

**WAR BY PROXY: LEGAL AND MORAL DUTIES OF ‘OTHER ACTORS’  
DERIVED FROM GOVERNMENT AFFILIATION\***

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The theme for this panel is outsourcing torture, which of course harkens back to a contractual model in conducting our campaign against those who would commit terrorist acts. I want to do something that I realize may be a bit unusual in this setting; I want to focus on the substantive framework of the laws themselves with regard to the regulation of private contractors who are suspected of having committed torture. My premise, which I recognize is shared by most of you, is that the United States government cannot simply relegate its duty to protect the American people to friends and allies. By the same token, neither can our government relinquish its legal and moral obligations to ensure the proper treatment of persons in our custody to proxies acting on its behalf. This difficulty is most pointedly raised in recent operations by the presence of paid civilian contractors who are charged with sensitive aspects of our military operations, yet operate beyond the boundaries of established military lines of authority.

You have doubtless all seen the commentary about our presence in a new paradigm of warfare. That is certainly true in the political and legal sense. In the context of dealing with civilian contractors supporting the war effort, it is equally true. The reliance on paid civilian contractors is a direct consequence of the fact that our military structure is roughly 40% smaller than it was at the height of the Cold War. After the United States military, the second largest deployments in Afghanistan and Iraq today are the hundreds of contractors funded by the United States government. The reality at present is that the legal framework for regulating the conduct of civilian contractors is not a tightly woven and interconnected whole. This, in turn, raises the real potential that paid civilian contractors, who earn salaries that seem astronomical to those in uniform, actually undermine our war effort through undisciplined and illegal acts beyond the control of the affected military commanders.

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The failure to implement a comprehensive mechanism for controlling and punishing the conduct of private contractors could be portrayed by our enemies as a hypocritical convenience. On the one hand, our rhetoric and ideals are soaring. The National Security Strategy, for example, postulates that America's role in the world is to "defend liberty and justice because these principles are right and true for all people everywhere."<sup>1</sup> Our national policy obligates America to "stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property."<sup>2</sup> President Bush used the United Nations pulpit to reiterate the United States policy on the prevention of torture to an attentive world audience:

The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment.<sup>3</sup>

On the other hand, the worldwide broadcasts of Americans mistreating Iraqi detainees during the night watch at Abu Ghraib exemplified a gulf between American ideals and American actions, at least in that place at that time. While it represented a leadership failure for the military chain of command, Abu Ghraib also demonstrated the cultural fissures between the civilian contractor and the military professional. Military officers have been uncomfortable with interrogations of detainees by non-military actors in areas that exclude military personnel.<sup>4</sup> The Final Report of the Independent Panel to Review Department of Defense Detention Operations concluded that civilian "[c]ontractors were a particular problem at Abu Ghraib."<sup>5</sup>

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<sup>1</sup> THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> George W. Bush, Statement at the United Nations International Day in Support of Victims of Torture (June 26, 2003), available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html> (declaring a "strong solidarity with torture victims across the world" and noting that "[t]orture anywhere is an affront to human dignity everywhere.").

<sup>4</sup> See generally *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division*, 17 HUM. RTS. WATCH (2005), available at <http://hrw.org/reports/2005/us0905/us0905.pdf>. See also Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29 (commenting on the erosion of some of the most elite sectors of the U.S. military occasioned by the rise of private contractors and the cultural and financial gaps between active duty soldiers and corporate employees).

<sup>5</sup> U.S. DEP'T OF DEF., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS [hereinafter Schlesinger Report], reprinted in KAREN J. GREENBERG & JOSHUA L. DRATEL, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 942 (2005) [herein-

Military professionals were, on the whole, more affected and more appalled by the revelations from inside the Abu Ghraib prison complex than any other identifiable entity because of the pervasive culture of discipline and dedication to duty within military channels. With some notable exceptions, this culture is not present in the ranks of civilian contractors. Soldiers were acutely embarrassed by the worldwide revelations, and angry that those images provided fodder for enemies who portray the American military as arrogant and lawless. The exploitation of those images by America's enemies made daily patrols more dangerous and tarnished the sacrifices of comrades. Service members who mistreat civilian detainees are subject to prosecution under the Uniform Code of Military Justice, but the civilian contractors who contributed to the crimes at Abu Ghraib were subject only to official reprimands, removal of their security clearances, and the termination of employment.<sup>6</sup>

This symposium is an excellent opportunity to gauge our progress in overcoming the obstacles that hinder efforts to protect American lives and property. As we fight this asymmetric war, our enemies hide behind a twisted set of principles and undemocratic ideals. As a result, the western world is simultaneously faced with two distinct adversaries: 1) the armed civilians who have unlawfully taken up arms to direct violent acts against western interests,<sup>7</sup> and 2) the radicals who sustain a pernicious and widespread effort to foster a belief system that produces terrorist acts. Acts of torture or cruel, inhuman or degrading treatment of those who come into American custody and control provide fodder for both sets of enemies and would further undermine our national security objectives. Reflecting the overarching truths of an interdependent world, the cornerstone of the struggle against terrorist extremism has been the presidential declaration on September 20, 2001 that the campaign against "international terrorism"<sup>8</sup> is more

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after TORTURE PAPERS]. See also SEYMOUR M. HERSCH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 32-33 (2004).

<sup>6</sup> MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, paras. 11-12, reprinted in TORTURE PAPERS, *supra* note 5, at 405 [hereinafter TAGUBA REPORT].

<sup>7</sup> See Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR TO 21ST CENTURY CONFLICTS 75 (DAVID WIPPMAN & MATTHEW EVANGELISTA eds., 2005); see also Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005), available at <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf>.

<sup>8</sup> See 18 U.S.C. § 2331(1) (2000) (reflecting amendments made in the PATRIOT ACT and providing that for the purposes of the federal criminal law) --

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a

than just a fight to secure American freedoms because it is “civilization’s fight” waged on behalf of civilized peoples who “believe in progress and pluralism, tolerance and freedom.”<sup>9</sup>

The presidential premise is identical to that intuitively embodied in the title of this panel: a deliberate policy to outsource torture would be inimical to our values and counterproductive to the efforts to defeat transnational networks of terrorists. While we may be at liberty to outsource our yard work or our automobile repairs in our private lives, deliberate efforts to contract out the use of torture on behalf of the United States would substitute a pretext of lawfulness even as other actors or states willingly violate fundamental international norms at our request to serve our interests. Such deliberate efforts would be a sham in practice and make a mockery of our stated commitment to upholding the basic principles of human liberty and dignity, not to mention our binding treaty commitments.

On this score, the Torture Convention,<sup>10</sup> which entered into force for the United States on November 20, 1994, is precise and on-point. Articles 2, 3, and 4 of the Convention impose obligations to implement sweeping measures to prevent torture committed by any actor under any circumstances, and to have off the shelf criminal sanctions to punish violations, no matter where the offense was committed:

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criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion;

or

(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

<sup>9</sup> George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 30, 2001), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001\\_presidential\\_documents&docid=pd24se01\\_txt-26.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_presidential_documents&docid=pd24se01_txt-26.pdf) [hereinafter Joint Session].

<sup>10</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/english/law/pdf/cat.pdf> [hereinafter Torture Convention].

## Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.<sup>11</sup>

Article 3<sup>12</sup>

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>13</sup>

## Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

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<sup>11</sup> *Id.* art. 2.

<sup>12</sup> Responding to allegations that the United States is violating its Article 3 obligations, President Bush flatly declared on January 27, 2005 that "torture is never acceptable, nor do we hand over people to countries that do torture." Jane Meyer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106. See also *U.S.: Don't Send Detainees Back to China*, HUM. RTS. WATCH (2003), available at <http://hrw.org/english/docs/2003/11/26/china6539.htm>. Department of Defense General Counsel William Haynes echoed this policy by writing that:

Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.

*Id.* (citing Letter from William Haynes II, Gen. Counsel, U.S. Dep't of Def. to Patrick Leahy, Senator, U.S. Senate (June 25, 2003), available at <http://www.hrw.org/press/2003/06/letter-to-leahy.pdf>).

<sup>13</sup> Torture Convention, *supra* note 10, art. 3.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.<sup>14</sup>

For the purposes of this panel, it is significant that there is no limitation on the United States obligation to implement the scope of Articles 2, 3, or 4 although the instrument of ratification<sup>15</sup> contained a series of important declarations, reservations, and understandings relevant to the United States implementation of the Torture Convention as a whole. In particular, the broad responsibility to implement a range of “effective legislative, administrative, judicial or other measures” found in Article 2<sup>16</sup> creates a legal and moral imperative to take action rather than simply hope for the best. Military contractors who are in contact with detainees raise particular legal and moral problems in implementing U.S. treaty obligations because they operate essentially as free agents outside the scope of military authority and control. Private contractors are not within the military chain of command. Even though they operate in general support of the military mission, they may or may not obey the guidance of a local commander. They are, nevertheless, operating with the financial and operational sponsorship of the United States government. They are quasi-officials whose very presence in the area of operations depends on the largesse of our contracting officials.

During their deployment, civilian contractors operate under a parallel system of private control that is divorced from the hierarchical model needed to ensure a common baseline of professionalism, discipline, and training. Derived from the basic principles of war recognized across the globe, the principle of “Objective” obliges commanders to direct every operation towards a defined, decisive, and attainable end state.<sup>17</sup> The overall mission is subdivided into specified tasks, which are clear and imperative directives to the military commander, and implied tasks, which are those subordinate tasks necessarily implied in support of the specified tasks. American combatant commanders accordingly issue “authoritative direction to subordinate commands and forces” as required to accomplish the as-

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<sup>14</sup> *Id.* art. 4.

<sup>15</sup> *See* U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17, 486 (1990) (the key reservation is an interpretive rule that “the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment” applies only as that term is construed under the “Fifth, Eighth, and/or Fourteenth Amendments” to the United States Constitution). *See also* [http://www.unhchr.ch/html/menu3/b/treaty12\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm) (last visited Feb. 12, 2006).

<sup>16</sup> Torture Convention, *supra* note 10, art. 2.

<sup>17</sup> The Principles of War crystallized as a military doctrine around the world around 1800. The accepted principles are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity. THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 557 (John Whiteclay Chambers III ed., 1999).

signed missions within the theater.<sup>18</sup> This four-star command authority necessarily entails decisions “over all aspects of military operations, joint training, and logistics” and the organization and assignment of forces to the appropriate chain of military command.<sup>19</sup> For example, after an exhaustive review of interrogation techniques, military doctrine is expanding “from two publications to eight . . . because [American] soldiers have found themselves in a very challenging and new environment.”<sup>20</sup> There are times when soldiers may complain about cold, rigid, structured military discipline, but when the nation confronts the operational need to prevent torture, and cruel or inhumane treatment, it is a good thing to have a commander specifically empowered with a legal duty to instill standards of professionalism. The flip side of command authority is the correlative responsibility to punish those who ignore those lawful orders and regulations. You lose all of that unity of command the second you take a wad of money and pay some person from Blackwater, or Executive Outcome, or California Microwave or Triple Canopy to operate in the same area.

Today is a particularly appropriate time to focus on the current framework for addressing the conduct of non-military actors. On October 3, 2005, Senator John McCain offered a notable amendment to the pending Fiscal Year 2006 Department of Defense Appropriations Act.<sup>21</sup> The text is important because in substance it seeks to fill the gap that I have spoken of today by creating a uniform worldwide standard for the treatment of all persons in United States custody, regardless of whether they are held by civilian or military officials acting on behalf of the United States. If enacted in its present form, the McCain amendment would provide as follows:

UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS  
UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of

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<sup>18</sup> 10 U.S.C. § 164(c) (1994).

<sup>19</sup> *Id.*

<sup>20</sup> Colonel Pete Champagne, Army Deputy Provost Marshal, U.S. Dep’t of Def., Dep’t of Def. Briefing on Detention Operations and Interrogation Techniques (Mar. 10, 2005), <http://www.defenselink.mil/transcripts/2005/tr20050310-2262.html>. In addition, other officials who participated in this briefing described other initiatives resulting from the Department of Defense review of interrogation techniques, which involved over 800 interviews, review of thousands of pages of documentary evidence, and careful analysis of the seventy documented cases of detainee abuse. *See generally* Department of Defense Briefing on Detention Operations and Interrogation Techniques, *supra*.

<sup>21</sup> 151 CONG. REC. S10, 908-9 (daily ed. Oct. 3, 2005 ) (submitting amendment to the Fiscal Year 2006 Department of Defense Appropriations Act tabled by Senator McCain on behalf of himself and Senators Graham, Hagel, Smith, and Collins).

Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) **APPLICABILITY.**—Subsection (a) shall not apply to with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) **CONSTRUCTION.**—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

**PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.**

(a) **IN GENERAL.**—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) **CONSTRUCTION.**—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) **LIMITATION ON SUPERSEDURE.**—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) **CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.**—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.<sup>22</sup>

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<sup>22</sup> *Id.*

In one sense, the McCain language merely restates the truism that the treaty obligations of the United States attach to those acting in an official capacity to detain or interrogate detainees. At the same time, the amendment would create a statutory extrapolation from existing military authority to the private actors who enter the operational area because it is their job rather than their military duty. I should note in passing that there is a school of thought that might maintain that any “effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”<sup>23</sup> Nevertheless, the application of Army doctrine to all non-military actors who take custody of detainees in areas under the effective control of the military would lend a consistency to our national practice that has been heretofore lacking.

The McCain language would address the reality that military commanders often have little or no effective control over civilian contractors working in their area, and consequently have a decreased ability to promulgate and enforce uniform professional standards. The United States military provides the world’s foremost training base and an accompanying set of operational norms that have been emulated around the world. Congress expressly noted that “the vast majority of members of the Armed Forces have upheld the highest possible standards of professionalism and morality in the face of illegal tactics and terrorist attacks and attempts on their lives.”<sup>24</sup>

Abu Ghraib demonstrated that the modern dependence on civilian contractors has weakened the sense of pervasive professionalism across the Armed Forces and the uniformity of practice that should be assumed in this important area. To ensure operational consistency across all the uniformed branches, the Secretary of the Army is the executive agent for implementing our treaty obligations regarding the treatment of persons in United States military custody.<sup>25</sup> The McCain language would expand the Army regula-

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<sup>23</sup> U.S. Dep’ of Def. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), *reprinted in* TORTURE PAPERS, *supra* note 5, at 259-60 (basing this assertion on the stated premise that “[t]here can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign”), *available at* <http://www.ccrny.org/v2/reports/docs/PentagonReportMarch.pdf>.

<sup>24</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091, 118 Stat. 2067 (2004).

<sup>25</sup> *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, CJCSI 3290.01A, Program for Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detained Personnel, Oct. 15, 2000. *See also* U.S. DEP’T OF DEF., DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, para 1.2 (1998) [hereinafter DOD DIR. 5100.77] (requiring that United States Armed Forces shall “comply with the law of war” in the conduct of military operations and related activities in “armed conflicts, however such conflicts are characterized”), <http://www.dtic.mil/whs/directives/corres/html2/d510077x.htm>.

tion to provide the baseline for assessing the legality of the actions of non-military actors as well. Existing military doctrine prohibiting mistreatment of detainees is grounded in proven operational realities, and prescient, pragmatic considerations that are apparent in the aftermath of the Abu Ghraib debacle:

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.

Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It may also place US and allied personnel in enemy hands at greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied PWs [the military abbreviation for prisoners of war] does not justify using methods of interrogation prohibited by the GWS [Geneva Convention on Wounded and Sick], GPW [Geneva Convention on Prisoners of War], or GC [Geneva Convention Relative to the Protection of Civilian Persons], and US policy.<sup>26</sup>

The pragmatic basis for the Army regulation applies whether the detainee is being interrogated by military personnel or by private civilian contractors. With regard to interrogation techniques, the doctrine is explicit that “illegal acts are not authorized and will not be condoned by the US Army.”<sup>27</sup> Army Field Manual 34-52 goes on to list the specific provisions of military law that could be violated by unlawful interrogations and warns that the Geneva Conventions and Department of Defense policy “expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.”<sup>28</sup> This stark policy statement illustrates the powerful professional undercurrent that animates United States military detention operations and generally prevents mistreatment of enemy personnel in United States military custody. While it is a promising development on its face, the McCain Amendment should not be viewed in isolation.

The second reason why this is a particularly appropriate topic this morning is that Department of Defense procedural policy is finally beginning to catch up with events on the ground. One of the pertinent observations of the Schlesinger Report was that 35% of the contractors employed as interrogators had received no formal training in military interrogation tech-

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<sup>26</sup> HEADQUARTERS, U.S. DEP'T OF THE ARMY, INTELLIGENCE INTERROGATION, FM 34-52, 1-8 (1992).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

niques, policy or doctrine. Though some civilians interrogating detainees had previous military training, the systematic “[o]versight of contractor personnel and activities was not sufficient to ensure intelligence operations fell within the law and the authorized chain of command.”<sup>29</sup> The comprehensive review of detainee policy recognized that the “[c]ontinued use of contractors will be required, but contracts must clearly specify the technical requirements and personnel qualifications, experience, and training needed. They should also be developed and administered in such a[] way as to provide the necessary oversight and management.”<sup>30</sup>

Congress responded to these insights with alacrity. Section 1092 of the Defense Authorization Act for Fiscal Year for 2005 required the Secretary of Defense to oversee the implementation of uniform procedures to ensure that “all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States.”<sup>31</sup> This statutory mandate further required “[t]he Secretary of Defense [to] certify that all Federal employees and civilian contractors engaged in the handling or interrogation of individuals detained by the Department of Defense on behalf of the United States Government have fulfilled an annual training requirement on the law of war, the Geneva Conventions, and the obligations of the United States under international law.”<sup>32</sup> Section 1092 created a statutory obligation that the newly promulgated policies include procedures for:

- (1) Ensuring that each commander of a Department of Defense detention facility or interrogation facility—
  - (A) provides all assigned personnel with training, and documented acknowledgment of receiving training, regarding the law of war, including the Geneva Conventions; and
  - (B) establishes standard operating procedures for the treatment of detainees.
- (2) Ensuring that each Department of Defense contract in which contract personnel in the course of their duties interact with individuals detained by the Department of Defense on behalf of the United States Government include a requirement that such contract personnel have received training, and documented acknowledgment of receiving training, regarding the international obligations and laws of the United States applicable to the detention of personnel.

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<sup>29</sup> Schlesinger Report, *supra* note 5, at 942.

<sup>30</sup> *Id.*

<sup>31</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1092, 118 Stat. 2067 (2004).

<sup>32</sup> *Id.*

- (3) Providing all detainees with information, in their own language, of the applicable protections afforded under the Geneva Conventions.
- (4) Conducting periodic unannounced and announced inspections of detention facilities in order to provide continued oversight of interrogation and detention operations.
- (5) Ensuring that, to the maximum extent practicable, detainees and detention facility personnel of a different gender are not alone together.<sup>33</sup>

Section 1092 was a reasonable response by Congress to the evidence that contractors were operating as free agents outside the military chain of command. Doubly compounding that problem is the present lack of training in uniform standards or practices. Congress stated that we are not satisfied with that and ordered the Secretary of Defense to address a systematic problem that has grave implications for our national security, not to mention our treaty compliance. Nearly a year later on September 1, 2005, the Department of Defense published an interim rule to the Defense Federal Acquisition Regulation Supplement (DFARS)<sup>34</sup> that was the first tangible step towards operationalizing the goals set by Congress.<sup>35</sup>

In order to process a United States government contract, all contracting officers must now include a contractual requirement that, prior to interacting with detainees, all civilians will be trained in the “international obligations and laws of the United States applicable to the detention of personnel, including the Geneva Conventions.”<sup>36</sup> This contractual training requirement should, in theory, provide uniformity of practice because the military combatant commander is responsible for providing the training (and for annual retraining of the appropriate personnel). The contractor has a corresponding duty to include the same contractual clause in any subcontracts. The combatant commander will issue a training receipt document to personnel who receive such training, and the individual employee is required to retain possession of that receipt. This comprehensive approach was finally formalized within the contractor community on September 12, 2005 through a memorandum from the Under Secretary of Defense for Ac-

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<sup>33</sup> *Id.*

<sup>34</sup> Defense Federal Acquisition Regulation Supplement; Training for Contractor Personnel Interacting with Detainees, 70 Fed. Reg. 52,032, 52,033 (Sept. 1, 2005) (to be codified at 48 C.F.R. pts. 237 and 252), available at <http://www.acq.osd.mil/dpap/dars/dfars/changenotice/archive/2005/20050901/05-17347.htm>.

<sup>35</sup> Training for Contractor Personnel Interacting with Detainees, 70 Fed. Reg. at 52,033. For the broader context of these terms *see also* 48 C.F.R. Parts 232 and 252.

<sup>36</sup> 48 C.F.R. § 252.237-7019 (2004) (implementing the results of DFARS Case 2005 D007 as embodied in DFARS 252.237-7019).

quisition, Logistics, and Technology which required immediate incorporation of the new DFARS into “each affected solicitation and contract.”<sup>37</sup>

On paper, the newly implemented system represents a distinct shift in the direction of consistent standards accompanied by motivated adherence. Contractors and their employees have a major financial incentive to check the training block, then move on to the bank. Linking the training requirement to contract solicitation and management is a tangible improvement over the void that helped cause Abu Ghraib. The four star combatant commanders will implement these standards along with their other responsibilities. Nevertheless, in my view, we should expect to see a gap remaining between the intentions of the policies as drafted and their effect with regard to practices on the ground. There is no obligation for subsequent monitoring of contractor conduct. Apart from the training requirement, which many contractors will see as a necessary evil to be overcome as an unpleasant obstacle to a fat paycheck, there are no standards for administering the contractual terminology. In addition, the broad duty to train in the relevant international and domestic laws is not accompanied by any requirement for substantive consistency between combatant commands, which could lead to very different standards and interpretations across regional commands. Lastly, the DFARS clause itself implements only a portion of the broader aspirational goals found in Section 1092. This is the situation as we meet today.

Of course, the logical corollary to training contractors is the question of how contractor misconduct can be addressed. After Abu Graib, this is not a theoretical matter. The economic incentives that should motivate contractor compliance with the established legal norms are insufficient because the universe of companies and individuals who are prepared to deploy and serve alongside the deployed military force remains small. The free market cannot effectively regulate contractor conduct. Regardless of the documented crimes committed by DynCorp employees in the Balkans, for example, the firm received a contract to train Iraqi police that could be worth as much as US\$250 million.<sup>38</sup> Rather than the inherent lines of command authority, “[t]he contract [itself] is the principal legal basis for the

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<sup>37</sup> Memorandum from Kenneth J. Krieg, Under Sec’y of Def. for Acquisition, Logistics, & Tech., U.S. Dep’t of Def. to Secretaries of the Military Departments (Sept. 12, 2005), *available at* [https://acc.dau.mil/simplify/file\\_download.php/Statutory+Training+Requirements+for+Contract+Personnel+2005-1213-DPAP.pdf?URL\\_ID=84969&filename=11268857031+Statutory+Training+Requirements+for+Contract+Personnel+2005-1213-DPAP.pdf&filetype=&filesize=&name=&location=user-S/](https://acc.dau.mil/simplify/file_download.php/Statutory+Training+Requirements+for+Contract+Personnel+2005-1213-DPAP.pdf?URL_ID=84969&filename=11268857031+Statutory+Training+Requirements+for+Contract+Personnel+2005-1213-DPAP.pdf&filetype=&filesize=&name=&location=user-S/)

<sup>38</sup> P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 525 (2004) (giving an example of one of the most egregious cases of contractor misconduct, which involved a supervisor who made videotapes of himself raping women – the man was never prosecuted).

relationship between the Department of Defense and the contractor.”<sup>39</sup> The military commander accordingly has extremely limited power to compel compliance with relevant legal standards, and even less power to discipline disobedient civilians. The enforcement question is somewhat eased by the knowledge that the perpetrator should be in possession of a signed receipt acknowledging training in the relevant international and domestic norms related to the treatment of detainees. This receipt will most certainly assist prosecutors in meeting the *mens rea* requirements of the particular charged offense.

However, the current framework for charging contractor misconduct is little more than a patchwork quilt of overlapping measures. While the problem of contractor misconduct remains and perhaps grows as the stress of sustained operations mounts, the imprecise parameters of the existing enforcement framework threaten to undermine the military mission as never before. I want to close by briefly surveying the vagaries of the statutory tools for punishing civilian contractors. As already noted, military commanders cannot enforce the legal norms *vis à vis* civilian contractors. Despite the worldwide application of the Uniform Code of Military Justice (UCMJ), and the specific authority to punish individuals for disobeying the lawful orders of superior authorities, the military commander cannot punish civilian contractors unless they are “serving with or accompanying an armed force in the field.”<sup>40</sup> A formal declaration of war by Congress is the necessary legal predicate for a commander to use the UCMJ to impose criminal liability over civilian contractors.<sup>41</sup> As a result, only the Department of Justice may prosecute civilians who deploy based on a contractual relationship with the Department of Defense during the current global campaign against terrorists.

Though the Justice Department can select from a menu of statutory options created to establish criminal jurisdiction over civilian contractors, closer examination of each reveals a series of quirks and wrinkles that in the aggregate make effective enforcement difficult. The principal tool that is often mentioned is the Military Extraterritorial Jurisdiction Act (MEJA).<sup>42</sup> Congress passed MEJA in 2000 as a comprehensive effort to close the “jurisdictional gap” over civilians operating alongside military forces outside the United States.<sup>43</sup> MEJA amended the federal criminal code to provide

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<sup>39</sup> U.S. DEP'T OF DEF., INSTRUCTION 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES, para. 6.1.4 (2005) [hereinafter DOD INSTRUCTION 3020.41].

<sup>40</sup> 10 U.S.C. § 802(a)(10) (1996).

<sup>41</sup> DOD INSTRUCTION 3020.41, *supra* note 39, para. 6.3.3.

<sup>42</sup> See 18 U.S.C. §§ 3261-67 (2000).

<sup>43</sup> H.R. Rep. No. 106-778, at 5 (2000), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_reports&docid=f:hr778p1.106.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:hr778p1.106.pdf).

extraterritorial jurisdiction over persons, both United States citizens and foreign nationals, who commit criminal acts “while employed by or [otherwise] accompanying the Armed Forces outside the United States.”<sup>44</sup> MEJA can only be implemented in accordance with the extraordinarily complex and difficult procedural guidance that the Department of Defense promulgated on March 3, 2005.<sup>45</sup> MEJA has never been successfully used to prosecute a civilian contractor despite its purpose as the all-encompassing tool for regulating contractor misconduct.

Last fall, Congress broadened MEJA to remedy a major textual limitation to its original language. As enacted in 2000, MEJA applied with regard to civilians employed by the Department of Defense and to those hired pursuant to contracts awarded by the Department of Defense. The plethora of contracts awarded to other governmental agencies meant that military contractors employed by other agencies who were assigned to interrogate or handle detainees remained beyond the scope of its criminal coverage. Congress accordingly extended coverage of the act to include Department of Defense contractors as well as civilians working under any contract awarded by “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>46</sup>

Nevertheless, as currently drafted, MEJA is at best a clunky tool for punishing contractor misconduct because by its terms it applies to felonies committed “outside the United States.” As used in the statute, the geographical element “outside the United States” captures the intent of the drafters to exclude conduct committed within the special maritime and territorial jurisdiction of the United States. In other words, conduct committed within the special maritime and territorial jurisdiction of the United States is outside the scope of MEJA. This is a fatal flaw because one of the key provisions of the PATRIOT Act enacted in the wake of September 11 was to expand the special maritime and territorial jurisdiction of the United States to include the “premises of any diplomatic, consular, military, or other United States government missions or entities in foreign states, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for the purposes of those missions or entities, irrespective of owner-

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<sup>44</sup> 18 U.S.C. § 3261(a)(1) (2000). MEJA also closed the preexisting jurisdictional loophole that allowed military personnel to escape prosecution for acts committed while subject to the UCMJ simply by reverting to civilian status at the end of their service.

<sup>45</sup> U.S. DEP'T OF DEF., INSTRUCTION 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2005).

<sup>46</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088(A)(i)(II) (2004) (amending 18 U.S.C. § 3267(1)(A)).

ship.”<sup>47</sup> These are precisely the places that mistreatment of foreign nationals at the hands of civilian contractors could occur.

The amendment does specify that the expansion of special maritime and territorial jurisdiction “does not apply with respect to an offense committed by a person” described in MEJA.<sup>48</sup> This is circular reasoning that clouds the utility of MEJA. The conduct is criminal under MEJA precisely because it is defined in contradistinction to the special maritime and territorial jurisdiction. It is extremely quirky for a prosecutor to be forced to argue that a particular location in the world is within the special maritime and territorial jurisdiction for one purpose, while being simultaneously excluded for another statutory purpose. Moreover, exclusion of “an offense committed by a person” described in MEJA from the definition of special maritime and territorial jurisdiction sets up a double negative. Conduct that is within the special maritime and territorial jurisdiction is not an “offense” covered by MEJA, so a court could logically find itself foreclosed from enforcing its provisions against the described contractors. These oddities perhaps explain why MEJA has not been applied to regulate contractor misconduct to date.

Congress recognized and remedied a parallel problem in the portion of the federal criminal code implementing the Torture Convention. The Torture Convention Implementation Act made it a federal crime for any person to commit acts proscribed by the treaty “outside the United States.”<sup>49</sup> As originally enacted, the statute excluded conduct occurring within the special maritime and territorial jurisdiction of the United States, which would have effectively nullified its applicability with regard to civilian conduct in support of military operations following the PATRIOT Act amendment. This inconsistency was addressed and solved last fall by simply defining the coverage of the Torture Convention Implementation Act in geographic terms rather than legal terms.<sup>50</sup> At the same time, 18 U.S.C. § 2340A remains an unwieldy weapon for prosecutors because it requires a showing that the contractor “acted under the color of law” with the specific intent “to inflict severe physical or mental pain or suffering.”<sup>51</sup>

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<sup>47</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 377, 115 Stat. 272, 377 (2001) (adding a new paragraph 9 to the definition of special maritime and territorial jurisdiction codified at 18 U.S.C. § 7 (2005)).

<sup>48</sup> *Id.*

<sup>49</sup> 18 U.S.C. § 2340A(a) (1994).

<sup>50</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1089 (2004) (amending 18 U.S.C. § 2340(3) to define “United States” as the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.).

<sup>51</sup> 18 U.S.C. § 2340(1) (1994). The statutory definition of torture is drawn directly from the Torture Convention. *See* Torture Convention, *supra* note 10.

In the final analysis, the normal provisions of the federal criminal code seem to be the best fit for punishing civilian contractors who mistreat detainees. Every place around the world where civilian contractors are in support of military operations arguably falls within the special maritime and territorial jurisdiction under the PATRIOT ACT. The indictment and pending trial of a CIA contractor named David A. Passaro in the Eastern District of North Carolina is the first use of this expanded federal punitive power. As many of you are aware, Passaro is charged with assaulting an Afghan citizen who had voluntarily turned himself in for questioning related to a rocket attack near the Asadabad military base in Kunar province, Afghanistan. In announcing the prosecution, the Assistant Attorney General said that “[t]he criminal abuse of persons detained in the global war on terrorism will not be tolerated.”<sup>52</sup>

Thus, the problem of contractor abuse is growing larger as we deploy more and more contractors, and pay them more and more money, and put more and more pressure on them to earn that money by producing actionable intelligence. As Senator Levin noted with reference to the crimes at Abu Ghraib, “we are a Nation of laws” and the acts of misconduct by those acting on behalf of United States interests have “undermined the hard work and sacrifices of our military and tarnished the image of our armed forces.”<sup>53</sup> The operational mechanisms for inculcating and enforcing our justifiable abhorrence to torture committed in the name of the United States are only now maturing. If we fail to respond and remediate future misconduct at the hands of civilian contractors the American people will be further endangered. The United States is a nation that clings to its values and standards of decency in an otherwise hostile world, and that is why we cannot be true to our moral and legal obligations by permitting torture.

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<sup>52</sup> Press Release, U.S. Dep’t of Justice, CIA Contractor Indicted for Assaulting Detainee Held at U.S. Base in Afghanistan (June 17, 2004), *available at* [http://www.usdoj.gov/opa/pr/2004/June/04\\_crm\\_414.htm](http://www.usdoj.gov/opa/pr/2004/June/04_crm_414.htm).

<sup>53</sup> 150 CONG. REC. S10, 947 (daily ed. Oct. 9, 2004) (statement of Sen. Levin).