

8-17-2012

## Torture, Truth and Intelligence: The United Kingdom's War on Terror

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### Recommended Citation

Spindel, Jennifer (2012) "Torture, Truth and Intelligence: The United Kingdom's War on Terror," *Colgate Academic Review*: Vol. 9, Article 3.

Available at: <http://commons.colgate.edu/car/vol9/iss1/3>

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## Jennifer Spindel '11 – Social Science

*Torture, Truth and Intelligence: The United Kingdom's War on Terror*

### Abstract

Is it the duty of government to protect its citizens and their society at all costs? Does a government have the right to torture in the name of protecting its citizens? This paper examines the ways in which assumptions and rationalizations about torture have shaped counter-terrorism tactics in the United Kingdom. At issue are questions of epistemology; questions that become even more complicated in the violence-filled and politically charged War on Terror. How does the theoretical possibility of torture become a viable counter-terror tactic? Using official government documents, texts from non-governmental organizations, scholarly works and documents obtained through WikiLeaks, this paper analyzes how and why torture became a technique relied upon by United Kingdom Security Services. Beginning with a discussion of the various definitions of torture, this paper presents a chronology of counter-terrorism practices in the United Kingdom as a way to discover how intelligence-gathering practices and interrogation techniques have changed over time. This paper concludes that torture is not an effective method for extracting accurate information and offers an explanation for why the United Kingdom has continued to rely on this ineffective practice. Finally, this paper argues that a new method for gathering, evaluating and transmitting information related to terrorism needs to be developed in order to prevent future attacks.

### Acronyms

**CIA** – Central Intelligence Agency (United States)  
**CIDT** – Cruel, Inhuman, and Degrading Treatment  
**ECHR** – European Convention on Human Rights  
**FCO** – Foreign & Commonwealth Office  
**FBI** – Federal Bureau of Investigation (United States)  
**ISC** – Intelligence and Security Committee  
**ISI** – Inter-Services Intelligence (Pakistan)  
**JCHR** – Joint Committee on Human Rights  
**MP** – Member of Parliament  
**NGO** – Non-governmental organization  
**SIAC** – Special Immigration Appeals Court  
**SIS** – Secret Intelligence Service (MI6)  
**TBS** – Ticking bomb scenario  
**UNCAT** – United Nations Convention Against Torture

This is not the time to falter. This is the time for this house, not just this government or indeed this prime minister, but for this house to give a lead, to show that we will stand up for what we know to be right, to show that we will confront tyrannies and dictatorships and terrorists who put our way of life at risk, to show at the moment of decision that we have the courage to do the right thing.

Tony Blair<sup>1</sup>

## Introduction

### British Intelligence Gathering Since 9/11

On 18 March 2003 then-Prime Minister Tony Blair spoke to the House of Commons to urge the members to vote on a resolution that would commit the United Kingdom to war in Iraq. In this speech he argued that it was the duty of the United Kingdom to confront tyranny, and to do the “right thing” by confronting terrorists who sought to put an end to liberal democracies like the United Kingdom. In November 2010 *The Guardian* published a series of articles documenting a secret interrogation site in Iraq where prisoners were allegedly tortured with the full knowledge of the British government. The newspaper referred to the site as the UK’s Abu Ghraib. In light of these allegations, one wonders what Blair meant when he encouraged the United Kingdom to do the “right thing” by entering the War on Terror that had been declared by the United States.

Is it the duty of government to protect its citizens and their society at all costs? Does a government have the right to torture in the name of protecting its citizens? When a government engages in torture, it must rationalize this decision, making it appear as the last resort of a state trying to protect its citizens and society. The types of rationalizations and the assumptions that must be held by government actors in order for torture to enter the government discourse are just as important as actual instances of torture. Do governments engage in torture because they assume it extracts truthful information that can help prevent loss of life? Or is torture rationalized in a different way?

Sixty-seven British citizens lost their lives in the 11 September 2001 attacks on the World Trade Center and Pentagon in the United States. These deaths are the largest loss of British life due to an act of terrorism (Hewitt, 2005, 30). In light of these attacks, the British government undertook a reexamination of its intelligence-gathering techniques and interrogation practices in an effort to prevent further loss of British life in terror attacks, either at home or abroad. These new strategies for combating international terrorism were impacted and shaped by assumptions and rationales about the efficacy and purpose of torture.

Different actors in government had different beliefs about the efficacy and purpose of torture based on both shared and divergent assumptions and rationales about torture. The ways in which government actors talked about torture is best understood and analyzed by distinguishing between the different branches of the UK government. For the purposes of this paper, four branches of government have been differentiated:

- (1) The executive branch composed of the Office of the Prime Minister and the Foreign & Commonwealth Office

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<sup>1</sup> Speech given to the House of Commons on 18 March 2003, *The Guardian* online, <http://www.guardian.co.uk/politics/2003/mar/18/foreignpolicy.iraq1>

- (2) The security services, composed of the Secret Intelligence Service (MI6), the Security Service (MI5) and the armed forces
- (3) Parliament
- (4) The Judiciary

Because a government is composed of different actors and institutions, this separation enables an analysis of intra-governmental discourse as a way to more closely examine the assumptions and rationales about torture.

This paper is divided into two basic parts, each separated into different sections in order to situate the reader inside the discourse about torture and intelligence. The first part of the paper begins with a section that clarifies and disaggregates the various terms used by government actors. This exercise is undertaken in order to demonstrate how actors and agencies can use the same term in a multitude of ways. The second section offers a discussion of the three arguments through which torture enters government discourse. The rationales and assumptions that underlie these arguments are explained and the implications for counter-terrorism tactics are analyzed. This section becomes the foundation for the remainder of the thesis.

The second part of the thesis is a chronology of counter-terrorism practices in the United Kingdom. This part has been divided into three different periods as a way to introduce the reader to the ways in which the counter-terrorism and intelligence-gathering practices in the United Kingdom have changed over time. The three periods to be discussed are:

- (1) 11 September 2001 to the 7 July 2005 attacks on the London Tube system
- (2) 8 July 2005 to the resignation of Prime Minister Tony Blair on 27 July 2007
- (3) 28 July 2007 to 5 February 2011, when current the Prime Minister delivered a speech at the Munich Security Conference.

The first period (1) examines the public government consensus about torture as an interrogation technique and how this consensus led to torture becoming quasi-policy. This period discusses the ways in which the four branches of government publicly cooperated and supported decisions and actions concerning counter-terrorism tactics. The second period (2), outlines the reexamination of intelligence practices and changes to existing law that were a consequence of the 7 July 2005 London Tube attacks. Additionally, this period offers an explanation for the lack of consensus about intelligence techniques and torture that emerged after the attacks. The final period (3) analyzes how assumptions and rationales about torture held by different government entities created an environment in which government institutions were simultaneously working cooperatively and in conflict with one another.

The conclusion of this paper reiterates the rationales and assumptions that underlie government decisions to torture and situate the thesis in the wider theoretical discourse of intelligence analysis and interrogation techniques.

### **Definition of Terms**

An exercise in defining terms demonstrates how a word can have simultaneously different meanings for different groups. By redefining the aggregate terms “truth” and “torture,” it becomes possible to see that even when agencies and actors are speaking the same language and using the same words, they do not necessarily mean the same thing. Truth and torture are

lump-sum terms that do not hold any meaning, except as how they are defined by different groups. Unified use of language, then, is not equivalent to unified meaning.

### **Types of Information**

Although “truth” is often used by interrogators and intelligence analysts, there are multiple ways in which the term is employed. Truth is used to describe the type of information interrogators obtain during an investigation, but there are different types of information. Disaggregating the types of information from the descriptor “truth” is a way to better understand how interrogators, intelligence analysts and political leaders can all be using the same term but with different meanings. The four different types of information that interrogators obtain are:

- (1) Actionable information;
- (2) Accurate, actionable information;
- (3) Deceptive, but actionable information; and
- (4) Mistaken, but high-confidence information

In distinguishing between the types of information listed above, it is helpful to determine what type of suspect would most likely give each type of information. In his 2009 book *Torture and Democracy*, Darius Rejali explains that deceptive, but actionable information is “given by uncooperative or innocent prisoners” (469). The information is deceptive because the suspect is uncooperative and is giving interrogators information that he knows is false in order to lead them astray. Rejali also explains the fourth term, mistaken, but high-confidence information, as that “offered by cooperative prisoners after torture” (469). This type of information is believed by the suspect, even though it is not accurate. The difference between terms three and four, then, is intent. In deceptive, but actionable information, the suspect is knowingly deceiving the interrogator. However, in cases of mistaken, but high-confidence information, the suspect believes he is providing accurate information. This brings us to the final two terms, actionable information, and accurate, actionable information.

Actionable information is any information that can be acted upon. This is a very general term that assesses no value to the information being investigated; it only indicates that the information provided is information that can be investigated. In discussing what type of information would *not* be actionable, scholar Richard Betts (2007) writes, “The system warned clearly about *whether* an attack was coming and that it would be soon, but it could not determine where, *how*, or *exactly* when. The warning was too vague to be ‘actionable’” (105). Therefore, actionable information includes details specific enough to allow investigators to take further action.

A type of actionable information is information that is accurate. Accurate, actionable information is the type of information investigators are searching for when they talk about truth. Deceptive and mistaken information are described by intelligence scholar Robert Jervis as “a mismatch between the estimates and what later information reveals to have been true” (10). Accurate, actionable information is just the opposite: it is information that accurately reflected threats in the world.

This distinction will become vitally important later in the paper, as I will show the difficulties interrogators have in distinguishing between accurate and deceptive information, and how this impacts the ways in which torture becomes part of the government discourse.

## Torture

There is a proliferation of definitions of the term torture, and both scholars and government actors make a distinction between torture and cruel, inhuman, and degrading treatment (CIDT). Though the United Nations Convention Against Torture provides a definition of the term “torture,” there is no universally agreed upon definition of the term. The United States has restricted the definition of torture in order to allow more harsh techniques to be used at Abu Ghraib and Guantanamo Bay prisons. The United Kingdom has taken the opposite approach, publishing numerous operations manuals that state its agents do not engage in torture, but that do not provide, as detailed below, any definition of what acts would constitute torture. Comparing these three different definitions to scholarly definitions of what is (or is not) torture helps illustrate the lack of consensus surrounding the term.

The United Nations Convention Against Torture (UNCAT) was opened for signature in New York on 4 February 1985 (United Nations, 1997). Article 1 defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or persons acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (United Nations, 1997)

This definition of torture is expansive, as it prohibits torture to obtain information, as punishment, or to elicit information or a confession from a third party. This comprehensive ban was signed by the United Kingdom on 15 February 1985, just a few days after the convention opened for signature, and ratified on 24 October 1986 (United Nations, 2010). The UNCAT does distinguish between acts that qualify as torture and other acts that it classifies as CIDT. This is important, because the United Kingdom makes a similar distinction in all of its manuals and reports.

Various operating manuals published by defense organization in the United Kingdom state very clearly that the UK will not torture prisoners. *Prisoners of War, Internees and Detainees*, published in 2006 by the Chiefs of Staff and the 2007 *Army Field Manual Combined Arms Operations: Counter Insurgency Operations* published by the Ministry of Defence both lack a definition of torture. The former manual is eighty-three pages long, and though it uses the term “torture,” there is no definition provided. It does, however, distinguish between torture and other forms of abuse, prohibiting “Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment” (2-3). This would suggest that any definition of torture that might be developed by the Chiefs of Staff would be restrictive, since the UNCAT would define mutilation and corporal punishment as torture, but the 2006 manual excludes these acts from torture. The 2007 army manual is over two hundred pages long, and includes exhaustive definitions of insurgency, the rules of engagement and guidelines for contact with the media. However, in the entirety of the document, there is no definition of what types of techniques are allowed during an interrogation. The only guidance given by this manual is to state that, “Systematic interrogation

of captured insurgents can have excellent results” (B-6-10). Because there is no definition of interrogation given, officers are again left without guidance when it comes to what techniques are permitted.<sup>2</sup>

The lack of a definition of torture is not unique to army or Security Service operations manuals. The Foreign & Commonwealth Office (part of the executive branch of government) publishes an annual report on human rights. Each report contains a condemnation of torture, though there is again no definition of what the office defines as torture. An excerpt from the 2007 *Annual Report on Human Rights* is illustrative:

Torture is one of the most abhorrent violations of human rights and human dignity and its use is absolutely prohibited under international law. Accordingly, the government—including the intelligence and security agencies—never uses it for any purposes. We unreservedly condemn the use of torture and seek its eradication. (12)

The lack of a definition of torture stands in contrast to the type of definition provided by the United States. Whereas the UNCAT definition of torture is expansive, and the UK appears to lack a definition of torture, the United States is very specific and restrictive in what it considers torture.

Because many of the cases of torture discussed throughout this paper are instances of rendition and third party torture, particularly at the US military base at Guantanamo Bay, an understanding of the techniques allowed under US law is necessary. The relevant document has become known as the “Bybee Memo” because it was written by Assistant Attorney General Jay S. Bybee. This memorandum was addressed to Alberto Gonzales, then Counsel to the President, on 1 August 2002. It has been reprinted in full in Mark Danner’s 2004 book on torture and truth. The Bybee Memo states, “The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause ‘severe physical or mental pain or suffering’” (119). After searching US judicial precedent for a definition of this phrase, Bybee comes to the conclusion that:

These statutes suggest that ‘severe pain’... must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such a death, organ failure, or serious impairment of body functions—in order to constitute torture. (120)

It is critically important to note that it took nearly ten years, until 21 October 1994, for the United States to ratify the UNCAT. Though the US declared upon ratification that it accepted the UN definition of torture, the Bybee Memo shows that states can change their interpretation of what techniques constitute torture because there is no single, objective definition of “severe pain.”<sup>3</sup> Even though there is an international definition of torture, it is still open for state

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<sup>2</sup> For a more detailed explanation of the relevant operations manuals and their definition, or lack of definition, of torture, please see Appendix A.

<sup>3</sup> Upon ratification, the US declared: “That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the

interpretation, which means it is highly unlikely that there will be an agreed-upon list of techniques that constitute torture.

It may appear as if the numerous definition of torture and CIDT make it impossible to undertake any analysis of alleged instances of torture. This not the case, as legal scholars and scholars of torture argue that there does not need to be a legal consensus over what practices constitute torture. The point of view, explained by Kim Lane Scheppelle (2005) and Darius Rejali (2009) allows such an investigation to continue. Scheppelle writes, "Torture does not have to have a clear *legal* meaning, in part because there have been no general and systematic attempts to map the border between 'torture' and 'non-torture'" (289). The Bybee Memo represents such an attempt, but it leaves the border between torture and non-torture no more defined than any previous attempts. Additionally, the Bybee Memo is only a single instance, rather than a systematic effort, aimed at distinguishing torture from non-torture. Rejali discusses the problems with both a restrictive and a loose definition of torture. He writes, "Defining torture as *any* indignity fails to distinguish between cases where the physical pain is incidental and the far graver cases where it is inevitable" (39). Scheppelle and Rejali make the case that it does not matter if there is a uniform definition of torture precisely because there are so many definitions currently available; all that matters is the *intent* to cause pain to someone in order to get them to reveal information. Their point of view is not a new one, and is in fact found in a quote attributed by the Encyclopedia of Roman Law to the Roman Jurist Javolenus. Javolenus says, "Every definition is civil law is perilous since there is little that could not be easily subverted" (Berger, 1953, 429). The different definitions of torture discussed above are an example of how a definition given by the UN can be changed and interpreted in many different ways. Therefore, instead of attempting to provide an internationally and universally accepted definition of torture, it is more important to ask why harsh techniques are being authorized, what the goal is when using these techniques, and why the authorization of torture methods changes. In asking these questions, it is important to remember the different types of information encountered by interrogators and the different definitions of torture in order to understand how a single term can have simultaneously different meanings.

### **Torture in Government Discourse**

There are essentially three arguments that become avenues for torture to enter government discourse. The three arguments are:

- (1) The illegality of terrorist action removes terrorists from protection under international law
- (2) Even though torture is an effective method of extracting accurate, actionable information, interrogators are confident in their ability to detect deception
- (3) Torture is a lesser evil, especially in a ticking bomb scenario.

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administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality" (United Nations, 2010).

In order for torture not to be excluded from the options available to intelligence services, these arguments must be made. This section analyzes the rationalizations and assumptions embedded in each of the three arguments, as a way to understand the foundation upon which the government dialogue about torture was based.

### **Illegality of Terrorist Action**

The first argument that enabled torture to remain an option is that terrorists exist outside of international law and therefore any response to terrorism should not be constrained by international law either. Legal scholar Emanuel Gross (2006) explains how this argument can lead states to torture. He writes, “Under international law, terrorists are unlawful combatants—that is, armed fighters who conduct their warfare outside the legal framework by committing acts that constitute a violation of the laws of war” ( 50). When terrorists are seen as unconstrained by international legal instruments, states who are signatories to such instruments can see themselves in a position of handicap: the states must obey international law, while those they are trying to fight are not restricted by any laws of armed conflict. Gross documents the frustration this poses for intelligence services. “The distinction between lawful and unlawful combatants is designed to preserve the distinction between combatants and civilians. If combatants were able to disappear within the civilian population, every civilian would be suspected of being a hidden combatant and would suffer inevitable consequences” ( 48). In other words, because terrorists eradicate the distinction between civilian and military it is possible that those who appear to be civilians hold vital information about terrorist activities. Ironically, it is what Gross calls the “humanist principles” of international law designed to protect the rights of innocent civilians that also bestow rights on terrorist who disguise themselves as civilians ( 49). The paradox and dilemma in which states are caught—the need to distinguish between terrorists posing as civilians and truly innocent civilians—is often confronted by crafting new legislation.

The United Kingdom passed the Anti-Terrorism, Crime and Security Act 2001 in order to increase powers of detention concerning foreign nationals suspected to be involved with international terrorist activities and organizations. It is important that this act concerns “suspected international terrorists” (11), because “suspect” is a low burden of proof, that meant a person could be detained on the possibility that he was a terrorist, even if there was no proof. The Act exemplifies the actions taken by a state to protect and reassure its citizens by aggressively working to thwart potential terror attacks. It represents a new legal framework in which counter-terror operations would be conducted. However, as Gross points out, the type of detention allowed under this act has the potential to lead to torture; the Anti-Terrorism, Crime and Security Act 2001 shows how torture enters the dialogue as an option for interrogators.

The 2001 Act meant that people could be detained if they were *suspected* of being involved in terror-related activities. UK Supreme Court Justice Laws explains the difference between suspicion and belief: “Belief is a state of mind by which the person in question thinks that *X is* the case. Suspicion is a state of mind by which the person thinks that *X may be* the case” (2004 EWCA Civ 1123, para. 229). It follows, then, that some of those detained were not guilty of what they were accused. Nevertheless, when interrogators believe that that a suspect possesses but is withholding information, there is a shared conviction that torture is the only option for extracting information. This is explained by Gross (2006), when he writes, “nothing will prevent [interrogators] from continuing to torture him until they are convinced that he has surrendered all the information they require” (76). Torture as not excluded as an option for

intelligence services and interrogators. This reveals a shared conviction that information can be extracted from a person by subjecting him to pain and fear of pain.

The reliance upon torture has two unfortunate implications. The first is that when detainees provide interrogators with information, even if it is deceptive or mistaken, this supports the belief that that the person had been withholding information and that torture was successful in extracting it. When a suspect provides information to interrogators during or after torture, it increases the interrogator's confidence that torture was the right technique to use because it successfully made the suspect talk. The second implication is that when mistaken or deceptive information is extracted and acted upon, a threat that was non-existent to begin with is seen as "thwarted," creating the illusion that information extracted by torture successfully stops terror attacks. This second implication also reinforces interrogators' confidence that torture was the right course of action. Now not only has torture caused the suspect to provide information, it is also assumed that the information obtained was accurate, since an attack did not occur.

There is an additional implication that is related to the confidence of interrogators in their ability to stop terror attacks. When information is extracted, acted upon, and it is believed that a threat was thwarted, interrogators and the intelligence services believe they have been successful. Robert Jervis (2006) writes that intelligence successes are significant because "we have post-mortems [of intelligence practices] only after failure, not after successes" (19). Therefore, when interrogators assume that the lack of an attack on the UK is due to their successes in extracting information from suspects, there is no need to question or consider changing the existing interrogation methods. There is even less reason to question the actions of interrogators when there is confidence in their ability to differentiate an accurate statement from a deceptive one.

### **Confidence in Deception Detection**

When interrogators and their superiors believe that it is possible to distinguish between deceptive and accurate statements, torture is not excluded from the interrogation and intelligence discourse. Training manuals and professional organizations rely on techniques of behavioral analysis as a way of establishing the truthfulness of statements. John E. Reid & Associates is a professional organization that has, according to its website, trained over 500,000 law enforcement professionals in the techniques of behavioral analysis.<sup>4</sup> The Reid Technique of Interview and Interrogation has been criticized by many scholars, including Darius Rejali (2009) who writes, "Those trained in the Inbau and Reid method are likely to be more prone to error, but just as confident about their opinion" (465). Here he is referencing the *Criminal Interrogation and Confessions* manual, published by Inbau and Reid, most recently in 2004. While Rejali casts doubt upon the ability of interrogators to use the Reid technique of behavioral analysis to detect deception, the manual explains that the technique is supported by "physicians, psychiatrists [and] psychologists" (121). It continues by saying that:

[T]here are several levels, or channels, of communication, and that the true meaning of the spoken word is amplified or modified by the other channels, including speech hesitancy, body posture, and gestures, facial expressions, and other body activities. In other words, a person can say one thing while his body

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<sup>4</sup> The Reid Organization lists among its clients all branches of the United States military, the Central Intelligence Agency, the Federal Bureau of Investigation as well as numerous law enforcement agencies around the world.

movements, facial expressions or tone of voice may reveal something entirely different. (121)

There is an assumption that gestural communication is unmediated access to a person's true thoughts and that studying involuntary or subconscious gestures is a way to learn who is concealing something and who is not. Training interrogators to spot gestural communication is based on the assumption that this technique gives interrogators the ability to distinguish between accurate and inaccurate information.

There is, however, no consensus across the professional and academic communities about the ability of interrogators to detect deception. In studying laboratory experiments, a majority of scholars have concluded that interrogators are no better than chance at detecting deception. After numerous studies of the ability of police interrogators to detect deception, Saul M. Kassin concluded "that individuals perform no better than chance at detecting deception, that training tends to produce only small and inconsistent increments in performance, and that 'experts' perform only slightly better than ordinary people if at all" ( 383).<sup>5</sup> Though scholars have documented the inability of interrogators to spot deception, this has not changed the way interrogators are trained, nor has it impacted the confidence of interrogators in their own ability to detect deception.

A Central Intelligence Agency (CIA) operation manual demonstrates that the people who would actually be directly involved in the interrogation suspects had confidence in their own ability to distinguish between accurate and deceptive information. The KUBARK counterintelligence manual used by the CIA was originally published in 1963. KUBARK is now available is a slightly redacted form that allows for an examination of CIA interrogation techniques and the fundamental assumptions and beliefs behind the development of these techniques. KUBARK discusses the various physical manifestations of guilt, deception or innocence that interrogators can expect to observe, arguing that these physical cues are assessment aids (73). The KUBARK manual, then, clearly relies upon behavior analysis as a way to inform interrogators whether or not the suspect is being deceptive. Importantly, and much like the Reid manuals, KUBARK does not allow for the possibility of a false confession, or of a deceptive confession not being recognized by interrogators as such.<sup>6</sup>

Behavior analysis techniques are not the only reason why interrogators will be confident in their ability to extract and identify truth. A phenomenon called confirmation bias, described by Robert Jervis (2006) helps explain why interrogators are confident in their abilities. He writes, "the obvious danger in asking people to be on the look-out for certain information is that they

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<sup>5</sup> Kassin, working both by himself and with other researchers, has produced a number of papers studying the ability of interrogators to detect deception. See: Kassin, S.M, Goldstein, C.C. & Savitsky, K. (2003). Behavioral confirmation in the interrogation room: On the dangers of presuming guilt. *Law and Human Behavior*, 27(2), 187-203; Kassin, S. M. & Fong, C. M. (1999). 'I'm Innocent!': Effects of training on judgments of truth and deception in the interrogation room. *Law and Human Behavior*, 23(5), 499-506; and Kassin, S. M. (2002). Human judges of truth, deception and credibility: Confident but erroneous. *Cardozo Law Review*, 23(3), 809-816. For a summary of the findings in these studies, please see Appendix B.

<sup>6</sup> KUBARK states, "And the use of coercive techniques will rarely or never confuse an interrogatee so completely that he does not know whether his own confession is true or false" (p. 112). Similarly, the *US Army Intelligence and Interrogation Handbook* does not include the possibility of receiving false or deceptive information. There is confidence that in using methods of behavior analysis interrogators will be able to distinguish between accurate and deceptive or mistaken information.

and their sources will find it” (25). When interrogators are searching for a particular piece or certain type of information, confirmation bias will make them likely to find what they seek, because, as Jervis continues, “people seek information that confirms their beliefs and to gloss over what could contradict them” (24). Therefore, when interrogators are convinced that the person they are interrogating is a terrorist, they will be more likely to interpret information in a way that would make the person appear as a terrorist. The KUBARK manual insists that interrogators have a clear idea of what they are looking for before beginning an interrogation. “Before questioning starts, the interrogator has clearly in mind what he wants to learn, why he thinks the source has the information, how important it is, and how it can best be obtained” (58). The problem with confirmation bias, then, is that it produces high confidence in interrogators for two reasons. First, interrogators believe that their techniques have been effective in making the suspect talk. Second, because of the phenomenon of confirmation bias, the interrogators will often interpret information in a way that supports their belief that the suspect had relevant information to offer, further boosting their confidence in the techniques used.<sup>7</sup>

So far two of the ways in which torture enters government discourse have been explained. First, the illegality of terrorist action under international law can suggest that state response to terrorism should not be constrained by such law either. Second, when interrogators and their superiors are confident in their ability to distinguish between deceptive and accurate statements, torture is not removed as an option. Now we turn to the final argument that is used to rationalize torture as an option for states combating terrorism.

### **Ticking Bomb Scenario**

Numerous scholars have referred to the hypothetical *ticking bomb scenario* to describe the ideal from which practical considerations of torture have been derived. Matthew Hannah (2006) writes that “The ticking-bomb scenario frames official and public understandings of the threat of terrorism, it tends to make torture appear more reasonable as a response. The ticking-bomb scenario prompts a reimagining of everyday life as suffused with an unacceptably high level of risk” (623). The hypothetical scenario that is constructed, and forms the basis of interrogation policy, is one that does not exclude torture from the available options.

The hypothetical of the ticking bomb scenario (TBS) has three premises which must be accepted by those relying on it to inform their decisions. These are explained by Hannah (2006):

- (1) the danger posed by the ticking bomb (or equivalent threat) must be extremely grave; (2) the captives must be known, not merely suspected to have the information necessary to save lives; and (3) the brutal interrogation methods contemplated must be known to be effective in gaining the information. (625)

When the TBS hypothetical is believed, and interrogators use it as a justification for torture, they are submitting that the above three premises are true. In other words, the TBS justification necessitates that there is a known, imminent and gravely dangerous threat; that interrogators

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<sup>7</sup> The author attended a three-day training program on the Reid Technique of Interview and Interrogation in March 2011 at the Manchester (Connecticut) Police Department. Of twenty-seven, total attendees, the author was the only non-military or police member. Mark Reid, Director of the Reid Institute, led the program. When asked about criticisms of the Reid Technique from scholars like Kassin and Rejali, Mr. Reid responded that such scholars did not study the Reid Technique in situations where the stakes were high enough to allow interrogators to distinguish between deceptive and accurate statements.

know that the suspect they want to torture is withholding information related to the threat; and interrogators have confidence that their methods of interrogation will extract the withheld information. While it is possible that interrogators may have knowledge of one, or even two, of the above factors, it is highly unlikely that they will ever know all three pieces of information related to a specific threat. The confidence of interrogators in their methods and ability to extract accurate information has already been documented. A September 2002 email between members of Prime Minister Tony Blair's staff is an example of UK government officials trying to demonstrate the existence of an immediate and grave threat. At this time, staff members were engaged in discussions about the publication of a dossier intended to show that Saddam Hussein posed a threat to the UK and other western nations. The email said, "Our aim should also be to convey the impression that things have not been static in Iraq but over the past decade he has been aggressively and relentlessly pursuing WMD [weapons of mass destruction] while brutally repressing his own people. Again, the dossier gets close to this – but I think some drafting changes could bring it out more." By emphasizing that Saddam Hussein has weapons of mass destruction and was being violent towards his own people, the intention was to demonstrate that Saddam posed a grave threat to the world. The picture being painted was one in which agents hostile to the United Kingdom could obtain weapons of mass destruction, which indeed would be a grave threat.

Even though real-world situations are not likely to be sure of all three premises, the TBS hypothetical is used by those who seek to justify the use of torture and harsh interrogation techniques. Actors in the intelligence community and armed forces used it to convince those who stood resolutely against torture that in some, very specific instances, torture might be permitted. And once torture is allowed in one instance, an absolute ban is no longer possible.

Therefore, the TBS hypothetical is effective in creating consensus. This phenomenon is explained in *Liberalism, Torture, and the Ticking Bomb*, written by David Luban (2005). In it, Luban writes:

The liberal rationale for torture as intelligence gathering in gravely dangerous situations transforms and rationalizes motivation for torture...it becomes possible to think of torture as the last resort of men and women who are profoundly reluctant to torture. And in that way, liberals can for the first time think of torture dissociated from cruelty. Torture as a way to save lives seems almost heroic. For the first time, we can think of kindly torturers rather than tyrant. (1436)

The ticking bomb situations allows for the presentation of a unified public belief because it makes those who would never agree to allow torture feel as if they are causing a lesser evil, and are acting heroic by injuring one person to save many others. Luban continues, "Dialectically, getting the prohibitionist to address the ticking time bomb is like getting the vegetarian to eat just one little oyster because it has no nervous system. As soon as she does that—gotcha!" (1441). By making those who would never consider the use of torture address the TBS, torture enters government discourse. This has the effect of transforming the dialogue about the TBS in an important way. Explained by Kim Lane Scheppelle (2005), once the "trade-off between 'lives saved' and 'techniques used' is [established as] proper, the debate shifts to *how serious* the consequences have to be to justify torture" (286). In other words, instead of only using torture in the instance of the extremely grave threat posited by Matthew Hannah, the TBS allows for the consideration of torture techniques in less-than-grave situations, or situations where knowledge

of the potential threat is not full. In fact, Scheppelle argues that full knowledge of an imminent threat is highly unusual, and instead “it is far more likely that you will wonder *whether* there is a bomb in the first place and, if there is *how dangerous it might be*” (294). The real-world instances in which torture might be considered, though based on the TBS hypothetical, do not match the premises of the hypothetical. Even though there is a disconnect between the hypothetical and the real-world situation, the TBS is still put forth as justification for torture.

The very specific requirements of the TBS hypothetical would make it appear as if torture would be considered only in very certain cases where all three premises are met.<sup>8</sup> This is not the case, however, as the TBS has been transformed to encompass a wider degree of potential threat. Yuval Ginbar (2008) writes that a “wider ticking bomb situation” is created. He defines this term as a situation “where it is safe to assume that, *at any given moment*, hostile organizations are at some stage of recruiting, training, preparing, planning or executing a terrorist attack” (131). The definition of the wider ticking bomb situation is more expansive than the hypothetical TBS. The process through which the TBS becomes equated to a wider ticking bomb situation is similar to the types of definition exercises that occurred around the terms torture and truth. In each case, the definition is adapted to fit the needs of a state at a particular moment in time. After the 11 September 2001 attacks, the TBS and wider ticking bomb scenario entered government discourse.

The definition of a wider ticking bomb situation provided by Ginbar is important because of the language it employs. This type of threat impairs the primary duty of government institutions—protection of citizens—and is discussed in the language of an existential threat. In the United Kingdom, the submission of a derogation to the European Convention on Human Rights (ECHR) was a tangible consequence of torture in government discourse.

The United Kingdom submitted its derogation from the ECHR on 18 December 2001, nearly three months after the 11 September attacks. The requirement for a derogation is listed in Article 15(1) of the ECHR. “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation” (Council of Europe, 2009). In order for a signatory to derogate from the rights guaranteed by the ECHR there must be an emergency so great that it threatens the life of the nation, which means that threats must be seen as existential. The UK equated the public emergency of a wider ticking bomb situation—in which the lives of citizens are always at risk—to a threat to the life of the nation. The logic here is that if citizens cannot continue their daily lives free of risk from a terrorist attack, the type of lives citizens lead may become fundamentally changed.<sup>9</sup> Importantly, however, the ECHR

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<sup>8</sup> American lawyer and Harvard law professor Alan Dershowitz, in a 22 January 2002 article in the *San Francisco Gate*, argued that if law enforcement were to find themselves in a ticking bomb situation, that their recourse of action should be to obtain a “torture warrant” from a judge, in order that the harsh techniques used would remain inside the law. He wrote, “An application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives couple with the probably cause that the suspect had such information and is unwilling to reveal it.” He argues that creating a legal framework for authorizing torture would keep those involved in thwarting threats accountable. See: Dershowitz, A. (2002, January 22). Want to torture? Get a warrant. *San Francisco Gate Online*. Retrieved from [http://articles.sfgate.com/2002-01-22/opinion/17527284\\_1\\_physical-pressure-torture-terrorist](http://articles.sfgate.com/2002-01-22/opinion/17527284_1_physical-pressure-torture-terrorist).

<sup>9</sup> That it is the duty of the state to protect not only sovereignty, but also its citizens and society is an important change that occurred, arguably, with modernity. Michel Foucault, describing this new role of the state, wrote, “The principle underlying the tactics of battle—that one has to be capable of killing in

makes it clear that any derogation must be strictly confined to the specific emergency situation used as justification.

The derogation from the ECHR shows how the ticking bomb scenario is used in conjunction with the lesser-evil argument to allow brutal techniques to be used in interrogations. Facing a threat to the life of a nation (or believed to be facing such a threat), the lesser-evil argument holds that it is allowable to harm or injure one person to save the nation. Ginbar (2008) writes, “they [leaders of states] justify it on consequentialist grounds, namely on the need to cause a ‘lesser evil’ in order to prevent a (much) greater one from happening (107). Buried within this argument is the assumption that torture works. Both the TBS and the lesser-evil argument cannot be justified unless it is stipulated that torture produces accurate information. Whether or not torture produces accurate information is a question that will be explored further, but it is extremely important to note that the logic behind torture entering government discourse rests on the assumption that torture extracts accurate information.

### **Period I: Torture Becomes Quasi-Policy, 11 September 2001 – 6 July 2005**

The argument that terrorists are removed from international law, the assumption that torture is an effective method of extracting information, and interrogator’s confidence in deception detection techniques meant that torture was not excluded as an option for interrogators and intelligence collectors. But if torture was not excluded from the options and the dialogue, then where did it fit? In the United Kingdom, torture became quasi-policy, a term used to describe the role of torture in the intelligence community because no level of government has explicitly admitted to using torture. Instead, all government agencies had to cooperate and work together to present a public appearance of consensus in order to allow the implementation of the harshest interrogation techniques.

### **Creation of a Public Consensus**

Cooperation among government entities meant that the ECHR derogation had to be supported by Parliament and the Judiciary. Parliament supported the derogation by passing the Anti-Terrorism, Crime and Security Act 2001, which was justified as a response to the perceived threat to the life of the British nation. As explained above, the ECHR requires actions to the extent “strictly required by the exigencies of the situation” (Council of Europe, 2009). In its derogation, the UK wrote, “The extended power of arrest and detention in the Anti-Terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation” (Her Majesty’s Government, 2001). By including this line in its derogation submission, the UK was attempting to ensure that the legality of the 2001 Act, and the greater powers it gave the state, would not be challenged.

The Judiciary was given the opportunity to provide its support for the derogation when the legality of the act was challenged by the court case *A and others v. Secretary of State for the Home Department* ([2004 EWCA civ 1502], hereafter referred to as *A and others (2002)*). The case resulted from the December 2001 detention of ten men who were then supposed to be deported due to suspicions that they were a threat to national security. In their decision, the justices ruled that the men would not be deported because they faced a risk of ill treatment in

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order to go on living—has become the principle that defines the strategy of states.” This means that the state must see itself as willing and capable of undertaking violent actions in order to protect its citizens. See: Foucault, M. (1978) Right of Death and Power over Life. In Scheper-Hughes, N. & Bourgois, P (Eds.), *Violence in war and peace: An anthology* (pp. 79-82). Malden, Mass: Blackwell, 2003.

their home countries.<sup>10</sup> This confusing decision left those suspected of terrorist acts in an anomalous position: they were not wanted in the UK because of the threat they posed, but deporting them to their home countries would be a violation of international law because of the high likelihood that these individuals would be tortured.

Perhaps more important than the ultimate ruling, however, is the logic exposed in the written opinions of the justices. Lord Justice Brooke wrote a paragraph in his judgment that is hauntingly prescient:

But unless one is willing to adopt a purist approach, saying that it is better that this country should be destroyed, together with the ideals it stands for, than that a single suspected terrorist should be detained without due process, it seems to me inevitable that the judiciary must be willing, as the SIAC [Special Immigration Appeals Court] was, to put an appropriate degree of trust in the willingness and capacity of ministers and Parliament, who are publicly accountable for their decisions, to satisfy themselves about the integrity and professionalism of the Security Service. (para. 87)

This opinion represents two important things: (1) the judiciary publicly acknowledged that there was a threat to the life of the nation posed by foreign nationals residing within the UK; and (2) the justices offered a public statement of confidence in the Security Service (MI5) and encouraged others to extend a similar degree of trust in the interest of protecting the nation. The ideology present here is that the life of one may be violated (or sacrificed) to save thousands. Justice Brooke says as much himself: “On this appeal, we are concerned not only with matters of personal liberty but with matters of life and death for possibly thousands of people” (para. 89). Not only does this legal opinion show that there are believed to be people living in the UK with information about terror operations, it also demonstrates the acceptance of actions that impinge the rights of suspected terrorists in order to protect the nation. The opinions in *A and others (2002)* show that the Judiciary publicly accepted the reasons put forth by the executive branch in submitting its derogation, and supported the increase in state powers granted by Parliament through the Anti-Terrorism, Crime and Security 2001 Act in response to the derogation. This shows that there was a public consensus in government about a threat to the life of the nation.

Legal loopholes and an ambiguous definition of what practices constituted torture in operations guidelines published by the Ministry of Defence and the Chiefs of Staff meant that the implementation of the harshest techniques was not explicitly restricted nor was it challenged by other branches of government. As discussed earlier, a 2006 Chiefs of Staff publication about prisoners of war never defines what techniques constitute torture, even though it contains a prohibition of torture. The manual states, “Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment” are all “Acts which are and shall remain prohibited at any time and in any place” (2-3). There is no definition of what techniques would be torture, but torture is differentiated in this statement from corporal punishment, mutilation and murder—all acts that

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<sup>10</sup> The ultimate result of *A and others (2002)* will be discussed later in this paper, though it should be noted here that the case was heard three subsequent times and resulted in the removal of certain powers from the 2001 act, as well as the exclusion of torture evidence from legal proceedings. For a condensed explanation of this case, please see Appendix C.

would be classified as torture under a less restrictive interpretation of international law. What we know from this document is only what torture is not; there is no positive definition of torture.

The lack of a definition of torture is seen in all UK military operations manuals. The 2007 *Army Field Manual Combined Arms Operations: Counter Insurgency Operations* written by the Ministry of Defence places a premium on intelligence obtained from human sources. Under this logic, interrogations are necessary and vital to the collection of intelligence. This manual states, “Systematic interrogation of captured insurgents can have excellent results,” though systematic interrogation is never defined (B-6-10). Again, we are left wondering what techniques produce these excellent results.

Another example of a vague definition of interrogation is found in the 1998 *Handbook for Operations Other Than War*, published by the Office of the Prime Minister. Comparing this manual to the 2006 and 2007 manuals discussed above shows that there was no change in the assumptions that guide UK intelligence collection following the 11 September 2001 attacks. The 1998 manual begins by providing a brief history of the British Empire’s encounters with insurgency and describes the necessity of human intelligence. Significant in this document is the definition of interrogation: “Interrogation is used to extract information from an unwilling person” (D-1-2). Though the ultimate goal of an interrogation is defined, never once in this 312-page document is there any guidance for interrogation techniques. These three manuals demonstrate the lack of a ban on specific techniques during the intelligence and interrogation process. Such a ban would have broken the public consensus about UK intelligence techniques that was presented by government entities. However, it is extremely interesting to note that all of the manuals discussed above are not public documents: they were obtained through the WikiLeaks website. These documents, which were never intended for public consumption, revealed an interrogation and intelligence culture that valued human intelligence and assumed interrogation was a way to make suspects talk.

*Countering International Terrorism: The United Kingdom’s Strategy* is a 2006 document prepared by Prime Minister Tony Blair and Foreign Secretary Jack Straw that was intended for a public audience. This document shows how government agencies presented their public strategy of cooperation among entities. The document states that the UK strategy is divided “into four principal strands: Prevent, Pursue, Protect, and Prepare” (1). It then continues to describe how each of these strands relates to the goal of protecting citizens, and describes how different agencies contribute to this goal. In discussing the Pursue strand, the manual states, “There may be situations where the police believe they have no choice but to take action on the basis of specific intelligence they have received” (17). This statement is similar to the legal opinion given by Lord Justice Brooke in which he said that there needed to be a degree of trust placed in the Security Services. Brooke’s legal opinion and the sentence from the counter-terrorism strategy represent government entities publicly expressing confidence in other government entities. We now have examples of the Judiciary and executive branch supporting the actions of the security services and armed forces, but there was an additional, important dialogue also occurring at this time.

The inter-agency dialogue between Parliament and the executive branch shows that, publicly, there was complete support for the actions of each government entity. The House of Commons Foreign Affairs Committee and the Foreign & Commonwealth Office—which is part of the executive branch of government—were in agreement over the UK’s counter-terrorism strategy and support for human rights. The Foreign & Commonwealth Office publishes an annual report on human rights, in which it details actions taken by the UK to ensure human rights

and notes problems with upholding human rights in nations around the world. After the publication of these reports, the House Foreign Affairs Committee publishes a response, in which it either criticizes the original report or stands by its findings. The 2004 human rights report and response included no large points of contention. In fact, in a section titled “Conclusions and Recommendations” the Foreign Affairs Committee wrote, “We welcome the fact that since 1998 the Foreign and Commonwealth Office has published an increasingly comprehensive, well set-out and useful Annual Report on Human Rights. We recommend that the FCO continue this practice” (8). This paragraph is significant because it is not found in any subsequent reports, as will be discussed later. However, it is important the Parliament is supportive of executive transparency in 2004. Another point of interest in this inter-agency dialogue is that all of the human rights annual reports from 1998-2004 begin with a reprint of the Universal Declaration of Human Rights. This demonstrates that all government entities were invested in presenting an image of the UK as a state that upholds international law and protects human rights, while at the same time also presenting a consensus in regards to UK counter-terrorism and intelligence policies.

### **Torture as Quasi-Policy**

Though there was a public consensus about intelligence and counter-terrorism policy, how do we know that torture was in fact quasi-policy in the United Kingdom for the period 11 September 2001 to 7 July 2005? In January 2002 Prime Minister Tony Blair was informed of abuses to detainees at the hands of US agents. In a hand-written note on a Foreign Office document dated 18 January, Blair wrote: “The key is to find out how they are being treated. Though I was initially skeptical about claims of torture, we must make it clear to the US that any such action would be totally unacceptable and [very] quickly establish that it isn't happening (Cobain, 28 September 2010). There are three important threads in this note. First, Blair had received enough information about torture occurring to detainees in US custody to overcome his initial skepticism. Second, Blair ordered an investigation into the treatment of detainees in US custody in 2002, which is significant because it demonstrates that there were quickly concerns about the treatment of detainees. Even so, the intelligence relationship with the US is ongoing today. Finally, this note shows that Blair was concerned with the appearance of torture, and sought to distance the UK from it legally and in terms of intentionality rather than stopping US practices.

Exhibits from a second court case show that, despite knowledge of detainee abuse at US hands, the UK was willing to render suspected terrorists to US custody in Guantanamo Bay. *Basher al-Rawi and others v. Secretary of State for the Home Department* ([T3/2009/2581], hereafter referred to as *Bisher (2010)*), is a case brought against the British government by six British citizens who were detained and allegedly tortured at the US military base at Guantanamo Bay. Of the five total exhibits that have been presented to the courts as part of this case, four are only partially redacted and contain enough information to show that torture was quasi-policy.

Exhibit SM20<sup>11</sup> contains an email dated 15 August 2002. While the sender and recipient of this correspondence are redacted, the information of import is contained in the body of the

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<sup>11</sup> Each exhibit is given a letter combination and number by the court system. Exhibits SM19, SM20, SM21, SM22 and LC13 are all identifying names for the exhibits in *Bisher (2010)*. Within each exhibit there are multiple documents, including emails and memoranda. For the purposes of explaining the information contained within the exhibits, the exhibit name will be referenced, and the type of document and the date on the document will distinguish individual documents.

email. It references the case of Martin Mubanga, dual British-Zambian national who was detained in Zambia. The sender writes, “As an apparent ‘dual national’ Mubanga was entitled for us to try and get consular access in accordance with our stated policy. We didn’t seek consular access in Zambia, which meant we broke our own policy despite knowing there was a significant question mark over the Zambian aspect of his nationality.” This email means that the British consulate in Zambia did not seek to help a British citizen who was detained abroad, even though extending consular support was a stated policy. The reasons for this are explained in an earlier email, dated 13 August 2002: “Mubanga entered Zambia on his Zambian passport, and we were clearly instructed by [name redacted] London to take no responsibility for him, though Consular Division wanted us to seek Consular access.” Though it was stated policy to extend consular access to British nationals detained abroad, in the case of Mubanga this policy was broken, and he was eventually transported to Guantanamo Bay. The rendition of Mubanga occurred in August 2002, eight months after the executive branch became aware of US abuse of detainees.

Removing consular access is not enough to show that torture was quasi-policy. However, once consular support was denied, it became easier to render suspects to US custody at Guantanamo Bay. The process of rendition is shown in Exhibit SM21, which contains a telegram written by Foreign Secretary Jack Straw on 17 January 2002 on the subject of detainees in Afghanistan. It says: “We accept that the transfer of UK nationals held by US forces in Afghanistan to the US base in Guantanamo is the best way to meet our counter-terrorism objective by assuring they are securely held.” In addition, a special operations team was in Afghanistan interviewing detainees with a possible connection to the United Kingdom at the time the telegram was sent. This telegram shows that there was cooperation and information sharing between US and UK intelligence services in 2002, and that the UK was actively involved in allowing the transfer of detainees to Guantanamo Bay, where it had already been established that there was evidence of mistreatment.

Supporting the conclusion that torture was quasi-policy—that it was never admitted to by actors in the UK government—is a memorandum contained in Exhibit LC13. Written by the Terrorism and Protect Unit, the memorandum has the subject line “Re: UK nationals held in Guantanamo.” The memorandum is dated 26 February 2002, which means that it was sent after the investigation into US treatment of detainees was ordered by Tony Blair. It summarizes a meeting that took place between the Terrorism and Protection Unit, the Foreign & Commonwealth Office and other actors whose names have been redacted. The meeting concluded that the UK “should not be in any hurry to take back the detainees” who were UK nationals and that there would be “obvious problems of public presentation” should the US decide to make use of military tribunals, though it notes tribunals are preferred to the detainees being released in the UK. This memorandum demonstrates another attempt to distance the UK legally from US actions at Guantanamo. It was feared that taking back the detainees might implicitly acknowledge UK involvement in the detainees’ arrest.

The executive branch tried to move the discourse about detainees and counter-terrorism procedures away from torture, while at the same time privately providing tacit approval of torture. A 7 December 2005 letter, included in Exhibit LC13, states:

We should try to move the debate on from concentrating on whether the US practices torture, which they clearly have said they do not, and try to focus on the US’s constructive reassurance that, in all respects they have acted in a way consistent with their domestic and international legal obligations.

Recall that the United States defined torture as pain equivalent to organ failure. Saying that the US was acting consistently with its legal obligations is saying that the US was not causing pain any greater than pain associated with organ failure, even though this degree of pain would be torture under international and UK law. Nonetheless, this paragraph is an attempt to steer the discourse away from torture and to distance the UK from legal culpability related to torture.

A memorandum from 11 January 2002 shows again that British authorities were aware of mistreatment and took no action other than to tell its agents not to be directly involved in torture. This is further proof that torture was quasi-policy. Intelligence officers are cautioned not to directly engage in abuses, though they are allowed to observe abuse by a third party:

With regard to the status of the prisoners, under the various Geneva Conventions and protocols, all prisoners, however they are described, are entitled to the same level of protection... It appears from your description that they may not be being treated in accordance with the appropriate standards. Given that they are not within our custody or control, the law does not require you to prevent this.

The above paragraph shows that intelligence officers were concerned with the treatment of detainees who were in the custody of another state and that they reported this concern. However, the advice they were given was not—in accordance with the Geneva Conventions—to take action, but instead to ignore the violations. As long as UK agents were not actively involved in torture, there could be no legal culpability. The agents were not told to intervene on behalf of the detainee, which shows that torture was quasi-policy because although not legally allowed, it was tacitly approved of.

The requirement of an existential threat, necessary in order to derogate from the ECHR, was publicly supported by all government entities. As a result of this public consensus, torture became quasi-policy, which meant UK agents were involved in transferring British nationals to US custody, where it was known they would be abused. Information gained from those tortured at Guantanamo Bay created the appearance of success for UK intelligence agencies because they had succeeded in preventing attacks on British soil. The “success” of preventing terrorist action during this period fueled the assumption among all branches of government that torture evidence was accurate. If the evidence gained from torture was not accurate, then attacks would have occurred because the security services would not have been in possession of the intelligence necessary to stop the attacks. It was therefore assumed that the intelligence-gathering and interrogation techniques worked to produce accurate, actionable information. By not condemning the use of torture by the US—an intelligence partner—and by acting upon intelligence that was obtained through torture, torture became quasi-policy in the United Kingdom.

### **Period II: The Public Consensus Breaks, 7 July 2005 – 27 July 2007**

On 7 July 2005, fifty-two British citizens were killed and over 700 injured when four bombs exploded in the London Tube System and on a double-decker bus during the morning commute hours (Adams, 2005). This attack represented a challenge to the assumption that torture could extract accurate information, since the security services failed in stopping the attack. Ordinary citizens and government actors sought to learn how the attacks had been carried out and if there were lapses in intelligence that prevented the attacks from being stopped. However, the 7 July bombings were not the only event to impact this era. In 2004 it was

revealed that US troops had tortured detainees at Abu Ghraib prison in Iraq. These revelations provided powerful and shocking images of abused detainees that were shown constantly in the news media. The UK had to confront two crises at one: the loss of British lives on British soil and the increased international scrutiny of intelligence practices of the US and her allies. The result was a recognition, in Parliament and the Judiciary, that torture did not extract accurate information and a growing lack of public consensus in government about how information should be collected and processed. The lack of public consensus resulted in a reexamination of intelligence practices and changes to UK law, both of which are detailed below. Following this analysis, an explanation of the emerging lack of consensus and its impact on the rationales and assumptions about torture is offered.

### **Parliament and the Executive Branch: Reexamination of Intelligence Practices**

In the wake of the 7 July bombings the UK intelligence community had two options. It could invest more time and resources in the current methods of intelligence collection or it could reexamine and change the current methods to collect more accurate information. The choice of which path to pursue divided government, as the House of Commons Foreign Affairs Committee sought to reexamine and change practices while the Foreign & Commonwealth Office and the Prime Minister desired to keep intelligence practices unchanged. The resulting debate demonstrates a lack of consensus about the efficacy of torture and can be viewed through published reports from each group.

While the Foreign Affairs Committee did not raise any major issues with the Foreign & Commonwealth Office annual human rights reports from 2001 to 2004, this was not the case beginning in 2005. The *Human Rights Annual Report 2005* makes no mention of torture by foreign intelligence services, and the issue of UK agents observing torture is glossed over. The report tries to shift the focus of investigation to other nations. Parliament's desire to reexamine intelligence practices is seen through the Foreign Affairs Committee's response to the report. It wrote:

We conclude that the continued use of Guantanamo Bay as a detention centre outside all legal regimes diminishes the USA's moral authority and is a hindrance to the effective pursuit of the war against terrorism. We recommend that the Government make loud and public its objections to the existence of such a prison regime. (19)

Urging the executive branch to raise loudly its objections is one way of combating the presence of images of abuse from Abu Ghraib in the news media. If the UK government were able to make as much noise as the pictures, then perhaps it would not come under as much international scrutiny. Also important in this statement from the House of Commons is that it introduces morality as an argument against torture. Prior to the 7 July 2005 bombings, human rights were less important than preserving national security as seen in the legal opinions from *A and others* (2002). In the wake of the attacks, however, Parliament placed a greater emphasis on human rights, bringing it into conflict with the executive branch.

An additional point of contention between the Foreign & Commonwealth Office and the House Foreign Affairs Committee was over the role of Pakistan as an intelligence ally. The Foreign Affairs Committee was concerned with human rights abuses in Pakistan and was dismayed that the human rights reports did not make note of these abuses. In its response to the

2007 report on human rights, the Foreign Affairs Committee raised the issue of Pakistan and said, "there are serious and wide-ranging human rights abuses in Pakistan" and noted that the human rights report should have been more critical of abuses in Pakistan (59). The criticism of Pakistan is missing from the *Human Rights Annual Report 2007*. In the report, the Foreign & Commonwealth Office named Pakistan as "one of our most important partners in our counter-terrorism efforts," and said, "the UK and Pakistan work closely on all levels, including through regular political contact and operation co-operation." (16). What the Foreign Affairs Committee found concerning was the willingness to rely on Pakistan as a serious intelligence partner despite widespread abuses and the unreliability of information obtained under torture, a marked change from the 2002 statements that did not require intelligence agents to protest against detainee mistreatment.

The debate over Pakistan became even more important with the publication of NGO reports documenting abuses in the country. The Foreign Affairs Committee worded its concerns with Pakistan more strongly in the response to the *Annual Report on Human Rights 2008*:

We conclude that the practices of Pakistani Inter-Services Intelligence (ISI) Agency continue to give cause for great concern, in light of the allegations we have received that the Agency subjected detainees to mistreatment and torture... We are very concerned by allegations that the nature of the relationship UK officials have with the ISI may have led them to be complicit in torture. (7)

This statement represents a dissolution of the consensus that existed prior to the attacks on the London Tube System in July 2005. This statement also shows how the Foreign Affairs Committee used and responded to information published by non-governmental organizations (NGOs), particularly Human Rights Watch and Amnesty International, that implicated Britain in torture abroad.

NGO reports show the growing divide between factions of government that based their actions on assumptions about torture. On one side was a group that assumed torture can extract accurate information and was therefore a valid interrogation technique. On the other side was a group that determined torture is a grave human rights violation that must be stopped, even if it does produce accurate information. In 2006, Human Rights Watch published *Dangerous Ambivalence: UK Policy on Torture Since 9/11* as an indictment of policy that was based on the belief that torture extracted accurate information. The report quotes a speech given by Home Secretary Charles Clarke after the 7 July bombings. Secretary Clark said, "The human rights of those people who were blown up on the Tube in London on July 7 are, to be quite frank, more important than the human rights of people who committed those acts" (24). This speech exemplifies the way the executive branch viewed torture as an interrogation technique: even though torture was a violation of human rights it was sometimes necessary in order to extract information that could save the lives of British citizens. Some factions of the UK government questioned the assumption that torture could extract accurate information, and thus could justify the suspension of human rights. The 2006 Human Rights Watch report observed the "contradiction at the heart of the British government's approach. One the one hand, it emphasizes the importance of human rights around the world, and encourages other states to improve protections against torture" (2). This position is seen in the official human rights publications from the Foreign & Commonwealth Office that categorically denounce torture and encourage nations with poor human rights records to make changes. Human Rights Watch continued, however, to say, "On the other hand, it argues that security in an age of terror requires

loosening the rules on human rights, including the ban on torture” (2). This second position is seen in the actions of the security services and executive branch, which, because torture was quasi-policy, meant that all information obtained under torture was treated as accurate. The lack of consensus in government was visible to the extent that Human Rights Watch was able to pick up on the different threads of thought and assumptions in government.

Amnesty International took a different approach than Human Rights Watch and focused on the experiences of men who were tortured at Guantanamo Bay to show that certain actors in government assumed that torture could extract accurate information. The treatment of Bisher al-Rawi and Jamil El-Banna, claimants in *Bisher* (2010), is documented in *Europe's Role in US Renditions* (2006). The extensive investigation launched by Amnesty International into how these two men ended up in US custody concluded that the British government was aware they had been rendered to Guantanamo Bay. What is significant about the report, though, is that it discovered that UK security service officials had questioned the men on several occasions after their arrest, even though they were never charged and the visits were never official (3). Even while Parliament was seeking to stop UK actions that led to torture, individuals were still being rendered to Guantanamo Bay with full British knowledge.

The simultaneous positions on torture held by the UK government are again documented in a Human Rights Watch report from 2009. *Cruel Britannia: British Complicity in the Torture and Ill-Treatment of Terror Suspects in Pakistan* reveals that British agents were knowledgeable of torture by Pakistani ISI. While the House Foreign Affairs Committee was critical of the intelligence relationship with Pakistan, this Human Rights Watch report shows that MI5 and MI6 agents were observers of interrogations of British nationals held in Pakistan. Human Rights Watch learned from a source in Pakistan that one man, Zeeshan Siddiqui, “was arrested on the basis of a tip-off from British Intelligence (MI6) and principally at their request” (26). The involvement of British intelligence services in the detention and interrogation of Siddiqui was not a unique instance. A second man, Rangzieb Ahmed, was eventually brought to trial in Britain after a lengthy detention in Pakistan. The Human Rights Watch report states, “During Ahmed’s trial, the British government did not dispute in open court that MI5 and the Greater Manchester Police sent questions to the ISI to be put to Ahmed during interrogation and that MI5 officers questioned Ahmed while he was in ISI custody” (33). Despite the awareness that Pakistan tortured terror suspects, the British intelligence services took part in these interrogations by supplying questions to be asked or by visiting the detained suspects in person. This shows that after the London Tube bombings forced a reexamination of intelligence techniques, the security services did not seek to change their practices. As the House Foreign Affairs Committee struggled to change the assumptions about torture in the executive branch and security services, an additional point of contention arose.

### **Oversight Powers of the Intelligence and Security Committee.**

In light of the London Tube attacks and the proliferation of information from NGOs about tortured terror suspects, an intra-governmental debate emerged over the role of the Intelligence and Security Committee as the primary body of oversight for intelligence services.

The Intelligence and Security Committee (ISC) occupies an anomalous position in the UK government. It is at the level of a Parliamentary committee, but it reports directly to the Prime Minister and its members have a higher security clearance than ordinary committee members, which enables it to be the primary body overseeing matters of intelligence. However, members of Parliament (MPs) do determine who sits on the ISC, making it a point of conflict

because MPs don't have control over ISC investigations. The Prime Minister has the authority to appoint members of the ISC, and as a result the ISC is seen as sympathetic to the agenda of the Prime Minister. In the debate over intelligence practices, the ISC played a role akin to mediator: its reports supported human rights and denounced torture, but MPs felt the ISC was not critical enough of the security services and the executive branch. In order to understand the dissolution of consensus following the Tube bombings, as well as the challenge to assumptions about the efficacy of torture, key reports from the ISC must be analyzed.

In its role as mediator, the ISC made statements that painted UK agents who were involved in torture as rogue. In a 2005 report on the handling of detainees, the ISC said, "The SIS [Secret Intelligence Service] told us that because they saw no apparent political sensitivities associated with these interviews [of detainees in Pakistan], there was no need to inform the FCO or the Foreign Secretary" (12). This statement makes the SIS (MI6) agents who conducted interviews of detainees in Pakistan appear as acting on their own initiative, without the support of the institution they were supposed to represent. In an attempt to reestablish consensus between Parliament and the executive branch, the same 2005 report also stated, "The UK Government expressed publicly at the time of the first transfers of detainees to Guantanamo Bay a sense of unhappiness about the process and the need for the US to abide by international law" (16). This statement is an attempt to align the executive branch with Parliament, which sought an enforcement of human rights and for torture to be excluded as an interrogation technique. This statement is truthful only in that the UK did encourage the US to abide by its domestic and international legal obligations. However, we also know that the Bybee Memo redefined torture under US law to be pain equivalent to organ failure. This statement ignored the US's redefinition of torture by focusing on the word "torture" rather than the restrictive definition created by the US which authorized the use of harsh techniques. This statement, then, is an attempt to show consensus with Parliament by focusing on the importance of human rights for the UK and her allies.

The final report of relevance from the ISC is *Rendition* (2007). This report has a stronger connection to Parliament than previous reports, and states that because of the US rendition program, "The UK now has some ethical dilemmas with our closest ally" (13). Then-Prime Minister Tony Blair wrote a response to *Rendition*, in which he noted the "importance of the UK's international intelligence relations, particularly with the United States, in countering the threat to the UK from international terrorism" (1). Though the ISC acknowledged the ethical and moral dilemmas facing the UK, it did not criticize the Foreign & Commonwealth Office or the Prime Minister to the extent members of Parliament would have liked. At the end of *Rendition*, the ISC wrote, "Our intelligence-sharing relationships, particularly with the United States, are critical to providing the breadth and depth of intelligence coverage required to counter the threat to the UK posed by global terrorism" (64). Even though the ISC recognized that the UK was potentially becoming involved in human rights violations by continuing its intelligence relationship with the US, it did not issue any recommendations about how to mediate this dilemma. By recognizing the problem with torture but not suggesting any solutions, the ISC exemplifies the lack of government consensus in the period following the 7 July 2005 attacks.

In the process of reexamining intelligence techniques, the rationales and assumptions used to allow torture to become quasi-policy were questioned. The previous era saw Parliament accepting the arguments put forth by the executive branch, and supporting these arguments by passing new legislation. This period, however, was marked by Parliament not accepting the counter-terror arguments used by the executive branch.

### **The Judiciary: Changes to Existing Law**

The legislative and executive branches of government were not the only entities to have to choose which course to pursue in the wake of the July 2005 bombings. The judiciary had also been given the opportunity to weigh in when *A and others* (2002) reached another level of appeal. Though the 2002 ruling upheld the constitutionality of the Anti-Terrorism, Crime and Security 2001 Act, the case had gone on appeal in 2004. The decision that was handed down on 11 August 2004 shows premonitions of discontent prior to the 2005 attacks. Known as *A and others v. Secretary of the State for the Home Departments* ([2004 EWCA Civ 1123], hereafter referred to as *A and others* (2004)), this case ruled on the use of evidence in the Special Immigration Appeals Court (SIAC) that may have been obtained under torture. Though the justices admitted there were compelling reasons for the exclusion of evidence obtained under torture, they all reasoned that the goal of the SIAC to hear evidence related to those suspected of terrorist activities meant that extraordinary evidence could be heard. Lord Justice Laws summarized the opinion of the court when he wrote, “The Commission may receive evidence that would not be admissible in a court of law” (para. 243). An emphasis was placed on information that was obtained by third parties, and thus did not dirty the hands of UK agents nor represent a violation of UK common law. The ultimate result of *A and others* (2004) was that it excluded evidence that had been directly obtained by torture. It did, however, allow the Foreign Secretary to act upon information obtained through torture and then use the secondary information in SIAC proceedings. In other words, there had to be one degree of separation between torture evidence and evidence presented to the court, even though the evidence used originated from statements made under torture. The justices all acknowledged the reasons why statements extracted under torture should not be included as evidence, though they decided that information relating to terror activities was too important to be entirely excluded, which explains the one degree of separation. However, after the 7 July bombings, it took only five months for the justices to reverse course.

Unsatisfied with the result of *A and others* (2004), the claimants appealed to the House of Lords once more and a judgment was issued on 8 December 2005. This was the final appeal of the original 2002 case, and is known as *A and others v. Secretary of State for the Home Department* ([2005 UKHL 71], hereafter referred to as *A and others* (2005)). In the opinions in this case the justices all spoke of the abhorrence of torture and condemned it in language similar to that found in the Foreign & Commonwealth Office human rights reports. The difference between the reports and the verdict in *A and others* (2005) is that the court excluded from consideration all evidence that was based on information obtained through torture. Here the justices wrote about the illegality of torture and also rejected the assumption that torture could extract accurate information. Writing the longest judgment in the case was Lord Bingham of Cornhill, whose opinion was referred to by all of the other justices. Lord Bingham opined:

It is clear from the very earliest says the common law of England set its face firmly against the use of torture... in rejecting the use of torture the common law was moved by the cruelty of the practice as applied to those not convicted of crime and by the inherent unreliability of confessions or evidence. (5)

In this paragraph Lord Bingham rejects the judgment in *A and others* (2004) that said that the SIAC could rely on torture evidence and not be in conflict with British common law. Torture, he said, is cruel and unreliable, so there were two incentives to exclude torture evidence from legal

proceedings. Supporting Lord Bingham's assertion that torture produces inaccurate information, Lord Carswell wrote, "The unreliability of such evidence is notorious; in most cases one cannot tell whether correct information has been wrung out of the victim of torture, or whether, as is frequently suspected, the victim has told the torturers what they wanted to hear in the hopes of relieving his suffering" (79). The rejection of evidence obtained under torture was not just because it was unreliable. Lord Rodger of Earlsferry took a position similar to that of the House Foreign Affairs Committee, which sought to change intelligence practices based on torture due to the need to uphold human rights. Lord Rodger wrote in his opinion, "In short, the torturer is abhorred as a *hostis humani generis* not because the information he produces may be unreliable, but because of the barbaric means he uses to extract it" (72). Lord Rodger calls torture the "enemy of all mankind," aligning himself with Parliament, by presenting the argument that torture is cruel and inhuman.

The eleven months it took for *A and others* (2004) to be overturned shows how quickly the 7 July bombings caused intelligence and interrogation practices to be reexamined. It also helps demonstrate the dissolution of public consensus that existed before the attacks. The division that took its place was one in which those sectors that are either directly involved (security services) with torture information, or that have to give public reassurances that citizens' security is being attended to (Prime Minister and Foreign & Commonwealth Office) come down in favor of torture as a way to extract information. The Judiciary and Parliament are more distanced from the security question and therefore can criticize involvement in torture because they do not have the same public profile as the executive branch and are not directly involved in torture. But is a government entity's level of engagement with torture and/or torture evidence the only explanation for the emerging lack of consensus?

### **Bureaucracy: Explaining the Emerging Lack of Consensus**

The observed lack of consensus that emerged in 2005 can be better understood with the assistance of theories about bureaucracy. The theory of bureaucracy helps us to make sense of the struggle over access to information, because in a bureaucracy information is equivalent to power. B. Guy Peters (1984) explains "the first, and perhaps most important, resource of the bureaucracy is *information and expertise*" (188). This means that in order for agencies to exert power in a bureaucracy, they must have access to information and have a claim over the expertise about that information. In the UK, having access to information about where intelligence came from and what is said was tantamount to having a control over the intelligence and interrogation discourse. Peters explains how information is power in a bureaucracy:

The relative monopoly of information can be translated into power in several ways. The most blatant is the argument that since they (the agency) know more about the subject, they should be given control over it... If this argument fails, as it often does, and the politicians are sufficiently audacious to attempt to make policy themselves, then the major source of information for formulating those policies will still be the bureaucracy. *This means that the bureaucracy is in a situation in which it can at least implicitly trade information for influence over policy, and indeed information may be produced selectively to make one type of decision virtually inevitable.* (188, emphasis added)

The process described by Peters was observed following the 2005 London Tube bombings. Though the Intelligence and Security Committee was given access to certain information,

Parliament was not. The continued concealment of information can be partly explained by the need for secrecy, but it is also likely that the security services were seeking to continue their monopoly over intelligence, and thus continue to exert influence over policy. Expanding who had access to information would have decreased the degree of control the security services had over intelligence analysis.

Max Weber attributes the invention of the concept of state secrecy to the bureaucracy. It is precisely because information is power in a bureaucracy that state secrecy was developed: it allows certain agencies or actors to have sole control over information and thus exert the most influence over the other agencies in the bureaucracy. It is therefore not surprising that the intelligence chiefs did not want to testify before Parliament. Weber describes that the “fanatical” defense of official secrecy is because:

In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy’s interests. (Gerth and Mills, 1946, 233)

The above quote helps explain why Parliament desired access to information for itself and why the security services did not want to aid that process. Parliamentary access to information would have represented the breaking of the monopoly the security services held over intelligence information. It also would have allowed the possibility for Parliament to develop its own interpretation of intelligence information, putting the security services’ claim to expertise in jeopardy. Since Parliament was not successful in its quest for information, it is necessary to examine how the bureaucratic system contributed to the lack of government consensus. The next two sections will apply the theory of bureaucracy to intelligence practices to show the impact on intelligence and the torture debate.

### **Impact on Intelligence.**

Though information is power, agencies also need funding to survive. This means, according to Peters (1984) that “in order to survive, prosper, and grow, agencies require money and must be able to influence political institutions to provide them that money” (190). In terms of intelligence, this means that agencies must be able to prove their worth to those institutions that distribute funding. Steve Hewitt (2005) quotes an analogy by UK terrorism expert Paul Wilkinson that illustrates one of the problems with conducting a post-mortem on a perceived failure of intelligence. He writes, “Fighting terrorism is like being a goalkeeper. You can make a hundred brilliant saves but the only shot that people remember is the one that gets past you” (103). In the case of the British security services, the 7 July 2005 bombings are the shot that made it into the goal. This shot, preserved because of its destructive power, is the one that the bureaucracy focused upon during the intelligence post-mortem.

Scholars who analyze intelligence failures point to ways in which a bureaucracy can corrupt or degrade intelligence. Robert Jervis (2006) explains two of the reasons why intelligence in a bureaucracy can be bent to a political will or desire.

Here and in many instances, officials in the US and the UK engaged in 'cherry picking' and 'stove-piping'. The former is highlighting reports that support the policy to the exclusion of contradictory ones that may be more numerous and better established; the latter here refers to the delivery of selected raw intelligence to policy-makers, bypassing intelligence analysts who could critically evaluate it (34).

Cherry picking and stove-piping both occurred in the UK prior to 7 July 2005, as revealed by a series of emails originating in the executive branch.<sup>12</sup> An email exchange between members of Prime Minister Tony Blair's staff on 11 September 2002 is illustrative of the ways in which intelligence was manipulated. This email states, "All intelligence material tends to read like unevicenced assertion, and we have to find a way to get over this a) by having better intelligence material, b) by having more material (and better flagged-up, and c) more convincing material." This email represents an attempt to selectively pick intelligence that would support a policy decision, in this case the decision to invade Iraq. A response to this email was written on 17 September 2002, and stated, "The dossier is good and convincing for those who are prepared to be convinced," which is an extremely important point to make when discussing the bureaucratization of the intelligence process.

Preparing information for those who are prepared to be convinced shows how the quality of intelligence analysis is influenced by confirmation bias and politicization. In terms of confirmation bias, the above emails show how intelligence was used to convince people *who were ready to be convinced*, that is, people who were already prepared to accept that there was a terror threat, that the UK needed to fight as part of the War on Terror. Politicization of intelligence is explained by Mark Phythian (2008a) in his analysis of the decisions that led the UK to become involved in the War on Terror. He wrote, "The questions about the case and the qualified intelligence concerning the threat posed by Iraq were of less importance to Blair than being seen to perform the role of key US ally" (94). In other words, the intelligence shared with the public and other government entities was selectively chosen to support a pre-made decision; intelligence became politicized.

The process of politicization that was at contention and contributed to the emerging lack of consensus in July 2005, once the Judiciary and Parliament recognized that it had occurred. The problem with politicization is that guesses and uncertainty become reconstituted with truth. In the bureaucracy, where information is power, one must assert confidence in the information one possesses. Otherwise, why should that institution continue to receive funding and be relied upon to undertake analyses? The problem with asserting a high degree of confidence in intelligence analysis is explained by scholar Richard Betts, who writes, "It is the role of intelligence to extract certainty from uncertainty and to facilitate coherent decision in an incoherent environment." This means that information needs to be presented as certain and accurate. Otherwise, the incoherent environment will become overwhelming and prevent any decision-making. To reiterate: a consequence of politicization is that uncertainty is presented as true, accurate and certain. As described by Robert Jervis (2006), "Politicization represents the tribute that vice plays to virtue and may be a modern phenomenon. That is, leaders at least in the

<sup>12</sup> These emails were made public during the course of the Hutton Inquiry in 2003 – 2004. The Inquiry was tasked with investigating the death of Dr. David Kelly, a biological warfare expert employed by the Ministry of Defence and a weapons inspector for the United Nations. The findings of the Hutton Inquiry are available online at <http://www.the-hutton-inquiry.org.uk>.

US and UK now need to justify their foreign policies as being based on the findings of intelligence professionals” (37). This is a point that cannot be understated: when intelligence is needed to support a policy decision, intelligence collectors are subject to confirmation bias and pressure from the top of the bureaucracy to find the information that is desired. When the interrogators find the wanted information, they relay it to their field supervisor, who then informs the head of the intelligence organization, who is then able to give the information to the politician. Darius Rejali (2009) describes the “chain of praise” that results when intelligence professionals provide information politicians need. He writes, “Prisoners reason they are unlikely to be second-guessed. Interrogators will show successful arrest and kill rates and win praise from superiors, who will not ask too many questions afterward since they are invested in the information being accurate” (461). When politicization of intelligence occurs, all actors become invested in the information being true. The rationale for allowing torture to become quasi-policy is that it is a method of extracting accurate information. Politicians then use the information extracted from torture—which is assumed to be accurate—to justify policy decisions. If this information was not accurate, and instead “sold” or “drummed up,” then the entire system collapses because the rationale for accepting information obtained from torture no longer holds. There is therefore an incentive to portray all information as accurate, and to continue to insist that the established methods of intelligence collection are effective for providing accurate information.

When the Judiciary and Parliament desired a reexamination of intelligence practices in 2005, they were questioning the assumptions and rationales government entities used to allow to torture to become quasi-policy. If the security services were to continue to have control over the flow of information in the bureaucracy, they needed to continue to demonstrate that they were the only organization that could retrieve and analyze information related to terror attacks and Britain’s national security. Recently published memoirs from soldiers in the United States Army show the pressure the soldiers involved in interrogation were under to get results. This is an example of bureaucracy impacting those engaged in the interrogation process, and it changed the way soldiers treated prisoners.

### **Examples of Bureaucracy in Interrogator Memoirs**

Writing under the pseudonym Chris Mackey, one US soldier described the environment under which he had to operate. Mackey (2004) wrote, “Command was worried about the meager intelligence being gleaned from the prisoners. Pressure was also coming from the Pentagon to turn things around” (140). As a result of this pressure, Mackey and his fellow interrogators adopted a new technique, “monstering,” which describes instances when, “You’ve got to scare them, get right up in their faces and *monster* them” (289). As a result of the pressure from the Pentagon, Mackey and the interrogators who worked with him would keep a prisoner in the interrogation room until he talked. However, Mackey believed that this was a way to get accurate information from the prisoners. In discussing the international ban on torture, Mackey wrote, “The reason the United States should not torture prisoners is not because it doesn’t work. It is simply because it is wrong” (477). Mackey leaves open the possibility that torture can extract accurate information, and in a statement similar to those made by the Judiciary and Parliament after 2005, he brings up the issue of morality and ethics in order to argue for a ban on torture.

Erik Saar, a former US military sergeant who served at Guantanamo Bay also observed the pressure his interrogation unit felt to produce intelligence the Pentagon was looking for. In his 2005 memoir he wrote:

The interrogators were under a lot of pressure to extract from the captives the golden nuggets that would prevent future terrorist attacks...And it was crystal clear to me and anyone else paying attention that very little of the interagency intelligence sharing that was supposed to be taking place in the aftermath of 9/11 had made its way to Cuba; I suspected that that was more talk than action even on the mainland. It was the same old story: everybody was worried about looking good. (150)

This excerpt shows two of the implications of bureaucracy on the intelligence process. First, interrogators were under pressure to collect information from the captives that could be used to prevent terror attacks, thus simultaneously justifying the detention of the captives and the methods used to extract the information. Secondly, Saar notes the struggle to retain ownership over this information, as a way of “looking good” and increasing the power an organization has within the bureaucracy.

Though the experiences of two individuals who were directly involved in the interrogation process cannot speak for the experiences of all, their memoirs help illustrate how bureaucracy impacts the intelligence process. Returning to the rising division in the UK government following the July 2005 attacks, the struggle over access to information (power) was seen in the House of Commons Foreign Affairs Committee's request to have access to the same information provided to the Intelligence and Security Committee. By denying the Foreign Affairs Committee this access, the Foreign & Commonwealth Office was ensuring that it had more power than the Parliamentary committee. The security services, in order to keep their funding and respect, had to keep producing information that would support decisions made by politicians. They could not reverse policy, because to do so would have meant admitting that their interrogation methods had been developed based on invalid assumptions.

The divide between which government agency had access to what type and how much intelligence information also impacted the way that entity viewed the role of torture in the intelligence and interrogation process. Again, the theory of bureaucracy helps explain why the observed public consensus from 2001-2005 was broken by the 7 July 2005 London Tube bombings.

### **Impact on the Torture Debate.**

After the 11 September 2001 attacks there was a public consensus concerning the UK's counter-terrorism strategy and intelligence collection methods. It is this consensus that allowed torture to become quasi-policy. However, underneath this public consensus was a division that was exposed by the July 2005 attacks and the resulting debate over access to information. Prior to the July 2005 attacks the public government consensus obscured the knowledge that there were two simultaneous definitions of what it meant for torture to “work” as an interrogation method.

The first definition of how torture worked was that it was a way to extract accurate information. This is the definition accepted by the Judiciary and Parliament, and can be seen in the actions they took from 2001-2005 to contribute to the government consensus. The second definition of how torture worked was provided by the executive branch and Security Services.

These entities used torture as a way to extract information that would support their pre-determined policy decisions, and can be seen in the email exchanges between members of Tony Blair's staff in 2002, discussed above. The July 2005 attacks exposed that the public consensus was based on two definitions of "work." Recognition of the simultaneous existence of two different reasons for turning to torture raises the question of whether or not the ticking time bomb hypothetical was accepted by all of the government entities.

While it is nearly impossible to know what anyone actually *believes*, Darius Rejali provides different models for how torture becomes quasi-policy that help us understand how the two definitions could exist simultaneously. The first model presented by Rejali (2009) is called the National Security model. According to Rejali:

In the National Security model, officers practice torture as part of a proactive strategy to combat an enemy in an emergency. Victims may be locals or foreigners, but they are always chosen because of their suspected political activities. Torturers are interested not in confessions to crimes (for that is already taken for granted), but in information. They torture to secure a complete file on a person's contacts and to recruit their victims as informers. (49)

The National Security model was the model by which the Judiciary and Parliament allowed torture to enter government. The Anti-Terrorism, Crime and Security Act 2001, passed by Parliament and upheld by the Judiciary allowed for the detention of foreign nationals based on suspected terrorist activity. The 2001 act was supplemented by the Prevention of Terrorism 2005 Act, which allowed for the detention of British nationals if they, too, were suspected of terrorist activities. Also important is that the derogation from the European Convention on Human Rights required a threat to the life of the nation, an emergency that would make torture appear as a lesser evil when it was used to extract information to save the nation at risk. Therefore, the National Security model explains why the Judiciary and Parliament supported the public consensus from 2001-2005.

The next model provided by Rejali is called the Civic Discipline model. This model is a way to distinguish between citizens, and is a model under which "torture is not merely following pre-established legal understandings of who is or is not a citizen, falling solely on foreigners. It is conferring identities, shaping a finely graded civic order. It reminds lesser citizens of who they are and where they belong" (50). While we can never know the inner thoughts of members of the executive branch and security services, the Civic Discipline model seems to be the one most likely held by these groups. They were involved in removing consular support for British nationals detained abroad, as was seen in the case of British-Zambian national Rangzieb Ahmed.

Support for the conclusion that the executive branch and security services believed the Civic Discipline model can be found in UK terrorism laws. The 2005 Prevention of Terrorism Act revised the 2001 Anti-Terrorism, Crime and Security Act, which allowed only for the detention of "suspected international terrorists." This was changed in the 2005 Act, which allowed for the detention of any "individual," a term which includes British citizens. Prior to the 7 July 2005 attacks, the executive branch and the security services were able to argue that their methods of intelligence-gathering and interrogation were effective. Based on this perceived effectiveness, they were able to increase who they were able to detain and for how long. However, powers of detention were swiftly restricted after the 7 July 2005 attacks. The Terrorism Act 2006 replaced the 2005 Act, and reduced the amount of time a person could be held without charge to 28 days, even though the Prime Minister desired to increase this time

period to 90 days. This shows how Parliament was no longer willing to accept the assumptions and rationalizations that were presented by the executive branch and security services.

The application of the theory of bureaucracy to intelligence practices and assumption about torture helps explain how government became divided after the July 2005 attacks. This section has outlined how access in information is equivalent to power in a bureaucracy. The struggle to maintain power manifested as a debate over access to information. Additionally, this section has shown how a bureaucracy can obscure the multiple definitions of what it would mean for torture to work, because the public consensus was based on the National Security model. Only with the July 2005 attacks was it realized by Parliament and the Judiciary that the executive branch and security services defined "work" differently.

The opportunity for a new person to step into the role of Prime Minister and attempt to change the bureaucratic system that had allowed torture to become quasi-policy was offered by the resignation of Tony Blair on 27 July 2007. Though government was divided and Parliament and the Judiciary seemed poised to take action, change was not as easily brought about. This led to an era in which different government entities worked simultaneously in cooperation and in conflict with one another.

### **Period III: Cooperation and Conflict, 28 July 2007-5 February 2011**

When Gordon Brown assumed the Office of the Prime Minister on 28 July 2007, he promised transparency and accountability. The result, as will be shown in the analysis that follows, was only the appearance of transparency. Though the consensus and acceptance of the ticking bomb argument that allowed torture to become quasi-policy were no longer present, the Office of the Prime Minister and the Security Services still relied on torture as an interrogation technique. This section outlines the ways in which an acceptance of rejection of the assumptions about torture drove government agencies to work simultaneously in cooperation or in conflict with one another.

One of the issues Gordon Brown had to confront as Prime Minister was how to deal with the legacy of torture from a previous administration. He had to quickly develop a strategy when *Bisher al-Rawi and others v. Secretary of the State for the Home Department* (2010) began to work its way through the court system. On 16 November 2011, Justice Secretary Kenneth Clarke announced that millions of pounds sterling would be paid to sixteen former Guantanamo Bay detainees as compensation. Among the sixteen men are the six claimants in *Bisher* (2010). The discourse surrounding this payment shows how different government entities worked together to confront the UK's legacy of torture.

By choosing to settle out of court with the former detainees, the British government avoided what could have become a lengthy court battle. The legal case would have necessitated the claimants obtaining documents from the security services, so the settlement has been justified on the ground that revealing such documents would have compromised national security. David Davis, a Member of Parliament, stated, "I don't like the idea of paying out £5 million of taxpayers' money without due process, but at the end of the day the government didn't really have a choice" (Wintour, 2010). Government officials and spokespersons have claimed that the compensation does not imply culpability, but the payments make one wonder what previously secret documents would have come out during the legal proceedings. Could it be that exhibits like SM19 from *Bisher* (2010), which currently reads as 36-pages of complete redaction would have been provided in full? Before the announcement of compensation, the exhibits provided in the *Bisher* (2010) case were provided during preliminary hearings to decide if the case had

enough merit to go to trial. It is logical that because the case was allowed to proceed, the documents requested by the six claimants would have had to be provided, and not provided as entirely redacted documents. The settlement means the British government succeeded in making sure that documents like SM19 would never be revealed to the public.

By settling this case out of court, Prime Minister Brown ensured that documents that could have revealed the foundational assumptions by government entities that allowed torture to become quasi-policy were not revealed. A headline written by Richard Norton-Taylor for *The Guardian* on 16 November 2010 states as much: “Analysis: Settlement means no more damaging documents or information will be released by the courts.” In the battle over access to information that occurs in a bureaucracy, a joint decision was made by Parliament and the executive branch to settle this case so that documents related to interrogation and intelligence would not be revealed.

In addition to working cooperatively to settle the *Bisher* (2010) case, two documents related to the UK’s strategy against terrorism were published. In 2009 Prime Minister Brown authorized the publication of *Pursue, Prevent, Protect, Prepare: The United Kingdom’s Strategy for Countering International Terrorism*. Though previous iterations of this strategy had been published in 2003 and 2006, the version published by Brown was the most extensive. The report included a foreword by Brown that appeared to represent a paradigm shift in the UK’s approach to countering terrorism. Brown wrote, “This is the first time we have published this strategy in such detail: we want to be as open as possible in describing the threat we face and the responses that we believe are appropriate to address it. In a few areas only, we have had to withhold information either for legal or security reasons” (6). The foreword presents an appearance of government entities working with one another to prevent torture.

Representing continuity with past reports and strategies, the 2009 strategy included the standard denial and condemnation of torture. “The Government opposes the use of torture in all forms and the Government has always and will continue to condemn the practice of ‘extraordinary rendition’. UK agencies and police have not and will never engage in these practices” (12). This denial, however, seems negated by subsequent paragraphs that explain the need to rely on foreign intelligence services that hold detainees in ways that vary “significantly from the procedures to which we are accustomed in this country” (76). Even though it is recognized that other nations do not necessarily guarantee the same protection of detainee rights as the UK, these cooperative relationships are still viewed as necessary in the fight against terrorism. This report represents an attempt to reestablish a public consensus in government, in order to have all government entities support the methods and techniques to be used in interrogation and intelligence collection.

Gordon Brown also authorized the publication of a consolidated version of the guide given to intelligence officers for interrogation.<sup>13</sup> This consolidated report, only 16 pages long, was prefaced by a letter written by Brown that hailed the consolidated guide as an unprecedented

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<sup>13</sup> A request for information under the Freedom of Information Act (2001) was made on 7 September 2010. The request was for “official documents regarding the techniques for interrogation of detainees by MI5 and the Secret Intelligence Service.” The request was denied on 14 September 2010, as the information was declared exempted from release under Section 23(1), “information supplied by, or relating to, bodies dealing with national security measures.” Though the request was denied, the correspondence stated, “the Foreign and Commonwealth Office holds information relating to your request,” however the exemption under Section 23 is absolute and therefore cannot be appealed on the basis of public interest.

gesture of transparency. The preface is an attempt to build support and sympathy for the job of the security services. Brown wrote that the job of combating transnational terrorism “means working in a challenging environment where we are not always in total control” (2). Here he is saying that the security services are doing the best they can to fight a transnational threat, and is also attempting to gain support from other government entities for the strategies employed by the security services. He is acknowledging that UK forces cannot control how other nations interrogate their prisoners, and thus have a duty to act on information received if it pertains to threats to Britain, even if the information might have been obtained in ways that are not authorized for UK agents themselves. Brown wrote:

When a serious risk of mistreatment of a detainee at the hands of a third party remains, the Guidance makes clear that personnel must consult Ministers and provide them with all the details of a particular case. It is right that responsibility in these cases lies with the democratically elected Government, and that ultimately it is ministers who will make these judgments. (3)

The argument put forth in this paragraph is that the Ministers were elected by the public based on their position on issues. Therefore, when a Minister chooses to engage in an action which may lead to torture he is only listening to the will of the public. Essentially, Brown is stating the argument that he and the other Ministers were elected to engage in torture. This letter is typical of the approach to torture in intelligence collection after 28 July 2007: while there are denials of torture and assurances that everything is being done to stop torture, there is an underlying sentiment that torture produces something of value.

When David Cameron assumed the office of the Prime Minister on 11 May 2010, he too had to confront the UK's legacy of torture. A speech he gave at the Munich Security Conference on 5 February 2011 is demonstrative of the way in which July 2007-February 2011 has been an era of government entities working in cooperation and in conflict with one another. At the conference he said,

Frankly, we need a lot less of the passive tolerance of recent years and a much more active, muscular liberalism. A passively tolerant society says to its citizens, as long as you obey the law we will just leave you alone. It stands neutral between different values. But I believe a genuinely liberal country does much more; it believes in certain values and actively promotes them. Freedom of speech, freedom of worship, democracy, the rule of law, equal rights regardless of race, sex or sexuality. It says to its citizens, this is what defines us as a society: to belong here is to believe in these things. Now, each of us in our own countries, I believe, must be unambiguous and hard-nosed about this defence of our liberty.

This speech was a performance for multiple audiences. For the security services it represents a recognition of the threats facing the British way of life and a pledge to defend the nation. Second, it was a performance for the public in that it portrayed Cameron as a strong leader. And finally, it was a performance for Parliament and the Judiciary, as well as the international community, in that it stated that the defense of liberty and way of life can come in a positive way (through the promotion of the values he enumerated) rather than engaging in torture in order to prevent terror attacks.

Prime Minister Cameron supported reducing the amount of time that the security services could detain a person without charging him. The 28-day period in which a person could be held, guaranteed under the Terrorism Act 2006, expired in January 2011, meaning that the security services were only authorized to hold a person in such a state for fourteen days. This is significant, because it is an example of Cameron responding to the desires of the security services while still recognizing the importance of human rights. It appears as if this action was a response to a report published by the Joint Committee on Human Rights (a committee composed of members of the House of Lords and the House of Commons). It published a 2010 report titled *Counter-terrorism and Human Rights: Bringing Human Rights Back In*, which was critical of the state of emergency declared in the 2001 derogation from the European Convention on Human Rights and became the basis for the formulation of counter-terror policies. The report states:

The Government's position that there is a public emergency threatening the life of the nation is important because it determines the starting point in any debate about the justification for counter-terrorism powers. Like the language of the "War on Terror", it asserts the existence of a state of exception, which implies that exceptional measures require less justification than when times are normal. It amounts to a permanent claim that courts and other accountability mechanisms should defer to the Government's assessment of what measures are required. (9)

In this passage, the committee on human rights is stating that the acceptance of a public emergency threatening the life of the nation became the basis of counter-terror policies in September 2001. It is questioning the assumption that such a threat does exist, thereby casting doubt upon the techniques of interrogation and intelligence collection used as a result of this assumption.

The dialogue and debate between different government entities resulted in a historic speech by Sir John Sawers, the director of the Secret Intelligence Service (SIS).<sup>14</sup> Though the SIS has been in existence for more than 100 years, the organization was only officially acknowledged to exist in 1994. The SIS is commonly referred to as MI6, and its chief is known to the public only as "C." Referring to his speech, Sawers said, "This, I believe, is the first public speech given by a serving chief of the British Secret Intelligence Service." He continued to describe the role of the SIS in the intelligence and counter-terrorism process, stating, "SIS does not choose what it does. The 1994 Intelligence Services Act sets the legal framework for what we do. Ministers tell us what they want to know, what they want us to achieve." This speech was given on 28 October 2010, after David Cameron had become Prime Minister, and during heated debates in Parliament about their access to secret intelligence documents. The timing of Sawers's address would support the argument that his speech was an attempt to alleviate some of the tension and conflict in government. His statement about the SIS not choosing its own direction is an encouragement for Parliament to question ministers, and not the security services, regarding Britain's counter-terrorism policy. So while Sawers appears to be addressing some of the concerns of Parliament, he is telling the members that if they are concerned about the practices of the SIS that they need to look to the executive branch of government.

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<sup>14</sup> The full text of this speech was reprinted in *The Guardian*, and can be read online at <http://www.guardian.co.uk/uk/2010/oct/28/sir-john-sawers-speech-full-text>

The speech given by Sawers was also a public denial of engagement in torture, possibly as a way to rebuild consensus in government, but also in order to reassure the public about the methods used by the SIS, which was one of the stated goals of his speech. Sawers said, "Torture is illegal and abhorrent under any circumstances, and we have nothing whatsoever to do with it. If we know or believe action by us will lead to torture taking pace, we're required by UK and international law to avoid that action. And we do, even if that allows that terrorist activity to go ahead." Here is he again trying to establish that government entities are working in cooperation with one another, stating that the SIS will obey international and domestic law and avoid actions that would lead to torture. He also stated, however, that "We can't do our jobs if we work only with friendly democracies. Dangerous threats come from dangerous people in dangerous places. We have to deal with the world as it is." Sawers's speech exemplifies the era of government entities working in cooperation and in conflict with one another. In one paragraph he is ensuring the public—and other branches of government—that the SIS will not take any action that would lead to torture, and in the next he is acknowledging that the work of terror prevention necessitates working with dangerous people who have different strategies when it comes to extracting information. He also attempts to avoid responsibility for SIS actions, by saying numerous times "There is oversight and scrutiny by parliamentarians and judges." With this statement, Sawers is asserting that all branches of government are partly responsible for making the counter-terrorism policy that the SIS must then implement, and therefore all share responsibility for those policies.

In many ways, the era of government entities working in tandem and in conflict with one another has been an exercise in assigning responsibility and blame. Sir John Sawers's speech attempted to make all government entities responsible for counter-terrorism policies that led to torture. Similarly, David Cameron announced on 6 July 2010 the creation of a panel of inquiry to investigate Britain's involvement in torture and reliance upon evidence gained from torture. The goal of this inquiry, as reported in *The Guardian*, is to reestablish the reputation of the security services, which had been "overshadowed by allegations about complicity in abuse" (Cobain, 6 July 2010). Statements like the one from the Joint Committee on Human Rights and Sir John Sawers represent one entity of government trying to indict another. Within the debate about responsibility, there is also a dialogue about the fundamental assumptions and rationales that were accepted and given in order for torture to become quasi-policy.

## Conclusion

Is there an agency or actor that can be found responsible for the 7 July 2005 attacks and the role of torture as quasi-policy in the UK government? Though it is tempting to assign blame and fault to different agencies and actors, this does not help develop an understanding of why torture became quasi-policy and why it is still relied upon by the security services as an extractor of information. Instead, this section will place the paper in the wider theoretical discourse of intelligence analysis and interrogation techniques. It will begin by examining intelligence failures to try and develop an understanding of the methods that are at work behind intelligence successes.

It seems counterintuitive to examine a failure in order to understand a success. By failure here I am referring to a terror attack on UK soil, and by success I am referring to the prevention of such an act. Richard Betts (2007) explains the reason why we can only examine intelligence failures. He writes:

We lack a normative theory of intelligence, or a theory of how to make it succeed. Negative or descriptive theory—the empirical understanding of how intelligence systems make mistakes—is well developed... An affirmative or normative theory of intelligence has not been fully developed because the lessons of hindsight do not guarantee improvement in foresight, and hypothetical solutions to failure only occasionally improve practice. (20)

In other words, it is possible to learn from errors in intelligence, but not necessarily to adapt the lessons learned from past errors to current or future practice. Examining the 7 July 2005 attacks, we do find a few instances of failure that might help us understand what will be necessary in order to prevent future attacks.

The first reason for failure has already been well documented in previous places in this paper. It is that of politicization of intelligence and confirmation bias. Robert Jervis (2010) writes, “It is perhaps the most confirmed proposition in cognitive psychology that once a belief or image is established, new material will become assimilated to it, with discrepant and ambiguous information being ignored or fitted into the established views” ( 169). Sir John Sawers partially addressed this issue in his 28 October 2010 speech when he stated that the Secret Intelligence Service is asked to search for particular information by ministers. Investigations into the 7 July bombings revealed that MI5 had at least two of the bombers under surveillance a year prior to the attacks.

It was reported in *The Telegraph* that MI5 had bombers Mohammed Sidique Khan and Shehzad Tanweer under surveillance a year before the attacks, but abandoned surveillance of them to pursue other leads and interests. A 1 May 2007 article stated that MI5 saw the two men “as fringe players and were never followed up” (Gardham and Johnston). This shows that in all “facts” of intelligence there is a degree of interpretation. Jervis (2010) explains the belief that intelligence services failed to “connect the dots” between multiple pieces of information “betrays a fundamental misunderstanding of the problem. There are countless dots, and they can be connected in a great many ways” ( 128). The uncertain and chaotic environment of intelligence gathering necessitates the interpretation of information. However, these interpretations are presented as true and accurate. Clearly in the case of the 7 July bombings, the decision not to follow up with Khan and Tanweer was a mistake, but Jervis makes it less clear if MI5 should be blamed for this mistake.

If an exercise in assigning responsibility does not help us understand why torture became quasi-policy, where do we go from here? Intelligence agencies and security services cannot stop processing information they think will help protect citizens and society. And governments cannot abandon their duty to protect citizens just because of the degree of uncertainty that is inevitable in intelligence work. There are more questions to be asked about torture in the fight against terrorism than there are answers.

The most fundamental question to ask is whether or not torture can extract *accurate* information. It is clear that torture can extract information, but what type of information is obtained? From scholars and practitioners, we have learned that torture cannot extract accurate information. Darius Rejali (2009) writes, “For harvesting information, torture is the clumsiest method available to organizations, even clumsier in some cases than flipping coins or shooting randomly into crowds” (478). When the answer is that torture does not extract accurate information, numerous other questions must be asked.

First, why do states resort to torture, if it cannot extract accurate information? An adequate answer to this question requires more time and space than allowed in this paper, but a

second quote from Rejali provides a possible answer. He writes, "Torture for information may be the clumsiest method, it may produce serious institutional damage, but it may also be better than sitting on one's hands" (460). Rejali is one of only a few scholars to recognize and acknowledge the disconnect between scholars of torture and practitioners of torture. The CIA, US Army and Reid Organization rely on scholars to support their methods of interview and interrogation. However, these scholars are different than the scholars who have written books about or studied police interrogation or torture methods. The cherry-picking of scholars means that the two different communities rarely come in contact with one another, at least in a way that fosters an interactive dialogue instead of each side independently criticizing the other.

Another question that must also be asked concerns the ticking time bomb hypothetical. If this hypothetical model will never be found in the real world, is there a different model that can be developed to replace it? If laws and actions cannot be based off of a theory that already exists, is it possible to develop a new theory of intelligence? This question is especially important, in light of the conclusion drawn by British scholar Steve Hewitt: "new acts of terrorism in the UK are a matter of when, not if" (119). There is a need for a better-developed mechanism for gathering, evaluating, and transmitting information related to terrorism in order to make future attacks less damaging.

And finally, the issue of the derogation from the European Convention on Human Rights and the declaration of a state of public emergency needs to be addressed. Within the UK government, there has been a debate about whether or not a state of emergency can still exist more than ten years after it was first declared. Is this the same emergency? Has it changed, and how? The Joint Committee on Human Rights (2010) wrote, "Since September 11<sup>th</sup> 2001 the Government has continually justified many of its counter-terrorism measures on the basis that there is a public emergency threatening the life of the nation. We question whether the country has been in such a state for more than eight years" (3). To what level does a threat have to rise to be a public emergency threatening the life of the nation? Is it possible for such a threat to exist for more than a week? A month? A year? The question of a public emergency forces us to ask questions about the changing nature of warfare. If the UK can still validly claim a threat to the life of the nation, then has war taken on a whole new structure and form? If so, what methods, strategies and tactics will need to be developed in order to fight this new type of warfare?

Whatever the methods and techniques developed and used, the rationalizations and assumptions that are held by government actors concerning these techniques and methods need to be critically examined. Accurate intelligence about terrorist threats is a continued need so long as the United Kingdom is engaged in the War on Terror. Only by critically questioning the assumptions and rationales behind the development of counter-terror policies will it be possible to ensure that strategies are based on an accurate assessment of the world.

## Appendix A

### Summary of Operations Manuals

***Prisoners of War, Internees and Detainees***, published by the United Kingdom Chiefs of Staff, 2006.

This document totals eighty-three pages, and has the stated purpose “to provide high level joint doctrinal guidance on how to deal with prisoners who fall into the hands of UK Armed Forces during military operations, whether Prisoners of War (PW), civilian internees or those detained as a result of suspected or actual criminal activity” (iii). It’s five chapters, nine annexes, and two lexicons do not anywhere address a definition of torture. The Chapter Titles are: (1) The Fundamentals; (2) Standards of Treatment; (3) Violations of the Law Relating to the Treatment of Captured or Detained Persons; (4) Determining the Status of Captured Persons; and (5) Planning Training and Advice. The Lexicon of Terms and Definitions defines the following: combatant, (criminal) detainee, internee, law of armed conflict, non-combatant, occupation, prisoners of war, protected persons, and protecting power.

This document was obtained through the WikiLeaks website.

***Army Field Manual: Counter Insurgency Operations***, published by the Ministry of Defence, 2007.

This document begins with the following 1961 quote from BH Liddell Hart, a British officer during the First World War. “If you wish for peace, understand war, particularly the guerilla and subversive forms of war.” The 216-page manual is divided into two separate parts, totaling fifteen different chapters, and includes an annex and a glossary. The chapters cover everything from a definition of insurgency to a detailed account of the British government’s previous experiences fighting an insurgent force. For Section A, An Introduction to Insurgency, the chapter titles are: (1) Introduction; (2) The Concept of Insurgency; (3) The Conduct of Insurgency; (4) Tactical Considerations for an Insurgency; and (5) Contemporary Insurgency. For Section B, Strategic Considerations, the chapter titles are: (1) Aspects of the Law; (2) The Application of Military Doctrine to Counter Insurgency Operations; (3) The Principles of Counter Insurgency Operations; (4) A Strategic Concept of Operations; (5) Coordination; (6) Intelligence; (7) Military Operations; (8) Logistic Planning for Counter Insurgency; and (9) Contact with the Media. Of the sixty-two terms listed in the glossary, none of the define torture or provide a list of accepted interrogation techniques.

This document was obtained through the WikiLeaks website.

***Tactical Handbook for Operations Other Than War***, published by the Ministry of Defence, 1998.

This 312-page document begins with a quote from George Bernard Shaw: “Peace is not only better than war, but infinitely more arduous.” The purpose of the manual is to provide guidance for operations other than war, including, among others, counter insurgency operations. Its four main sections are each broken down in to numerous sub-sections. The four main sections are titled: (A) The Nature of Operations Other Than War; (B) Techniques to Promote Cooperation

and Consent; (C) Force Protection Measures; and (D) Operations to Gain the Tactical Initiative. Section A-1 is titled, "The Experience Gained from Counter Insurgency Operations" and details the exposure of the British government to insurgent forces in the 1930s, 1960s and 1970s.

This document was obtained through the *WikiLeaks* website.

***Countering International Terrorism: The United Kingdom's Strategy***, published by Her Majesty's Government, 2006.

This document explains the UK's strategy for countering international terrorism. Because it is a publicly available document, there are some elements of this counter-terrorism strategy which remain classified and do not appear in the report. As a result of this classification, the document is only 38-pages long. Included in the document is a statement about the need for all parts of government to act together to counter terror threats ( 3) as well as a statement about the need for continued cooperation with other governments in order to protect the UK ( 4).The document is available in full at <http://www.iwar.org.uk/homesecc/resources/uk-threat-level/uk-counterterrorism-strategy.pdf>

***Pursue, Prevent, Protect Prepare: The United Kingdom's Strategy for Countering International Terrorism***, published by her Majesty's Government, 2009

This document is an updated publication of the 2006 strategy for countering international terrorism. It is significantly longer, containing 176 pages instead of just 38. The document includes a foreword by Prime Minister Gordon Brown, which explains the reason for the more extensive publication of the counter-terrorism strategy is to inform the public (4). The document is divided into four different parts: (1) Strategic context; (2) the CONTEST Strategy; (3) Delivering CONTEST; and (4) Communications. CONTEST is the name used to represent the UK's strategy for countering the threat from international terrorism. The document is available in full at <http://www.officialdocuments.gov.uk/document/cm78/7833/7833.pdf>.

***KUBARK: The CIA's 1963 Interrogation Manual***, published by Catocin Creek Publishing, 2008.

This still-redacted manual has been the basis of the Central Intelligence Agency's counterintelligence interrogation policy since 1963. The manual relies on behavior analysis as a way to inform interrogators of how to detect deception, as well as a way to determine what type of statements will make a person talk. The manual is 146 pages long, and includes a chapter titled "The Coercive Counterintelligence Interrogation." The purpose of this chapter is stated as "To present basic information about coercive techniques available for use in the interrogation situation" (109). The techniques described are: deprivation of sensory stimuli; threats and fear; the threat of debility; pain; heightened suggestibility and hypnosis; and narcosis (116-134). The manual is well supported by scholarly research. The following list represents just a few of the authors whose work is cited in the manual: Max Barioux, Albert Biderman, Dr. Lawrence E. Hinkle, Jr., Dr. Malcolm L. Meltzer, and most importantly John E. Reid and Fred E. Inbau. The manual can be read online at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/01-01.htm>

***US Army Intelligence and Interrogation Handbook***, published by The Lyons Press, 2005.

This 202-page manual is the basis of US Army interrogation techniques. It was referenced in multiple memoirs from interrogators who served in the US military in Iraq, Afghanistan and at the military base at Guantanamo Bay, Cuba. The manual is divided into four chapters and seven appendices. The chapters are titled: (1) Military Intelligence Missions and Intelligence Preparation of the Battlefield; (2) Composition and Structure; (3) The Interrogation Process; and (4) Processing and Exploiting Captured Enemy Documents. Within the interrogation chapter, there are three different approach combinations that can be used by interrogators. They are “Direct—futility—incentive”; “Direct—futility—love of comrades”; and “Direct—fear-up—incentive”. The last option given became the title of one interrogator’s memoir. All of these approaches are described in terms of how they fit to a particular person’s psychological profile, but there is never any list of what techniques can be used other than sitting down in a room and questioning a suspect until he answers.

## Appendix B

### Summary of Research and Experiments about Police Interrogation

*Kassin, "Human Judges of Truth, Deception, and Credibility: Confident But Erroneous"*

This is a transcript of a talk Kassin gave at the Cardozo School of Law in 2000. In the talk he cites the following accuracy rates (out of 100) for distinguishing a truthful statement from a deceptive one (811):

College students – 52.8	CIA, FBI, military polygraphers – 55.7
Police detectives – 55.8	Trial judges – 56.7
Psychiatrists – 57.6	US Secret Service – 64

*Kassin, "He's Guilty!": Investigator Bias in Judgments of Truth and Deception*

Forty-four North American law enforcement investigators, averaging 13.7 years of experience, with 68% having training in interviewing, interrogation and detection of deception. After viewing interrogation tapes, and making a judgement about whether or not the suspect on the tape was truthful or deceptive, each investigator had to rate his or her level of confidence in that judgment on a scale of 1 (not at all confident) to 10 (extremely confident). The results of the study are reprinted below (475)

#### **Judgment accuracy**

Students – 56%	Investigators – 50%
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#### **Confidence**

Students – 5.91	Investigators – 7.05
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*Kassin, "I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*

Sixteen male college students who had committed a mock crime were interrogated in videotaped sessions. Forty different college students were then randomly divided into two groups, one group to be trained in the Reid Technique of Interview and Interrogation, the other not. (See p 501 and 504 for a more in-depth description). The group of forty was then shown the pre-taped interrogations, asked to determine if the person on tape was deceptive or truthful, and then to rate their confidence in that judgment on a scale of 1 (not at all confident) to 10 (extremely confident).

Accuracy scores were calculated on a scale from 0 to 8, since each of the observing college students viewed eight different taped interrogations (508). The results of the study are reprinted below (508):

#### **Judgment accuracy**

Trained students – 3.65	Untrained students – 4.40
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#### **Confidence**

Trained students – 6.55	Untrained students – 5.91
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*Eckman and O'Sullivan "Who Can Catch a Liar?"*

This was a study of the ability of different groups of people to detect lie during an interrogation. Participants were shown ten different videotaped interviews and was asked if the person on the tape was honest or deceptive. Their accuracy score could range from 0 to 10. The mean accuracy scores for each group are listed below (916):

Secret Service – 64.12	Federal polygraphers – 55.67
Robbery investigators – 55.79	Judges – 56/73
Psychiatrists – 57.61	Special interest – 55.34
College students – 52.82	

## Appendix C

### **Timeline of *A and others v. Secretary of State for the Home Department***

25 October 2002 (Case No. C/2002/1710) – Heard in the Special Immigration Appeals Court (SIAC), this appeal challenged the legality of the Anti-Terrorism, Crime and Security Act 2001. The appeal was brought on the basis that the Act was discriminatory, as it did not apply equally to British and foreign nationals suspected of involvement in terrorist activities. The legality of the Act was upheld.

11 August 2004 (EWCA Civ 1123) – Heard by the Court of Appeals, this case allowed the use of evidence obtained by third party torture, so long as the evidence was not directly introduced. In order for evidence to be allowed, it had to be removed by one degree from the torture evidence. In other words, if torture extracted a set of information ‘A’ from a detainee, and ‘A’ led to police discovering a new set of information ‘B’ only evidence ‘B’ can be used, even though the sole reason ‘B’ was discovered was because of the evidence ‘A’ obtained under torture.

16 December 2004 (UKHL 56) – Heard by the House of Lords, this was an appeal of the 2002 decision that allowed for indefinite detentions of foreign nationals suspected of involvement with terrorist activities. The Law Lords reversed the 2002 decision, declaring that the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the 1998 Human Rights Act.

8 December 2005 (UKHL 71) – Heard by the House of Lords, this appeal overturned the use of any evidence that can be linked to torture. The Justices in this ruling stated that torture was a degrading force to both the nation and the legal system permitting its use. There have been no further appeals of this case.

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