

**Statement of
Deborah N. Pearlstein**

**Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights, and Civil
Liberties
Committee on the Judiciary
United States House of Representatives
July 15, 2008**

**Administration Lawyers and
Administration Interrogation Rules**

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Chairman Nadler, Ranking Member Franks, members of the Subcommittee, thank you for giving me the opportunity to testify today. I would like to share with you some of what I have learned in the past several years of researching the effects of administration legal interpretation and policy toward detainees held since the attacks of September 11.

My testimony is informed by two different areas of expertise – both as a scholar of U.S. constitutional and national security law, and as a human rights lawyer. I am currently a visiting scholar at the Woodrow Wilson School of Public & International Affairs at Princeton University, where I teach and study in the fields of U.S. constitutional law, national security law, and international human rights. From 2003-2006, I served as director of the Law and Security Program at the non-profit organization Human Rights First, where I led the organization's efforts to study the impact of U.S. counterterrorism operations on human rights. Before that, I was privileged to serve as a judicial clerk to Justice John Paul Stevens at the U.S. Supreme Court, and to pursue a litigation practice in public and constitutional law at the law firm of Munger, Tolles and Olson in California.

Human Rights Effects

My work as a human rights lawyer was for an organization that had, for most of its 30-year history, pursued research, reporting, litigation and advocacy to advance the cause of human rights overseas – through efforts on behalf of dissidents in oppressive regimes, victims of crimes against humanity, and refugees seeking asylum from political violence and persecution. Human Rights First (formerly called the Lawyers Committee for Human Rights) prided itself on providing dispassionate legal analysis and pragmatic policy advice to help craft solutions to the world’s most pressing human rights problems. It was with these values that the organization decided to engage some of the administration’s most concerning post-September 11 counterterrorism efforts by creating a new program on the human rights questions presented by U.S. national security policies. I was hired in 2003 to establish and direct that program.

Over the next three and a half years, I had occasion to travel to Guantanamo Bay; meet with Iraqi and Afghan nationals who had been victims of gross abuse in U.S. detention facilities there; consult with military service-members and medical experts whose work had been touched by these events; and review hundreds upon hundreds of pages of government documents detailing our treatment of the many thousands of detainees who have passed through U.S. custody since 2002. Based on this work, and as documented in several reports, which I attach to my testimony today, it became clear to me that the United States’ record of detainee treatment fell far short of what our laws require and what our security interests demand.

Well beyond the few highly publicized incidents of torture at Abu Ghraib, as of 2006 there had been more than 330 cases in which U.S. military and civilian personnel

were credibly alleged to have abused or killed detainees (this, according to a study based almost entirely on the U.S. government's own documentation by New York University, Human Rights First, and Human Rights Watch issued in April 2006). These cases involved more than 600 U.S. personnel and more than 460 detainees held at U.S. facilities in Afghanistan, Iraq and Guantanamo Bay. They included some 100-plus detainees who died in U.S. custody, including 34 whose deaths the Defense Department reported as homicides. At least eight of these detainees were, by any definition of the term, tortured to death.¹ (My former colleagues, who continue to track these cases, tell me that the numbers of detainee deaths in custody have increased significantly since the 2006 report.)

It also became clear to me that these patterns were not merely the results of accidents or misconduct by a few wrong-doers. Rather, senior civilian legal and policy guidance was one of the key factors that led to the record of abuse just described. In addition to the testimony this Committee has already received from Philippe Sands and others on the role of direct authorization for abusive interrogation, I based my conclusion on several findings in particular, which I describe here. I should note, by way of introduction, that by focusing on these additional aspects of administration conduct, I do not mean to underemphasize the importance of direct authorizations for abusive interrogations by Mr. Rumsfeld and others. Nor do I wish to overlook the many fine military and civilian leaders who pushed back against these policies as they were being developed and carried out. What I do wish to underscore is that looking at direct orders

¹ N.Y. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE ET AL., BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006), <http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf>; HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

alone is not enough to provide a clear picture of the extent to which responsibility lies among senior administration leaders.

First, as one of the many Pentagon investigations conducted into the issue concluded in 2004,² and as the numbers just discussed confirm, the problem of detainee abuse was systemic in nature. My friend, former Navy TJAG Rear Adm. John D. Hutson put it succinctly in commenting on some of our research on detainee treatment: “One such incident would be an isolated transgression; two would be a serious problem; a dozen of them is policy.”³

Second, the pattern of abuse we documented followed a series of broad legal decisions (as other witnesses have addressed) to change what had been for decades settled U.S. law. This law, embodied in military doctrine, field manuals, and training, had unambiguously provided that detention operations in situations of armed conflict were controlled by the Geneva Conventions, including Common Article 3 of those treaties affording all detainees a right to basic humane treatment. The administration’s 2002 legal interpretation to the contrary, as the Supreme Court later made clear in *Hamdan v. Rumsfeld*, was wrong as a matter of law. It was also disastrous as a matter of policy. In suspending application of Common Article 3, the administration offered no comprehensive or even consistent set of rules to replace those it had summarily rejected, producing rampant confusion and ultimately gross abuse by front-line, inexperienced troops. Although young troops and command moved seamlessly from Afghanistan to Guantanamo Bay to Iraq (as a result of transfers and shifting troop deployments), the

² MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

³ HUMAN RIGHTS FIRST, COMMAND’S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006) (back cover blurb), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

operative detention and interrogation orders in each theater differed. The orders differed further within each detention center depending on the month, the agency affiliation of the interrogator, and the legal status assigned (which itself shifted repeatedly) to the prisoner himself. These policies and orders, and the confusion they engendered, unquestionably played a role in facilitating abuse.⁴

Finally, it is now clear that gross acts of detainee abuse continued long after senior Pentagon offices, including that of Defense Secretary Rumsfeld, knew it was happening. And yet no meaningful action was taken to stop it. By February 2004, the Pentagon had seen extensive press accounts, NGO reports, FBI memoranda, Army criminal investigations, and even the report of Army Maj. Gen. Antonio Taguba detailing detainee torture and abuse – yet essentially no investigative progress had been made by 2004 in some of the most serious cases, including the interrogation-related homicides of detainees in U.S. custody. On the contrary, shortly after the Taguba Report was leaked to the press in early May 2004, the office of then Under Secretary of Defense for Policy Douglas Feith reportedly sent an urgent e-mail around the Pentagon, warning officials not to read the report.⁵ The e-mail warned that the leak was being investigated for “criminal prosecution” and that no-one should mention the Taguba Report to anyone, including family members.⁶ This is not the response of an administration that takes human rights – or law enforcement – seriously. For far too long, the message from senior Defense

⁴ I describe the evolution of these policies (based largely on the Pentagon’s own investigations) and the effects they had in detail in my article, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006).

⁵ Michael Hirsh and John Barry, *The Abu Ghraib Scandal Cover-Up?*, NEWSWEEK, June 7, 2004, available at <http://www.newsweek.com/id/53972>.

⁶ *Id.*

Department leadership was that violators could break U.S. and international law against cruel treatment with impunity.

It is my understanding based on a Defense Department directive that throughout the period of most serious abuse, Douglas Feith had “primary staff responsibility” for overseeing the detainee program.⁷ As then Under Secretary of Defense for Intelligence Stephen Cambone testified to the U.S. Senate Armed Services Committee in 2004, “[t]he overall policy for the handling of detainees rests with the undersecretary of defense for policy, by directive.”⁸ In light of the record just described, it is difficult for me to imagine how someone in this position would not bear some responsibility for the consequences of policy in this area.

National Security Effects

As I mentioned at the outset, I am also here today as a scholar of U.S. constitutional and national security law, fields I have studied as a Supreme Court clerk, a lawyer in private practice, and now in academia. It was because of these interests that one of my earliest decisions as director of a human rights program in law and security was to engage the security community on these issues directly – to learn about the critical government challenge of counterterrorism, to inform our advocacy by working with those most expert on the issues, to consult with military and intelligence experts who could ensure that our policy understandings reflected the best technical knowledge, and (as it turned out) to cultivate relationships with colleagues keen to work with us in advancing positions of common concern. In interviewing experts in the course of our research, and

⁷ Dep’t of Defense, Department of Defense Program for Enemy Prisoners of War and Other Detainees, 4.1.1, August 18, 1994, available at <http://www.dtic.mil/whs/directives/corres/text/d23101p.txt>.

⁸ Stephen Cambone, Hearing of the Senate Armed Services Committee on the Treatment of Iraqi Prisoners, p. 11, May 11, 2004.

in convening off-the-record conferences on methods of human intelligence gathering, I was privileged to meet an array of senior retired military leaders, JAG officers, and civilian intelligence and Defense Department officials who spent their careers devoted to pursuing U.S. national security interests – and who were, overwhelmingly, deeply troubled by the administration’s approach to human intelligence collection and detainee treatment.

While I would hardly purport to speak for these professionals, I have drawn from their insights several critical points that I would like to bring to the Committee’s attention. First, multiple U.S. defense and intelligence officials have described the negative effects such practices have had on the United States’ strategic counterterrorism and counterinsurgency efforts – that is, our strategic interest in mitigating the threat of terrorism over the long term.⁹ Polling in Iraq in 2004 underscored how U.S. detention practices helped to galvanize public opinion against the United States.¹⁰ Extremist group websites invoke the image of Abu Ghraib to spur followers to action against the United States.¹¹ There is thus by now substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security.¹²

⁹ See News Transcript, Dep’t of Defense, Coalition Provisional Authority Briefing (May 10, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040510-0742.html> (Brigadier General Mark Kimmitt, spokesman for the U.S. military in Iraq, acknowledged “The evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency, that winning over Iraqis before the planned handover of some sovereign powers next month had been made considerably harder by the photos.”); see also John Hendren and Elizabeth Shogren, Shooting Spurs Iraqi Uproar, U.S. INQUIRY, L.A. TIMES, Nov. 17, 2004.

¹⁰ Edward Cody, *Iraqis Put Contempt for Troops on Display*, WASH. POST, June 12, 2004, at A1; see also John Hendren and Elizabeth Shogren, *Marine May Be Charged in the Fallouja Killing of an Unarmed Fighter: The Footage Airs on Arab TV, Further Tarnishing America’s Image*, L.A. TIMES, Nov. 17, 2004.

¹¹ Daniel Benjamin and Gabriel Weimann, *What the Terrorists Have in Mind*, N.Y. TIMES, Oct. 27, 2004, at A21.

¹² See, e.g., *Guantanamo’s Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40 (polling a bipartisan group of leading foreign policy experts and finding 87% believed the U.S. detention system had hurt more than

Second, beyond the damage these policies have done to U.S. strategic interests, it is now apparent they have also had an adverse impact on *tactical* intelligence collection – that is, short-term operational efforts geared toward producing more immediate counterterrorism gains. A comprehensive review of the effectiveness of interrogation methods by the U.S. Intelligence Science Board uncovered no study that had ever found that torture or coercion produces reliable information,¹³ raising substantial question as to whether interrogation programs produced any security benefits. But there can be little question about the security burdens of these methods. As a remarkable recent study by the Intelligence and Security Committee of the British Parliament found, widely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist suspects led the British to withdraw from previously planned covert operations with the CIA because the United States failed to offer adequate assurances against inhumane treatment and rendition.¹⁴ Along similar lines, former Navy General Counsel Alberto Mora testified to the Senate Armed Services Committee last month presenting his own list of such consequences, including his report that senior NATO officers in Afghanistan left the room when issues of detainee treatment have been raised by U.S. officials out of fear that they may become complicit in detainee abuse. As one U.S. Army intelligence officer

helped in the fight against Al Qaeda) (“Nothing has hurt America’s image and standing in the world—and nothing has undermined the global effort to combat nihilistic terrorism—than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands; if its behavior descends to the level employed by the terrorists, then we have all become them instead of us.”).

¹³ Gary Hazlett, *Research on Detection of Deception: What We Know vs. What We Think We Know*, in EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART-- FOUNDATIONS FOR THE FUTURE (U.S. Intelligence Science Board, ed., 2006), at 45, 52.

¹⁴ See Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007 at A6 (“Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said.”). See also INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, ISC 160/2007, available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf.ashx (providing the full report of the Committee).

who served in Afghanistan put the challenge perhaps most succinctly: “The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect.”¹⁵

To what extent can the administration’s approach to law be held responsible for such consequences? At the broadest level, I believe responsibility lies with those who acted on a view seemingly embodied in the Pentagon’s 2005 National Defense Strategy, that: “Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism.”¹⁶ On one reading of this statement – a reading consistent with ongoing charges of “lawfare” against lawyers seeking to enforce America’s constitutional and treaty obligations – the Constitution and many laws constraining the exercise of U.S. executive power are generally adverse to U.S. security interests. They are an obstacle to be overcome when possible, ignored when necessary.

I believe the past six years have demonstrated as an empirical matter why this view is incorrect. Indeed, our society has long thought the rule of law a good idea for reasons that are centrally relevant to the intelligence collection mission. The law can create incentives and expectations that shape institutional cultures (to help overcome, for example, the excessive institutional secrecy the 9/11 commission highlighted). The law can construct decision-making structures that take advantage of comparative institutional competencies, and maximize the chance for good security outcomes (like requiring experts to participate in the development of interrogation techniques – rather than simply

¹⁵ CHRIS MACKEY & GREG MILLER, *THE INTERROGATORS: TASK FORCE 500 AND AMERICA’S SECRET WAR AGAINST AL QAEDA* 44–45 (Little, Brown & Co. 2004).

¹⁶ Special Defense Dep’t Briefing by Under Secretary of Defense for Policy Douglas Feith (Mar. 18, 2005), available at <http://www.defenselink.mil/transcripts/2005/tr20050318-2282.html>.

substituting detailed training with “gloves off” directives). Law can provide a vehicle for building and maintaining more reliable working relationships with international partners (through mutual respect for international treaty obligations). Finally, and not least, the law sets limits on behavior and ensures accountability. If we take our national commitment against torture seriously, we cannot fail to establish such limits.

This list of law’s virtues is, of course, only the way law functions ideally; the law itself must be clearly stated and reliably enforced. But in considering the lessons of the past several years, it is to me apparent that our military and intelligence communities *needs* law to fulfill these roles. Law and legal rules must be considered an essential component of counterterrorism strategy going forward.

Recommendations

To that end, it should be clear in all U.S. practices – detention, rendition, interrogation, and trial – that there is no “intelligence collection” exception to the commitment of the U.S. government to operate under the Constitution and a system bound by the rule of law. The laws governing the treatment of U.S.-held detainees – rules already established by the Constitution, treaties, and statutes of the United States, and reflected in the U.S. Army Field Manual on Intelligence Interrogation – should be standardized government-wide. U.S. efforts to educe information from detainees, whether held by our own military or intelligence agencies, or other agents acting at the United States’ behest, should be guided by uniform rules and training programs, backed by the clear support of the law and the best evidence of what is effective. And violations of these rules should be met with swift and sure discipline proportionate to the offense. Whether to deter the kind of policy disaster we saw with Abu Ghraib, to enhance our

chances of obtaining meaningful human intelligence, or to clarify for ourselves and the rest of the world the advantages of a free and democratic society, the law is the among the most important counterterrorism weapons we have.

I am grateful for this Committee's efforts, and for the opportunity to share my views on these issues of such vital national importance.