US Human Rights Conduct and International Legitimacy

The Constrained Hegemony of George W. Bush

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Chapter 3: Torture

1 Introduction

The international legal agreements that prohibit the bodily harm defined by the term ‘torture’ are particularly stringent and well entrenched. A basic protection against torture is enshrined in the post-World War II human rights agreements, and with adoption of the 1984 Convention Against Torture, which has over one hundred state signatories who have additionally passed domestic legislation to comply with its mandate, the prohibition of the use of torture became one of the most well-established human rights norms in existence.¹

Despite this general agreement within international society against the use of torture, the Bush administration faced numerous accusations of torture, particularly in its choice to use what it called ‘enhanced interrogations’ for intelligence-gathering purposes. These accusations are particularly problematic if one considers that the United States traditionally supported the prohibition against torture to a degree over and above other human rights commitments. The Convention Against Torture was signed and ratified by Ronald Reagan and George H.W. Bush respectively,² both of whom came from a political party that has traditionally avoided ‘idealism’ in international affairs instead having a tendency to “judge international agreements and institutions as means to achieve ends.”³ This was particularly striking since the United States, which has a history of rejecting treaties that are seen to breach US sovereignty, not only agreed to the implementation of universal jurisdiction, but openly advocated for it on the basis that torture was "an offence of special international concern."⁴

¹ Hawkins, "Explaining Costly International Institutions," 783. Despite this legal entrenchment, there is some debate over the effectiveness of the Convention Against Torture in providing protection to citizens in authoritarian signatory states. In highly authoritarian states, there is some suggestion of a positive correlation between the use of torture and being a signatory to the regime. See Oona Hathaway, "Why Do Countries Commit to Human Rights Treaties?,” The Journal of Conflict Resolution 51, no. 4 (2007). Despite this possible counterintuitive effect with highly authoritarian states, there is still an overall correlation between a fall in the level of torture perpetrated by states and signing the convention.
Given the rapid transformation of US torture policy in the war on terror, from accepting it as a human rights norm even over and above long-standing issues of sovereignty and political party preferences to actively using techniques that arguably constitute torture for counterterrorism purposes, the question of whether this dramatic change might have repercussions on torture norms within wider international society is even more prescient. However, I argue that there is little evidence that the Bush administrations defection from the torture norm created a norm cascade favoring their preferences.

The analysis, however, is not completely straightforward, as on the one hand, the Bush administration’s attempt to legitimate their actions within international society did not challenge the norm against torture itself, but rather challenged what actions it forbade. The Bush administration attempted to push against the boundaries of what might or might not be considered acceptable conduct, arguing for utilizing techniques that were arguably within the penumbra of uncertainty with respect to what constitutes torture. In addition, when confronted with US human rights abuses, other members of international society expressed their horror at their conduct and called for investigations.

On the other, with the exception of states with poor human rights records, states publicly avoided calling the US conduct “torture’ and some US legitimation strategies were replicated by a small number of states. Expanding on Ann Florini’s argument concerning the purpose of international secrecy, this might indicate that the conduct of the United States for the most part was not sufficiently grievous in the eyes of other members of international society that they would risk the costs of a legitimation struggle, preferring to stay quiet unless the abuse rose to a particular threshold, such as when the Abu Ghraib scandal broke. However, by the end of the Bush administration’s second term some states were changing detainee policy to the detriment of the United States, and the Bush administration stopped all attempts to legitimate itself through appeals to international law, relying instead on domestic law. Though the United States might have been successful in reaching a state

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5 Florini, "The End of Secrecy."
of norm emergence for a period of time, there is no evidence that by the end of the Bush administration the United States had created a norm cascade that fundamentally shifted the international torture norms. In fact, as time progressed there was an entrenchment of the norm as more and more states openly opposed the Bush administration’s policies.

It is possible to read the relative silence from Western nations over whether the United States was torturing detainees, particularly when contrasted to the vocal opposition from states with poor human rights conduct, as a situation where even if the Western nations did not approve of US conduct, the US might have been able to leverage its material power to silence them. In fact, off-the-record statements from European diplomats lend some evidence that this took place. However, with respect to the book of Stephen Brooks and William Wohlforth that material advantage can generate long-term norm change, the case is far less clear, particularly as Western states became more vocal about the detainee mistreatment and began to institute detainee procedures that were disadvantageous to the United States. This, despite the potential ability of the United States to lower the amount of opposition they faced in the public realm, this ability was limited and did not produce significant norm change in the manner that Brooks and Wohlforth suggested.

The evidence supporting these claims will be examined in three sections. The first section will review the major historical events surrounding the allegations of torture and review the internal discourses of the Bush administration as a way of setting the stage for the legitimation strategies that the United States and other members of international society undertook. The next two sections will review thematically the legitimation strategies of the United States and other members of international society.

Historical Timeline and Internal US Discourses
This section examines the allegations made in the media concerning US treatment of detainees in the War on Terror to set the context in which the legitimation strategies of the United States and other actors in the international system operated. It will also provide an overview of some of the off-the-record or private statements made by government officials.
or employees that give an inside sense of the Bush administration’s attitude towards interrogations that demonstrated their intent to defect from the norm.

Domestically, the United States appeared to have undergone a domestic norm cascade with respect to torture. There was a consistent minority, sometimes a plurality, who supported the use of torture. For instance, in early October 2001, when asked whether the government should use torture, not just “rough interrogation techniques,” to extract information from detainees, 45% of the American public agreed and 53% disagreed according to a Gallup/CNN/USA Today poll. The percentage of American citizens who agreed that torture is sometimes or often permissible remained in the high thirties or low forties for the entire Bush administration, rising as high as 46% even after the majority of the torture scandals had occurred. Into the Obama administration, a 2009 poll found that 52% of Americans supported the use of torture in some circumstances. Overall, the percentage of the public that thought torture was often or sometimes justified increased over time. This public support provides context for the political decisions made by the Bush administration, as they did not face the level of domestic opposition one might expect given the status of the prohibition of torture as a fundamental norm. This gave the Bush administration more leeway to act, and presents a complication for the maintenance of the torture norm in international society.

Initial Reports of Abuse
The first reports that the United States was contemplating using harsher interrogation methods on detainees occurred only a month after 9/11, when the Federal

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6 McKeown, "Norm Regress."
Bureau of Investigation (FBI) reportedly considered the use of “truth serums’ and the CIA began to look into the use of rough interrogation techniques and high-decibel music to extract information.\textsuperscript{11} However, the first major scandal involving the suspected mistreatment of detainees began with the internment of prisoners in Guantanamo Bay, Cuba. In January 2002 the British newspaper the \textit{Daily Mail} printed photos of recently transferred detainees and argued that their treatment was not in line with the Geneva Conventions. They claimed that the detainees were “chained, manacled, hooded and even, in a few cases, sedated ... kept in cramped outdoor cages, open to the elements and to the attentions of possibly malarial mosquitoes.”\textsuperscript{12} Under this scrutiny, the United States seemed to make attempts to rectify the problems and concerns of other actors in international society. For instance, on 24 January 2002, the United States suspended transfers to Guantanamo Bay citing a lack of space. A representative of the American military was quoted as saying, “Rather than put ourselves in the position of bringing them out here and doubling them up in two per unit, which is not good from a detainee perspective or from a security perspective, we said, “Let’s hold on for a second.” An unidentified American military source in Washington suggested that this had something to do with the recent international pressure, that “they don’t want it to be perceived that we’re jamming them in there.”\textsuperscript{13}

In April 2002, CIA interrogation manuals from 1963, released for the first time in 40 years, heightened the speculation over what the United States might be doing to detainees,\textsuperscript{14} particularly as they detailed the use of pain in interrogation. This speculation was only strengthened as off-the-record comments from FBI agents suggested that they were considering the use of torture.\textsuperscript{15} The Associated Press reported that current

interrogations involved having the detainee sit or stand for long periods, depriving him of sleep, isolation and changing the temperature of the room.16 The New York Times reported that although military officials stated that torture, including physical contact, was not an option for interrogations, anything short of this would be, including preying on a prisoner’s fears, desires, sexual stereotypes and cultural sensitivities.17 The Globe and Mail reported that when the military was questioning the detainees, they use “stress-positions,” sleep deprivation, shackling, solitary confinement and humiliating living conditions.18

In addition to the general reports of mistreatment, in early 2002 the media leaked information on the treatment of “high-value” detainees, whom the United States targeted for harsher treatment. Time Magazine reported that there was at least some initial discussion within the administration about extracting information from al-Qaeda leader Abu Zubaydah through torture.19 The Age reported that it took three months of “interrogation, sleep deprivation, solitary confinement and mental torture” to break Omar al Faruq, thought to be one of Al-Qaeda’s senior operatives in Southeast Asia, who reportedly divulged the information on the Bali bombings.20 A Western intelligence official later called his treatment “not quite torture, but about as close as you can get.” It included food, sleep and light deprivation, prolonged isolation and subjecting him to temperatures that spanned from -10C to 40C.21 Both Ayub Ali Khan and Abu Zubaydah allegedly faced similar harsh treatment.22 This early behavior was later reflected in an October 2002 document released in 2008 where CIA counter-terrorism lawyer Jonathan Fredman told a meeting of intelligence and military officials gathered to extract better intelligence from detainees that

torture “is basically subject to perception,” and that “if the detainee dies, you’re doing it wrong.”

By the end of 2002, the Washington Post reported that the United States was using interrogation methods that constituted torture. It revealed that the CIA had an interrogation center in the Bagram air base in Afghanistan where al-Qaeda and Taliban suspects were kept awake for days with what were called “stress and duress” techniques. Two prisoners held at the Bagram air base in Afghanistan were killed during their interrogation, the coroner’s report stating that they were likely mistreated in a manner that led to their deaths. Both men exhibited blunt force trauma that led to their deaths by pulmonary embolism and heart attack respectively. According to Americans with direct knowledge of the general apprehension process, captives at Bagram were “softened up” by either Special Forces or Military Police who beat them before locking them up in tiny rooms. As one official who supervised the capture and transfer of suspected terrorists put it, “Let’s just say we are not averse to a little smacky face. After all, if you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”

The treatment of detainees at Guantanamo led several FBI agents to file complaints with the FBI administrators, including beatings and the exploitation of the detainees’ sexuality and religious beliefs, hooding, denial of food and water, sleep deprivation, use of loud noises and strobe lights, the use of dogs, and extreme temperatures. After the scandal at Abu Ghraib, the FBI solicited further reports from Guantanamo, where agents reported detainees being held in cells for over 24 hours, denied food and water, beaten, with many found in fetal positions after having urinated or defecated on themselves, or

26 Craig, “The Net Tightens.”
where the temperature in the room was left so hot that the detainee started pulling out his own hair.  

This type of treatment was also reflected in confidential Bush administration memos written in 2002 that were released in 2004. These memos were allegedly written for the CIA, who had been aggressively interrogating suspects since 9/11 and were concerned about potential prosecution for their actions. The first memo issued approval of a range of interrogation techniques, including changing normal sleep patterns, drastically changing the holding temperature and subjecting detainees to “sensory assault” with noise and lights. With proper permission, the detainees could be subject to psychological techniques designed to create “feelings of futility” and the use of female interrogators on male detainees. Prisoners could also be made to stand for up to four hours at a time. However, physical contact of any kind, waterboarding and the use of electricity were prohibited. Despite these limitations, the military acknowledged that two guards at Guantanamo Bay had already been disciplined for the use of excessive force against detainees. 

A second memo argued that torturing detainees “may be justified” and that international laws on the subject “may be unconstitutional if applied to interrogations.” Any government employee who engaged in torture could argue for “necessity and self-defense” to eliminate subsequent criminal liability. The President was not bound by American or international laws on torture, and that if national security was at stake, government agents who tortured prisoners would be immune from prosecution on the President’s authority. Famously, an August 2002 memo written by Alberto Gonzales argued that:

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30 Dana Priest and Joe Stephens, "Pentagon Approved Tougher Interrogations," *The Washington Post*, 9 May 2004. The exact permission that was needed for the psychological techniques is not stated in this article. In a well-known story, Donald Rumsfeld, who uses a lectern as a desk, wrote a note in the brief that permitted forced standing for up to four hours that stated, "However, I stand for eight to ten hours a day. Why is standing limited to four hours?" See ABC, "World News Tonight with Peter Jennings," 22 June 2004.
Torture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body function will likely result. If the pain is psychological ... these acts must cause long-term mental harm ... In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.33

It also noted that only those who had “specific intent” to torture would be covered – those who might have strayed into the realm of torture through overzealous questioning would not be covered under the torture laws, despite the fact that federal law does not make this distinction. This could be established by either a lack of intent to engage in torture through the reasonableness of the interrogator’s belief or through a good-faith effort to stay within the law.34 Another memo noted that because there were no long-term psychological consequences from particular techniques when the military used them against their own personnel in the SERE (survival, evasion, resistance, escape) training, these were also permissible to use on detainees, despite the fact that the SERE program does not expose soldiers to these techniques in the long term. Additionally, because there had been consultation with psychologists and interrogation experts, the memo argued that these methods could be pursued in “the presence of a good faith belief that no prolonged mental harm” would come to the detainees. Some later memos also argued that there could be no international legal consequences because the Convention Against Torture could not impose a different obligation on the United States than found in the torture statute, and ICC prosecution was not possible both because the United States had withdrawn its consent and because war crime prosecutions could only occur when the detainees are covered under the Geneva Conventions.35 Finally, even if an interrogation method did violate existing statute, it would be unconstitutional if it interfered with the President’s constitutional power to conduct a military campaign. With this legal backdrop, the CIA used waterboarding at least

35 *Torture and State Violence*, 753.
83 times in one month on Abu Zubaydah and 183 times on Khalid Shaikh Mohammed. Additionally, this legal interpretation, though dismissed by the Obama administration, was upheld in their declarations not to prosecute any agent who had acted in good faith in accordance with the memos.\textsuperscript{36}

In addition to the reports coming out of Afghanistan and the CIA, the conditions at Guantanamo Bay also generated some controversy. An anonymous source described the techniques used in Guantanamo Bay since the fall of 2002 as “extremely aggressive” and “appalling,” based on a very narrow legal definition of what constitutes torture.\textsuperscript{37} The International Committee of the Red Cross (ICRC) was the only international organization that the United States allowed at Guantanamo up to this point, but it was not given a permanent presence on the base nor was it allowed to monitor interrogations.\textsuperscript{38} Despite these problems, conditions across the camps were dissimilar. For instance, detainees held in certain facilities such as Camp Iguana had very few complaints about treatment. A 14-year-old released detainee was reported as saying, “Cuba was great! … I am lucky I went there, and now I miss it.” Others at the same facility said that the United States military treated them very well.\textsuperscript{39} In addition, conditions sometimes changed over time for the better. For instance, the ICRC noted that complaints of sexual taunting stopped during the course of 2004.\textsuperscript{40}

**Abu Ghraib and CIA Black Sites**

In April 2004 the Abu Ghraib scandal shifted the focus temporarily from Guantanamo Bay, and resulted in an internal Army investigation finding 27 people to have committed offences.\textsuperscript{41} For the first time in history, four Navy Special Forces personnel were charged with abusing the Iraqi detainee who later died in Abu Ghraib; a practice that military officials

\textsuperscript{36} Torture and State Violence, 754.
\textsuperscript{38} Frank Griffiths, "Guantanamo Suicide Attempts Continue," Associated Press Worldstream, 19 February 2003.
\textsuperscript{39} "Hell-Hole or Paradise? Detention in Guantánamo," The Economist, 20 March 2004.
\textsuperscript{40} Neil A Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," The New York Times, 30 November 2004.
\textsuperscript{41} "For Abu Ghraib," Ibid., 26 August.
noted was very unusual given that the offences were committed on the battlefield.\textsuperscript{42} The level of abuse was corroborated by an October 2003 ICRC report that stated that their representatives had witnessed prisoners being kept completely naked in empty concrete cells, having been told by the officer in charge of the interrogation that this practice was “part of the process.” When a medical delegate examined them, he found that they were “presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behavior and suicidal tendencies,” all of which appeared to have been caused by the methods and duration of detention.\textsuperscript{43}

This treatment was not limited to Abu Ghraib. An American army captain stationed at Camp Mercury near the Syrian border in Iraq, Ian Fishback, testified to Human Rights Watch that abuses occurred there both before and after the Abu Ghraib scandal broke, including pouring chemicals on prisoner’s faces, shackling in stress positions, forced exercise leading to unconsciousness and stacking prisoners in pyramids. He stated that commanders would tell army personnel that someone would be, for instance, the triggerman for an improvised explosive device, after which they would “…fuck them up. Fuck them up bad … But you gotta understand, this was the norm.” Another sergeant who remained anonymous testified that, “Everyone in camp knew if you wanted to work out your frustration you show up at the PUC [Persons Under Control] tent. In a way it was sport. One day (another sergeant) shows up and tells a PUC to grab a pole. He told him to bend over and broke the guy’s leg with a mini-Louisville slugger, a metal bat. As long as no PUCs came up dead, it happened. We kept it to broken arms and legs.”\textsuperscript{44} Furthermore, the sergeant stated that “trends were accepted. Leadership failed to provide clear guidance so we just developed it. They wanted intel [intelligence].” When Fishback consulted with a Judge Advocate General (JAG) about the abuse, the JAG told him that the Geneva Conventions are a grey areas but


that the abuse was within them.\footnote{Neil Mackay, "Torture of Iraqis Was 'Stress Relief', Say US Soldiers," \textit{The Sunday Herald}, 2 October 2005.} \textit{The New York Times} similarly reported on a Special Operations forces” prison, off-limits to the ICRC, called the Black Room at Camp Nama in Baghdad. Here detainees, under the guise of extracting information about Abu Musab al-Zarqawi, were subject to beatings with rifle butts, were yelled at and were used as targets for paintball. Signs at the facility stated, “NO BLOOD, NO FOUL,” explained by a Defense Department official as, “If you don’t make them bleed, they can’t prosecute for it.”\footnote{Eric Schmitt and Carolyn Marshall, "In Secret Unit's 'Black Room,' a Grim Portrait of U.S. Abuse," \textit{The New York Times}, 19 March 2006.}

There is some evidence that the government was aware of the problems associated with the abuse in Iraq. The CIA station at Baghdad had sent a cable to headquarters on 3 August 2003 stating that it had concerns of the aggressiveness of the techniques Special Operations Forces were using in interrogations. Five days later the CIA issued a classified directive stating that no harsh interrogations were to take place and barred them from working at Camp Nama. A year later an FBI agent sent an email about a detainee captured by Task Force 6-26, who were involved in capturing high-value targets, claiming that he had been tortured and had suspicious burn marks on his body.\footnote{Ibid.}

At the same time that the Abu Ghraib scandal broke \textit{The New York Times} reported that the CIA was using a secret set of harsh interrogation techniques, endorsed by both the Justice Department and the CIA, against high-level al-Qaeda operatives. For Khalid Shaikh Mohammed, they noted that one of the techniques used was “water boarding.’ These methods were reportedly so harsh that the FBI told their agents to leave the room lest they permanently compromise themselves for future criminal cases.\footnote{James Resen, David Johnston, and Neil A Lewis, "Harsh C.I.A. Methods Cited in Top Qaeda Interrogations," ibid., 13 May 2004.} Faced with the recent leaks and scandals, in 2005 the Pentagon approved a new policy directive that tightened controls over interrogations, ensuring that interrogators were properly trained and enacting measures through which soldiers in the field could report abuses. It specifically prohibited acts of physical or mental torture, the use of military dogs and the involvement of military
police in the interrogations.\textsuperscript{49} The 2005 Detainee Treatment Act additionally prohibited cruel, inhuman, or degrading treatment of any individual in the custody or control of the US government.\textsuperscript{50} However, \textit{The New York Times} later reported that this update to the Army’s Field Manual removed references to Article 3 of the Geneva Conventions in the section dealing with the treatment and questioning of prisoners.\textsuperscript{51}

In another attempt to demonstrate reform, the Department of Justice reportedly asked the CIA to disclose the specific interrogation methods used on senior al-Qaeda operatives in an effort to dispel the idea that Department of Justice officials authorized methods that bordered on torture.\textsuperscript{52} A military report published the following year on the abuses at Guantanamo Bay stated that though there was no evidence of physical mistreatment, several prisoners were mistreated or humiliated in other ways, perhaps illegally.\textsuperscript{53} At the same time that it was taking action against the abuses, the Bush administration also increased pressure on its allies to prevent criticism. A European diplomat was quoted in the same year as saying, “It’s very clear they want European governments to stop pushing on this. They were stuck on the defensive for weeks, but suddenly the line has toughened up incredibly.”\textsuperscript{54}

The next scandal involving allegations of torture by the United States occurred when the \textit{Washington Post} stated that the CIA was hiding and interrogating the most important al Qaeda captives in Eastern Europe, a system that was reportedly kept secret from public officials and “nearly all members of Congress charged with overseeing the CIA’s covert actions.” CIA interrogators at these sites were permitted to use “enhanced interrogation techniques” that were otherwise prohibited by law. The article noted that under American law only the president could authorize such a covert action. In total, the United States held

about 100 people across the secret bases.\textsuperscript{55} ABC News later reported that according to current and former officers, the CIA was quick to shut down the secret prisons in Poland and Romania after being discovered, moving 11 al-Qaeda suspects to secret jails in North Africa.\textsuperscript{56}

A week later, The New York Times published a classified 2004 CIA report that included a list of 10 interrogation techniques for high-value detainees, including waterboarding, that were secretly created in early 2002. It also reported a deep unease with some of the techniques that were thought to violate the Convention Against Torture. Though the report did not say that techniques such as waterboarding constituted torture, they did constitute cruel, inhuman or degrading treatment according to the convention.\textsuperscript{57} The Daily Telegraph later reported that some CIA agents were taking out legal insurance policies that would cover detainee suits for torture and human rights abuses. Normally agents would be covered under government programs, but the Telegraph reported that there was some fear that this assistance could be withdrawn in cases of serious wrongdoing.\textsuperscript{58}

The Bush Administration’s Response to the Scandals
There were further attempts at the legal clarification of torture, such as in 2005 when the Justice Department published a memo with a revised definition of torture, stating that torture, previously defined as acts which led to “organ failure, impairment of bodily function, or even death,” would now include acts that fell short of excruciating pain, including those that caused physical suffering or lasting mental anguish.\textsuperscript{59} In 2006, the Supreme Court’s Hamdan ruling rejected the structure of the Guantanamo Bay military commissions where evidence extracted through torture might have been admissible, and gave all detainees the protection of the Geneva Conventions, effectively outlawing

\textsuperscript{56} Cited in Denis Staunton, ”CIA Hurriedly Closed Down Secret Prisons in Europe – Report,” The Irish Times, 7 December 2005.
\textsuperscript{58} Francis Harris, "CIA Agents Insure against Torture Suits," The Daily Telegraph, 12 September 2006.
torture. This led the Bush administration to admit to the existence of then-secret CIA prisons. The subsequent legislative struggle over what constituted torture culminated in a compromise bill between the White House and Senate. Despite claims in August 2006 that the CIA detention centers had been shut down, the administration admitted that the sites reopened seven months later.

The administration spent the rest of its term augmenting and defending the CIA program. This included diplomatic pressure, such as when CIA Director Michael Hayden was reported to have complained privately with European diplomats about their response to the American interrogations of terrorism suspects. He argued that fewer than 100 people had been detained in CIA “black site” facilities since 2002, and, of those, fewer than half had been subjected to “alternative procedures” in their questioning. A former CIA interrogator, John Kiriakou, argued that these procedures were effective, noting that Abu Zubaida agreed to cooperate after being subjected to waterboarding, stating that “it was like flipping a switch.” Other CIA operatives claimed that Abu Zubaida was able to withstand waterboarding for much longer than other detainees, but that “a short time afterwards, in the next day or so, he told his interrogator that Allah had vis[ed] him in his cell during the night and told him to cooperate.” In February 2007 the ICRC delivered a secret conclusion to the Acting General Counsel of the CIA, stating that, “[T]he ill-treatment to which [the detainees] were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel inhuman or degrading treatment.” In July 2007 President Bush issued an executive order stating that detainees held by the CIA

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60 "What Bush Can Do, and What He Can’t," The Economist, 8 July 2006.
63 Honigsberg, Our Nation Unhinged, 184.
66 Quoted in Honigsberg, Our Nation Unhinged, 183.
would be covered by Common Article 3 of the Geneva Conventions, protecting them from torture or “humiliating and degrading” treatment, specifically avoiding “intentionally causing serious bodily injury” and “forcing the individual to perform sexual acts,” and for the CIA to adopt a separate and secret set of interrogation methods from those of the military. Privately, officials stated that waterboarding was now out of the question, but did not comment on sleep deprivation, stress positions or other methods used by the CIA in the past.  

The administration also began to discuss the legal ramifications of the CIA program. Attorney General Michael Mukasey stated that he would not allow the Justice Department to investigate whether the CIA interrogators broke torture laws through waterboarding because the Justice Department had issued secret memos stating that the President’s wartime powers made it legally permissible. He noted that if they investigated officials who took action on the basis of the memos, then others would stop trusting the legal opinions of the department. The Justice Department subsequently announced that its internal ethics office was investigating its legal approval of waterboarding. The counsel for the Office of Professional Responsibility stated that, “Among other issues, we are examining whether the legal advice contained in those memoranda was consistent with the professional standards that apply to Department of Justice attorneys.” A letter sent on 5 March 2008 from the Justice Department to Congress stated that despite the executive order that made CIA comply with international treaties against the harsh treatment of detainees, “the fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purpose of humiliation or abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act.” An anonymous official responded that, “I certainly don’t want to suggest that if there’s a good purpose you can head off and humiliate and degrade


someone ... [but] there are certainly things that can be insulting that would not raise to the level of an outrage on personal dignity.\textsuperscript{72}

This summary of the allegations and internal discourse on the treatment of detainees lends credibility that there was both an attempt to utilize interrogation techniques that could constitute torture and create a legal backdrop through which this would be possible. It shows that there were some serious problems with detainee abuse, particularly in the military and the CIA, which led to domestic legal reform in an attempt to prevent similar future conduct. However, the executive continuously resisted any restrictions on their ability to use particular interrogation techniques that might constitute torture by arguing that there could be some emergency circumstances under which it would be permissible. In other words, Congress tightened the restrictions over what the CIA and other government agencies could do normally in interrogations, but the Bush administration did not support the non-derogable character of torture, claiming alternatively that they should be able to use special techniques in a state of emergency. There is also some evidence that the United States put pressure on its allies to prevent them from speaking out against the abuses. Finally, it shows that despite its legal norm revisionism, there were still real concerns within the Bush administration that the actions taken could lead to prosecutions, at least domestically.

**United States**

**Denial, Mitigation and Secrecy**

The United States used two primary means to avoid or reduce the discussion of mistreatment allegations. The first strategy, utilized between 2002 and 2004, was to deny reports of mistreatment on the basis that there were factual errors in the statements by the media or other members of international society.\textsuperscript{73} For example, Secretary of Defense Donald Rumsfeld commented on allegations of abuse at Guantanamo Bay in early 2002, asserting, “the numerous articles, statements, questions, allegations, and breathless reports


on television are undoubtedly by people who are either uninformed, misinformed, or poorly informed." Claims of misinformation were also used between 2004 and 2006 when responding to specific reports by international organizations concerning the detainee abuse, at times adding that the allegations made by international organizations were not only false, but also politically motivated. The second means to avoid or reduce the discussion of mistreatment allegations was to appeal to the need for secrecy. When reasons were given for the secrecy, they revolved around the argument that sharing such information could aid future terrorists in developing ways to combat the interrogation techniques.

In general, discourses that involve only denial or appeals to secrecy occur because a state wants to avoid legitimation contestation from other members of international society for conduct that it suspects might be illegitimate. However, this does not necessarily absolve the state from the costs of illegitimacy. If these types of discourses occur at a time when the alleged conduct is widely viewed to be illegitimate, they will not necessarily help to prevent the state from the costs associated with the illegitimate acts as other actors in international society can still engage in legitimation discourses that place costs on the offending state. At best, they can only allow the state to avoid engaging in a legitimation discourse that might be even less successful in terms of avoiding costs and maintaining its legitimacy. However, if other states accept that US actions are not worth discussing openly,

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this strategy might be successful in alleviating short terms costs, and would also point to a relative weakness in the particular international human rights norms.\textsuperscript{77} This does not necessarily lead to an optimal long-term outcome for the Bush administration; however, as Ian Hurd argued that any type of secrecy is a high risk strategy to pursue because there are negative consequences associated with the exposure of illegitimate behavior.\textsuperscript{78} The other possibility explaining the presence of the discourse is that the state feels that it is in such a strong position, either ideationally or materially, that it can ignore other actors, refuse to engage in practices of legitimation, and absorb the costs of what others view as illegitimate actions.\textsuperscript{79}

\textbf{Moral Legitimation}

The moral legitimation strategy of the United States occurred via four major types of discourses. The first set of legitimating discourses focused on entrenching the idea of a state of exception, either through appeals to the special nature of terrorism itself or the detainees in particular. This was complimented with an argument that the state had a duty to protect its citizens under such conditions. The second discourse involved an argument that the United States did not engage in torture either because torture was abhorrent, that the treatment of the detainees was respectful, or that claims by detainees that contradicted these statements were dubious. Third, the United States promoted the idea that torture was a contested idea and suggested that particular methods that the government engaged in were not torture. Lastly, it appealed either to the character of the state or the character of the interrogators, either arguing that it is not within the US character to engage in torture, or that the interrogators were professionals with proper procedures in place so acts of torture are unlikely.

\textsuperscript{77} Florini, "The End of Secrecy," 60.
\textsuperscript{78} Hurd, "Breaking and Making Norms," 210.
\textsuperscript{79} This analysis works only under the presumption that there is an illegitimate behaviour to avoid, as one would also expect statements of denial in the case where only legitimate behaviour is taking place. Given the record of allegations outlined in the previous section, however, it is safe to argue that there were potentially illegitimate actions occurring.
State of Exception

The first moral legitimation strategy used by the Bush administration was to argue that there existed exceptional circumstances brought on by the threat of terrorism. As the state has a duty to protect its citizens, this justified the differential treatment of the detainees—treatment that was effective in combating this special threat. This type of argument could be problematic for the Bush administration because torture is defined under international law as a right to which there can be no derogations under any circumstances.\(^80\) To counter this problem, the Bush administration never directly linked the argument of exceptional circumstances to specific changes in the treatment of the detainees. Instead, it referred generally to exceptional circumstances in discussions on detainee treatment, usually in light of the potential for a future terrorist attack. This legitimation strategy allowed the Bush administration to suggest that there were extraordinary circumstances that might permit treatment that would otherwise be unacceptable without making statements that would be in conflict with its treaty obligations.

This legitimation strategy involved the use of contradictions between the prevailing norms against torture and the need to provide physical security for US citizens, in the hopes that the Bush administration could legitimate actions that fell within the penumbra of the accepted definition of torture. In Skinnerian terms, this is an attempt to associate a negatively held evaluative-descriptive term, torture, with a positively held one, security, in order to offset the negative reaction to the former. Notably it is this particular contradiction, as David Luban argued, that allows torture to be legitimated in a liberal democracy. Instead of portraying torture as the application of cruel agency, torture is committed by those who find themselves in circumstances where it is a necessary evil that they otherwise would not commit. As such, the Bush administration argued that there were exceptional circumstances that could be alleviated by state action through intelligence-gathering methods that were effective. Stressing the exceptional circumstances and particularly the effectiveness of intelligence-gathering methods, one of the most frequent

\[^80\] United Nations General Assembly, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Art. 2 §2-3.
moral discourses employed by the Bush administration, made it more likely that the discourse would be accepted in a liberal democracy under Luban’s framework.

However, the clear limitations faced by the United States that prevented it from directly applying the idea of exceptional circumstances to differential detainee conduct also demonstrates the legitimacy of the torture norm being non-derogable. As Schimmelfennig noted, when actors are faced with the external constraints of legitimate norms, they are forced to argue their case through the pre-existing legitimate standards. This lack of direct appeal means that the non-derogable nature of the torture norm under exceptional circumstances is likely one that the United States was aware of, and felt constrained sufficiently by, so that it would prefer to sidestep the issue rather than directly confront the norm.

The administration justified exceptional measures both through on appeal to the risk of future terrorist threats and the differing and exceptional nature of the detainees. In an example of the former, Vice President Dick Cheney alluded to the possibility of non-standard interrogation methods days after 9/11. He argued that, in addition to using military force against al-Qaeda,

> We also have to work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful.  

Cofer Black, the head of the CIA Counterterrorist Center, likewise stated in September 2002 that there was “operational flexibility” in dealing with detainees, noting that, “there was before 9/11, and there was an after 9/11 ... After 9/11 the gloves come off.” In 2004, military spokespersons appealed to the condition of war to legitimate alternative interrogation tactics. Speaking to reporters en route to Berlin in 2005, Secretary of State

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82 Priest and Gellman, "U.S. Decries Abuse."
Condoleezza Rice similarly asserted that the war on terrorism “is frankly challenging our norms and our practices.”\(^{84}\) The exceptional circumstances discourse appeared more frequently in 2005 and 2006, primarily through administration officials reminding their audiences of the special dangers inherent in the terrorist threat,\(^ {85}\) but declined near the end of the administration, occurring only a handful of times in 2007 and 2008.\(^ {86}\) Notably, the White House spokesperson stated in 2008 that the President could authorize further waterboarding on terrorist suspects under certain circumstances, particularly if they were to believe that an attack may be imminent.\(^ {87}\)

In addition to speaking to the general danger of terrorism, the administration also reinforced the exceptionalist discourse by making claims that the detainees were unusual or extraordinary themselves. General Richard B. Myers was quoted as saying that the detainees were so dangerous that if not properly bound during transport “they would gnaw through the hydraulic cables”\(^ {88}\) on their transport plane to make it crash. From time to time this moral aspect of the claim would be more explicit, such as when Deputy Secretary of Defense Eric Ruff stated that, “We face an enemy who has no standards, respects no laws, and whose destructive intent has no limits.”\(^ {89}\) The discourse that the detainees were

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\(^ {84}\) "US 'Does Not Condone Torture'," Canberra Times, 7 December 2005. See also CNN, "CNN Late Edition with Wolf Blitzer 13/06/2004."


'dangerous' or were 'bad people' in some way was a very common legitimation tactic for members of the Bush administration, particularly in 2005 and 2006. The discourse that the state had an overriding duty to protect its citizens only occurred between 2005 and 2006. It is possible that this was added to the Bush administration’s legitimation discourses because of the pressure from the torture scandals the Bush administration felt that it needed to make the protective role of the government over its people explicit to legitimate its actions. In effect, it used another contradiction between norms to emphasize the positive role that the state provides for its citizens in contrast to the negative conduct of torture. Again, at no point did an administration official directly tie together the duty of the state to differential interrogation techniques. Instead, these arguments only occurred while discussing these interrogation techniques. This only reinforced the claim that there was a pre-existing norm that prevented the Bush administration from explicitly tying together the protective role of the state with potentially torturous interrogation methods. In one example, the executive stated that proposed legislation to limit interrogation methods would usurp the president’s authority and, according to a White House official, interfere with the President’s ability “to protect Americans effectively from terrorist attack.” The administration would sometimes direct this discourse at other states. Condoleezza Rice used this argument during a visit to Europe in an attempt to reassure the European allies, reminding them that, “we are all working
together through law enforcement cooperation, intelligence cooperation, to try and produce the very best outcome to protect innocent citizens." She emphasized the unique nature of the situation in later statements during this trip, reminding others that the state has a duty to protect its citizens in the face of this unique danger. The Bush administration also used this discourse after the press disclosed the existence of the CIA black sites. Moreover, the administration appealed to needing the proper tools with which to conduct the war on terror a few times late in its tenure. In an interview with Matt Lauer, President Bush responded to a question concerning whether the administration had gone too far in interrogating terror suspects, stating that, “You can’t expect me, and people in this government, to do what we need to do to protect you and your family if we don’t have the tools that we think are necessary to do so.” A government spokesperson similarly stated of a bill that would limit the interrogation capabilities of the CIA that it, “would take away one of the most valuable tools on the war on terror: the CIA program to detain and question key terrorist leaders and operatives.

Having argued that there existed exceptional circumstances and that the state has the primary duty to protect its citizens, the Bush administration contended throughout its entire term that the successful interrogation of detainees was important to alleviating the security risk, again attempting to associate US interrogation techniques with security. The sheer volume of these statements reflects Luban’s book that liberal democracies can only engage in torture as an act to prevent future evils and not as punishment or terror that would be antithetical to the liberal project. Even as early as 2002 Rumsfeld responded to an

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accusation of the torture of Abu Zubaydah by arguing that: “We are very anxious to gather as much intelligence as we can. We’ve been working hard on it and we intend to continue it.” 97 Two days later he did admit during questioning from reporters that, “the overriding importance -- important issue is intelligence gathering” and that “and we intend to get every single thing out of him to try to prevent terrorist acts in the future.” 98 Between 2005 and 2006 many administration members used this discourse, particularly President Bush. 99

Once the media publicized the methods of interrogation, the Bush administration began to emphasize that the interrogations were working to produce actionable intelligence. They claimed that after almost 100 sessions with both the CIA and FBI, the interrogation of Abu Zubaydah had resulted in information that allowed the administration to pre-empt a new wave of attacks and arrest an American citizen accused of plotting to detonate a radioactive device in the United States. In addition, they claimed that Abu Zubaydah provided information about the identity of Khalid Shaikh Mohammed, one of the central planners of the 9/11 attacks. 100 The administration made widespread claims concerning the usefulness of the information gathered from the interrogations of detainees, 101 when defending the CIA secret prisons, 102 when opposing legislation that

97 U.S. Department of Defense, "DoD News Briefing 03/04/2002."
98 Ibid.
might limit the CIA interrogation program,\textsuperscript{103} to justify waterboarding,\textsuperscript{104} or defending the interrogation program more generally.\textsuperscript{105}

Torture is Abhorrent and Not Conducted

The second major discourse of the Bush administration was that torture is abhorrent, that it was not conducted by the administration, and, where it did occur, the government brought the perpetrators to justice. The discourse concerning the morally repulsive and unproductive nature of torture attempted to separate the interrogations techniques of the administration from torture. It also suggested that by upholding the moral norm against torture that the United States was not as much challenging the torture norm as it was attempting to revise the definition of torture. In other words, there was a difference between special interrogation techniques used which were both apt for the situation and effective, and torture, which was morally unjustified. However, there were far fewer statements concerning the lack of utility for torture versus its moral repulsiveness, which might indicate given the large discourse over the positive utility of the interrogation techniques that there was some belief within the administration that interrogation techniques that pushed the boundaries of what was considered torture were useful. The legitimation strategy that declared the treatment of the detainees to be respectful serves, in parallel with the discourse that torture is abhorrent, as a discourse that legitimated the


norm against torture but underpinned the Bush administration’s desire to use its alternative interrogation techniques, which were still respectful, though possibly harsher than normal.

The claim that the administration did not torture is one of the more difficult discourses to classify, as it could mean two things. First, it could indicate that the United States did not torture as defined by international standards, in which case it was a denial discourse that operated to avoid the costs associated with potentially illegitimate activity in conjunction with secrecy and claims of misinformation. Second, it could mean that the United States did not torture according to its own standards, standards that were different from those of international society, and it was attempting implicitly to legitimate these domestic standards. If this was the case, then the discourse was a legitimation strategy that attempted to normalize particular behavior that would otherwise be unacceptable. However, as there was relatively full knowledge of the techniques used in the Bush administration’s interrogation program when this discourse was prevalent, it points towards the latter interpretation that the United States was not torturing according to its own standards.

The United States also acknowledged that abuse had occurred, but claimed that these were isolated mistakes that, first, did not represent the status quo and, second, were followed either by changes in policy or additional monitoring by independent agencies. This helps to reinforce a number of issues. First, it appeals to Luban’s claim that torture in a liberal democracy can only be for the purposes of intelligence gathering, so when government operatives step beyond this, it is important to demonstrate that there are corrective mechanisms. Second, it helps to play into the previous discourses stressing that there is professionalism among the interrogators and that the United States is a liberal democracy with a particular character that abhors torture. Third, the argument that the abuse was not systematic, but was only perpetrated by lower-level agents, helps to protect the executive from issues of command responsibility.

The first discourse by the Bush administration was that the treatment of the detainees was respectful without any reference to a particular law or treaty. This discourse
was particularly prevalent when information came out that suggested that the United States was abusing prisoners in both in 2002 and in the period from 2004 to 2006. Administration officials often nuanced this discourse with the idea that detainee treatment would not necessarily be ideal given their previously legitimated status as dangerous, but would at least meet particular standards. Administration officials also tied the need for respectful treatment with the utilitarian value of this treatment in yielding intelligence. For instance, a military spokesperson stated that respectful treatment was strategic because “the more comfortable that the detainees are, we’re hoping that they’re going to be more forthcoming with information.” The Bush administration reiterated this claim in 2005 and 2006 when an Army psychologist described the accoutrements in the interrogation room at Guantanamo Bay, including a faux Persian carpet, a coffee pot, a mini-fridge and a La-Z-Boy recliner. Another official argued that, “the most common method used to interrogate detainees is to sit down with them, watch a movie and eat pizza … You build up a relationship with them and eventually they co-operate.” In 2006 and 2007, administration officials simply claimed, for the first time, that the United States does not


108 Gaskell, "Books."


torture. This switch in discourses from the respectfulness of treatment to the outright denial of torture might indicate that sufficient pressure had been placed on the Bush administration that caused it to directly confront allegations that it tortured instead of making claims about respectful treatment.

The discourse that torture was morally repulsive was prevalent particularly after the Abu Ghraib scandal. In general, from 2003 to 2006 the Bush administration declared that torture was immoral or that it did not tolerate its use. For instance, in a report to the United Nations Committee Against Torture, the United States government stated that “the United States is unequivocally opposed to the use and practice of torture ... [and that] no circumstance whatsoever, including war, the threat of war, [or] internal political stability” can justify its use. However, the Bush administration’s claims that torture is ineffective were somewhat sparser. For instance, John Ashcroft stated in front of the Senate Judiciary Committee that despite the 100-page memo that, “I condemn torture. I don’t think


it’s productive, let alone justified.”116 John Negroponte similarly stated at his confirmation hearing before the US Senate that the CIA and other agencies would be in “full compliance” with laws that ban torture as torture is not “an effective way of producing useful information.”117

The Bush administration additionally argued that although particular abuses had occurred, it had brought the perpetrators of those abuses to justice. This occurred even before the Abu Ghraib scandal, when the US military charged six soldiers with indecency and assault over transgressions at the Abu Ghraib prison. Brigadier General Mark Kimmitt stated that “less [sic] than 20” prisoners were abused, and that “Even though it was a very small number, that’s the kind of cancer you have to cut out completely.”118 He continued that, “the coalition takes all reports of detainee abuse seriously, and all allegations of mistreatment are investigated.”119 This idea that those who committed abuse would be brought to justice was particularly prevalent after the Abu Ghraib scandal.120 After the trials of these suspected personnel, the discourse transformed to focus on the claim that the Bush administration had brought those responsible to justice.121 The United States rarely addressed the systemic nature of the abuse. President Bush made statements that

116 Bender, "Ashcroft."
119 Shanker, "6 G.I.'S.”
portrayed the acts of abuse as the responsibility of one of a few bad apples, arguing how the abuse showed, “how much difference, for good or ill, the choices of individual men and women can make ... The cruelty of a few has brought discredit to their uniform and embarrassment to our country.” At other times, the administration explicitly stated that the abuse was not systemic.

The last discourse was to question the moral character of the detainees. This involved claiming that they always lied in the hopes of diminishing the legitimacy of any statements that the Bush administration might make with regard to their mistreatment. In a 2001 Senate Judiciary Committee meeting, John Ashcroft displayed what he called a “seized al Qaeda training manual,” that he described as a “how-to” instruction manual for terrorists that instructed them to, “exploit our judicial process for the success of their operations ... to concoct stories of torture and mistreatment at the hands of our officials.” This legitimation strategy was continued almost two weeks later by Paul Wolfowitz at a press conference. When asked by a reporter about the interrogation plans for 18 prisoners in US custody, he stated that “it’s a complicated business ... [because] these guys are very skilled liars. They lie shamelessly; when you catch them out in a lie, they go on to another lie.” This discourse reappeared over the debate concerning detainee suicides in 2003, when countering allegations of ill-treatment while attempting to force-feed detainees on

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125 U.S. Department of Defense, "DoD News Briefing - Deputy Secretary Wolfowitz and Gen. Pace," *Office of the Assistant Secretary of Defense (Public Affairs)*, 18 December 2001. This legitimation strategy was also used with the “Manchester manual” as evidence of their training in deceit, see Jane Mayer, "The Experiment," *The New Yorker*, 11 July 2005.
hunger strike in 2006, and to defend the allegations of mistreatment by Omar Kadr in the same year.

Contesting and Defining Torture

In addition to arguing that there was a state of emergency that required special detainee treatment, but arguing that torture was reprehensible and not conducted, the Bush administration also attempted to define what it meant by torture. First it argued that torture was a fundamentally contested concept, by focusing on the fact that there is no commonly accepted definition of torture. This further played on the doubt that there are circumstances in which one might feel morally squeamish about particular action, but where structural constraints might force one’s hand. At the same time, administration officials gave examples of acts that they would not regard as torture, sometimes being quite specific. Legally, this was an important distinction because there are interrogation techniques that may be particularly cruel or unusual, but would not rise to the level of torture and therefore have fewer legal ramifications. This legitimation strategy also set up potential contestation between the United States and other actors in international society since it put forward contestable claims regarding what actions constituted torture. It also demonstrates that there was less confidence about the nature of waterboarding, as no administration official directly came out and stated that waterboarding was not torture. Instead, they would imply that waterboarding was not torture or argue that they personally thought it was torture, but that they could not comment on its legal status.

Some administration officials set an exceptionally high bar as to what constituted torture when asked to define it. Paul Rester of the Joint Interrogation Group stated in 2006 that it was, “the deliberate and sadistic of [sic] mental or physical pain on another human being. It’s as simple as that. For the pure and simple satisfaction of doing it. It serves no

redeeming social value in eliciting concrete information."\textsuperscript{129} National Intelligence Director Mike McConnell defined torture in 2007 as “mutilation or murder or rape or physical pain, those kinds of things.”\textsuperscript{130} Administration officials would also appeal to relativism in their definition of torture. In 2005, the Director of the CIA, Porter Goss, defined torture, “in terms of inflicting pain or something like that, physical pain or causing a disability, those kinds of things that probably would be a common definition for most Americans, sort of you know it when you see it.”\textsuperscript{131} Attorney General Alberto Gonzales similarly stated at a meeting that, “If we went around this room, people would have different definitions of what constitutes torture, depending on the circumstances.”\textsuperscript{132} On the subject of waterboarding however, some administration officials claimed that it was torture to them, but would not make claims of legality beyond their personal feelings on the matter.\textsuperscript{133}

The Bush administration also argued that particular interrogation techniques did not constitute torture. Between 2003 and 2005 administration officials claimed that acceptable interrogation techniques consisted of temporary deprivations of sleep, light, food, water and medical attention, covering detainees in black hoods, having them stand or kneel in uncomfortable positions, subjecting them to extremes of hot or cold or using detainee’s children as leverage;\textsuperscript{134} interrogating them for 20 hours a day for two months, telling them that they were gay, forcing them to dance with a man, forcing them to wear a bra and forcing them to wear a leash and perform dog tricks;\textsuperscript{135} and any of the 24 interrogation procedures permitted at Guantanamo, including placing detainees in uncomfortable cells or

\textsuperscript{129} ABC News Transcripts, "ABC Nightline 26/06/2006."
\textsuperscript{130} NBC, "Meet the Press 22/07/2007."
\textsuperscript{131} ABC, "Good Morning America 29/11/2005."
\textsuperscript{132} Hentoff, "America's."
\textsuperscript{134} Craig, "The Net Tightens."
\textsuperscript{135} Dunham, "Prisoner." As the article title suggests, this treatment was later found by a military investigation to be ‘degrading,’ but not ‘torture.’
pretending that they had been flown to a Middle Eastern state for interrogation.\textsuperscript{136} They also claimed that the interrogation techniques used were not torture without disclosing what the techniques actually were. Donald Rumsfeld, when asked in 2004 whether the American troops tortured detainees, stated that, “I’m not a lawyer. My impression is that what has been charged thus far is abuse, which I believe technically is different from torture ... I don’t know if the -- it is correct to say what you just said, that torture has taken place, or that there’s been a conviction for torture. And therefore I’m not going to address the torture word.”\textsuperscript{137} Various spokespersons in the intelligence community made similar statements.\textsuperscript{138} Sometimes this argument relied on the legitimacy of domestic legal decisions, such as in an interview with Bill O’Reilly where George Tenet argued that the techniques used by his officers were legal because, “We know that the attorney general of the United States told us it was not torture.”\textsuperscript{139}

Later, the Bush administration implicitly argued that waterboarding was not torture. In 2006 Vice President Cheney was asked on a radio show whether “a dunk water [sic] is a no-brainer if it can save lives?” He responded that, “Well, it’s a no brainier for me, but I -- for a while there I was criticized as being the vice president for torture. We don’t torture. That’s not what we’re involved in.”\textsuperscript{140} This characterization of waterboarding as an obvious tactic given the circumstances, followed by a claim that the United States does not torture, suggests that waterboarding itself would not be classified as torture. In 2008, when President Bush was asked about waterboarding, he correspondingly replied that, “we, within the law, interrogate and get information,”\textsuperscript{141} suggesting again that waterboarding


\textsuperscript{140} CNN, "CNN Newsroom 27/10/2006."

\textsuperscript{141} Waugh, "Bush."
might be “within the law” without explicitly saying so. Similarly, when asked about waterboarding two days later, Stephen Bradbury, a senior official in the Office of Legal Council replied that the permitted interrogation tactics were “quite distressing, uncomfortable, even frightening,” so long as they did not cause enough severe and lasting pain to constitute torture.142 Thus, so long as waterboarding did not meet the threshold of both severity and duration outlined by the Justice Department, it could not be said to constitute torture.

Torture is not in Our Character

The last major moral discourse of the Bush administration was to argue that torture could not take place in the United States because of the character of the state or the interrogators themselves. Arguing that it is not in the character of the state to use torture attempts to leverage the legitimacy of the United States, perhaps specifically its democratic nature, in order to assuage international criticism. It can be a difficult discourse to implement, because by explicitly focusing on the legitimacy of the state or its institutions, one potentially opens the structures themselves up for criticism. Appealing to the character of the interrogators themselves is an argument related to the professionalism of the interrogators. This echoes Luban’s claim that torture cannot occur in liberal democracies if linked to cruelty. Instead, by appealing to proper procedure, tools to achieve a goal, and given the professionalism of the interrogators, the program was acting with restraint in a manner consistent with liberal values, only applying enough pressure to the detainees as was needed to prevent future terrorist attacks. The Bush administration officials further consolidated this discourse through their claims that interrogators should receive immunity from prosecution, as those interrogating detainees were not sadists, but only state agents attempting to prevent terrorism.

Concerning the legitimation strategy that torture is not part of the American character, President Bush stated as early as 2003, “No, of course not - we don’t torture people in America, and people who make that claim just don’t know anything about our

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Similarly, after the Abu Ghraib scandal, President Bush responded to the pictures of prisoner abuse in Abu Ghraib by stating, “I share a deep disgust that those prisoners were treated the way they were treated. Their treatment does not reflect the nature of the American people.” Other administration officials followed up between 2004 and 2006 by emphasizing either that Americans do not torture others and that there would be no cover-up of torture in a democratic system unlike in other more dictatorial states, that torture was not an American value, that the United States was a leader in human rights, or that the structures of liberal democratic society would bring perpetrators to justice. The United States attempted to demonstrate its character by reminding the audience of the relative openness of the state and the media. Other actors in international society, particularly the ICRC, were monitoring the United States’ conduct. This legitimation discourse was prevalent after various scandals over the torture of detainees. The United States Department of State also invited three UN experts to visit Guantanamo Bay to ensure that the detainees were treated properly, the officer in charge of media relations at Guantanamo Bay later mentioning that, “we keep inviting people down, even the people from organizations that say we torture.”

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151 Alberts, "World."
An example of the discourse stressing proper procedures occurred when a Pentagon spokesperson explained in 2004 that, “the high-level approval is done with forethought by people in responsibility, and layers removed from the people actually doing these things, so you can have an objective approach.”

Similarly, after the Abu Ghraib scandal broke, a spokesperson for the American military denied the claims that mistreatment at Guantanamo Bay was equal to that at Abu Ghraib, stating that, “From the beginning we have taken extra steps to treat prisoners not only humanely but extra cautiously.”

Several administration officials used this legitimation strategy between 2004 and 2008. Even waterboarding was defended with this discourse, the administration arguing that it was subject to “strict time limits, safeguards, [and] restrictions,” and that water had not entered the lungs of the three prisoners subjected to the practice.

The last discourse in this category was to appeal to the professionalism of the interrogators. For instance, National Security Advisor Stephen Hadley defended the program in an interview with George Stephanopoulos, stating, “this is not a program out of control. This is a program that is conducted pursuant to law by professionals who receive a lot of training.” Similarly, between 2005 and 2008, other members of the administration appealed to the professionalism of the interrogators.

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152 Priest and Stephens, "Pentagon Approved."
153 Glenn Frankel, "Three Alleged Guantanamo Abuse," ibid., 5 August.
156 Eggen, "Justice Official."
157 ABC News Transcripts, "ABC This Week 17/09/2006."
Legal Legitimation
Norm Entrepreneurship

In order to understand the legal norm entrepreneurship that the Bush administration engaged in, it is necessary to place it within the context of the previous moral argumentation. The moral legitimation strategies that stressed the state of exception due to the dangers of terrorism, the duty of the state to protect its citizens and the importance of intelligence gathering provide the backdrop to the Bush administration’s legal challenges during its tenure, both in terms of international human rights and humanitarian law. The United States attempted to act as a norm entrepreneur through both international humanitarian law, where they claimed that the detainees should receive differential treatment, and in international human rights law, where it challenged the geographical scope of applicability of the Convention Against Torture and passed legislation that gave the powers of defining torture to the executive. However, there are very few statements of either type, and no legal legitimation occurred past 2006, suggesting that the United States believed it had been unsuccessful in its attempts to innovate and had given up. This idea is reinforced by a subsequent revival of legitimation via domestic legal sources from 2006 to the end of the Bush administration’s term.

Within international humanitarian law, the administration attempted to justify differential treatment for the detainees of the war on terror through an appeal to the notion that they were not prisoners of war, but instead ‘enemy combatants’ who had fewer rights. This legal legitimation strategy correlates with the moral legitimation strategy that the detainees were morally suspect and to be treated respectfully in light of their position as particularly heinous individuals who could commit future crimes. In response to the initial Guantanamo pictures, Donald Rumsfeld insinuated that the detainees were not classified as Prisoners of War, stating that they were only, “for the most part” being treated “in a manner that is reasonably consistent with the Geneva Convention.” This was built upon by Secretary of State Colin Powell, who added that, “A certain set of criteria were applied to the terrorists at Guantanamo, that they were illegal noncombatants, and a different set of

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criteria were applied to the people that came into our custody in Iraq. That was clearly
during [a] normal conventional war and they would be treated fully within the Geneva
Convention.” However, this appeal to norm change in international humanitarian law
was limited in scope, and after 2006 there were no further attempts to legitimize a
reclassification of the detainees in the administration’s discourse concerning their proper
treatment.

A longer-lasting but equally sparse legal discourse that attempted to innovate
through the medium of international human rights law dealt with the interpretation of the
Convention Against Torture. Here the administration attempted to argue that there were
demographical limits to the applicability of the convention that rendered it inapplicable to
those held in Guantanamo Bay. In a March 2003 memo entitled “Working Group Report on
Detainee Interrogations in the Global War on Terrorism,” lawyers assessed the rules for
interrogations at Guantanamo Bay, stating that while the United States ratified the
Convention Against Torture, it did so with “a variety of reservations and understandings”
and that “the United States has maintained consistently that the covenant does not apply
outside the United States or its special maritime and territorial jurisdiction, and that it does
not apply to operations of the military during an international armed conflict.” Similarly,
in his confirmation as Attorney General, Alberto Gonzales stated that nonmilitary personnel
such as CIA agents fell outside the 2002 directive on the humane treatment of prisoners
issued by President Bush, and that the Congressional ban on cruel, unusual and inhuman
treatment of prisoners did not extend to all cases of aliens overseas.

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159 ABC, “This Week with George Stephanopoulos 13/06/2004.” [Some punctuation added to original
transcript for clarity.]
160 For two late uses of this discourse, see President Bush: Richard W Stevenson, "White House Says Prisoner
Against Torture was never intended to apply to armed conflicts: Matthew Schofield, "U.S. Denies Torture
161 Ingrid Arnesen, "Detainees Not Covered by Geneva Conventions, Report Concluded," CNN.com,
162 Dan Eggen and Charles Babington, "Torture by U.S. Personnel Illegal, Gonzales Tells Senate," The
Treatment in Accordance with the Law

At the same time that the United States was attempting to innovate within international law, it also used legitimation strategies where it claimed that it was acting within the law, both international and domestic. However, like previous legitimation strategies where it denied that torture was taking place, this was potentially norm entrepreneurial depending on whether the United States intended to make the statements to deny the actions that it was taking, or to indicate that it considered that the publicly known interrogation methods were in accordance with international law. This legitimation strategy took two general forms. The first was to use the idea of lawfulness without engaging in legal argumentation itself. The second was to engage actively in direct appeals to international or domestic law.

The general discourse of lawfulness without engaging in legal reasoning occurred throughout the administration. The use of this discourse might have indicated an unwillingness to engage directly in legal debates over the treatment of the detainees, as there was no specificity to what law it was engaging with, while still attempting to give the impression that the techniques were legal. For instance, as part of his confirmation as attorney general, Alberto Gonzales stated that “there was a desire to explore certain methods of questioning these terrorists,” though “there was concern that nothing be done that would violate the law.” At times, ‘international law’ was referenced without any clue as to what particular aspect was being discussed, such as when General Richard Meyers noted that “torture is not one of the methods that we’re allowed to use and that we use. I mean, it’s just not permitted by international law. And we don’t use it.” This type of claim

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166 ABC, "This Week with George Stephanopoulos 02/05/2008."
was more specific than appealing to the law in general, since it demonstrated an assertion that the methods used to interrogate the detainees fell specifically within international norms. Again though, because of the lack of specificity, it is difficult to know whether this was the intention, or whether they were used in the same manner as the discourses appealing to generalized ‘law.’ This problem also exists with rather frequent statements that covered a gambit of laws, mentioning both international and domestic sources. This discourse was less abstract than the previous legitimation strategy of appealing to ‘the law’ in general, and can be interpreted more as a direct claim to legality. However, in its generality it could also be understood as a means to make a discursive appeal to the law without engaging in the legality of the treatment of the detainees. In a typical example, John Ashcroft stated in front of the Senate Judiciary Committee that the administration, “has operated with respect to all of the laws enacted by the Congress, all of the treaties embraced by the president and the Congress together, and the Constitution of the United States, and no direction or order has been given to violate any of those laws.”

The second set of legal discourses directly appealed to specific international or domestic laws. These were almost certainly claims that the treatment of the detainees was legal, but were relatively rare compared to the legal discourses that did not appeal to specific laws. Some discourses explicitly cited international humanitarian law. Donald Rumsfeld responded to an accusation of the torture of Abu Zubaydah by reiterating that the United States was not torturing them: “We’re treating these people under the Geneva

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Convention and in a humane way." This appeal to international humanitarian law was particularly prevalent among military spokespersons in 2003 and 2004, but other administration officials occasionally used the discourse up to 2006. Other references were explicit in mentioning international human rights law. For instance, the State Department issued a statement on the International Day in Support of the Victims of Torture in 2002 that, “freedom from torture is an inalienable human right, and the prohibition of torture is a basic principle of international human rights law. This prohibition is absolute and allows no exception ... The United States is committed to the world-wide elimination of torture.” Some administration statements in 2005 and 2006 specifically mentioned treaties such as the Convention Against Torture, but again these were relatively rare.

Finally, the Bush administration would appeal solely to its own domestic law in responding to claims of torture or mistreatment. This had a bimodal distribution, appearing just after 9/11 and just before the end of the Bush administration’s second term. This distribution, particularly in light of how appealing to international sources of law disappeared at the end of Bush’s second term, seems to demonstrate that the administration had given up on appealing to international law and was placing increasing emphasis on domestic sources of legal legitimacy. For instance, when the United States


allowed some reporters to visit the Guantanamo facility in early February 2002 to refute the claims of torture, Brigadier General Mike Lehnert stated that “the questioning that goes on is within the bounds of normal legal procedures that are in effect within the United States.”\textsuperscript{174} Despite a discourse in 2003 that did not mention domestic law directly, but instead referred to American standards or civil rights,\textsuperscript{175} direct appeal to solely domestic law did not reappear until 2005, when the Assistant Secretary of State for democracy, human rights and labor asserted that, “torture and other forms of abuse are absolutely verboten under U.S. law and policy for all agencies, including the intelligence agencies.”\textsuperscript{176} The idea that the administration adhered to the domestic law of the United States, which prohibits torture, was used by several officials up to 2007.\textsuperscript{177} Notably, Attorney General Michael Mukasey testified before Congress that the Justice Department would not investigate whether US interrogators broke the law when they waterboarded suspected terrorists because “whatever was done as part of a CIA program, at the time that it was done, was the subject of a Department of Justice opinion through Office of Legal Counsel – and was found to be permissible under the law as it existed then.”\textsuperscript{178}

International Society
Challenging Claims
This section will review all of the arguments that the other members of international society used that did not involve the legitimation of torture. They can be broken up into two categories. The first category consisted of challenges to claims that the United States did not abuse the detainees. This discourse countered US attempts to avoid engagement in practices of legitimation with other members of international society. The second was to call for investigations or ask for additional information on the nature of the abuses. Again,

\textsuperscript{176} Stout, "U.S."
\textsuperscript{178} "CIA Chief: Waterboarding".
this brought focus on US conduct and forced the United States into a position where it needed to legitimate its behavior. Few members of international society chose to engage in these discourses, instead focusing on moral and legal legitimation strategies over the abuse that was already publicized. Of those that did, almost all were representatives of international organizations.

International organizations publicly aired their concern about the abuses allegedly conducted by the United States between 2002 and 2005, though the discourse was rather sparse in frequency. For example, UN Special Rapporteur on Torture Theo van Boven noted that, “detainees in Bagram Air Base, Afghanistan, had been subjected to ‘stress and duress’ techniques during interrogation by the Central Intelligence Agency [and in particular] had allegedly been subjected to prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, sleep deprivation and 24-hour lighting, and were kept in painful or awkward positions.” However, not all international organizations reinforced the discourse that the United States was treating detainees poorly. For instance, the head of European Union (EU) anti-terrorism, Gijs de Vries, stated in 2006 that there was no evidence to prove that the CIA had secret prisons in Europe, arguing that neither the European Parliament nor the Council of Europe investigations uncovered human rights abuses. From 2004 to 2006 international organizations tended to call for investigations of the allegations, request further information from the United States, or question whether current investigations were sufficient. A letter from the Special Rapporteur on Torture to the US government dated 22 October 2003 asked the administration for information

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regarding the alleged conditions at the military base at Guantanamo Bay. European officials similarly vowed to investigate reports of mistreatment, stating that they "have to find out exactly what is happening." This concern was extended with the revelation of CIA secret prisons. Manfred Nowak argued several times that the existence of these facilities could indicate serious violations of human rights, especially since torture is more frequent in incommunicado detentions. Louise Arbour also expressed her concern several times, writing that she held that the “disappearance’ of those in the secret detention, “in and of itself has been found to amount to torture or ill-treatment of the disappeared person or of the families and communities deprived of any information about the missing person. Furthermore, prolonged incommunicado detention or detention in secret places facilitates the perpetration of torture and other cruel, inhuman or degrading treatment.” The ICRC asked the United States that, if these facilities did exist, a representative be allowed to visit.

Moral Legitimation Strategies
Other members of international society pursued several moral legitimation strategies in response to the allegations of US treatment of detainees and US legitimation strategies. Some of the discourse supported the Bush administration by parroting back its messages. Some implicitly supported the treatment of the detainees through appealing to the danger of those held or the exceptional circumstances brought on by the security problems surrounding the terrorist threat. Others corroborated the Bush administration’s position by arguing that particular interrogation techniques did not constitute torture, that the character of the American state would not allow torture to occur, or by reminding their

publics that despite the problematic conduct, the United States was a friend and ally. These discourses point to some weaknesses in the norm as, all things being equal, a strong norm under threat will yield rather uniform responses criticizing the conduct or discourse of the offending member of international society. The majority of the moral legitimation strategies, however, involved criticizing the United States for its conduct or legitimation strategies. This included stating that they were morally appalled by the abuse, using the US conduct as a means to minimize their own human rights problems, issuing reminders that there should not be trade-offs between human rights and counterterrorism strategies, defining specific abuses as torture, and reminding the United States that it had a special role to play in the human rights system.

No evidence of Abuse

States in international society would, at times, declare that there were no problems with the human rights conduct of the United States, through declaring that there was no evidence that the detainees were being mistreated. This was a relatively rare phenomenon, indicating that very few states believed that the United States was treating the detainees in an acceptable manner, at least enough to publicly support the United States. For example, the British government defended the American treatment of the detainees in 2002, stating that among the three British detainees at Guantanamo Bay there were no complaints of ill treatment and they seemed to be in good physical health. This claim, however, was not as significant given that we know that the relative level of mistreatment was low at this time. More noteworthy were similar claims regarding there being no evidence of the mistreatment of prisoners made by Australia between 2003 and 2005, and Denmark in 2005. There was also one example of Western states attempting to avoid debate on the topic. In 2004, Cuba presented a resolution to the UN Human Rights Commission calling on the Americans to open Guantanamo Bay for inspection by the United Nations Special

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Rapporteur on Torture and the Special Rapporteur on Arbitrary Detention. Cuba also called for all European countries with citizens in Guantanamo, namely France, Sweden and Great Britain, to support the resolution. *Le Monde* reported that the Europeans were having difficulties harmonizing their position on the resolution, with Sweden, Germany and Austria leaning towards abstention to send a clear signal to the Americans, while the United Kingdom and France wanted to put forward a procedural motion in order to avoid a difficult debate. A Western diplomat admitted that, “We are in a very difficult situation ... Guantanamo is the elephant in the room, everyone knows that it is there and everyone pretends to ignore it.”

Responses to US Legitimation Strategies

Few states within international society chose to endorse key Bush administration moral legitimation strategies, suggesting a general failure in the United States to properly legitimate its preferences within international society as a whole. Despite the paucity of support, the presence of these arguments also demonstrates that a norm that should be relatively entrenched, given its legal status, has not yet reached a fully taken-for-granted status within international society. For instance, a handful of states echoed the Bush administration’s argument that either the detainees themselves or terrorism in general posed an extraordinary threat, potentially requiring new intelligence-gathering methods. There was little support for the Bush administration’s claims concerning a less permissive interpretation of torture. Only Australian Attorney-General Philip Ruddock stated that he believed the use of sleep deprivation could not constitute torture in interrogations, arguing, “some decisions will have to be taken as to what constitutes torture for the military commission process and those who are adjudicating the matter will determine that.”

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191 Bassir, "Une Résolution." Original: “Nous sommes dans une situation très difficile ... Guantanamo est comme un éléphant rose au milieu de la salle, tout le monde sait qu’il est là et tout le monde fait mine de l’ignorer.”


Other governments echoed the US discourse that the abuse was only due to the mistakes of a few people and did not represent a systemic problem. With respect to the abuse at Abu Ghraib, Britain was quick to acknowledge that “you shouldn’t judge the actions of the coalition as a whole on the basis of the actions of a few.” The British and Australians additionally argued that the United States was handling allegations of torture through proper procedures. These discourses might have been affected by the fact that many of these states were part of the “coalition of the willing” responsible for the occupation of Iraq, but given that this was not the case for Germany, it suggests that participation in the occupation was not the only causal factor that account for this discourse.

Other states within international society used legitimation strategies that referred to the nature of the state, how the United States had given them reassurances, or how they had a close relationship. These discourses attempted to legitimate particular beliefs by focusing on the intrinsic legitimacy of the United States, either in its liberal democratic nature or in their relationship to it. For instance, in 2002 German Foreign Minister Joschka Fischer warned about comparing a constitutional democracy like the United States to other torture regimes. The Prime Minister of Spain, Jose Zapatero, stated that those responsible for the crimes in Abu Ghraib should be held accountable, not for the United States in general, arguing that, “As I have confidence in US democracy ... I am sure that the perpetrators will be held responsible for their deeds.” President Bush noted in a press conference with Hungarian Prime Minister Peter Medgyessy that Medgyessy had brought up the problems of Abu Ghraib in their meeting, but noted that Medgyessy believed that

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this incident did not characterize the US or the American people. Informed by this implicit nature, many states, particularly members of the EU, discussed how the United States gave them assurances that there was no torture taking place in 2005 and 2006. For example, the British Foreign Secretary stated, “US policy is to comply with the UN Convention Against Torture.” International organizations also mentioned how the United States gave them reassurances that it was not torturing detainees. UN High Commissioner for Human Rights Sergio Vieira de Mello noted that, “the President assured me he had given instructions for torture not to be used and I take that as a very sincere, important statement.” A few also reminded the public of the good relationship they had with the United States. Germany stated that despite the abuse the US and Germany still worked as “close partners and friends,” and the Czech foreign minister Cyril Svoboda noted that trust among allies is important for an effective anti-terrorism struggle.

The United States Commits Prisoner Abuse or Torture

States with good human rights records were very cautious in their use of the word ‘torture’ when referring to the conduct of the United States, whereas those with poor records used the term frequently. States with good human rights records additionally did not call for investigations into the alleged mistreatment unless it was obvious, as in the case of Abu Ghraib. Thus, although there was only a smattering of open support for US legitimation strategies, as we saw in the last section, there was also little opposition except from states with poor human rights records. If the strength of a norm is measured by the response to it when it is under threat, as Hurd suggests, then this response was lukewarm at best. This is

201 Foreign and Commonwealth Office, "Foreign Secretary's Response."
203 "Rice Weathers CIA Storm in Germany," The Australian, 7 December 2005.
204 BBC Monitoring Europe, "Critics."
particularly the case if the United States was attempting to expand the definition of torture to include treatment that might have formerly been excluded. According to Hurd's method of determining legitimacy, if the norm had been firmly entrenched other members of international society would be expected to actively challenge this claim by stating that these actions are torture and forbidden. Despite the lack of such a discourse from states with good human rights, it is important to note that the discourses of states with poor human rights records are strategically utilized to impose costs on the United States, which would be impossible if the norm itself was relatively weak. As such, this strategic discourse lends some evidence to the fact that the norm is strong enough to be used in such a fashion.

Some states with poor human rights records argued that the United States had failed to protect human rights, while others explicitly argued that the United States had committed torture. For instance, a member of the Iranian Guardian Council, Ayatollah Ahmad Jannati, stated that the United States will "now arrest, jail and torture whoever they want and force confession from them as well as confiscating their belongings." Similarly, the Zimbabwean Minister of Information and Publicity, in responding to American criticism

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over problems in a by-election in Zimbabwe, stated that the United States had lost the moral rights to judge others because of their, “racial profiling, illegal detention and torture of inmates under the guise of fighting terrorism.”

States with good human rights records declared that torture was taking place through their legal maneuvering, such as when Spain dropped an extradition request for two British residents formerly at Guantanamo Bay after stating that the torture they had suffered there made them too weak to stand trial. In general, Spain disallowed extraditions to the United States on the grounds that legal guarantees of the state could be violated. Additionally, Dutch soldiers were ordered not to hand over Afghan captives to US forces for fear of abuse, deportation to Guantanamo or rendition. A British official told a parliamentary committee that the British government did not believe early reports of torture by the Americans, but after Abu Ghraib they became “fully aware of the risk of mistreatment associated with any operations that may result in U.S. custody of detainees.” Regarding the intelligence relationship after this point, he noted that “we still trust them, but we have a better recognition that their standards, their approaches, are different, and therefore we still have to work with them, but we work with them in a rather different fashion” without specifying what “a different fashion” entailed. Similarly, the House of Commons Foreign Affairs Committee released a report that similarly argued, “the UK can no longer rely on US assurances that it does not use torture, and we recommend that the government does not rely on such assurances in the future.” At other rare times their discourse was explicit, for instance, when the Italian Foreign Minister France Frattini claimed that the abuse at Abu Ghraib was torture. Similarly, British Foreign Secretary David Miliband argued in 2008 that, “We would never use waterboarding ... There’s absolutely no question about the UK government’s commitments in respect of torture,

208 "Zimbabwe."
which is illegal, and our definition of what torture is.”\textsuperscript{214} International organizations also issued statements explicitly warning the United States to avoid the torture of detainees.\textsuperscript{215} States with good human rights records would alternatively call for public explanations or investigations into the allegations of abuse or torture, but this occurred almost entirely in response to Abu Ghraib.\textsuperscript{216} In a rare counterexample, when the first photos from Guantanamo Bay leaked, then British Foreign Secretary Jack Straw had British representatives at Guantanamo Bay ask the Americans for an explanation.\textsuperscript{217}

Negative Moral Reactions

Many states used discourses that described their moral outrage at the abuses perpetrated by the United States. These discourses reinforced the moral prohibition against torture independently of the legitimation strategies employed by the United States. Members of international society also reminded the United States not to operate as if there were direct trade-offs between successful intelligence techniques and committing torture. However, these discourses generally occurred after large scandals like Abu Ghraib, suggesting that it is only when torture reaches a particular public frequency that other members of international society, particularly states, will react to reinforce the norm. Many states with problematic human rights records used the exposure to contrast US conduct with their own, while others directly suggested that the United States had lost legitimacy in speaking out


\textsuperscript{217} Gardiner, "Guantanamo." For a similar demand after Abu Ghraib, see Andrew Buncombe, "War on Terror: Guantanamo: Shocking Prisoner Abuses Are Revealed," \textit{The Independent}, 4 August 2004.
against other human rights abuses. In addition, and contrary to Brooks and Wohlforth, some states changed their policy regarding detainees in reaction to the detainee abuse despite the material advantage of the United States. This added to US costs and suggested that though the material advantage might have helped to mitigate adverse reactions in the short term, it did not help to legitimate the Bush administration’s position.

Many states claimed that they were shocked by the abuse, suggesting a moral prohibition against it, particularly after Abu Ghraib. For instance, the British government said it was “appalled by the photographs.” The Spanish Foreign Minister Miguel Angel Moratinos equally expressed his “total horror” over the prison photos. International organizations also expressed their disapproval over the treatment of the prisoners and the UN Special Rapporteur on torture, Theo van Boven, stated that he was, “seriously concerned about recent reports of torture and other cruel, inhuman or degrading treatment of Iraqi detainees by United States of America and United Kingdom military forces serving under the Coalition Provisional Authority.” The UN special representative in Afghanistan similarly argued about two prisoners who were reportedly tortured to death in 2002 that, “such abuses are utterly unacceptable and are an affront to everything the international community stands for in Afghanistan.” The UN High Commissioner for Human Rights, Louise Arbour, stated in 2005 that “It is appalling that even now we are entering an era


219 Brogan, “Bush’s.”


where we are even revisiting this [legal and moral] terrain ... There are no circumstances where recourse to torture can ever be justified. End of debate.\textsuperscript{224}

Many states also commented that the United States should be careful about the trade-offs between human rights and successful counterterrorism. This was entirely a European discourse in 2004 and 2005, and was exemplified by German Chancellor Angela Merkel who stated that “we have to face the challenges of the 21st century ... but we have to strike a careful balance. We have to stay in line with the laws we believe in.”\textsuperscript{225} This discourse was also found among international organizations.\textsuperscript{226} The High Commissioner on Human Rights, Mary Robinson, stated in an interview with \textit{Le Temps} that,

I am also very concerned about the treatment of prisoners Taliban or Al Qaeda detainees in Afghanistan, they are under U.S. jurisdiction or Afghanistan. According to my information, their conditions of detention are alarming: they did not have enough to eat, they do not care, prisons are overcrowded, they are confined in the darkness ... Certainly, they can be questioned, but the questioning should not lead to abuse or torture.\textsuperscript{227}

Very few spokespersons, however, argued that torture was ineffective. In a rare example, Louise Arbour wrote that, “Whatever the value of the information obtained in secret facilities – and there is reason to doubt the reliability of intelligence gained through


\textsuperscript{227} “Mary Robinson.” Original: “Je suis aussi très inquiète du traitement réservé aux prisonniers talibans ou d’Al-Qaida détenus en Afghanistan, qu’ils soient sous juridiction américaine ou afghane. D’après mes informations, leurs conditions de détention sont inquiétantes: ils n’ont pas suffisamment à manger, ils n’ont pas de soins, les prisons sont surpeuplées, ils sont confinés dans l’obscurité... Certes, ils peuvent être questionnés, mais les interrogatoires ne doivent pas déboucher sur de mauvais traitements, voire des actes de torture.” See also a latter statement by Louise Arbour: Arbour, “No Exceptions.”
prolonged incommunicado or secret detention – some standards on the treatment of prisoners cannot be set aside.\textsuperscript{228}

States with poor human rights records sometimes compared the conduct of the United States to their own conduct, suggesting that the United States did not have the moral standing to reprimand them.\textsuperscript{229} For instance, in a question from \textit{Der Spiegel} in 2007 Vladmir Putin defended his regime by criticizing the United States, arguing that “I am an absolutely true democrat. The tragedy is that I am alone. The Americans torture at Guantanamo, and in Europe the police use gas against protesters.”\textsuperscript{230} China suggested in 2004 and 2005 that the United States should focus on its own problems instead of criticizing other states.\textsuperscript{231} Some states, notably Indonesia, made statements claiming that the reaction of international society to the scandal shows how international society discriminates between developed and developing states in terms of human rights promotion.\textsuperscript{232} Many states argued that the United States had lost its moral high ground or was acting hypocritically, though most were human rights abusing states themselves. For instance, the Chinese government released a 2002 report criticizing the American human rights record, stating that the US had double standards whereby it actively engaged in “censuring other countries for their human rights situations ... [while turning] a blind eye to serious violations of human rights on its own soil.” Specifically citing the prisoners in Guantanamo Bay, it noted, “it was unclear ... what kind of treatment they would receive ... Former Al-Qaeda members were also subject to torture or other forms of maltreatment.”\textsuperscript{233} Some were quite explicit, such as an Indonesian Foreign Affairs Spokesperson who said in 2004 that “the US

\textsuperscript{228} "No Exceptions."


\textsuperscript{230} "'I Am a True Democrat'".


\textsuperscript{233} "China Releases." For later statements of a similar timbre from China see "US Report a Satire of Its Human Rights 'Promotion' in World," \textit{Xinhua}, 18 May 2004; "'Full Text'; "Text; Kahn, "In Response."
Government has no moral authority whatsoever to make any evaluations or to stand as a jury on other countries including Indonesia in regard to Human Rights Issues, let alone after the cases of torture and harassment in Abu-Ghraib prison in Iraq. This discourse was popular in states with human rights problems, but was also voiced by the Czech Republic. Some international organizations also argued that the conduct was undermining the status of the United States in the world. Another was to discuss how the strength of American democracy was being eroded. In responding to a question from Le Temps about Guantanamo, Louise Arbour stated:

What was most disturbing after the events of September 11 in the United States was to see how the administration ... abandoned what has always been its strength, namely the commitment and quality of all its institutions including the power of the judiciary. The strength of American democracy is the exceptional attributes of the three branches of governance ... Whatever the ultimate answer for the interpretation of the convention against torture and habeas corpus, what is important is that the these matters are referred to courts.

Manfred Nowak was even more explicit in his discussion of Vice President Cheney’s attempt to have the CIA excluded from a ban on torture, claiming that, “One of the cornerstones of

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237 "Il Faut Mettre Fin Au Schisme"," Le Temps, 10 December 2007. Original: “Ce qui était le plus inquiétant après les événements du 11 septembre aux Etats-Unis, c’était de voir à quel point l’administration ... abandonnait ce qui a toujours fait sa force, à savoir l’engagement et la qualité de toutes ses institutions y compris du pouvoir judiciaire. Ce qui fait la force de la démocratie américaine, c’est la qualité exceptionnelle des trois branches de la gouvernance. ... Quelle que soit la réponse ultime que j’espère positive en matière d’interprétation de la convention sur la torture et d’habeas corpus, l’important, c’est que ces tribunaux sont saisis.”
human rights is being put in question. This is undermining the reputation of the US as a democratic country based on the rule of law."^{238}

Some members of international society suggested that US conduct could have larger effects on the international human rights system. Both Germany and Austria reminded the US that it has a special role in the human rights system that torture would make problematic.\(^{239}\) Manfred Nowak claimed that, "the framework of international human rights which the UN has built up since 1945 is threatened when a democratic country undermines the total prohibition on torture. ... This should not be undermined by democratic states. The world is more dangerous: on the one hand due to terrorists, and on the other due to actions taken in the fight against terrorism."\(^{240}\) Louise Arbour similarly expressed frustration in 2007 at the US conduct, stating that "If I try to call to account any government, privately or publicly, for their human rights records, the first response is: first go and talk to the Americans about their human rights violations."\(^{241}\)

**Legal**

**Appeal to International Law**

Very few states appealed to international law in their discourse over the allegations of torture by the United States. This reflects the moral legitimation discourses where very few states with good human rights records would state that the United States engaged in torture. Some appealed to international norms,\(^{242}\) such as the government of South Africa which stated that, "the reports of abuse undermine the stated goals of the coalition forces to bring about a human rights-based culture and democracy in Iraq, under the rule of law, in line with international norms and standards."\(^{243}\) A much rarer discourse, limited to states

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\(^{238}\) Mackay, "Torture by UK."

\(^{239}\) For statements by Germany: BBC Monitoring Europe, "German Foreign Minister." Austria: "CIA Overflight."

\(^{240}\) Mackay, "Torture by UK." See also Ian Munro, "US a 'Negative Role Model' for Global Torture," *The Age*, 31 October 2007.


\(^{243}\) BBC Monitoring Africa, "South Africa."
with poor human rights records, was to challenge the United States on its legal interpretation of international humanitarian law.\textsuperscript{244} Equally as rare was bringing up humanitarian law at all, such as when the publication of the first Guantanamo photos led the British Prime Minister Tony Blair to argue that the prisoners needed to be treated in accordance with the Geneva Conventions.\textsuperscript{245} Again, this particular claim was made before the serious allegations of abuse took place, which leads to a question of why these more serious allegations did not trigger similar statements.

International organizations, on the other hand, were more active in legitimating their preferences through legal argumentation, often arguing that detainees should be treated in accordance with international law generally. Sometimes this was put in terms of International Human Rights Law, for example on 22 November 2001 the Committee Against Torture reminded state parties to the Convention Against Torture of “the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention,” including the prohibition of torture under any circumstances and the prohibition of cruel, inhuman or degrading treatment or punishment.\textsuperscript{246} UN Special Rapporteur on Torture Manfred Nowak stated similarly in 2008 that the US should give up on its defense of “unjustifiable” interrogation methods, arguing that, “this is absolutely unacceptable under international human rights law.”\textsuperscript{247} In 2007, the Committee Against Torture argued that because torture was difficult to differentiate torture from cruel, inhuman or degrading treatment or punishment, and since experience shows that the conditions that facilitate ill-treatment often facilitate torture, that the prohibition against ill-treatment is also non-derogable under the Convention.\textsuperscript{248} This shows that not only did international organizations reject Bush administration claims, but also clarified and strengthened existing international human rights law. At other times the legal legitimation strategies were based on international

\begin{footnotes}
\item[244] For statements by North Korea: BBC Monitoring Asia Pacific, "Spokesman." Iran: BBC Monitoring Middle East, "Iranian Minister."
\item[245] Gardiner, "Guantanamo."
\item[246] Flynn, "Counter Terrorism," 37.
\item[248] Committee Against Torture, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2: Implementation of Article 2 by States Parties," (2007), ¶3.
\end{footnotes}
humanitarian law, such as when the ICRC reminded the media that, “International humanitarian law bans all forms of torture absolutely, regardless of the circumstances.”

At other times, international organizations referenced ‘international law’ without specifying which type.

In addition to appealing to international law in general, international organizations used legal legitimation strategies to call on the United States to bring perpetrators of detainee abuse to justice. However, the US was also commended in the same way, such as when the Norwegian member of the Committee Against Torture, Nora Sveaass, stated that the US representatives had given “very reassuring answers” with regards to bringing those responsible to justice. International organizations used legal legitimation strategies to remind the United States about command responsibility, which could make those at the top of the chain of command responsible for allegations of torture. They also classified certain interrogation techniques conducted by the United States to be legally torture or tantamount to torture. Finally, some international organizations argued that the United States did not have the legal competence to define torture by itself.

252 Schofield, “U.S. Denies Ignoring.”
Conclusion
This chapter has examined the legitimation discourses of the Bush administration and other members of international society with respect to the United States’ treatment of detainees during the war on terror. Specifically, it asked whether the Bush administration was successful in the legitimation of its preferences and whether its materiality seemed to play a role in the practices of legitimacy.

The legitimation discourses of the Bush administration can be broken down into three overlapping periods. The first set of discourses occurred before the Abu Ghraib scandal, from 2001 to 2004. These involved several avoidance discourses, including outright denial that mistreatment was taking place, arguing that claims to the contrary were incorrect, and, early on, claiming that discussion of the exact interrogation techniques was impossible due to national security. The Bush administration stressed both the unique threat posed by terrorism and the idea that the detainees were taught to lie to the media about alleged acts of torture. At the same time, the Bush administration was also active in claiming that the detainees’ treatment reflected the standards of both international humanitarian and human rights law and, over time, became more explicit in describing the interrogation techniques involved.

Once the Abu Ghraib and CIA secret prison scandals broke, in the period between 2004 and 2006, the number of legitimation strategies increased considerably. The Bush administration ended its denial discourses but continued the idea that some claims, particularly from international organizations, might be due to misinformation or were politically motivated. It expanded its legitimacy strategy to emphasize not only the general threat caused by terrorism, but also the danger posed by the detainees themselves and the need for the state to gather actionable intelligence so the state could protect its citizens. At the same time, it argued that the treatment of the detainees was respectful, that torture was immoral, and that all perpetrators of torture either were going to be brought to justice or, later on, had been brought to justice. The Bush administration initiated legitimation strategies involving claims that the United States does not torture because it is not in its nature, that there were proper procedures in place, and that questioning was conducted by
professional interrogators. Legally, it continued to appeal both specifically to international humanitarian or human rights law, but more often to the general international legality of the acts in general.

We can see the utility of Luban’s theory of torture within liberal democracy playing out in the legitimation strategies of the United States during this period in particular, with the Bush administration’s stress on future-looking, structurally constrained action to avoid potential catastrophe. This was particularly clear in its claims of the existence the exception danger of terrorism, the danger posed by the detainees themselves, its stress on the need to gather intelligence, their argument about the professionalism of the interrogators, and its argument that when scandals did occur they were the result of a few ‘bad apples’ who were appropriately punished. These discourses, in sum, attempted to give the impression that the treatment that took place, whether considered torture or not, was not due to revenge, punishment or sadistic pleasure, but only to ensure that the greater catastrophe of a future terrorist attack could be avoided. The treatment of the detainees, where questionable, was done reluctantly by professionals who had no other choice given the circumstances.

In the last period between 2006 and 2008, almost all previous legitimation strategies fell by the wayside. The few exceptions were a continuation of the state of exception argument, though this also declined in 2007 and 2008. However, the appeal to proper procedures and the professionalism of the interrogators continued. The Bush administration for the first time claimed outright that it did not torture, but at the same time made more statements that either challenged the idea of a firm definition of torture or presented exceptionally vague definitions of what would constitute torture. From a legal perspective, all appeals to international law ended, replaced by appeals to the domestic legality of the interrogations.

Within international society, there were very few legitimation discourses in the first period, with the exception of some international organizations claiming that there were problems with the way that the United States treated its detainees, some calls for investigations, and a few states with poor human rights records using the discourse of US
torture strategically to point out US hypocrisy in the matter. It was only with the revelation of the Abu Ghraib scandal and the CIA secret detention centers that other members of international society became involved. When this occurred, many claimed to be shocked by the abuse, called for investigations, reminded the US of balancing the trade-offs between counterterrorism and human rights, and concern that this conduct was undermining US legitimacy to defend human rights, particularly given its special role in the system. The frequency of response between states and international organizations, however, varied. For the former, the span of these legitimation discourses was much more acute than the latter, with almost all discourses occurring in 2004, whereas international organizations extended these discourses from as early as 2003 to as late as 2006. Additionally, states within international society supported some of the US legitimation strategies during this period, either by reflecting on the extraordinary threat posed by terrorism, claiming that there was no systematic abuse by the US or that proper procedures were in place, or claiming that the United States had given them reassurances that torture was not taking place. On the other hand, states with poor human rights records used the opportunity to either publicize the US abuses, claim that the United States was acting hypocritically and undermining its authority to speak on human rights, or attempted to downplay their own human rights problems by comparing them to those of the United States.

During the final period between 2006 and 2008 most of these discourses disappeared, with the exception of claims that the abuse had undermined US authority, though this time mostly from states with good human rights records and international organizations. International organizations continued to press the United States to give up any justification for the interrogation techniques that it championed. Perhaps more problematically for the United States, other states within international society started changing state policy to reflect the risk of the United States torturing detainees in its custody.

Reflecting this summary of the data on the central research questions, it seems that, given the absolute legal prohibition on torture, the Bush administration was relatively successful in avoiding costs of its potentially illegitimate activities, particularly at the
beginning of the administration’s term. Whether the Bush administration was willing to act as an overt norm entrepreneur is somewhat unclear as there are only a few statements explicitly justifying its conduct in terms of the law, but this is not particularly surprising given that the norms that it would be contesting were seemingly quite entrenched within international law. This corresponds with Schimmelfennig’s idea that actors are faced with external constraints from pre-existing norms, where they are forced to argue their case through these standards if the actor believes them to be sufficiently legitimate in international society. This lack of direct appeal might indicate that the Bush administration was both aware of and felt constrained by the non-derogable nature of the torture norm.

Thus, instead of attempting to pursue overt norm innovation, during the period between 2004 and 2006 when the United States faced the most criticism from other members of international society, the Bush administration attempted a policy of justification, or where the state attempts to legitimate its preference through claiming that it is in compliance with the norms as ‘properly’ interpreted.\textsuperscript{256} As such, the Bush administration was not attempting to challenge the torture norm in its entirety, but rather redefining the meaning of torture to permit actions that would not be previously permissible.\textsuperscript{257} This explains the conduct of both claiming legality, that it was in compliance with international law, coupled with moral legitimation tactics stressing that the treatment was respectful, that torture was immoral, that it had taken steps where interrogators have crossed the line, and explicitly outlined some of the interrogation techniques used, while at the same time reminding international society of the dangers of terrorism that required good intelligence so that the state could defend its citizens. In other words, the Bush administration attempted to use the contradictions between the particular and unique situation that threatened citizens that it had a duty to protect, and pushing the boundaries of what might be acceptable interrogation techniques, all at the same time reinforcing that it does not ‘torture,’ which it declared to be immoral.

\textsuperscript{256} Morris et al., \textit{The Rise and Fall}, 5-6.
\textsuperscript{257} As is predicted in Skinner, “Some Problems,” 113-16.
This strategy seemed to have some success within international society, as very few states commented negatively on US behavior, even when reports of mistreatment surfaced. This is possibly because the conduct of the United States was not sufficiently grievous to challenge it openly given the potential costs to any state of doing so. However, given some statements reflecting on the importance of the United States in the human rights system, the silence might also have been a way of avoiding structural damage to the system through making the US a hypocritical, and therefore more illegitimate, actor. Even at the height of the scandals in 2004 and 2005, states with good human rights records made seemingly conflicting statements; first by claiming that they were shocked by the abuse and calling for investigations, second by echoing some American legitimation discourses that there was an extraordinary threat posed by terrorism, that there was no systemic abuse, or that the United States had given them reassurances. This is particularly striking given that these supportive legitimation discourses were complementary with several introduced or augmented by the United States during this middle period, namely that the detainees were particularly dangerous, that there were proper procedures and professional interrogators in place, and that the perpetrators had been brought to justice.

Despite this relative success given the purported stringency of the norm, as the term progressed there is evidence that the US ability to translate this mixed attitude into norm change was not successful. First, international organizations exhibited a fervent opposition to the possibility of torture throughout, demonstrating their utility in promoting human rights norms in the face of state behavior that was less supportive. They rarely engaged with the moral legitimation discourses of the United States, instead preferring to argue that torture was wrong, to call for investigations and occasionally to remind the United States of its special place in the international human rights system. Legally, the international organizations were more apt to challenge specific claims that the United States made, while reaffirming existing international law and calling for investigations into alleged misbehaviour. Second, there is some evidence that the United States attempted to coerce its allies into compliance based on comments made by European diplomats, suggesting that

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258 This idea is based on the general theory of secrecy in Florini, "The End of Secrecy," 60.
legitimacy alone was not effective in producing compliance. Third, some allies began to change their detainee policies at the end of the Bush administration, increasing the costs of interaction between themselves and the United States. Lastly, the United States also faced constant criticism from states with poor human rights records. While this latter observation is not the strongest evidence of the strength of the norm, it is important to note that even these actions demonstrate both that the norm was seen to be strong enough to be useful to these states, and that their discursive actions reproduced it. As a whole, the Bush administration did not seem to be successful in completely legitimating its preferences, at best reaching a position of norm emergence, but with little evidence of a norm cascade.

This increased pressure that was a result of the Bush administration’s inability to legitimate its preferences is also confirmed by its retreat from international legitimation between 2006 and 2008, where it shifted to legal arguments based almost entirely on domestic law, moved away from explicit statements about the type of interrogation techniques used to statements that focused on the ambiguity of the term torture instead, and reaffirmed repeatedly that the United States does not torture instead of claiming that the detainees were treated respectfully. This abandonment of arguments based on international law, the lack of confidence in a clear definition of torture and a direct confrontation of torture claims indicates that the United States had given up on any major attempt to reinvent the torture norm in the way that the earlier internal memos suggested, taking instead a very defensive posture. This was also reflected in an evolution of domestic legislation that strengthened the torture norm, first outlawing it in the military in 2005, and second outlawing it for CIA intelligence agents in 2007. This trend should not be overstated, because at the same time the Bush administration consistently argued that special interrogation techniques should be allowed in exceptional circumstances. Additionally, this shift to legitimating domestic legal sources might have also helped to avoid issues of command responsibility, since their very restrictive definition of torture meant that there

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As Schimmelfennig argued, even statements that uphold a norm out of complete self-interest have future restraining power as states will be held to account for any perceived hypocrisy. See Schimmelfennig, "The Community Trap," 65.
was little to no conduct that would have been out of line with the legal recommendations of the Justice Department. This is particularly the case given the public and private statements made by administration officials that suggested that the purpose of the alleged torture, that is, whether it was done to successful thwart a terrorist attack, would be taken into consideration when determining the legality of the action. At the same time, the legal restrictions imposed by Congress certainty demonstrated a change in posture from the relatively unrestrictive definition of proper conduct put forward by the Bush administration at the beginning of the war on terror. This suggests the Bush administration’s failure to legitimate its behavior in the long run created costs that it then attempted to avoid by trying to create a tolerable consensus balancing between its preferences and those of the rest of international society.

This case study also seems to indicate that material preponderance did not help to change the norm, contra Brooks and Wohlforth. However, this does not mean that US material power was of no use. On the contrary, there is some evidence that it was effective in mitigating public criticism from the allies, which might explain the dual nature of other states’ reactions in 2004, whereby states condemned the activity but were far less prone to condemn the United States itself. This is supported by a European diplomat who in 2005 claimed that the United States went on the offensive against European states in their allegations of torture. However, there were clear limitations to this strategy, as towards the end of the term even coercion or bribery were either not effective, or judged to be too costly by the United States to implement at necessary levels to ensure compliance, leading to some allies making adjustments to their policies dealing with the relationship between detainees and the United States that negatively affected cooperation. Thus, other than mitigating some of the negative responses, the material position of the United States did not seem to have much effect on its ability to legitimate its position and therein significantly change the norms of torture.