions just as extreme as those found in the Soviet Union. Still, any sense of proportionality between the results of the two cases would not find them morally comparable. As I point out, most of the victims of imprisonment and torture by American armed forces and security agencies are, again, still alive.
outcomes generated by the formal rules, but are unable to change or openly violate those rules. As such, they often help to reconcile these actors interests with the existing formal institutional arrangements. Hence, although accommodating informal institutions may not be efficiency enhancing, they may enhance the stability of formal institutions by dampening demands for change.”

Such informal institutions can be brought into existence by relatively minor changes in formal rules that change the incentives offered to actors. By the same token, however, should authorities decide to do so, formal rules can be subsequently quickly modified to bring sanctions against those still using accommodating, but informal, rules (Helmke and Livitsky 2004). As we shall see, these concepts help explain the emergence of torture.

Torture as an Accommodating Informal Institution in the War on Terror

“... the war against terrorism is a new kind of war ... 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 citizens ... In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners ...” - Attorney General Alberto Gonzales, Memorandum for the President, 25 January 2002 (Gonzales 2002, in Danner 2004, 84).

“However, I stand for 8 - 10 hours a day. Why is standing limited to 4 hours?”

The War on Terror had two complementary purposes. The first, of course, was the defense of United States from further attacks. Shortly after the war on Afghanistan was launched in 2001, the United States was informed that before the September attacks Osama bin Laden and his chief aid, Ayman al-Zawahiri, had met with officials from the Pakistani atomic energy commission concerning the acquisition of nuclear weapons (Suskind 2006). The nightmare scenario of a nuclear armed al Qaeda understandably increased the pressure to acquire as much intelligence about terrorist networks as possible in the shortest time feasible. Substantial data concerning the terrorist organization had already been seized during the Afghan campaign. The capture of hundreds of al Qaeda operatives and fellow travelers presented a golden opportunity to gain the information necessary to flesh it out (Suskind 2006). But that also presented difficulties.

There were considerable differences between the CIA and FBI concerning the use of “extreme” interrogation techniques. According to Suskind (2006), the Bureau favored the more conventional interrogation methods they had used effectively in previous operations against terrorist networks. Such strategies, however, take time; they depend on the establishment of trust by interrogators. Given the situation and the almost total lack of solid intelligence about the terrorists and their plans, the CIA felt it was necessary to use more intense methods of questioning. As 2002 began, these matters were the subject of an extensive secret debate within the executive branch of the government over the legal limitations on interrogation techniques.
This debate considered two questions in different successive phases. The first, in early 2002, concerned whether the detainees from the Afghan War should be extended the protections of the GC concerning prisoners of war. The Department of Justice had reached the conclusion that neither the Taliban or al Qaeda were state actors or signatories of the Conventions. Hence the War on Terror was not an intra-state conflict and the GC did not apply. Consequently, the controlling federal statute, the War Crimes Act (18 USC 118, §2441), did not apply to treatment of detainees either. Further, the President’s powers as commander in chief under both the Constitution and the Authorization for the Use of Military Force passed after the attacks of 9/11 (hereinafter AUMF) allowed him to direct the actions of the armed forces, including treatment of prisoners, during time of war in any manner he saw fit (Gonzales 2002, Bybee 2002a). The Department of State, as might be expected from a bureau headed by Colin Powell, a former Chairman of the Joint Chiefs of Staff, disagreed strongly. They pointed to the long history of adherence to the GC in all conflicts by the United States and to the attendant dangers to U.S. personnel who might become prisoners during the conflict if the Conventions were held to not apply (Taft 2002). On 7 February 2002, President Bush accepted Justice’s position and decided that Taliban and al Qaeda captives were “unlawful combatants”, a classification new to both U.S. and international law, and that the GC did not apply to them. He directed, however, that “… 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, in Danner 2004, 106).”

The second phase of debate concerned the actual techniques that could be used to interrogate unlawful combatants under U.S. and international law. Here the debate turned on the nature of torture itself. In a secret memorandum, the Office of Legal Counsel of the Department of Justice held that to reach the level of torture an interrogation technique had to intentionally inflict severe pain or mental suffering and that a “… level that would be ordinarily associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions (Bybee 2002b, in Danner 2004, 115)” would alone suffice for torture to occur. Cruel, inhumane, or degrading techniques, while forbidden by the GC, could be applied to Taliban and al Qaeda detainees since the President had decided that the GC did not apply to them. Further, criminal liability did not attach under U.S. law unless such severe pain was inflicted intentionally (Yoo 2002). Soon afterward, the Department of Defense received a request for further direction concerning interrogation techniques for use at the Guantanamo Bay detention center (hereinafter GTMO) where most of the Afghan captives were held. The result was a confusing set of memoranda from Defense Secretary Rumsfeld first approving a variety of techniques, including some that all involved agreed violated the GC, then partially rescinding them a month later (Haynes 2002, Rumsfeld 2003a). Subsequently, a “Working Group” convened within the Pentagon under Secretary Rumsfeld’s orders, conducted a full review of the legality of interrogation techniques requested by GTMO commanders. They found that use of most of the techniques considered was legal and appropriate and that even those techniques that appeared to skirt the GC could be applied with proper command authority (Department of Defense 2003). Rumsfeld subsequently approved the use of most of the techniques mentioned in the Working Group report, though in some cases only with his express approval (Rumsfeld 2003b).

It should be obvious from these descriptions of executive policy decisions that the blur-
ring of formal rules requisite for the formation of informal institutions had taken place by the end of 2002 (Scheppele 2005, Bowker 2006). By then the CIA, drawing on prior research and the “reverse engineering” of the interrogation resistance training in the armed forces’s SERE (Survival, Evasion, Resistance, Escape) program, had already begun using extreme techniques in interrogations of al Qaeda detainees at prisons in Afghanistan and in allied countries (Suskind 2006, Mayer 2007, Mayer 2005). At the Bagram Air Base “Collection Point” prison, the 519th Military Intelligence Battalion had also improvised abusive interrogation techniques by winter of 2002 (Bazelon 2005). The new methods sanctioned by the Working Group recommendations had been put into use by the new “Tiger Team” interrogation units created by Major General Geoffrey Miller, who took command of the Guantanamo (hereinafter GTMO) Joint Task Force in 2002 (Taguba 2004). Interrogators at GTMO had also been briefed on interrogation methods by SERE instructors (Benjamin 2005). Agents of the CIA and the FBI (who soon withdrew) took part in interrogations at the base as well (Schmidt and Furlow 2005, Center for Constitutional Rights 2006). The subsequent abuses of detainees in Afghanistan and at GTMO have been well documented (Schmidt and Furlow 2005, Human Rights Watch 2004, Center for Constitutional Rights 2006, Physicians for Human Rights 2005, Mayer 2007).

The accompanying theme to the adoption of extreme interrogation techniques was an increase in attention to the resulting intelligence at the highest levels of government. The President and Vice President, often accompanied by other members of the National Security Council, were briefed daily by representatives of all intelligence agencies and showed deep interest in the results of specific interrogations of al Qaeda and Taliban operatives (Suskind 2006). At first, specific methods of torture were not discussed in these meetings. The officials at the meetings had, after all, been those who approved the new interrogation techniques and maintaining “plausible deniability” was deemed important, particularly by the Vice President (Suskind 2006). Further, many of them had first hand knowledge of the new techniques; they had approved their use for specific interrogations (Human Rights Watch 2005, Scherer and Benjamin 2006, Schmidt and Furlow 2005). Finally, however, meetings discussing and approving the actual schedules for interrogation of “high value detainees” became common (Greenberg, Rosenberg, and de Vogue 2008)).

“The more successful we are on the ground, the more these killers will react,” Bush said, Bremer at his side. “The more progress we make on the ground, the more free the Iraqis become, the more electricity is available, the more jobs are available, the more kids are going to school, the more desperate these killers become, because they can’t stand the thought of a free society.” - Partial transcript of a joint press conference by President Bush and CPA administrator Paul Bremer (Ricks 2006, 248).

The second purpose of the War on Terror is to provide the justification for an ideological project providing the cement for holding the regime coalition supporting the Bush administration together. After 9/11, the Bush administration carefully constructed a vision of a nation at war; a war of a new and dangerous type, a global “War on Terror”. Jackson (2006) describes several dimensions of this narrative: a contest between good (America and Americans) and evil (the terrorists), invocation of a right to national self-defense, the need for “new thinking” about warfare and executive power to protect national security, and the continuous threat to national security posed by a faceless, stateless enemy. The center piece
of this project was the war on Iraq. Dethroning the Ba’ath regime in Baghdad would pave the way for a new, democratic Middle East and secure the nation from on-going threats. Success in that war also secured the party discipline within the Republican Congress that the administration needed to pursue a contentious domestic agenda (Hacker and Pierson 2005) and provided rally effects that defanged opposition to both domestic and foreign policy initiatives from Democrats and the press (Suskind 2004a). But success in the war proved fleeting.

The final admission of a failure to find weapons of mass destruction in any quantity issued in 2004 was an embarrassment for the Bush administration, but did not undermine the narrative of democratic change in the Middle East that stood at the center of their justifications for the war (Duefler 2004). What did undermine that narrative substantially was the rapid decline of the security situation in Iraq subsequent to the military victory there. As soon became apparent, British and American forces had not been committed in sufficient numbers to fully occupy the country. Further, after the Defense Department had been given responsibility for providing a transition administration in Iraq, it also became clear that there had been little attention given to planning for it (Ricks 2006). A series of policy blunders by the newly established Coalition Provisional Authority (hereinafter CPA)—disbanding the Iraqi army, extensive de-Ba’athification, and the privatization of Iraqi industry—placed the entire occupation of Iraq under considerable pressure (Chandrasekaren 2007, Ricks 2006, Galbraith 2006).

At first, the consequences of these mistakes were only troubling: increasing levels of crime, widespread looting, extensive unemployment, a general breakdown in public services, and, ominously, small-scale guerrilla attacks on coalition soldiers. One might expect as much in the aftermath of most wars, but by August 2003 the situation had become much more worrying. In that month, car bomb attacks in Baghdad on the Jordanian embassy and United Nations headquarters and coordinated subsequent attacks in October against Red Cross headquarters, police stations, and hotels frequented by foreigners made it clear to all involved that a full scale insurgency against the coalition occupation had been launched. This was confirmed when most international organizations and diplomatic missions withdrew from the country. The command response to the situation was to intensify the war and to increase the demand for tactical intelligence (Ricks 2006). This created some further difficulties for civilian and military commanders.

Unlike the Afghan war, detainees taken in the conflict in Iraq were never deprived of GC protections; President Bush’s initial memorandum is quite clear on this point and was never superseded. However, as subsequent investigations have made clear, executive decisions—including the memorandum itself—delineating the limitations of GC protections were both confusing and contradictory (Schlesinger 2004). The new push to obtain operational intelligence that would help quell the insurgency in Iraq did not improve the situation. U.S. forces now using sweeps of insurgent territory and mass arrests that sent large numbers of detainees to the CPA prison network maintained by the military in Iraq, a prison system already filled with Iraqi criminals and seriously understaffed in trained corrections and intelligence personnel (Ricks 2006, Schlesinger 2004, Taguba 2004). It was that system that now absorbed the expectations of the entire civilian and military command structure of United States armed forces concerning the need to suppress the insurgency.

“The gloves are coming off gentlemen concerning these detainees, <redacted> has made it clear that we want these individuals broken. Casualties are mounting
and we need to start gathering info to help protect our fellow soldiers from further attacks. I thank you for your hard work and your dedication. MI ALWAYS OUT FRONT!" - E-mail communique from Captain William Ponce to all military interrogators in Iraq (ACLU 2005a, Schumway 2007).

"While eating at the dining facility at Camp Victory, SPC Mitchell, an MI guard, told an entire table full of laughing soldiers about how the MPs had shown him and other soldiers how to knock someone out and to strike a detainee without leaving marks. They had practiced these techniques on unsuspecting detainees, after watching, he had participated himself." - Prepared Statement, Samuel J. Provence (Provence 2006, 4).

Those expectations created a situation where an expansion of the use of torture techniques in interrogations as an accommodating informal institution was predictable. For as Iraq slid toward chaos, the public image of American success, an image closely attuned to the leadership narrative adopted as the War on Terror emerged, was relentlessly reiterated by the President and other administration officials. It was clear what the Bush administration wanted from its Iraqi proconsul and its military commanders: victory over the insurgency and a vindication of the strategic vision of a newly “democratized” Iraq, the first step in changing the Middle East to more closely suit American policy objectives (Suskind 2006, Danner 2004). It was as clear to those “on the ground” that, far from being defeated, the insurgency continued to gain strength throughout 2003 and 2004. To defeat it interrogations had to produce information for tactical operations and quickly. Guidelines for such interrogations were sadly lacking.

Given the (supposedly) successful intelligence gathering operations at GTMO and the need to greatly increase the flow of military intelligence, Major General Miller and a team from his GTMO task force was seconded to Iraq on 31 August 2003 to report on intelligence operations there and propose new methods (Miller 2003, Taguba 2004). This was a short mission, but had widespread ramifications. As later investigations of the field interrogations conducted by U.S. armed forces revealed, many abuses had already become common practice in some units. With trained interrogators in short supply, Lieutenant General Ricardo Sanchez, the new commander in Iraq, had allowed general officers in the field to issue orders on field interrogations with highly variable results (Ricks 2006). The resulting situation threatened to spin out of control, especially when the mass arrests sharply increased the number of detainees, most with no intelligence value and held solely for prophylactic purposes (Jones and Fay 2004, ICRC 2004)(7). Major General Miller’s mission made several suggestions, all based on the GTMO experience: the establishment of a Joint Interrogation Debriefing Center (JIDC) to control interrogations and collate intelligence, using military police in cooperation with military intelligence personnel, use of “Tiger Team” interrogation units, and review of the legal aspects of interrogations in Iraq (Miller 2003, Taguba 2004, Jones and Fay 2004). These suggestions were reinforced by verbal briefings and policy documents concerning the kinds of interrogation techniques used at GTMO promulgated by a follow-up team dispatched by Miller (Jones and Fay 2004, Public Broadcasting System 2005b).

Subsequently, Lieutenant General Sanchez issued policies authorizing several of the GTMO interrogation practices (Danner 2004, Human Rights Watch 2005). Sanchez had been under considerable pressure, including frequent teleconferences with Donald Rumsfeld, the increasingly impatient Secretary of Defense, a pressure he redirected down line to
his military intelligence chief, Colonel Thomas Pappas (Human Rights Watch 2005, Public Broadcasting System 2005b, Danner 2004). Soon new teams of interrogators, dominated by civilian contractors and prescreened by Miller, were arriving at Abu Ghraib to join others already experienced in similar techniques (Jones and Fay 2004, Public Broadcasting System 2005b). Since intelligence at Abu Ghraib was handled initially by elements of the same 519th Military Intelligence Battalion that had already extemporized extreme techniques at Bagram the year before, the transition was an easy one, again driven by word of mouth transfers of advice and techniques (Jones and Fay 2004). Soon a hodgepodge of poorly trained, understaffed military intelligence and police units and civilian interrogator teams, without clear lines of command or responsibility, and under tremendous pressure to produce “actionable” data, were taking the lead in creatively expanding the envelop of interrogation techniques to the elaborations found in Table 1 of this paper (Danner 2004, Ricks 2006).

“The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas. They operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret, and then they strike without warning. In this new war, the most important source of information on where the terrorists are hiding and what they are planning is the terrorists, themselves. Captured terrorists have unique knowledge about how terrorist networks operate. . . . As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used – I think you understand why – if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.”

When the initial revelations about detainee abuses in Iraq surfaced publicly on 28 and 30 April 2004, the administration faced a major strategic crisis. Criminal investigations had already been launched by the army in January of that year when Spc. Joseph Darby had passed photographic evidence of abuses in the “hard site” at Abu Ghraib to the army’s Criminal Investigation Division (CID). Subsequent reports by Major General Antonio Taguba and Lieutenant General Anthony Jones and Major General George Fay on the military police and military intelligence units at Abu Ghraib had already shown how extensive the use of torturous interrogation techniques had become and how completely discipline had collapsed as the informal institutions accommodating torture and abuse became established (Taguba 2004, Jones and Fay 2004). But these investigations had been classified and were conducted under military law, conditions that made handling the entire matter within the military’s command structure easy enough. Having pictures of detainee abuse and summaries of the investigative reports broadcast through national and international media outlets presented a qualitatively different problem.

The administration’s response was a classic example of handling an accommodating in-
formal institution when it is exposed (Helmke and Levitsky 2004). First, the premise of criticisms based on the revelations was denied. Here the initial legal obfuscations deriving from the secret debate concerning torture proved useful. By depending on the narrow definitions of torture and the expansive view of the President’s authority concerning interrogation methods contained in the memos circulated by the Department of Justice, administration officials simply denied that the extreme interrogation methods used in Guantanamo, Afghanistan, and Iraq rose to the level of torture (Sheppele 2005). This line of defense, however, became more tenuous over time as the American Civil Liberties Union (ACLU) and other organizations pressed Freedom of Information Act (FOIA) requests through government bureaucracies and, where necessary, the courts. FOIA documents soon revealed wide swaths of data concerning the extent and varieties of techniques used that called American adherence to the GC into question. That the revelations came in the midst of a hotly contested general election campaign did nothing to make the administration’s positions on these questions easier. The Supreme Court’s subsequent decisions in *Hamdi v. Rumsfeld* (542 US 507 2004) and, especially, *Hamdan v. Rumsfeld* further undermined the legal distinctions that had been used in this line of defense (Lederman 2006a). In *Hamdan* the Court decided that Common Article Three of the GC, forbidding not only torture but also cruel, humiliating, and degrading treatment, not only applied to detainees the administration deemed unlawful combatants, but was also enforceable in federal courts as part of American treaty obligations. Since violations of Common Article Three are criminalized under the War Crimes Act, the Court’s decision called the entire framework used for extreme interrogation of al Qaeda and Taliban detainees into question (Lederman 2006a).

The second line of defense by the administration also fits well in Helmke and Levitsky’s framework. On 6 September 2006, President Bush, at the end of a long internal debate concerning the interrogation techniques and detention responsibilities of the CIA, proposed new legislation to give form to informal policies (Liptak 2006, Linzer and Kessler 2006). In his speech on that day, the President admitted that the CIA had been running a secret prison system for some time and using what he referred to as “an alternative set of procedures” for interrogating al Qaeda and Taliban operatives held there. He proposed new legislation that, among other objectives, would allow the “alternative set of procedures” to continue in use by the CIA and the re-establishment of secret prisons by the agency should future situations warrant it (Liptak 2006, Lederman 2006b). There would also be amendments made to the War Crimes Act to partially immunize CIA operatives using the techniques, to limit the scope of the application of Common Article 3 of the GC to extreme interrogation techniques, and to limit or eliminate judicial review of cases stemming from their use (Lederman 2006c). On the same day, the U.S. Army issued a new field manual for interrogations that specifically forbids the use of many of the abusive techniques discovered in investigations in Afghanistan and Iraq (Barnes 2006). The passage of the proposed Military Commissions Act of 2006 soon afterwards and President Bush’s subsequent issue of an executive order vaguely defining the scope of the “alternative procedures” allowed to the CIA has gone some way to solidifying a legal space for continuing the use of torture as an accommodating informal institution (Lederman 2007). Here, again, we see a vindication of Helmke and Levitsky’s (2004, 732) approach; as they point out, one of the quickest ways to effect institutional change to solidify the benefits of informal institutions is to change the formal rules to give legal sanction to informal behavior.
Discussion

The situation described above is part of the inheritance of the Obama administration. The new president moved decisively to put the “alternative procedures” behind him and behind U.S. intelligence agencies as well. The “torture memos” have been repudiated, the MCA was substantially amended in 2009, and the use of tortuous interrogations has been admitted and condemned (Koh 2010). Given that the military has already repudiated almost all the techniques revealed in the numerous investigations subsequent to the Abu Ghraib revelations, this combination of policies has put the abuses cataloged in Table 1 on the shelf for the near future. But repudiation has its limits. The statutory basis for the torture regime—the MCA—remains in place, as do its many grants of presidential discretion. Obama has had little relish for prosecutions of former Bush administration officials and Congress, even when it had Democratic majorities, has been similarly unenthusiastic. While the recent report of the Senate Select Committee on Intelligence (2015) has added to the approbation for torturous interrogation, as mundane an initiative as a South African style “truth commission” that would not lead to any criminal prosecutions has had no traction. Further, there is a steady, if (at present) largely ignored, drumbeat of criticism of the decision to abandon the torture regime at all. Former Vice President Cheney has been particularly vocal in his support for the now lapsed interrogation methods, claiming that abandoning such options made gathering intelligence about further initiatives by al Qaeda or its terror affiliates more difficult to develop (Friedersdorf 2014). While a political “put” of this kind attracts little support from both elite and mass publics alike, it would, of course, only take one more fatal attack in the United States to change that situation overnight.

This is where the danger lies. Recall several features of the establishment of the torture regime under the Bush administration. First, as Davenport, Armstrong, and Moore (2006) predicted, there is considerable fragility of both institutional and cultural constraints on the use of torture under crisis conditions, despite the character of authority in the state in question. The United States is a well developed, highly institutionalized polity, supposedly bound by the rule of law and by civilized values for better than two centuries. Despite this, it succumbed to the widespread use of torture in interrogations, destroying in the process both regulatory and social barriers to abusive practices. Further, the mechanism used was an accommodating informal institution, allowing decision-making elites acting in secret to blur the boundaries of sanctioned behavior while never unequivocally addressing either the practices as they developed or the possible consequences of them. In the aftermath of Abu Ghraib, one hears a good deal about the need to strengthen the rule of law as a proof against further slippage toward unsanctioned abuse (ACLU 2006c). It would be wise to remember, however, just how extensive the secret debate within the Bush administration was concerning the definition of torture and its legal ramifications. Obviously, a concern about the rule of law cuts both ways, especially if the practices that result are the product of informal processes arising in crisis situations.

The character of those crises is the second revelation of these comparisons. It was the further expansion of the War on Terror—the war in Iraq—that created the levels of opposition and disorder that led to the metastasizing of torture throughout the security agencies of the government. As that opposition increased, as the disorder invalidated the basic premises of leadership narratives, the capability of the administration (or, more properly, the White House and parts of the Department of Defense and CIA) to control how torture was used de-
increased as well; accommodating informal institutions, as Helmke and Levitsky (2004) point out, can easily slip out of the grasp of those who create them. The result was a descent into barbarism.

Third, while that descent was never approved by the mass publics in the United States, it was tolerated. The Bush administrations narrative cast “our” enemies as less than human, as threats to the people and their values, threats that had to be eliminated and suppressed. Of course, the actual denouement of these attempts to combine fear, hatred, and scapegoating of those who opposed the world the administration tried to create was different. The exposure of the abuses of detainees created a massive public problem for the Bush regime. Still, for a not inconsiderable part of the population and much of the Republican elite, the entire matter of a public debate about the torture of terrorists is considered not just a distraction that threatens national security, but an aid to the terrorists akin to treasonous action (see the various expressions of this linked in Lederman 2006d). While presently muted in a population absorbed by economic distress, there is no love lost for the terrorists among the American people and little stomach for revisiting the entire sordid episode (Miller, Gronke, and Rejali 2014).

Finally, there is the obvious residue of using informal institutions to generate torture as an interrogation technique. That residue is the possible continuation of the practice in sanctioned forms. In their recent study of restraints on torture, Conrad and Moore (2010) look at a variety of structural constraints on the use of torture. They found that democratic regimes with a free press and greater electoral competition are significantly more likely to repudiate torture when not under threat. However, the likelihood that democratic and authoritarian governments will torture to the same level of intensity as in the past are much greater when regimes are under threat. Indeed, when threat levels are high, the incidence of torture is quite similar, no matter what structural characteristics are considered. This picture is disquieting when combined with Davenport and Armstrong’s (2005) earlier assertion that, as governments gain experience with torture, even democratic regimes are likely to continue to use torture to the extent they have historically. Consider the secrecy and executive discretion that still stands in the center of the MCA. This sanctions as part of U.S. law exactly the conditions that allowed the development of torture as an interrogation technique. Recall what leads to the use of accommodating informal institutions: a goal important to ruling elites that cannot be achieved with sanctioned mechanisms and a willingness to blur the legal barriers to the desired behavior. It is difficult to see how effective oversight of further developments might take place, especially since the military (recall that the new field interrogation manual specifically forbids the use of abusive techniques) may no longer be involved. It was the abuse of detainees in military custody that provided grounds for the use of the Freedom of Information Act to obtain records of the cooperation of military and civilian intelligence agencies in torture that provided much of the public evidence concerning the practice. This has possible extreme consequences for our constitutional system as well. In a useful recent study, Griffin (2009) has outlined a process of effecting informal constitutional change. As he points out, the Constitution, while allowing admirable flexibility for addressing rising problems, also creates space for using its general and often vague phrasing as a tool for expansion of, particularly, executive power. The use of torture by the Bush administration as an accommodating informal institution was part of an alternative interpretation of the Constitution, the so-called “unitary executive” theory. As seen by the administration, particularly Vice President Cheney, there had been a substantial weakening
of the discretion and power of the Presidency since the Nixon administration, a weakening they saw as both harmful and unconstitutional. This view was in the background as the administration fashioned the initial secret OLC opinions that laid the groundwork for the loosening of institutional rules that led to the torture regime metastasizing (Griffin 2009). This is a particularly troubling development since the precedents of executive action create the grounds for asserting their constitutionality. That no part of American government has moved to bring legal proceedings against the elite instigators of the torturous interrogations allows the precedents to act as placeholders for future presidents to use, placeholders that, as time wears on, could be considered presumptively constitutional.

Conclusion

“I’ve not come for what you hoped to do. I’ve come for what you did.” – V to Dr. Delia Surridge, V for Vendetta

The United States is today just beginning to retreat from the widespread use of torture in interrogations. It is imperative, however, that the retreat continue. As Conrad and Moore (2010) point out, there is one aspect of democracies that is different: democracies can and have stepped away from torture and are the only kind of regime that has actually reduced the level of abuse after initial experience. It is important to note, however, that if this is not done and the level of threat continues, democracies can get caught in the same spiral of increasing acceptance and use of torture as authoritarian governments. What, then, does our experience tell us and should we do?

First, I think the emergence of torture as an informal institution in the United States, a country with a prototypical regime of strong formal institutions, provides evidence for the theoretical speculations at the start of this paper. The case study above tracks the kind of distortions of formal rules that are commonly found and analytically confined to developing and transitional countries. The use of informal institutions by elites to achieve ends dictated by political considerations and restricted by legal and organizational norms is not, in other words, the product of the (un)rule of law or of an earlier era of “machine politics”; it is alive and well in the midst of the rule of law itself. Indeed, the rule of law virtually requires increasing executive discretion in modern governments, a discretion dictated by the “iron cage” of increasing societal complexity and fostered by the autonomy and capacity of states. This is not to say that there are not quantitative differences involved; elites can find a more fertile field for the use of informal institutions they initiate when faced by weak formal networks. However, the interstices of strong formal institutions can, as I believe I have shown, afford ample scope for elites to use informal institutions that are quite similar qualitatively to those normally associated with weak formal institutions.

There is a second aspect to this as well. In states with strong formal institutions, the use of elite initiated informal institutions will not be expected, with the result that, as we have just seen, there will be general incredulity concerning their existence. Further, since there is an expectation that the state will be ruled by formal institutions, there will be less resistance to protecting the gains of winning political coalitions by converting informal arrangements into formal ones. The pattern of initial denial of the torture regime in the War on Terror sequencing into proposals for formal recognition of presidential power to approve torturous interrogations at his discretion in the MCA is illustrative of the point. The danger that
Griffin (2009) has pointed out then comes to the fore; informal precedents can be converted presumptively constitutional laws. It is high time this was recognized as a possibility and that scholars begin to turn their attention to how to combat it. I have addressed some possible avenues for response—new laws outlawing “extraordinary rendition”, revising the anti-torture statute to cover cruel, inhuman, and degrading behavior and extending it to U.S. territory, and extending the Federal Tort Claims, Torture Victims Protection, and Alien Tort Claims Acts to cover torture by U. S. personnel (Lightcap 2011). Further, the Senate Select Committee report already mentioned will probably have longterm political impact. There was bipartisan support for its release and equally bipartisan calls for the country to abandon torturous interrogations. None of these steps will be easy, and, as Conrad and Moore (2010) point out, democracies like ours with extensive veto points are less likely to take such actions. However, The combination of a rising tide from below and above might be enough to reverse what is still a very dangerous course before some future terrorist incident forecloses the option. Let us hope that happens.

Appendix

The list of interrogation techniques in Table 1 is not intended to be comprehensive. As might be imagined, torturers do not leave complete accounts of their methods or of the incidence of them. The techniques I have included here are those listed as used in interrogations and only for the years indicated. I am defining interrogations, however, as the “long interrogations” described by Conquest (1990). Recall that long interrogations indispensably include retaliation for lack of cooperation (“softening up”) that takes place outside the questioning itself. Needless to say, in both cases abusive techniques have been used subsequent to arrest and interrogation to keep order in prisons. These are not considered in Table 1.

Data in the table is drawn from two sets of sources. For the Soviet Union, I have used the comprehensive list of interrogation methods compiled by Solzhenitsyn (1973) from prisoner accounts and his own personal experience, supplemented by techniques cited by Conquest (1999). There are some potential validity problems with these lists; they are based solely on prisoner accounts, hardly a disinterested source. Still, the evidence is overwhelming that the use of torture by the NKVD was widespread in the late 1930s and, while the incidence decreased markedly thereafter, continued in use. There is no reason to discount such personal testimony, especially when so much of it is internally corroborated. For the United States, I have used four different sources. I have relied heavily on the official AR15–6 investigations of different United States Army (hereinafter USA) units occasioned by the initial revelations concerning detainee abuse, on the reports of the ICRC concerning detainee abuses in Iraq, foreign prisons, and GTMO, and, most recently, on the Senate Select Committee on Intelligence report already mentioned. These sources are mutually reinforcing in most respects. Second, I have used the official reports of courts martial and of criminal investigations by the Criminal Investigation Division of the USA and the Criminal Investigation Service of the Navy. I have only used investigatory reports that involve either substantiated or indeterminate allegations; no unsubstantiated allegations have been included. My third source is personnel accounts, usually in sworn statements, by American servicemen. This includes some hearsay testimony, but in many cases the hearsay allegations were subsequently found credible in official investigations. Finally, I
have used a few sworn statements by detainees themselves, usually for illustrative purposes. In most instances, the allegations in these statements have been found credible in subsequent investigations or include allegations supported by accounts of other detainees incarcerated at the same time.

References


21


[58] Historians Against the War. 2006. Torture, American Style. 


Table 1: Comparison of Interrogation Techniques in the Soviet Union, 1937 - 38, and the United States, 2002 - 06

<table>
<thead>
<tr>
<th>Russian Union</th>
<th>United States</th>
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</table>
| **Night Interrogation/Sensory Deprivation** | Solzhenitsyn 1973, 103  
Solzhenitsyn 1973, 104  
Conquest 1990, 125,  
(Prisoners interrogated at night, use of blackout goggles, earmuffs)  
Rejali 2007, 80, HRW 2004, 2 - 3  
Danner 2009  
(Prisoners interrogated at night, hooding (multiple bags, extended periods))  
ICRC 2004, 260 - 61  
USDOA 1987, Appendix H  
(“Emotional Love,” “Mutt and Jeff” approach)  
Al-Sheikh 2004, 226  
(Prisoners cursed during interrogation)  
Taguba Report 2004, 292  
CCR 2006, 26, 28  
Mustafa 2004, 238  
White and Eggen 2005  
FBI 2007  
CIA IG 2004, 77 - 78  
(Detainees naked for extended periods) |
| **Persuasion** | Solzhenitsyn 1973, 104  
(“Futility,” “Emotional Love” approach)  
USDOA 1987, Appendix H  
(“Futility,” “Emotional Love” approach) |
| **Foul Language** | Solzhenitsyn 1973, 104  
Conquest 1990, 278  
(Prisoners cursed during interrogation)  
ICRC 2004, 264  
Al-Sheikh 2004, 226  
(Prisoners cursed during interrogation) |
| **Psychological Contrast** | Solzhenitsyn 1973, 104 - 05  
Conquest 1990, 278  
(“Fear up, harsh,” “Mutt and Jeff” approach)  
USDOA 1987, Appendix H  
(“Fear up, harsh,” “Mutt and Jeff” approach) |
| **Preliminary Humiliation** | Solzhenitsyn 1973, 104 - 05  
Conquest 1990, 122  
Tucker 1990, 471  
(Prisoners face down in hall, naked woman in cell, head forced into spittoon, forced to drink contents of spittoon, urinated on)  
ICRC 2004, 261 - 262  
Taguba Report 2004, 292  
Al-Sheikh 2004, 228,  
CCR 2006, 26, 28  
Mustafa 2004, 238  
White and Eggen 2005  
FBI 2007  
Danner 2009  
CIA IG 2004, 77 - 78  
(Detainees naked for extended periods) |
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Humiliation</td>
<td>periods, paraded naked, photographed in sexually explicit positions, forced to wear women’s underwear, forced to masturbate while being photographed and videotaped, “pyramids”, paraded on dog chain, forced to act like dog, subjected to forced grooming, urinated on, Koran abused, detainee wrapped in Israeli flag during questioning, forced enemas</td>
<td>Schmidt - Furlow Report 2005, 7 - 9 (“Lapdance” interrogation, smearing detainees with perfume, red ink represented as menstrual blood, detainee genitals squeezed until in pain)</td>
</tr>
<tr>
<td>Threats of Death</td>
<td>(Threats of death, transfer to another prison)</td>
<td>ICRC 2004, 261, 264</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Al-Sheikh 2004, 227</td>
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<tr>
<td></td>
<td></td>
<td>Hilas 2004, 242</td>
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<td></td>
<td></td>
<td>CIA IG 2004, 41-42</td>
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<tr>
<td></td>
<td></td>
<td>ACLU 2005b, 2006e</td>
</tr>
<tr>
<td></td>
<td>(Threats of death, transfer to an other prison, rape)</td>
<td>(Threats against family, detention, torture of family members)</td>
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<tr>
<td>Deception</td>
<td>(&quot;File and dossier&quot; approach)</td>
<td>USDAO 1987, Appendix H</td>
</tr>
<tr>
<td>Threats to Hostages</td>
<td>(Threats against family, detention, torture of family members)</td>
<td>ICRC 2004, 261</td>
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<td>USDOD Memo, Greenberg and Dratel 2005, 1170,</td>
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<td></td>
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<td>Juma 2004, 244</td>
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<td></td>
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<td>Provance 2006, 9</td>
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<td></td>
<td></td>
<td>CIA IG Report 2004, 42-43</td>
</tr>
<tr>
<td></td>
<td>(Threats against family, detention, torture of family members)</td>
<td>(Use of loud music, airhorns,</td>
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<tr>
<td>Sound Effects</td>
<td>(Megaphones directly on prisoner ears)</td>
<td>Provance 2006, 3</td>
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<td></td>
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<td>HRW 2005b, 24</td>
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<tr>
<td></td>
<td></td>
<td>Danner 2009</td>
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<tr>
<td></td>
<td></td>
<td>Faleh 2004, 230</td>
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<tr>
<td></td>
<td></td>
<td>Youss 2004, 232</td>
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<tr>
<td></td>
<td></td>
<td>ACLU 2004b</td>
</tr>
</tbody>
</table>

Note: This text provides a summary of methods of torture and abuse described in several sources. The categories include Sexual Humiliation, Threats of Death, Deception, and Sound Effects. Each category includes descriptions of specific abuses and references to sources where these methods are documented.
Tickling Solzhenitsyn 1973, 108 (Tickling the interior of prisoner’s nose)

Cigarette Burns Solzhenitsyn 1973, 108 (Cigarette put out on prisoner’s skin)


Continuously Led to Interrogation Solzhenitsyn 1973, 108 - 09 (Prisoner continuously led to questioning then returned to cell to disrupt sleep)

The “Box” Solzhenitsyn 1973, 109 (Imprisonment in small continuously dark or light cell)

Sitting on Chairs Solzhenitsyn 1973, 109 - 10 (Sitting on edge of stool after weight loss)

“Divisional Pit” Solzhenitsyn 1973, 110 (Prisoners confined to open pit during initial interrogation)

loudbspeakers on restrained detainees)

Provance 2006, 4 - 5
ACLU 2004a, 2006b (Cigarette put out on detainee’s skin, cigarette put out in detainee’s ear)

ICRC 2004, 263
ACLU 2004b
HRW 2006, 28 (Continuous light in cells, continuous, darkness in cells, use of strobe lights)

Schmidt - Furlow Report 2005, 10 - 11 (“Frequent Flyer” program - detainees moved continuously from cell to cell to disrupt sleep)

ICRC 2004, 261 - 262, 267 -268
Formica Report 2004, 47
Danner 2009 (Imprisonment in small continuously dark or light cell, detainee imprisoned in 4’x4’x20” cell for 4 days, detainee held in coffin-like (3.5’x2.5’x6.5’, 3.5’x2.5’x3.5’) boxes)

Jones - Fay Report 2004, 518
Danner 2009 (Sitting in precarious position on stool, detainee shackled to chair for 3 weeks)

HRW 2005b, 11
HRW 2004b, 5, 7
Khalilzad Memo, Greenberg and Dratel 2005, 1171 - 72
<table>
<thead>
<tr>
<th>Condition</th>
<th>Reference Details</th>
<th>Additional Details</th>
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<tbody>
<tr>
<td>Standing on Knees</td>
<td>Solzhenitsyn 1973, 111 (Prisoner kept up on knees 24 - 48 hours)</td>
<td>ACLU 2004d (Hand and leg cuffed detainees kept standing on knees for 24 hours)</td>
</tr>
<tr>
<td>Standing</td>
<td>Solzhenitsyn 1973, 111 Conquest 1990, 121 Tucker 1990, 471 Rejali 2007, 80 (Standing for extended periods, standing on tiptoe for extended periods)</td>
<td>ICRC 2004, 262, 265 HRW 2006, 9 Danner 2009 CIA IG 2004, 44 ACLU 2005a (Standing for extended periods in “stress positions,” e.g. standing on narrow boxes, standing bound to cell door, bedstead or window, standing on concrete blocks while hooded with hands cuffed between legs, standing with hands suspended from ceiling by shackles)</td>
</tr>
<tr>
<td>Thirst</td>
<td>Solzhenitsyn 1973, 111, 494 Rejali 2007, 81 (Prisoner deprived of water for 3 - 5 days, prisoners fed salt herring to induce thirst)</td>
<td>HRW 2005b, 9 (Detainees fed salted crackers and deprived of water for 12 hours in desert)</td>
</tr>
</tbody>
</table>
(Imprisonment in cells made alternatively extremely hot or cold, use of nakedness, cold bathes to increase effects of cold)

Locked in in an Alcove

Solzhenitsyn 1973, 114
(Imprisonment in closet-like cell)

HRW 2006, 9
Danner 2009
Al-Aboodi 2004, 245
CIA IG 2004, 73-76
ACLU 2004a, 2004c
(Detainees confined in cells made alternatively extremely hot or cold, detainees frequently kept naked and doused in cold water to increase effects of cold)

Starvation

Solzhenitsyn 1973, 114
Conquest 1990, 125
(Limited diet for extended periods)

Formica Report 2004, 8, 33
HRW 2005b, 12 - 13
Danner 2009
(Limited diet for extended periods (17 days on bread and water, crackers and water for extended periods, two weeks without solid food))

Beatings

Solzhenitsyn 1973, 116
Conquest 1990, 121
Tucker 1990, 468
Rejali 2007, 80
(Beatings by fist, kicks, stomping, chairs, clubs, rubber truncheons, wooden mallets, the “penalty kick” (kick in the groin), edge of rulers)

Taguba Report 2004, 292 - 93
HRW 2005b, 11 - 12
Hanfosh 2004, 233
ACLU 2005a, 2006c
Golden 2005
CIA IG 2004, 78-79, 69-70
Danner 2009
(Beatings by fist, kicks, stomping, chairs, batons, phosphorus bulbs (phosphorus poured on detainee), broomsticks, ax handles, phonebooks, kicks to the groin, baseball bats, “walling” (detainee’s head put in collar and swung into wall), rifle butts, metal flashlight (detainee died), choking to asphyxiation.)

Injured Extremities

Solzhenitsyn 1973, 116
Conquest 1990, 121

Taguba Report 2004, 292
PBS 2005a
<table>
<thead>
<tr>
<th>Category</th>
<th>Source 1</th>
<th>Source 2</th>
<th>Source 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Close Restraints</td>
<td>Solzhenitsyn 1973, 116</td>
<td>Reajli 2007, 81</td>
<td>ACLU 2005c</td>
</tr>
<tr>
<td></td>
<td>Reajli 2007, 81</td>
<td>(Prisoner restrained in straight jacket)</td>
<td>(“Litter sandwich” (detainee wrapped in foam mattress, then restrained between two stretchers strapped together))</td>
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<tr>
<td></td>
<td>Conquest 1990, 121</td>
<td></td>
<td>HRW 2005b, 11</td>
</tr>
<tr>
<td></td>
<td>(Breaking prisoner’s back, legs)</td>
<td></td>
<td>ACLU 2006d</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>(Breaking detainee’s back, legs, ribs, hyoid bone (detainee died as result))</td>
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<tr>
<td>Bondage</td>
<td>Solzhenitsyn 1973, 117</td>
<td>Conquest 1990, 121</td>
<td>Mayer 2005</td>
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<td></td>
<td>Conquest 1990, 121</td>
<td></td>
<td>Golden 2005</td>
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<tr>
<td></td>
<td>(“Bridling” (handcuffed prisoner bound by rope tying mouth and feet), “The Swallow” (prisoner’s hands and feet cuffed behind back, hands tied together, prisoner pulled off ground))</td>
<td>ICRC 2004, 262</td>
<td>(“Palestinian hanging” (detainee hands attached to bars of cell door or window at shoulder height or above), detainee handcuffed to ceiling with feet off floor, detainee handcuffed standing to cell door, bed, or railing)</td>
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<tr>
<td>Mock Executions</td>
<td>Solzhenitsyn 1973, 448</td>
<td>Conquest 1990, 126</td>
<td>ACLU 2006e</td>
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<td></td>
<td>Conquest 1990, 126</td>
<td></td>
<td>PHR 2005, 30</td>
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<tr>
<td></td>
<td>(Mock execution by firing squad, pistol)</td>
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<td>CIA IG 2004, 70-72</td>
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<tr>
<td>Skull Squeezed</td>
<td>Solzhenitsyn 1973, 93</td>
<td>Rejali 2007, 81</td>
<td></td>
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<tr>
<td></td>
<td>Rejali 2007, 81</td>
<td>(Prisoner’s skull squeezed in iron ring, squeezed by cloth bandage)</td>
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<tr>
<td>Method</td>
<td>Source(s)</td>
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<tr>
<td>Body Burns</td>
<td>Solzhenitsyn 1973, 93 (Prisoner lowered into acid bath)</td>
<td></td>
<td></td>
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<td></td>
<td>ICRC 2004, 259 - 60 (Detainee hooded, handcuffed,</td>
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<td></td>
<td>forced naked onto hot truck bed for transport to interrogation (three</td>
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<td></td>
<td>months hospitalization required for burns), detaine forced to sit on</td>
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<td>hot exhaust pipe of HMMWV)</td>
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<tr>
<td>“Secret Brand”</td>
<td>Solzhenitsyn 1973, 93 (Prisoner’s intestines burned with poker)</td>
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<tr>
<td>Crushing Testicles</td>
<td>Solzhenitsyn 1973, 93, 127 - 8 (Prisoner’s testicles crushed beneath boot</td>
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<td></td>
<td>while restrained)</td>
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<tr>
<td>Rape</td>
<td>Tucker 1990, 472 (Adolescent male prisoner raped)</td>
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<td></td>
<td>Taguba Report 2004, 292 - 93 (Rape of female detainee by</td>
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<td></td>
<td>interrogators, rape of male detainees by broomstick, baton, phosphorus</td>
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<td></td>
<td>bulb, interrogators)</td>
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<tr>
<td>“Waterboarding”</td>
<td>Danner 2004, 34 - 36 (Face of detainee under restraint covered with cloth,</td>
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<td></td>
<td>water poured on cloth until detainee cannot breath, simulating</td>
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<td></td>
<td>drowning)</td>
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<tr>
<td>“Sleeping Bag”</td>
<td>White 2005</td>
<td></td>
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<td>Technique</td>
<td>WAPO 2005</td>
<td></td>
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<td></td>
<td>Rosen 2006, 96 - 7 (Detainee forced into sleeping bag secured around</td>
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<td></td>
<td>detainee’s head with electric cord, interrogator sat on detainee’s</td>
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<td></td>
<td>chest to question him (detainee with broken ribs died of asphyxia)</td>
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<tr>
<td>Exhaustion</td>
<td>Provance 2006, 5</td>
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<tr>
<td>Exercise</td>
<td>HRW 2005b, 9, 15</td>
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</tbody>
</table>
(Hooded detainees exercised to point of collapse in desert climate)

Use of Dogs

*Taguba Report* 2004, 292
*Jones - Fay Report* 2004, 516 - 523
(Detainees threatened with, bitten by unmuzzled military police dogs)

“Short Shackling”

*HRW* 2004, 11 - 12
*ACLU* 2004c
*Schmidt - Furlow Report* 2005, 12
*Formica Report* 2004, 33
(Detainee’s hands and feet are closely shackled, then attached to a short chain fastened to the floor for extended periods (usually combined with punishment cell regimen—nakedness, closed cell, great heat or cold, and frequent dousing with cold water))

Electric Shock

*ACLU* 2006f
(Detainee attached to poles of electric battery and shocked)

“Rough Takedown”

*Senate Report* 2014
(Detainee set upon by up to 5 guards, dragged from cell, clothes cut off of him, secured with Mylar tape, then hooded and dragged along corridor while being punched and slapped)

Rectal Feeding/Hydration

*Senate Report* 2014
(Detainee’s meal pulverized and inserted into detainee’s rectum by tube; fluids inserted into detainee’s rectum by tube)

1. A similar technique was authorized for U.S. interrogators in the classified August 1, 2002 OLC memorandum on CIA interrogation techniques (Bybee 2002b), but there is no record of it ever being used (U.S. Department of Justice 2009).

2. Solzhenitsyn (1973, 126) mentions the use of “pumping”—forced infusions of water into the stomach (Rejali 2007)—in two instances. The dates of these accounts are uncertain and I have not included them.
3. This phrase is Rejali’s (2007). American soldiers usually refer to the technique as “smoking” (Human Rights Watch 2005b, ACLU 2005a).

Abbreviations: ICRC (International Committee of the Red Cross), ACLU (American Civil Liberties Union), HRW (Human Rights Watch), USDOA (U. S. Department of the Army), CCR (Center for Constitutional Rights), FBI (Federal Bureau of Investigation), CIA IG (Central Intelligence Agency, Office of the Inspector General), USDOD (U. S. Department of Defense), PBS (Public Broadcasting System), PHR (Physicians for Human Rights), WAPO (Washington Post), Senate Report (Senate Select Committee on Intelligence Committee Study of the CIA’s Detention and Interrogation Program)