

Panel 2: How Are Laws Applied and Detention Practices Reformed?

Reforming Interrogation Practices: Alexis St. Martin and the Post-9/11 Era Opportunity

*Remarks of Eugene R. Fidell**

ON JUNE 6, 1822, A MAN NAMED ALEXIS ST. MARTIN SUFFERED A CLOSE-RANGE SHOTGUN BLAST WHILE WORKING AS A VOYAGEUR FOR THE AMERICAN FUR COMPANY ON MACKINAC ISLAND, MICHIGAN. He had the good fortune to be attended by William Beaumont (1785–1853), a surgeon in the United States Army (for whom an Army hospital in El Paso, Texas, is named to this day). Mr. St. Martin’s fist-sized wound was grievous and did not heal promptly. Instead, it remained open – this is known as a permanent gastric fistula – and permitted, apparently for the first time, a sustained direct view of the digestive process. Dr. Beaumont conducted important experiments that significantly increased scientific knowledge.¹ For his part, Mr. St. Martin lived to the ripe old age of 86, dying in Canada in 1880.

Now why in the world, you are wondering, am I going into this tale? The answer is simple: the events of the last few years have given us a comparable opportunity to see and perhaps better understand interrogation than most of us who are not in law enforcement have had in earlier times.

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The news media have paid close attention to interrogation techniques, and even casual readers of the newspapers who never served a day in either law enforcement, the military, or the intelligence agencies, at least recognize the term “Field Manual” as if it was a “Betty Crocker” cookbook or Boy Scouts publication.

We know from the “torture papers” that the Office of Legal Counsel in the last administration – or at least some of its high officials – joining forces with Vice President Dick Cheney’s staff and other allies, secretly sought to authorize, or at least immunize from prosecution, various forms of torture and other ill-treatment of detainees by erecting permissive definitions. Congress was complicit, even if it was not privy to the Yoo-Bybee memoranda of 2002–03, by including within the Military Commissions Act a provision that effectively immunized certain conduct by interrogators undertaken prior to the effective date of the MCA.

On the other hand, Congress and President Obama have both sought to freeze permissible interrogation techniques by enacting into law a mere Army “Field Manual,”² seeking to impose a

set of outer limits for interrogations – surely a first in our country – beyond the bare bones (so to speak) of the Torture Act of 2000.³ As Professor David Cole of Georgetown has reminded us, President George W. Bush vetoed a bill requiring the CIA to hew to the interrogation techniques approved by that manual.⁴ Less promisingly, Congress also conferred on President Bush the power to define what conduct represents cruel, inhuman, and degrading treatment for purposes of Common Article 3 of the Geneva Conventions⁵ – a power he promptly used to blow an Alexis-St. Martin-size hole in the Conventions.⁶

There is no doubt that this is unfamiliar territory for us and our political and legal institutions. Who would ever have thought that an on-leave law professor working in the Office of Legal Counsel would be called upon – and would accept the task – of defining torture by reference to antiseptic-sounding clinical concepts such as “organ failure.”⁷ Or that we would be faced with a bizarre arrangement under which detailed rules might be spelled out for military personnel while CIA operatives were left to their own devices?

What we have, thanks in large measure to the Freedom of Information Act⁸ and litigants willing to invoke it (and government employees willing to “leak”), is a measure of transparency far beyond what is customary in such sensitive matters. Are we learning more than we need to know? Is that even possible, given the disastrous course of the last several years under President Bush?

Personally, although I believe there are aspects to governmental activity that can and should be kept out of the public eye, my view is that the St. Martin experience we have endured on the subject of interrogation is a salutary one. We’ve seen up-close-and-personal the nasty side of interrogations. The question is what we are going to do about it.

Whether there will be a formal reckoning (in the sense of criminal prosecution) with respect to interrogation abuses, as has increasingly been suggested,⁹ remains to be seen, but even if no one is punished through the criminal process as opposed to the judgment of history, there are lessons to be learned. Congress has to be more aggressive about its oversight responsibilities. A harbinger of things to come in this regard is the report issued in late 2008 by the Senate Armed Services Committee on the treatment of detainees in United States custody. Unfortunately, much of that report remains classified, but it is to the credit of Senator Carl Levin and his colleagues that the summary¹⁰ was made public.

Impeachment is another legislative function. There was never any meaningful support for impeaching President Bush¹¹

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because of the unsettling effect of such action on the country as a whole. This was especially so as the end of his second term loomed. But what of subordinate civilian officials? Would no purpose have been served by considering the impeachment of some of them, to impose a moral stigma, for example, and bar them from holding federal office in the future?¹²

Call me naïve, but it is my conviction that despite the failing marks a number of important institutions in American government and society have earned in the past several years, “sunlight,” which Justice Brandeis aptly described as the “best of disinfectants,”¹³ has played a potent and positive role. Because abusive interrogation practices can have such disastrous effects – not only on the affected individuals, but for our country as a whole – we should resist the temptation to put this unpleasant episode behind us and to take no further, continuing interest in the subject. To do so is to invite trouble.

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Congress is aware that it has to act. Last year, Representative David Price (D-N.C.) introduced the Interrogation and Detention Reform Act of 2008¹⁴ that would make important improvements. Senator Dianne Feinstein (D-Calif.) introduced interrogation reform legislation when the 111th Congress convened last month.¹⁵ Rather than go through all of the specifics of these proposals, let me catalog some of the things we should be looking for.

First, there must be a single, known, official standard.¹⁶ We cannot have one rule for CIA interrogations and another for Defense Department interrogations. To permit competing rulebooks is to invite both chaos and evasion. To his credit, President Obama’s January 22, 2009 Executive Order on “Ensuring Lawful Interrogations”¹⁷ applies across the board, so that other agencies must use “processes that are substantially equivalent to the processes the [Army Field] Manual prescribes for the Department of Defense.” Wisely, that Executive Order also forbids any federal official who interrogates individuals in United States custody in armed conflicts to rely on any interpretation issued by the Justice Department between September 11, 2001 and January 20, 2009 with respect to federal criminal

laws, the Convention against Torture, Common Article 3 of the Geneva Conventions, or the Field Manuals. Executive Order 13491 bespeaks a measure of publicly-acknowledged personal involvement on the part of the Chief Executive that is not only a sharp break from the immediate past but also important for the signal it sends throughout the government and to interested foreign observers.

Second, we should never lose sight of the golden rule. Our concern at all times must be to maintain the high ground not only because of our national moral compass, but also because the tables may well be turned if and when our personnel fall into enemy hands. This is an easy rule to remember and apply.

We must be prepared for detentions, rather than have to make up the rules, and search for legal authority, in real time.

We must insist on training. Interrogation may be a science; it is certainly an art.¹⁸ It makes no more sense to undertake an interrogation program without trained interrogators than it does to send into battle infantrymen who lack training in the use of their weapons.

We must recognize that interrogation of persons in American custody is an enormous responsibility – and an inherently governmental function. This means it is a function that must only be performed by government personnel, not contractors.¹⁹ Only in this way can we hope to ensure the necessary accountability.

We must demand that judge advocates and civilian government attorneys remain proactively mindful of their professional responsibilities to be a check-and-balance rather than simply members of a priesthood with power to pronounce a benediction over a course of action charted by others who may be more senior but less scrupulous. What broad “lessons learned” in the area of professional responsibility are being studied at the services’ law schools in Charlottesville, Newport, and Montgomery?

We must be willing to punish our own, *wherever they may be in the official pecking order*, or put on the public record cogent reasons – if such there be – for not doing so. To the extent that dereliction of duty may be at issue, or oppression of prisoners, President Obama should consider increasing the potential maximum punishments under military law, as he has the power to do under Article 56 of the Uniform Code of Military Justice.²⁰ This

will not have any impact on past conduct, of course,²¹ but it is a way of sending a message as to the seriousness with which we view these matters and thereby deterring future violations.

We must be alert to migration. On one level this means that activities undertaken in some other setting – Survival, Evasion, Resistance, and Escape (“SERE”) training, for example – are not necessarily a reliable indicator of permissible conduct in actual detention operations. On another level, before an interrogation regime is permitted to migrate (as in the ill-advised decision to send Maj. Gen. Geoffrey D. Miller to Iraq to “GITMO-ize” the detention facility at Abu Ghraib), it must be vetted carefully and at the highest levels to ensure that it comports with national policy.

Finally, perhaps the most potent check on torture and abusive interrogation is the power to resign. The grim history of the last administration demonstrates that internal “push back” can be effective. But at times more than that may be required. We do not have a robust tradition of resignation-on-principle in this country, but if we continue to find ourselves at or over the limits, then I hope we will have officials with the moral courage to “put their stars on the table” and resign – perhaps noisily, perhaps quietly.²² I hope that those who resisted the worst in the Bush Administration will serve as role models. **HRB**

ENDNOTES: Reforming Interrogation Practices

¹ WILLIAM BEAUMONT, *EXPERIMENTS AND OBSERVATIONS ON THE GASTRIC JUICE AND THE PHYSIOLOGY OF DIGESTION* (1838).

² U.S. Army Field Manual 34-52, *Intelligence Interrogation* (Sept. 28, 1992). The current version is U.S. Army Field Manual 2-22.3, *Human Intelligence Collector Operations* (Sept. 6, 2006).

³ 18 U.S.C. §§ 2340 *et seq.*

⁴ David Cole, *What to do About the Torturers?*, N.Y. REV. OF BOOKS, Jan. 15, 2009, at 20, 24.

⁵ Military Commissions Act of 2006, § 6(a)(3), 120 Stat. 2600, 2632 (2006).

⁶ See Ex. Order No. 13,440, 72 FED. REG. 40,707 (2007), *revoked*, Ex. Order No. 13,491, § 1, 74 FED. REG. 4893 (2009).

⁷ See Memorandum from Jay S. Bybee, Ass’t Att’y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002, in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 114, 119, 126 (2004).

⁸ 5 U.S.C. § 552.

⁹ E.g., Jordan J. Paust, *Banning Torture is Not Enough*, JURIST, <http://jurist.law.pitt.edu/forumy/2009/01/banning-torture-is-not-enough.php> (last visited Feb. 14, 2009); Human Rights First, *How to End Torture and Cruel Treatment: Blueprint for the Next Administration* 7 (rev. Nov. 2008) (recommending that next president direct efforts by Justice Department “to investigate individuals and hold them accountable for authorizing or engaging in abuse of prisoners”).

¹⁰ Sen. Comm. on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody*, 110th Cong., 2d Sess. (2008).

¹¹ Rep. Dennis J. Kucinich (D-Ohio) favored impeaching President Bush and Vice President Cheney, but had no allies. His own 2008 presidential campaign never gained traction.

¹² U.S. Const. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . .”).

¹³ LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT* 62 (1914, 1933 ed.).

¹⁴ H.R. 7056, 110th Cong., 2d Sess. (2008).

¹⁵ The Lawful Interrogation and Detention Act of 2009, S. 147, 111th Cong., 1st Sess. (2009).

¹⁶ See H.R. 7056, *supra*, § 401 (requiring president to establish uniform standards for interrogation of persons in custody or under effective control of United States). Among the “Principles for Effective Interrogation” developed in 2008 by a group of 15 senior interrogators and former intelligence officials at a forum hosted by Human Rights First was this: “There must be a single well-defined standard of conduct across all U.S. agencies to govern the detention and interrogation of people anywhere in U.S. custody, consistent with our values as a nation.”

¹⁷ Ex. Order No. 13,491, *supra*, § 3(b), 74 Fed. Reg. at 4894.

¹⁸ See generally Intelligence Science Board, *Educating Information, Interrogation: Science and Art, Foundations for the Future, Phase I Report* (Nat’l Defense Intelligence College Dec. 2006).

¹⁹ See H.R. 7056, *supra*, § 402; S. 147, *supra*, § 5 (prohibiting interrogation by CIA contractors); see also Joel Brinkley, *The Reach of War: Intelligence Collection; Army Policy Bars Interrogations by Private Contractors*, N.Y. TIMES, June 12, 2004 (discussing memorandum from Patrick T. Henry, Ass’t Sec’y of the Army (Manpower and Reserve Affairs), to Ass’t Dep. Chief of Staff for Intelligence, Dec. 26, 2000 (Exemption No. 2000-0004)).

²⁰ 10 U.S.C. § 856. The Bush Administration disregarded my suggestions to increase the punishment for dereliction of duty and cruelty and oppression. See Eugene R. Fidell, *Accountability, Transparency and Public Confidence in the Administration of Military Justice*, 9 GREEN BAG 2d 361, 365 & nn.26-29 (2006); Eugene R. Fidell, *Uphold the Geneva Conventions and the Convention against Torture*, in Open Soc’y Inst. & Security & Peace Inst., *Restoring American Leadership: Cooperative Steps to Advance Global Progress* 29-30 (2005).

²¹ U.S. Const. art. I, §§ 9, cl. 3, 10, cl. 1 (prohibition on ex post facto legislation); see generally *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

²² See generally Eugene R. Fidell, *Where is the Courage to Walk Away?*, NAVY TIMES, Aug. 22, 2005, at 46.