

## Senate Defies Cheney, Passes Anti-Torture Measure

by Edward Spannaus

In an overwhelming—and thoroughly bipartisan—rebuff of Dick Cheney and the White House, 90 U.S. Senators, including 46 Republicans, voted to reiterate the U.S. ban on torture, and to establish uniform standards for the treatment of prisoners in the war on terrorism. In adopting the anti-torture amendment on Oct. 5, the Senate defied a threat of a Presidential veto which had been delivered personally by Vice President Cheney, who had claimed that any assertion of Congressional authority would “interfere” with the President’s conduct of the war on terror.

This, despite the fact that the United States Constitution, in Article I, Section 8, clearly confers upon Congress the authority, and the obligation, to “make rules concerning Captures on Land and Water.”

The White House veto threat, delivered personally by Dick Cheney in July, was repeated again prior to the Senate vote. According to the *New York Times*, the White House tried to pressure sympathetic Senate Republicans to work against the “McCain amendment,” so named for its primary sponsor, former POW Sen. John McCain (R-Ariz.). But whereas in July, under pressure from Cheney, Senate Majority Leader Bill Frist (R-Tenn.) had pulled the Defense Authorization bill from the Senate floor in order to block the amendments, this time, Armed Services Committee chairman Sen. John Warner (R-Va.) succeeded in obtaining Frist’s backing for the measure.

The McCain amendment contains two provisions. One requires all U.S. military personnel to abide by the Army’s Field Manual on Interrogations, and the other reiterates the U.S. ban on “cruel, inhumane, and degrading treatment” (the language of the Geneva Conventions), by any U.S. agency.

### ‘Rooted in History’

As has been pointed out throughout the whole torture controversy, especially by military writers and witnesses, the United States military has had a long and proud tradition of humane treatment of prisoners, which has been sullied by the policies promulgated by civilians in the White House and the Pentagon in this Administration.

This came up repeatedly during the recent debate on the McCain amendment. During the Oct. 5 floor debate, Sen. Richard Durbin (D-Ill.), stated:

“The prohibition on torture and other cruel treatment is deeply rooted in the history of America. . . . These principles have even guided us during the times of great national testing. During the Civil War, President Abraham Lincoln asked Francis Lieber, a military law expert, to create a set of rules to govern the conduct of U.S. soldiers in the Civil War. The result was the Lieber Code. It prohibited torture and other cruel treatment of captured enemy forces. It really was the foundation for the Geneva Conventions.” (See *Documentation*.)

### Powell Intervention Crucial

A letter from former Secretary of State, and former Chairman of the Joint Chiefs of Staff, Colin Powell, was read on the Senate floor by McCain, in which Powell noted that the Senate has a constitutional obligation to regulate the treatment of prisoners captured in war. “I also believe the world will note that America is making a clear statement with respect to the expected future behavior of our soldiers,” Powell said. “Such a reaction will help deal with the terrible public diplomacy crisis created by Abu Ghraib.”

In December of 2001, through January 2002, Powell had



NATO Photo

*Gen. Colin Powell (ret.) declared his strong support for the Senate amendment respecting the conduct of U.S. troops with respect to detainees.*

waged a bitter fight against the forces in the Administration, centered in Vice President Cheney's office, who were determined to scrap the Geneva Conventions and give the Administration a free hand to abuse and torture prisoners.

In his letter, Powell also aligned himself with 28 other retired senior military officers who signed a letter to McCain supporting his amendment. The military signers include 25 retired flag officers, such as former CentCom Commander Gen. Joseph Hoar, and former Chairman of the Joint Chiefs of Staff Gen. John Shalikashvili; the three other signers are former Vietnam prisoners of war. (See *Documentation*.)

That 46 Republican Senators voted for the McCain amendment, far exceeded the expectations of the initial supporters of the provision. In the end, there were only nine who could be mustered to oppose the measure. Dubbed the "Torture Nine" by some, these were Stevens (Ak.), Sessions (Ala.), Allard (Colo.), Bond (Mo.), Coburn (Okla.), Cochran (Miss.), Cornyn (Tex.), Inhofe (Okla.), and Roberts (Kan.).

## New Torture Disclosures

The latest revelations on prisoner abuse and torture, which figured prominently in the Senate debate, came from a U.S. Army Captain in the 82nd Airborne Division, Capt. Ian Fishback (a West Point graduate), and from two Army sergeants.

Their accounts first came to light in a Human Rights Watch report made public on Sept. 23. That report, based on extensive interviews of Fishback and the sergeants, shows that the abuse and torture of prisoners captured in Afghanistan and Iraq was widespread, and was carried out in the belief that this was U.S. policy coming from the top levels of the Bush Administration. The abuse of prisoners at Forward Operating Base Mercury, near Fallujah, which is described in the interviews, was very similar to what had gone on at nearby Abu Ghraib, even including photographs. "They [the soldiers at Abu Ghraib] were getting in trouble for the same things we were told to do, so we destroyed the pictures," one soldier had told the captain.

Fishback describes one category of beatings and abuse of

prisoners which was just done for the amusement of soldiers, and another category of abuse and torture which was ordered by Military Intelligence interrogators in order to "soften up" prisoners for interrogation. Significantly, although he doesn't note this, this pattern of abuses began about one month after former Guantanamo commander Gen. Geoffrey Miller was sent to Iraq in late August and early September of 2003 by Defense Secretary Donald Rumsfeld, and by Rumsfeld's Undersecretary for Intelligence, Stephen Cambone, for the express purpose to "Gitmo-ize" prisoner operations in Iraq.

Captain Fishback told Human Rights Watch that he knew that he was witnessing violations of the Geneva Conventions, "but I was under the impression that that was U.S. policy at the time." But after the Abu Ghraib scandal broke in the Spring of 2004, and Defense Secretary Rumsfeld testified before the Congress that the U.S. followed the Geneva Conventions in Iraq, and followed the "spirit" of the Geneva Conventions in Afghanistan, Fishback began seeking clarification, according to a letter he later sent to Senators Warner and McCain.

Fishback went up his chain of command, and was told to keep quiet and not to jeopardize his career. It was only after he wrote to Warner and McCain that the Army opened an investigation, and then, according to interviews Fishback made to the press on Sept. 27, the investigation seemed to be targeting those who came forward to expose prisoner abuse, rather than looking up the chain of command to those who authorized it.

"I'm convinced this is going in a direction that's not consistent with why we came forward," Captain Fishback told the *New York Times*. "We came forward because of the larger issue that prisoner abuse is systemic in the Army. I'm concerned this will take a new twist, and they'll try to scapegoat some of the younger soldiers. This is a leadership problem."

It has been reported that Fishback is being subjected to continuous threats from the Pentagon leadership and some fellow officers—including accusations that he is siding with the enemy and working for their cause—and that he could be subjected to charges.

A number of Democratic Senators, as well as Republican McCain, quoted from the letter to McCain from Fishback during the floor debate. But shamefully, the neo-confederate Sen. Jeff Sessions (R-Ala.), mocked and ridiculed Fishback's account. McCain then took to the floor to defend Fishback and to denounce Sessions' attacks on him. "Captain Fishback is a noble, brave young American," McCain said. "He does not deserve to be disparaged on the Senate floor by any Senator, and the Senator from Alabama owes him an abject and deep apology."

The next battle will be in the House-Senate conference committee, since the House Defense Appropriations bill does not include the anti-torture amendments. But, the highly respected senior Democrat on the House Appropriations Defense Subcommittee, Rep. John Murtha (D-Pa.), has announced his support of the McCain amendment, and with

the demise of House Majority Leader Tom DeLay (R-Tex.), prospects look much brighter than a few weeks ago for passage.

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## Documentation

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# Military Leaders Back Anti-Torture Bill

*This letter, from 28 distinguished retired military leaders, was posted on Sen. John McCain's (R-Ariz.) website, dated Oct. 3.*

Dear Senator McCain:

We strongly support your proposed amendments to the Defense Department Authorization bill concerning detainee policy, including requiring all interrogations of detainees in DOD custody to conform to the U.S. Army's Field Manual on Intelligence Interrogation (FM 34-52), and prohibiting the use of torture and cruel, inhuman and degrading treatment by any U.S. government agency.

The abuse of prisoners hurts America's cause in the war on terror, endangers U.S. service members who might be captured by the enemy, and is anathema to the values Americans have held dear for generations. For many years, those values have been embodied in the Army Field Manual. The Manual applies the wisdom and experience gained by military interrogators in conflicts against both regular and irregular foes. It authorizes techniques that have proven effective in extracting life-saving information from the most hardened enemy prisoners. It also recognizes that torture and cruel treatment are ineffective methods, because they induce prisoners to say what their interrogators want to hear, even if it is not true, while bringing discredit upon the United States.

It is now apparent that the abuse of prisoners in Abu Ghraib, Guantánamo and elsewhere took place in part because our men and women in uniform were given ambiguous instructions, which in some cases authorized treatment that went beyond what was allowed by the Army Field Manual. Administration officials confused matters further by declaring that U.S. personnel are not bound by longstanding prohibitions of cruel treatment when interrogating non-U.S. citizens on foreign soil. As a result, we suddenly had one set of rules for interrogating prisoners of war, and another for "enemy combatants"; one set for Guantánamo, and another for Iraq; one set for our military, and another for the CIA. Our service members were denied clear guidance, and left to take the blame when things went wrong. They deserve better than that.

The United States should have one standard for interrogat-

ing enemy prisoners that is effective, lawful, and humane. Fortunately, America already has the gold standard in the Army Field Manual. Had the Manual been followed across the board, we would have been spared the pain of the prisoner abuse scandal. It should be followed consistently from now on. And when agencies other than DOD detain and interrogate prisoners, there should be no legal loopholes permitting cruel or degrading treatment.

The amendments proposed by Senator McCain would achieve these goals while preserving our nation's ability to fight the war on terror. They reflect the experience and highest traditions of the United States military. We urge the Congress to support this effort.

Sincerely,

Gen. Joseph Hoar, USMC (ret.)

Gen. John Shalikashvili, USA (ret.)

Gen. Donn A. Starry, USA (ret.)

Lt. Gen. Ron Adams, USA (ret.)

Lt. Gen. Robert G. Gard, Jr., USA (ret.)

Lt. Gen. Jay M. Garner, USA (ret.)

Vice Adm. Lee F. Gunn, USN (ret.)

Lt. Gen. Claudia J. Kennedy, USA (ret.)

Vice Adm. Al Konetzni, USN (ret.)

Lt. Gen. Charles Otstott, USA (ret.)

Vice Adm. Jack Shanahan, USN (ret.)

Maj. Gen. Eugene Fox, USA (ret.)

Maj. Gen. John L. Fugh, USA (ret.)

Rear Adm. Donald J. Guter, USN (ret.)

Maj. Gen. Fred E. Haynes, USMC (ret.)

Rear Adm. John D. Hutson, USN (ret.)

Maj. Gen. Melvyn Montano, ANG (ret.)

Maj. Gen. Robert H. Scales, USA (ret.)

Maj. Gen. Michael J. Scotti, USA (ret.)

Brig. Gen. David M. Brahms, USMC (ret.)

Brig. Gen. James Cullen, USA (ret.)

Brig. Gen. Evelyn P. Foote, USA (ret.)

Brig. Gen. David R. Irvine, USA (ret.)

Brig. Gen. Richard O'Meara, USA (ret.)

Brig. Gen. John K. Schmitt, USA (ret.)

Brig. Gen. Stephen N. Xenakis, USA (ret.)

Ambassador/Former Vietnam POW Douglas "Pete" Peterson, USAF (ret.)

Former Vietnam POW Commander Frederick C. Baldock, USN (ret.)

Former Vietnam POW Commander Phillip N. Butler, USN (ret.)

## Support From Colin Powell

*Senator McCain read the following letter from Gen. Colin L. Powell (USA, ret.), former Secretary of State and former Chairman of the Joint Chiefs of Staff, on the Senate floor on Oct. 5.*

Dear Senator McCain:

I have read your proposed amendment to the Defense Appropriations Bill concerning the use of the Army Field Manual as the definitive guidance for the conduct of our troops with respect to detainees. I have also studied your impressive statement introducing the amendment.

I fully support this amendment. Further, I align myself with the letter written to you by General Shalikashvili and a distinguished group of senior officers in support of the amendment.

Our troops need to hear from the Congress, which has an obligation to speak to such matters under Article I, Section 8 of the Constitution. I also believe the world will note that America is making a clear statement with respect to the expected future behavior of our soldiers. Such a reaction will help deal with the terrible public diplomacy crisis created by Abu Ghraib.

Sincerely,  
Colin Powell

## Scott Horton: Shirking Responsibility

*The following are excerpts from a Sept. 25, 2005 article by international law expert Scott Horton, posted on the blog "Balkinization," maintained by Prof. Jack Balkin of Yale University, balkin.blogspot.org.*

"Command is a sacred trust. The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority. Nowhere else does a boss have to answer for how subordinates live and what they do after work."

—Dep't of the Army, Field Manual 22-100, sec. 1-61.

With a sense of timing that can only be described as exquisite, the Secretary of the Army, Francis J. Harvey, and the Army Chief of Staff, General Peter J. Schoomaker, have published a defense of the Army's handling of the torture and prisoner abuse scandal in the National Review Online, just as another, particularly gruesome, chapter in this seemingly endless saga breaks across the front pages of the nation's newspapers. . . . We are rapidly arriving at the point where the denials of military senior brass and political appointees who supervise them can only be viewed either as shirking responsibility or as confirmation that torture and abuse are official U.S. policy. It is hard to judge which of these alternatives is more harmful to the nation and its armed forces. . . .

### Army Values

The Army is the oldest of the nation's institutions, antedating the Presidency, the Congress and the courts. It played a unique role in defining and unifying the nation and in fixing

the traditions with which the country has been associated since its founding. First among these may well be the tradition of humane warfare, articulated by George Washington after the Battle of Trenton, December 24, 1776. "Treat them with humanity," Washington directed with respect to the captured Hessians. He forbade physical abuse and directed the detainees be quartered with the German-speaking residents of Eastern Pennsylvania, in the expectation that they would become "so fraught with a love of liberty, and property too, that they may create a disgust to the service among the rest of the foreign troops, and widen the breach which is already opened between them and the British." (Things unfolded exactly as Washington envisioned.) Washington also set the rule that detainees be given the same housing, food and medical treatment as his own soldiers. And he was particularly concerned about freedom of conscience and respect for the religious values of those taken prisoner. "While we are contending for our own liberty, we should be very cautious of violating the rights of conscience in others, ever considering that God alone is the judge of hearts of men, and to Him only in this case are they answerable." I provide a more extensive account of Washington's doctrine on treatment of detainees and its philosophical underpinnings here.

Under Abraham Lincoln, in 1863, Washington's orders were expanded in the world's first comprehensive codification of the laws of war, General Orders No. 100 (1863), also called the Lieber Code. [See below.] Among other points, Lincoln clarified what was meant by "humane" treatment. It could under no circumstance comprehend torture, he directed in article 16.

This tradition has been a source of pride for our nation for over 200 years. The pressing question today is whether this legacy has been betrayed by those in the highest positions of our Government and in the Department of Defense. The evidence to this effect is now overwhelming. . . .

### Washington's Admonition

The nation's first commander-in-chief had a firmer and more comprehensive grip on these issues than his successor 230 years later. Washington engaged in no equivocation on the concept of treatment of those under our power. He ordered that "should any American soldier be so base and infamous as to injur[e] any [of them]. . . I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require. Should it extend to death itself, it will not be disproportional to its guilt at such a time and in such a cause." Any officer who failed to heed this direction, he said, would bring "shame, disgrace and ruin to themselves and their country." Departure from this injunction was a grave mistake.

If Harvey and Schoomaker are right, and a "small number" have failed to live up to the values that Washington and Lincoln fixed, it is increasingly clear that that "small number" sits at the top of the chain of command, not at the bottom. The time has come for accountability.

# Lincoln's Regulations For Armies in the Field

*"Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, promulgated as General Orders No. 100 by President Abraham Lincoln, 24 April 1863.*

Article 1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its Martial Law.

Art. 4. Martial Law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not Martial Law: it is the abuse of the power which that law confers. As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity - virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

Art. 11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers. . . .

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

Art. 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Art. 16. Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Art. 29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

Art. 56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

Art. 68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.

Art. 71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

Art. 75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

Art. 80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

Art. 148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.