The Northern Ireland Civil Rights Movement

This program will analyze the Northern Ireland civil rights era (1968-72) and how the civil rights movement in Northern Ireland modeled the U.S. civil rights movement by challenging societal inequality through nonviolent protest. It will look at the reforms the movement achieved and why the movement ultimately failed will be considered.

The Northern Ireland Civil Rights Association sought to end housing and employment discrimination, institute a one-person-one-vote system, and end gerrymandering of electoral districts. The disbandment of the Ulster Special Constabulary militia and repeal of the Special Powers Act were NICRA's other goals. The government responded by perpetuating religious, political, and cultural discrimination and utilizing emergency laws to repress peaceful protesters.

The program will be of interest to attorneys wanting to learn more about nonviolent protest movements and human rights law.

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The Northern Ireland Civil Rights Movement

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Three Reasons Why the Northern Ireland Civil Rights Movement (1968-72) Is Important:

- 1. The NI civil rights era was one of the defining moments of the Troubles.
- 2. Civil rights leaders in NI attempted to model their movement on the U.S. civil rights movement.
- 3. Societal repercussions from major cases during the civil rights era have an enduring legacy.

1. The NI civil rights era (1968-72) was a defining moment in the Troubles.

- According to Ivan Cooper, who organized a number of Derry protest marches, "Bloody Sunday destroyed the civil rights movement and opened a path for the hard men" of the IRA. (Alan Parkinson, 1972 and the Ulster Troubles, page 24).
- Bloody Sunday ushered in the deadliest year of the Troubles. 495 people were killed in 1972, and Northern Ireland was on the edge of civil war. (William Beattie Smith, From Violence to Power Sharing, page 179).
- Civil strife and killings continued after that for 26 years, until the 1998 Belfast/Good Friday Agreement ended the Troubles. More than 3300 people were killed during this period.

2. Civil rights leaders in NI attempted to model their movement on the U.S. civil rights movement.

- Former Irish President Mary McAleese, who grew up in the Ardoyne section of North Belfast: "I had to make a choice between violence and nonviolence and Martin Luther King, Jr. was the person who said it very simply that nonviolence was the way."
- Michael Farrell, one of the founders of the People's Democracy Group: "People who had watched Martin Luther King, Jr. on television now turned to his tactics."
- "I will now end with a quotation of total hope, the words of former Laureate, one of my greatest heroes of this century, Martin Luther King, Jr. - We Shall Overcome." (John Hume, 1998 Nobel Peace Prize Speech)
- Mitchell McLaughlin, a former Sinn Fein Stormont Assembly member: The NI civil rights movement was "[i]nspired by the bravery and determination of the black civil rights movement in the USA."

3. Societal repercussions from major events during the civil rights era have had an enduring legacy.

- Examples include ongoing cases stemming from Bloody Sunday, the Ballymurphy Tragedy, and the Hooded Men.

- PART I - U.S. Civil Rights Movement

- PART II - Northern Ireland Civil Rights Movement

PART I - U.S. CIVIL RIGHTS MOVEMENT

Forms of Nonviolent Direct Action

- Montgomery Bus Boycott
- Sit-Ins (focus on Nashville)
- Freedom Rides
- Protest Marches (focus on Birmingham)
- Selma to Montgomery (Voting Rights) March

(Highlighted tactics were employed in Northern Ireland as part of a nonviolent direct action campaign.)

NONVIOLENT DIRECT ACTION

Martin Luther King, Jr. on the need for direct action: “Bringing about passage of a new and broad law by a city council, state legislature or the Congress, or pleading cases before the courts of the land, does not eliminate the necessity for bringing about the mass dramatization of injustice in front of city hall. Indeed, direct action and legal action compliment one another. . . “

Martin Luther King, Jr.: “. . . The Christian doctrine of love operating through the Gandhian method of nonviolence [is] one of the most potent weapons available to oppressed people in their struggle for freedom.”

BOYCOTT

- The “boycott” originated in Ireland. In an 1880 speech during the Land Wars, Irish “Home Rule” politician Charles Stuart Parnell called for treating enemies of the Land League with “moral Coventry” (i.e., a British idiom for the “rigid denial of all social or commercial contact.”)
- The first person subjected to this technique was the land agent for absentee landlord Lord Erne in Co. Mayo. Captain Charles Boycott evicted Irish tenant farmers from their homes due to arrears in ever-increasing rents. He was shunned completely. Shops refused to serve him; employees refused to work for him; and he faced silence from everyone he encountered. He left Ireland in disgrace and returned to England.
- The Montgomery bus boycott (1955-56) began with the arrest of Rosa Parks who refused to give up her seat to a white bus customer as required by a city ordinance. The Montgomery Improvement Association and its President, Martin Luther King, Jr., coordinated the 13-month boycott of the city’s white bus system. This led to a U.S. Supreme Court ruling that segregation on public buses is unconstitutional.

BOYCOTT

- Browder v Gayle, 352 U.S. 903 (1956): The U.S. Supreme Court upheld a lower court ruling that a Montgomery city ordinance based upon Alabama law requiring segregation on public buses violated the equal protection and due process clauses of the 14th Amendment.
- "For more than 12 months, we, the Negro citizens of Montgomery have been engaged in a nonviolent protest against injustices and indignities experienced on city buses. We came to see that, in the long run, it is more honorable to walk in dignity than ride in humiliation. So, in a quiet dignified manner, we decided to substitute tired feet for tired souls, and walk the streets of Montgomery until the sagging walls of injustice had been crushed by the battering rams of surging justice." (Martin Luther King, Jr. on behalf of the Montgomery Improvement Association)

SIT-IN CAMPAIGN (1960)

- The first sit-in was conducted on February 1, 1960, by 4 black college students at a Woolworth's counter in Greensboro, NC. They protested segregation by ordering food at a lunch counter reserved for white customers. When told they would not be served and asked to leave, they politely refused and remained in their seats. No arrests were made on the first day. That would not be true as the number of students in the sit-in protest campaign grew to 85 and expanded to other cities. Student protesters were insulted, had ketchup and mustard poured over their heads, were physically assaulted, and arrested. Within 3 months, 50,000 students had participated in the sit-in campaign.
- Nashville, Tennessee was one of the cities where the sit-in campaign took hold. Students from Nashville's colleges volunteered for "a nonviolent army." (American Baptist Theological Seminary was one of the schools.) They attended workshops led by the Reverend James Lawson on the tactics of nonviolence - how to be courteous, remain sitting straight and not retaliate, exercise disciplined self-restraint while being insulted and assaulted, remember the teachings of Jesus Christ, Gandhi, and Dr. King ("Love and nonviolence is the way."), and prepare for arrest and jail. Among the students he trained to stage sit-ins at major downtown stores were John Lewis, Diane Nash, James Bevel, and Marion Barry.

SIT-INS

- As one group of students was arrested, they were replaced by another. Students sang "We Shall Overcome" as they were taken off to jail. On the first day, 82 refused to pay bail causing the city jail to overflow.
- Students from other schools joined the protest, which expanded to include a "don't buy downtown" boycott. Additionally, the first mass protest march of the civil rights movement was held in the city center. After 4 months, Nashville's mayor appealed to its citizens: "to end discrimination, to have no bigotry, no bias, no hatred." He ordered the release of all those still in jail. Diane Nash specifically challenged him on the desegregation of lunch counters. The mayor responded affirmatively saying they will be integrated.
- Dr. King came to Nashville, "not to bring inspiration," he said, "but to gain inspiration from the great movement that had taken place in the community." (John Lewis, Walking With the Wind, page 111).
- Two months later, the Student Nonviolent Coordinating Committee (SNCC) was established at Shaw University in North Carolina to use direct action to challenge segregation head-on. The sit-in movement continued. In October 1960, Dr. King and 300 students were arrested in Atlanta. At the request of Coretta Scott King, Presidential hopeful John F. Kennedy and his campaign manager Robert F. Kennedy helped secure Dr. King's release from jail.

SIT-INS

- "The key significance of the student movement lies in the fact that from its inception, everywhere, it has combined direct action with nonviolence." (Martin Luther King, Jr.)
- Garner v Louisiana, 368 U.S. 157 (1961): Defendants were convicted of disturbing the peace for sitting at lunch counters in whites-only seating sections. They had ordered lunch and refused to leave when asked to do so by police. They made no speeches, carried no signs, and did nothing to attract attention other than to sit at the counters.
- The convictions were reversed in an opinion written by Chief Justice Earl Warren. The Court "held that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the due process clause of the Fourteenth Amendment." The decision forbade states from using criminal statutes on disturbing the peace against protesters sitting peacefully in opposition to segregation.
- In accord, Brown v Louisiana, 383 U.S. 131 (1966).

FREEDOM RIDERS

- Boynton v Virginia, 364 U.S. 464 (1960): The Court held racial discrimination is prohibited by the Interstate Commerce Act. It overturned Boynton's trespassing conviction for sitting in the whites-only section of a restaurant in a Richmond bus station. As an interstate traveler, the Court said, he had the right to expect that transportation food service voluntarily provided would be rendered without discrimination.
- The Congress on Racial Equality challenged the lack of enforcement of the Boynton decision and the government's failure to enforce the integration of travel facilities in the summer of 1961 with the Freedom Riders movement. 13 civil rights protesters (7 blacks including John Lewis, and 6 whites) left Washington, DC on a Greyhound bus, planning to travel to New Orleans. One of the riders said, we sought to "redeem the land of Jim Crow with acts of commitment and sacrifice." The riders used whites-only restrooms, lunch counters, and waiting rooms. Beginning in South Carolina, they were subjected to violence.

FREEDOM RIDERS

- A second group of freedom riders joined in Atlanta. They rode on a Trailways bus. They were beaten by a mob at the bus station in Birmingham, Alabama. The Greyhound Bus was firebombed in Anniston, Alabama. As the riders escaped, they were beaten by a waiting mob.
- A second Greyhound bus left Birmingham with a police escort. The police departed just before the bus entered Montgomery, Alabama. The riders were attacked by a mob with baseball bats and clubs as they stepped off the bus.
- After federal intercession, the National Guard escorted a bus to Jackson, Mississippi, where the riders were arrested for trespassing after using whites-only facilities at the bus station. They received 30-day jail sentences that were served at Parchman maximum-security Penitentiary.
- The freedom rides were viewed as "a pivotal moment in American history - a revolutionary change in the character of citizen politics. . . [T]he lesson of the rides was the ability of ordinary citizens to affect public policy." (Raymond Arsenault, Freedom Riders, pages 298-99). This new model of citizen activism for democratic reform took courage and commitment.

BIRMINGHAM

- Dr. King said, “as much as I deplore violence, there is one evil that is worse, that’s cowardice.” He knew the freedom riders were not cowards, noting “I’m sure these students are willing to face death if necessary.”
- Birmingham Police Commissioner Bull Connor on Freedom Riders coming to Birmingham : “Long as I’m police commissioner in Birmingham, the n_____s and white folks ain’t gon’ integrate together in this man’s town.”
- Dr. King explained why he brought the direct action campaign to Birmingham at the request of Reverend Fred Shuttlesworth: He came, he said, because Birmingham is “probably the most segregated city in the U.S.” with an “ugly record of brutality.” Dr. King noted that “injustice anywhere is a threat to justice everywhere.”
- Still police commissioner 2 years later, Bull Connor responded to the “children’s protest march crusade” (children aged 8-10 marching from the Sixteenth Street Baptist Church) by unleashing police dogs and fire houses on them and filling the jails with mass arrests. Thousands of children and adults were injured in the city’s violent response to peaceful protest marches.

PROTEST MARCHES

- The Birmingham campaign was known as “Project C”. It included a combination of sit-ins, boycotts, and protest march mass demonstrations.
- Shuttlesworth v City of Birmingham, 394 U.S. 197 (1969): The Court reversed the conviction of Reverend Fred Shuttlesworth for leading a protest march against segregation without a permit. The Court held the ordinance upon which the denial was based was an unconstitutional prior restraint on speech, because it lacked narrow, objective, and definite standards.
- Birmingham Commissioners had “absolute power” to refuse a permit whenever they thought “the public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused.” The Court held that picketing and parading are methods of expression protected by the First Amendment which may be regulated (in terms of time, place and manner), but not wholly denied. The Commission had made clear to Reverend Shuttlesworth that under no conditions would he and his group receive a permit to demonstrate on the streets of Birmingham.
- See also Gregory v Chicago, 394 U.S. 111 (1969); Cox v Louisiana, 379 U.S. 536 (1965); Edwards v South Carolina, 373 U.S. 229 (1963).

DR. KING'S LETTER FROM A BIRMINGHAM JAIL (1963)

- Written by Dr. King over Easter Weekend after an arrest for defying a state court injunction against protest marches.
- Dr. King noted the legal and moral obligation to obey just laws. He believed, like St. Augustine, that "an unjust law is no law at all," and that "one has a moral responsibility to disobey unjust laws." Since all segregation laws are unjust, people are compelled to "disobey segregation ordinances for they are morally wrong." Furthermore, "an individual who breaks the law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law."
- In his "Civil Disobedience" essay, Henry David Thoreau argued that one should "try to use the political process to change the [unjust] law, but to obey and respect the law until it is changed. But if the law is clearly unjust, and the lawmaking process is not designed to quickly obliterate such unjust laws, then the law deserves no respect - break the law."

LETTER

- Bryan Stevenson, founder and executive director of the Equal Justice Institute in Montgomery puts it this way: there comes a time when people must “stand up, not sit down, and “speak out, not remain quiet.”
- Former Irish President and UN High Commissioner for Human Rights Mary Robinson: “There comes a time where an individual has to take a stand and be prepared to pay a price for taking that stand.”
- Bernadette McAliskey (nee Devlin): “It is integral to human dignity to have the right to die on your own feet fighting for what is just, then to live on your knees putting up with what is not.”
- “A social movement that only moves people is merely a revolt. A movement that changes both people and institutions is a revolution.” (Martin Luther King, Jr., Why We Can’t Wait, page 137).

LETTER

- Nelson Mandela's statement from the dock in the 1964 Rivonia trial justifying the use of sabotage against the apartheid Government: "I did not plan it in a spirit of recklessness, nor because I have a love of violence, I planned it as a result of a calm and sober assessment of the political situation that had arisen after many years of tyranny, exploitation and oppression of my people by whites . . . Firstly we believed that as a result of Government policy, violence by the African people had become inevitable. . . Secondly, we felt that without violence there would be no way open to the African people to succeed in their struggle against the principle of white supremacy."
- John Lewis was replaced as head of SNCC by Stokely Carmichael. Immediately following Carmichael's release from jail after his 27th arrest, he delivered a speech in Greenwood, Mississippi to a crowd of 600. The speech altered the civil rights movement. He said: "The only way we gonna stop them white men from whippin' us is to take over. We been saying 'freedom now' for 6 years and, we aint' got nothin'. What we gonna start saying now is 'Black Power.'" (John Lewis, Walking with the Wind, page 388).
- In 1967, Carmichael was replaced as SNCC Chairman by H. Rapp Brown, who is best known for saying: "Violence is as American as cherry pie." Brown also became the Minister of Justice for the Black Panther Party, which had a brief 6-month alliance with SNCC in 1968.

BIRMINGHAM

- The Birmingham campaign ended in May when the city's leaders agreed to desegregate lunch counters, restrooms, and drinking fountains, hire blacks in local stores, and release jailed protesters. Describing the impact of the nonviolent direct action campaign in Birmingham, Dr. King said, "brandishing only the healing sword of nonviolence humbled the most powerful, the most experienced, and the most implacable segregationists in the country." (Martin Luther King, Jr., Why We Can't Wait, page 44).
- At the beginning of that year (1963), newly elected Alabama Governor George Wallace vowed in his inaugural speech: "Segregation now, segregation tomorrow, and segregation forever." During the campaign he had promised to stand in the school-house door to block any attempt to integrate Alabama's all-white public schools. During the summer, Governor George Wallace staged his "Stand in the School-House Door" to block the integration of the University of Alabama.

BIRMINGHAM

- In taking this step, Wallace defied the holding in Cooper v Aaron, 358 U.S. 1 (1958), which re-iterated that Brown v Board of Education, 347 U.S. 483 (1954) was the supreme law of the nation. Cooper ruled that states are obligated to obey Brown under the command of the Constitution. "Our constitutional ideal of equal justice under the law is thus made a living truth." The Cooper case involved the "Little Rock 9." President Dwight Eisenhower sent in federal troops (101st Airborne Division) to enforce desegregation in the face of state opposition. Similarly, Wallace forced President John F. Kennedy to federalize Alabama's National Guard to escort 2 black students so they could register for class. Wallace became a national figure because of his stance.
- In September, 4 black school-girls were killed while attending Sunday School, when the KKK bombed the Sixteenth Baptist Street Church.

FREEDOM SUMMER (1964)

- The Civil Rights Act (1964) outlawed discrimination in hiring, playgrounds, libraries, and accommodation on the basis of race, color, religion, sex, or national origin.
- Voter drives in Mississippi and Alabama made little headway. Only a handful of blacks who wanted to register to vote were allowed to do so. Obstacles to registration included literacy tests, poll tax requirements, threats of job loss, arrests, and violence.
- The human cost that summer: 7 people murdered (5 black, 2 white); 80 beaten by mobs or the police; 35 shootings; 1,000 arrests; 37 black churches and 30 black homes or businesses burned or firebombed.

MISSISSIPPI FREEDOM DEMOCRATIC PARTY

- The MFDP held a convention for those who had not been allowed to register to vote despite attempts to do so. Delegates were elected to attend the 1964 Democratic National Convention in Atlantic City. This was an alternative all-black slate of delegates to the all-white Mississippi delegates. (In his book Walking with the Wind, John Lewis described the showdown in AC as the real democrats vs. the white democrats.)
- The MFDP claimed Mississippi's seats at the national convention, but they were not recognized by the National Democratic Credentials Committee.
- John Lewis called the refusal to seat MFDP delegates as "the turning point of the civil rights movement."

MFDP - "TURNING POINT" IN U.S. CIVIL RIGHTS MOVEMENT

- In his book Lewis wrote: "We had played by the rules, done everything we were supposed to do, had played the game exactly as required, had arrived at the doorstep and found the door slammed in our face. . . It was power politics that did the MFDP in, politics at its worst. . . It was a major let down for hundreds and thousands of civil right workers. . . They felt cheated. They felt robbed. It sent a lot of them outside the system. It turned many of them into radicals and revolutionaries." (Walking with the Wind, page 290).
- The SCLC's (Southern Christian Leadership Conference) James Bevel argued for direct action in Alabama against the denial of the right to vote.

RIGHT TO VOTE

- By the end of 1964, only 2% of the 15,000 eligible black voters in Dallas County, Alabama had been allowed to register to vote.
- In Selma, the county seat, although blacks outnumbered whites in the city's population of 28,500, the voting rolls were 99% white and 1% black.
- The direct action voting rights campaign in Selma and other Alabama cities sought to attract national attention to the denial of the right to vote, and pressure President Lyndon B. Johnson and Congress to pass national voting rights legislation.

SELMA TO MONTGOMERY MARCH (1965)

- The direct action campaign to gain the fundamental constitutional right to vote began in Selma on Jan. 2, 1965, with Dr. King's speech: "Today marks the beginning of a determined organized, mobilized campaign to get the right to vote everywhere in Alabama. . . Give us the ballot! We are not asking. We are demanding the ballot. We must be ready to go to jail by the thousands, We will bring a voting bill into being on the streets of Selma."
- Protest marches to the voter registration office and county courthouse began 16 days later. A city ordinance banning demonstrations led to waves of arrests.
- Governor Wallace sent state troopers to assist county deputies. They resorted to violence to break up demonstrations.

SELMA TO MONTGOMERY

- Protest marches were also held in Perry County, next door to Dallas County. After the Reverend James Orange was arrested in Marion, Alabama, peaceful demonstrators protesting the arrest were attacked. When Jimmie Lee Jackson intervened to protect his mother who was being beaten by a trooper with a nightstick, he was shot. He died 8 days later in a Selma hospital.
- James Bevel called for "a redemptive response to injury." He said: "We should march to Montgomery . . . and go see Governor Wallace."
- Principle #4 of Martin Luther King, Jr's 6 Principles of Nonviolence addresses Redemptive Suffering. "Perhaps the most important principle under the theory of nonviolence is the power of undeserved suffering. The nonviolent resister is willing to accept violence, if necessary, but not to inflict it, knowing that the suffering they endure has great power to change hearts and minds." (moral persuasion)
- Dr. King wrote: "Hate begets hate; violence begets violence; tough-mindedness begets tough-mindedness. We must meet the forces of hate with the power of love; we must meet physical force with soul force." (Stride Toward Freedom, page 74).

SELMA TO MONTGOMERY

- On March 7, 1963, 600 peaceful protesters seeking the right to vote set out from the Brown Chapel AME Church in Selma on a 54-mile protest march to Montgomery. John Lewis (SNCC) and Hosea Williams (SCLC) led the march. After the group crossed the Edmund Pettus Bridge (named for a Confederate Civil War general) on the outskirts of town, they faced a phalanx of state troopers, sheriff's deputies and vigilantes. Marchers refused to disperse when ordered to do so. The day became known as "Bloody Sunday" because of what happened next.
- Police on horseback and foot, many wearing gas masks, advanced on the marchers and attacked them with whips, billy clubs, and tear gas. Lewis suffered a fractured skull. 58 people went to the hospital due to injuries. The attack continued as the marchers retreated back into Selma. At 9:30 PM, ABC news broadcaster Frank Reynolds broke into the television premier of "Judgment at Nuremberg" to play footage of rampaging state troopers in Selma.
- U.S. District Court Judge Frank Johnson issued a temporary restraining order prohibiting further marches. On March 9, Dr. King led 1500 marchers - white and black - to the bridge, where they stopped, knelt, and prayed. The group then returned into Selma. (This day is known as "Turnaround Tuesday.)

SELMA TO MONTGOMERY

- That evening in Selma, the KKK attacked Reverend James Reeb - a white minister from Boston who had responded to Dr. King's call for clergy to come to Selma. He was beaten to death.
- On March 15, President Johnson went on national television to declare his support for the Selma protesters. "So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma . . . Every American citizen must have an equal right to vote." Johnson said this was not a black problem, nor a Southern or Northern problem. He called it "an American problem." He argued: "Their cause must be our cause too. Because it is not just Negroes, but it really is all of us who must overcome the crippling legacy of bigotry and injustice. And we shall overcome."
- Judge Johnson lifted the injunction, and he ordered Governor Wallace to protect those who marched along Highway 80 to Montgomery. President Johnson federalized Alabama's National Guard, and he also ordered U.S. Army troops to protect the marching protesters.

SELMA TO MONTGOMERY

- On March 21, Dr. King led 2000 marchers across the Edmund Pettus Bridge. 300 of them continued walking to state capital in Montgomery over the next 3 days. Upon arriving there, 25,000 people gathered to hear speeches by Dr. King and others.
- Dr. King's "Our God Is Marching On" speech: "And so I plead with you this afternoon as we go ahead: remain committed to nonviolence. Our aim must be to never defeat or humiliate the white man, but to win his friendship and understanding. We must come to see that the end we seek is a society at peace with itself, a society that can live with its conscience. And that will be a day of not the white man, not the black man. That will be the day of man as man. . . Somebody's asking, 'When will wounded justice, lying prostrate on the streets of Selma and Birmingham and communities all over the South, be lifted from this dust of shame to reign supreme among the children of men?' Somebody's asking, 'When will the radiant star of hope be plunged against the nocturnal bosom of this lonely night, from weary souls with chains of fear and manacles of death?' How long will justice be crucified and truth bear it? I come to say to you this afternoon, however difficult the moment, however the frustrating the hour, it will not be long, because 'truth crushed to earth will rise again.' How long? Not long, because 'no lie can live forever.' . . . How long? Not long because the arc of the moral universe is long, but it bends toward justice. . . Our God is marching on. . . His truth is marching on." (After the speech, Viola Liuzza - a volunteer from Detroit - was shot and killed driving on Highway 80.)

VOTING RIGHTS

- On August 6, President Johnson signed the Voting Rights Act into law. (The law was signed in the same room where President Abraham Lincoln signed the Emancipation Proclamation.) The law suspended literacy tests in 26 States; appointed federal examiners to replace local voter registrars; and authorized the U.S. Attorney General to take action against state and local authorities who use a poll tax as a prerequisite to voting.
- President Johnson called the right to vote: "the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men."
- One year later, 11,000 blacks had registered to vote in Selma.

VOTING RIGHTS - "NOVA" OF THE U.S. CIVIL RIGHTS MOVEMENT

- Passage of the Voting Rights Act has been called "the nova of the civil rights movement . . . which brought to a close the nonviolent struggle that had reshaped the South." John Lewis said: "The road of nonviolence had essentially run out. Selma was the last act." (Walking with the Wind, page 362).
- The Watts riots/rebellion began on August 12 due to bitterness over police brutality, and the lack of jobs and housing.(Walking with the Wind, pages 363-64).

PART II - NORTHERN IRELAND CIVIL RIGHTS MOVEMENT

- Northern Ireland Civil Rights Association (NICRA)
- Housing Protest Sit-In by Stormont Assembly Member Austin Currie (June 20, 1968)
- Derry Protest March for Housing and Voting Rights (Oct. 5, 1968)
- Belfast-Derry Voting Rights March (January 1-4,1969)
- Battle of the Bogside (August 12-13, 1969)
- Internment (Operation Demetrius), the Ballymurphy Tragedy, and the Hooded Men (August 1971)
- Bloody Sunday (January 30, 1972)

NORTHERN IRELAND CIVIL RIGHTS MOVEMENT (NICRA)

- A nonviolent, nonsectarian, cross-community organization established in Belfast in 1967 to achieve the following objectives:
- Enact laws prohibiting discrimination in housing and public employment;
- End gerrymandering of electoral districts;
- Redraw electoral districts to reflect the number of voters rather than their identity;
- Institute a one-person one-vote system;
- Disband the Ulster Special Constabulary force (B Specials);
- Repeal the Special Powers Act.

NICRA

- In pursuing its goals, NICRA sought constitutional reform, not separation from the United Kingdom or a united Ireland. Their demands "were simply for a fair deal" by granting "British rights" to British citizens in Northern Ireland. (Michael Farrell)
- By 1970, most civil rights demands had been implemented. Electoral boundaries were redrawn in 1969; one-person one-vote was implemented in 1969; public housing was allocated by an independent body called the Housing Executive in 1969; and employment anti-discrimination laws were enacted in 1969. The B-Specials were stood down in 1970, They were replaced by the Ulster Defense Regiment. The Special Powers Act was repealed and replaced by the Emergency Provisions Act in 1973.
- However, during 1969, "the behavior of state security forces" became the central grievance of nationalists, and it "completely displaced the other issues around which the civil rights campaign had begun." (Niall O'Dochartaigh, From Civil Rights to Armalites, page 311).

CALEDON SIT-IN (HOUSING SQUAT) - 'A SEMINAL MOMENT"

- Derry civil rights activist Eamonn McCann said housing and job discrimination was at the heart of the start of the civil rights movement in Derry. Gerrymandering in Derry resulted in unionists controlling 60% of the council seats even though the population of Catholics in the city outnumbered them. This meant unionists controlled the allocation of housing and public jobs.
- The seminal moment in the civil rights movement came in June 1968, when nationalist Stormont member Austin Currie challenged a decision of the Dungannon Public Housing Council to forcibly evict a Catholic family and award the house to a Protestant mother. He challenged housing discrimination in an acrimonious Stormont debate that ended with him ordered to leave the chamber. It was at this point that he decided to stage a sit-in.
- He and 2 others (one a member of the evicted family) broke into the house and "squatted" for a few hours in an act of civil disobedience. They were arrested and forcibly removed by the Royal Ulster Constabulary (RUC). Ultimately, Currie was convicted and paid a 5 pound fine.

COALISLAND TO DUNGANNON PROTEST MARCH - THE FIRST CIVIL RIGHTS MARCH

- The sit-in protest was viewed as a success after it was reported on BBC news, because it was the first time a major media outlet covered housing discrimination in Northern Ireland. Currie noted that "publicity was the purpose of the exercise," and that the sit-in had resulted in "good television and good press."
- Currie convinced NICRA to conduct its first civil rights march (Coalisland to Dungannon) 2 months later. This march was incident free, although the RUC blocked the 2,000 marchers from entering Market Square in Dungannon, where unionists were holding a counter demonstration. When blocked, the protesters sat down on the street and sang "We Shall Overcome." That evening, NICRA decided it would hold a march in Derry.

DERRY HOUSING MARCH (OCTOBER 5, 1968) AND THE START OF THE TROUBLES

- The NICRA/Derry Housing Committee protest march for housing and voting rights is considered by some as the start of the Troubles.
- The 400 marchers were nonviolent and nonsectarian. Two of the march organizers were Ivan Cooper (a Protestant) and Eamonn McCann. NI's Home Affairs Minister William Craig issued an order banning the march. He viewed the civil rights movement as "a creature of the IRA." He said NICRA "is essentially a nationalist republican front." Cooper refused an RUC request to call off the march.
- As soon as the speeches concluded but before the march began, police corralled the marchers by stationing themselves in front of and behind the demonstrators. Then, the RUC indiscriminately attacked the protesters with baton charges and water cannons. District Police Inspector Ross McGimpsie joined in the beatings with a blackthorn stick.
- Labor MP Gerry Fitt was "in the front of the line when the police moved in", and "he was one of the first to have his skull cracked." (He was accompanied by 3 MP's who planned to report back to the Prime Minister.) An RTE TV reporter filmed Fitt being beaten to the ground. He was held by 2 officers while a third repeatedly hit him in the head. The images were broadcast around the world.

DERRY HOUSING PROTEST MARCH - "A PIVOTAL MOMENT" IN THE TROUBLES

- Craig praised the RUC response, while McCann said "a howl of elemental rage was unleashed across NI . . . We indeed had set out to make the police overreact. But we hadn't expected the animal brutality of the RUC."
- For Bernadette Devlin, "[i]t was my first realization that the police hated us." John Hume concurred, saying he would never forget the hate he saw in the faces of the police. Dermie McClenaghan described how police "beat people to the ground viciously," to teach them a lesson. For peaceful protesters seeking equality, the day reaffirmed the attitude expressed in NI's first Prime Minister James Craig's statement during a House of Commons parliamentary debate on NI - ". . . All I boast is that we are a Protestant Parliament and a Protestant State." (1934)
- McCann saw the day as a "pivotal moment" that "turned [NI} in another direction." Many years later, former NI First Minister and 1998 Nobel Peace Prize recipient David Trimble admitted that local councils awarded housing in a discriminatory manner as claimed by civil rights protesters, and he acknowledged that NI was a "cold house" for nationalists.

PEOPLE'S DEMOCRACY (PD)

- One result of October 5 was the formation of the "People's Democracy" group by Queen's University students, including Michael Farrell and Bernadette Devlin.
- Another result was pressure British Prime Minister Harold Wilson put on Stormont Prime Minister Terence O'Neill that forced him to accept some of the reforms sought by the civil rights movement: promises were made to develop a new system for allocating public housing (a points system), end the Special Powers Act (which did not happen until 1973), institute certain voting rights reforms but not one-person one-vote, and appoint an ombudsman to investigate complaints about government services. O'Neill introduced a reform package that included social reform (housing and jobs), but not constitutional/political reform like one-person one-vote. The limited reforms split his cabinet but fell far short of what NICRA sought. So, the mass demonstrations continued.
- Another civil rights march was held in Derry a month later. Police brutality was added to the list of complaints. This march, led by John Hume had also been banned by Craig. Hume addressed the crowd: "I am not a law breaker by nature, but I'm proud to stand here with 15,000 Derry people who have broken a law which is in disrepute. I invite Mr. Craig to arrest the lot of us." (Echoes of Dr. King's Letter from a Birmingham Jail.) The march was completed without incident.

PD BELFAST-DERRY MARCH

- Two weeks later, the RUC halted a civil rights march in Armagh because unionists led by the Reverend Ian Paisley and Major Ronald Bunting had taken over the city center with a caravan of cars loaded with men armed with clubs and stones. Threatening a violent counter demonstration proved to be a successful tactic in stopping civil rights marches from being completed. Ultimately, Craig banned all marches and counter-demonstration, except for traditional Orange Order parades.
- In December 1968, O'Neill - under pressure from British Prime Minister Harold Wilson - delivered his "Ulster Stands at a Crossroads" speech: "For more than 5 years now I have tried to heal some of the deep divisions in our community. I did so because I could not see how an Ulster divided against itself could hope to stand . . . Unionism armed with justice will be a stronger cause than Unionism armed merely with strength."
- NICRA reacted positively to the speech and placed a temporary moratorium on marches. The PD, however, decided to march to build "momentum" for the one-person one-vote demand. The PD scheduled a 4-day voting rights march from Belfast to Derry. It was planned as a 6-county version of the U.S. civil rights Selma to Montgomery march. The PD march commenced on January 1, 1969.

PD BELFAST-DERRY MARCH

- PD planners set the 73-mile march through many unionist areas to be provocative. Authorities provided no protection. Marchers were sporadically harassed, blocked, and re-routed during the first 3 days. Yet, the group grew from 40 to over 100 marchers.
- On the 4th day, police advised the group they were going to be attacked. The group, however, decided to continue marching to Derry. 7 miles from the end at Burntollet Bridge, an organized mob of 300 men, including off-duty members of the B-Specials, attacked the peaceful protesters. First came the projectiles - "stones, bricks, and milk bottles," bringing the march to a halt. Then, "hordes of screaming people wielding planks of wood, bottles, lathes, iron bars, crossbars, and cudgels with nails" beat the marchers. (Bernadette Devlin, The Price of My Soul, page 139).
- None of the approximately 80 RUC members at the scene intervened. They stood by and watched. 87 marchers were taken to the hospital.
- Devlin was one of those beaten. She described rolling-up "in a ball on the road" to protect herself. She was "clubbed on her back and head, and two nails on a plank protruded into one of her hands," which was protecting her face.

PD BELFAST-DERRY MARCH

- Devlin and many other marchers [including Dolours Price] were radicalized by the experience. Devlin said that the message from authorities was to "let them march and let them take their hiding. They'll have manners when they're finished." She and other blood-stained survivors continued marching to Derry. Thousands joined them in the city.
- There were 4 days of riots in Derry, and a slogan authored by Eamonn McCann was painted on a gable wall at the entrance to the Catholic Bogside: "You Are Now Entering Free Derry." The wall stands today as a memorial to struggles of the past and "a focal point for campaigns of the present and future."
- NI Prime Minister O'Neill appointed Lord John Cameron, a Scottish judge, to chair an inquiry into the causes of unrest at the October 5 march in Derry and at Burntollet Bridge. The Cameron Commission Report was issued later in the year. It found that the police failed "to provide adequate protection" to the marchers at Burntollet Bridge, and that they handled the demonstration in Londonderry on 5 October in an "ill-coordinated and inept" manner. The report also criticized NICRA for "allowing itself to be infiltrated by "subversive, left-wing and revolutionary elements" and for "fomenting disorder and violence in the guise of supporting a nonviolent movement."

BATTLE OF THE BOGSIDE (August 12-13, 1969)

- 2 members of O'Neill's cabinet resigned in response to the report. He called an election but won only a bare majority. He narrowly defeated his opponent, Ian Paisley. He resigned a few months later but managed to get the Unionist Party to support one-person one-vote before he left.
- Bernadette Devlin became the youngest woman elected to the House of Commons when she won a Mid-Ulster by-election. She challenged MP's in what was describes as a "brilliant" maiden speech, warning that "if British troops are sent in [to NI], I should not like to be either a mother or sister of an unfortunate soldier stationed there." [More than 500 soldiers were killed during the Troubles.] She also presciently called for consideration of abolishing the Stormont government and having NI ruled by Westminster.
- The Apprentice Boys parade on the old city walls in Derry is an annual event to commemorate the "no surrender" defiance of 13 apprentice boys who closed the city gates to defend against the troops of Catholic King James in 1689. Copying a Paisleyite-tactic, Devlin and McCann organized a civil rights march at the city walls as a counter-demonstration. After a couple hours of clashes between unionists and nationalists, the RUC decided to storm the Bogside with a "baton charge." Devlin led the resistance. She organized "the manufacture of petrol bombs" and urged defenders "to throw them hard and straight." The Battle of the Bogside was waged for 2 days.

BATTLE OF THE BOGSIDE - “A TURNING POINT”

- The B-Specials were called in, and police used tear gas for the first time. As the fighting continued, security forces became “exhausted and demoralized.” They were unable to quell the violence. Residents made the Bogside and Creggan “no-go” areas by setting-up barricades that prevented the police from entering. British PM Harold Wilson sent in the British Army “to prevent the breakdown of law and order” and restore peace.
- Devlin called it “a turning point in Irish history.” In her book, The Price of My Soul, she wrote: “The people have made their situation clear. We will fight for justice. We will try to achieve it by peaceful means. But if it becomes necessary, we will simply make it impossible for an unjust government to govern us. We will refuse to have anything to do with it.”
- As the Bogside quieted, deadly sectarian riots erupted in Belfast. 8 were killed, and 650 Catholic families were burned-out of their homes. Once again, the RUC stood aside and watched. In total, 1500 Catholic families and 315 Protestant families were driven from their homes. British soldiers were sent into Belfast to keep the peace. NI was descending into the Troubles. 6,000 British troops were stationed there during the summer.

FALLOUT

- Europe's largest forced population movement since World War II, and the erection of 116 so-called "peace walls" made Belfast the most residentially segregated city in Europe.
- Lord Chief Justice Leslie Scarman was appointed to chair an inquiry into the August 1969 disturbances. His report a few years later rejected the assertion that the RUC had acted as a "partisan force cooperating with Protestant mobs to attack Catholic people," but it criticized the RUC for deploying B-Specials into Catholic areas which worsened the situation.
- The Hunt Commission on Policing was established. The Hunt Report in October 1969 recommended abolition of the B-Specials. (In response, there were Protestant riots in the Shankill, and the first member of the RUC to be killed during the Troubles was shot by a Protestant sniper.) A month later, a white paper recommended the creation of the Ulster Defense Regiment (UDR) to replace the B-Specials. The UDR became operational in April 1970.
- Within 6 months, the Official IRA split and the Provisional IRA was formed.

THE BRITISH ARMY GOES TO WAR WITH THE IRA

- Initially, “British troops were well received in nationalist areas.” Nationalists believed troops were there to protect them, so soldiers were greeted with cups of tea and gratitude. That view changed within a year, and they became an enemy. First, the Army became involved in policing the Catholic community. (In Derry, the Army was the “local police force” after the Battle of the Bogside.) Responsibility for policing made the Army responsible for restoring state authority. Catholic good will dissipated as the Army took sides.
- Second, to defeat what they saw as an IRA insurgency, the British military turned to their playbook on “low intensity conflict,” which had been used in counter-insurgency operations in Kenya, Cyprus, and Malaysia during the post-colonial period. Within days of the appointment of Reginal Mauldling as Home Secretary for NI under the new Conservative government, the British army took part in the “Fall Roads curfew operation” (1970), also known by nationalists as “the rape of the lower Falls.” Homes were raided and ransacked by soldiers. “Houses were torn apart, holy pictures torn up, crucifixes thrown in lavatories.” IRA recruiting soared as a result.
- In early 1971, the IRA shot and killed the first soldier to die in the Troubles. The next day, NI Prime Minister James Chichester-Clark announced, “NI is at war with the Irish Republican Provisionals.” When the IRA killed 3 soldiers a month later, he resigned.

INTERNMENT

- Brian Faulkner replaced Chichester-Clark as NI Prime Minister. He promises to run a "law and order" administration.
- The Special Powers Act authorized the detention of any person "who is suspected of acting or having acted or being about to act in a manner prejudicial to the preservation of peace and maintenance of order in NI." The law authorized the extrajudicial deprivation of liberty.
- NI Prime Minister Faulkner banned marches, but not Orange Order parades. He received approval in London to enact "effective measures to restore law and order." British Prime Minister Edward Heath overruled the head of the British Army in NI and authorized Faulkner to implement interment as he saw fit. In response to monthly increases in IRA bomb attacks, Faulkner approved internment - Operation Demetrius.
- Interment commenced on August 9, 1971. In the operation's initial sweep, 342 nationalists were arrested under the Special Powers Act. (No unionists were interned for 18 months). The government had tipped its hand, so many republicans went on the run to avoid arrest. Additionally, the government relied on outdated intelligence and compiled a list of individuals for detention that was "woefully out of date." No current Provisional IRA leaders were on it, but Ivan Cooper and Michael Farrell were. 1/3rd of those arrested were released within 48 hours.

FALLOUT

- Internment arrests continued. Ultimately 2,357 people would be detained, 50% of whom were released without going to court. Interment finally ended in 1976.
- Far from ending violence, internment "immediately produced a ferocious orgy of destruction, a reaction from the republican community of rage." (Lord Kenneth Bloomfield, Stormont in Crisis, page 150). 31 people had been killed in 1971 prior to August 9. 35 died during the rest of the month, and 146 more were killed by the end of the year. McCann said the hours after internment were "the bloodiest NI had known for decades."
- The government totally alienated the nationalist community and legitimized the IRA's argument that the government would not protect them. Recruits flocked to the IRA, and "substantial sums of money and arms were provided from overseas." The IRA became capable of conducting a guerilla war throughout all of NI.
- Faulkner argued internment was "working." He downplayed the impact on the nationalist community, noting that dealing with terrorists is harsh business, and that "innocent people will [sometimes] suffer." However, his aide Bloomfield had a different view. Bloomfield wrote: "The clear verdict of history is that the great gamble of interment failed."

THE HOODED MEN AND THE "5 TECHNIQUES"

- As part of the preparation for Operation Demetrius, the Army instructed members of the RUC Special Branch on how to conduct deep interrogations. During internment, the RUC subjected 14 internees to "the five techniques of interrogation."
- "These methods, sometimes termed 'disorientation' or 'sensory deprivation' techniques were not used in any cases other than the 14. . . [T]he techniques consisted of: (a) wall standing - forcing the detainees to remain for periods of some hours in a 'stress position,' described by those who underwent it as being 'spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;' (b) hooding - putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise - pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep - pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink - subjecting the detainees to a reduced diet during their stay at the center and pending interrogations." (Ireland v the United Kingdom, (Irish State Case I), Eur. Ct. H.R.(1978).

THE IRISH STATE CASES I AND II

- In the Irish State case I, the Irish government sued the UK in the European Court of Human Rights (ECHR) for violating the European Convention on Human Rights (Article 3) prohibition on torture and inhuman or degrading treatment. It was the court's first interstate case. The ECHR distinguished torture from inhuman and degrading treatment based upon "a difference in the intensity of the suffering inflicted." The ECHR held - Ireland v UK (1978) - that the five 5 techniques constituted "a practice of inhuman and degrading treatment," violating Article 3, but did not rise to the level of "torture."
- Forty years later, Ireland requested revision of the decision based on newly discovered psychiatric evidence and government memo's that were in the UK's possession but withheld in the original case. Ireland argued that the evidence suggested the five techniques amounted to torture and that the British government was aware of that at the time it approved its use. In Ireland v the United Kingdom, (Irish State Case II), Eur. Ct. H.R. (2018), the ECHR ruled the evidence could not be said to have had "a decisive influence on the finding of torture" in the original decision.

THE COMPTON COMMISSION REPORT

- 40 internees alleged brutality while in custody. The government established an inquiry under Sir Edmund Compton to report on the "allegations against security forces of physical brutality," during the interment swoop in August 1971. Compton found none of the detainees "suffered physical brutality," nor was there evidence of torture or brainwashing.
- The report considered some cases involving the five techniques. The report identified 2 cases of what he labelled as "ill-treatment" caused by hooding used "not as punishment but as a military precaution." It also identified one case of neglect for failing to give a detainee medical attention after he had been "accidentally cut" during arrest. Compton accepted the security forces denials about hitting or maltreating anyone.
- Nationalists rejected the report's major finding of "no brutality." For them, Compton's name became synonymous with the term "whitewash."

THE BALLYMURPHY TRAGEDY

- In 5 incidents over a 3-day period after Operation Demetrius commenced, 10 people were shot to death in Belfast's Ballymurphy area. A Coroner's Inquest in 1972 returned open verdicts on the killings. The NI Attorney General ordered a new inquest in 2011. That inquest began in 2018. The Coroner, now NI's Chief Justice Siobhan Keegan, heard 100 days of evidence and returned verdicts in 2021.
- Justice Keegan found 9 victims were "all entirely innocent of any wrongdoing," and the lethal force used by members of the British Army Paratroop Regiment to kill them was unjustified and "clearly disproportionate" to the situation (i.e., the unrest following interment) because the deceased were unarmed and posed no threat to the soldiers. (She was unable to determine who was responsible for shooting the 10th victim.) Justice Keegan said shooting "innocent people" was a "tragedy," and hoped the findings may provide the relatives of the deceased some peace. She also complimented them for their "tenacity" in seeking truth and justice.

BALLYMURPHY

- Coroner Keegan criticized the inadequacy of the initial investigation, the failure of some soldiers to provide evidence, and the military's false cover story that the victims were armed or were members of the IRA. She referred 4 cases to the Public Prosecution Service.
- The verdicts vindicated the 5-decade pursuit of the truth surrounding the deadly events by relatives to clear the names of their loved ones.
- British Prime Minister Boris Johnson issued a written apology to the families. They felt it was insincere and unacceptable, Johnson later apologized in the House of Commons, saying: "No apology can lessen their lasting pain. I hope they may take some comfort in the answers they have secured and in knowing this has renewed the government's determination to ensure in the future that other families can find answers without distress and delay." (Within a year, the government introduced the NI Troubles (Legacy and Reconciliation) Act. It was passed by Parliament in 2023 and took effect on May 1, 2024.)

PRELUDE TO BLOODY SUNDAY

- Civil rights leaders added internment to the list of grievances. In mid-January 1972, Faulkner banned parades for the year. 4 days later, John Hume led an anti-internment march at Magilligan strand in Co. Derry. 2,000 demonstrators took part and marched along the beach toward one of the detention camps. They sang "We Shall Overcome," as they walked, until they were stopped by the British Army's First Parachute Regiment.
- Barbed wire was strung along the beach down to the water's edge. When some marchers went into the water to get around the wire, members of First Para wearing riot gear fired rubber bullets and CS gas into the crowd and beat many protesters with batons. Hume accused the soldiers of "beating, brutalizing, and terrorizing demonstrators."
- NICRA had scheduled a march for the following week in Derry. Hume urged them to call it off, out of concern that "someone will be killed. The hatred level directed at the marchers had frightened him. Cooper was the organizer for NICRA. After obtaining IRA assurances that "its members would withdraw from the area during the march," Cooper decided the march would go on as scheduled.
- The RUC Chief Superintendent also had concerns. He "asked that the march be allowed to take place without military intervention." Despite his plea, First Para was placed in charge of the overall command "to contain the march." Faulkner pushed for the Army "to take a hard line with trouble-makers" (i.e., the protesters). The Army prepared an "arrest operation."

BLOODY SUNDAY - JANUARY 30, 1972

- Tens of thousands of demonstrators took part in a peaceful march. Army barricades directed them away from the city center and onto Rossville Street toward Free Derry Corner. Most marchers complied, but some remained at the barricade throwing stones at the soldiers. The Army fired CS gas, rubber bullets and a water cannon at the rioters. The arrest operation order was given; a company of soldiers deployed through the barrier to make arrests. Without authorization, vehicles deployed also and chased people down the street. Soldiers had no means of identifying peaceful demonstrators from rioters.
- A lieutenant fired shots. Afterwards, he claimed it was the only way to prevent being attacked. Hearing shots, other soldiers fired their weapons into the crowd turning the streets of Derry into a killing field.
- Thousands of protesters fled for cover. Many were shot in the back. Within 30 minutes, 13 unarmed civilians lay dead on the ground, 13 others were wounded. All had been shot by soldiers.
- The Army immediately claimed it had fired in self-defense after being fired upon. The British government adopted this cover story. Home Secretary Mauldling told the House of Commons that the Army only returned fire after being fired upon. Devlin, who was there, called him a “liar” and “murdering hypocrite” for defending the soldiers. She ran across the House floor, slapped his face, and pulled his hair.

FALLOUT

- Bloody Sunday ushered in 26 years of violence and death. More than 3300 people were killed between Bloody Sunday and the 1998 Belfast/Good Friday Agreement. (David McKittrick, Seamus Kelters, Brian Feeney, Chris Thornton, Lost Lives, pages 150-1432).
- The nationalist community was traumatized and totally alienated. It was said, "[e]very last vestige of Catholic trust, confidence, and reluctant support" for the Stormont and Westminster governments "went out the door." Many Catholics "felt that the Northern State was unreformable and that they would only get civil rights in a united Ireland."
- IRA ranks swelled with new recruits. Martin McGuinness, who was there, reacted in the following manner. He said, "There are only two responses: that people lie down and accept that there is no future for them, or that people fight. I am proud of the fact that I was part of the community which was prepared to fight back."
- On the day of the funerals for 11 of the Bloody Sunday victims, mobs in Dublin burned down the British embassy.
- British Prime Minister Edward Heath suspended Stormont and imposed direct rule of Northern Ireland from London. He also named William Whitelaw to a new position - Secretary of State for NI.

WIDGERY REPORT

- The British government established a tribunal under Lord Chief Justice John Widgery to determine what happened on Bloody Sunday. Heath instructed Widgery that the UK was fighting not only a political war but also a propaganda war. Widgery refused to accept over 700 eyewitness statements submitted by NICRA, and he called none of these witnesses to testify.
- The Widgery Report was issued in April 1972. It completely and unconditionally exonerated the soldiers and blamed march organizers for the deaths. The report concluded that "there is no reason to suppose that soldiers would have opened fire if they had not been fired upon first." (None of the eyewitness accounts about those shot saw guns or bombs, and none were recovered at the scene.) Still, the report noted that, although none of the deceased or wounded had been proven to be handling a weapon or bomb, there is "strong suspicion that some others had been firing weapons or handling bombs . . . and that yet others were supporting them." It was another "whitewash."
- Derry Bishop Edward Daly called what happened in the aftermath of Bloody Sunday worse than the day itself. Widgery rubbed salt in the wounds of Derry's nationalist community. McCann noted that after Widgery, young people believed there would be no justice. So, they felt justified in pursuing another path - a violent path.

SAVILLE REPORT

- McCann said, “the most powerful feeling [in Derry] was the desire for revenge.” In July, the IRA indiscriminately detonated 22 bombs in Belfast over 75-minute period “to balance the books for Britain’s Bloody Sunday.” 9 people died and 130 were injured on what is known as “Bloody Friday.”
- In 1998 British Prime Minister Tony Blair called for a new review of Bloody Sunday and established the Lord Mark Saville of Newdigate Inquiry. Saville conducted 900 interviews and called 700 witnesses to testify. The Saville Report was issued in 2010. It categorically and fully rejected Widgery’s findings.
- The Saville Report vindicated the Bloody Sunday families, and it exonerated all of the victims, finding they were innocent, unarmed civilians who posed no threat to the soldiers, Noting the soldiers failed to issue warnings, the report concluded: “Soldiers of 1 PARA on Bloody Sunday caused the deaths of 13 people and injury to a similar number, none of whom was posing a threat of causing death or serious bodily injury.” The report rejected the claims of self-defense and found soldiers tried to cover-up their actions with lies.

SAVILLE REPORT

- The Saville Report said NICRA was not to blame, rather responsibility and blame for the atrocity was placed on members of Support Company "whose unjustifiable firing was the cause of deaths and injuries."
- Family member of the victims marched from Free Derry Corner to Guildhall Square, where the report was made public. After 38 years, the truth was finally out. They sang "We Shall Overcome." ("The day we see the truth and cease to speak is the day we begin to die." (Martin Luther King, Jr.)).
- David Cameron was British Prime Minister when the Saville Report was released. He apologized to the families in the House of Commons. "What happened should never have happened. The families of those who died should not have to live with the pain and hurt of that day, and a lifetime of loss. Some members of the Armed Forces acted wrongly. The government is ultimately responsible for the Armed Forces. And for that, on behalf of the government - and indeed the country - I am deeply sorry. What happened on Bloody Sunday was both unjustified and unjustifiable. It was wrong."
- The report found some individual soldiers accountable, but absolved Army higher-ups. Soldier F is currently facing 2 counts of murder (victims James Wray and William McKinney) and 5 counts of attempted murder. Recently, the Public Prosecutor decided not to lodge perjury charge against any soldiers.

CONCLUSIONS

- Bloody Sunday ended the NI civil rights movement, and the IRA took advantage of the void. McCann argues that it was "the RUC and the unionist government" who created the IRA.
- Bernadette Devlin: Bloody Sunday was the day "when the civil rights movement ended, and the armed struggle began. . . That was the point of realization for me that the penalty for demanding equal rights in your society is that your government will kill you." (Christine Kinealy, War and Peace, page 86).
- After 1969, policing reform was the major civil rights issue. It remained at the heart of the conflict until the 1998 Belfast/Good Friday Agreement.
- "It wasn't the rat-a-tat of machine guns which had delivered many of the civil rights demands but the sound of marching feet." (Eamonn McCann, War and an Irish Town, page 26). For McCann, the Belfast/Good Friday Agreement consolidated the civil rights victories that the IRA rejected in the 1970's. (Ex: the 1973 Sunningdale Agreement).

POINTS OF COMPARISON

1. U.S. military interventions ordered by Presidents Kennedy and Johnson supported the civil rights protesters, while British military interventions supported the restoration of State authority over nationalists.

2. In the U.S., the civil rights movement had an effective channel for redress in the federal courts that was absent in the courts of both Northern Ireland and Great Britain.

3. The U.S. civil rights movement was influenced by the SCLC - an umbrella organization of black churches - and Dr. King, its charismatic President, who kept the focus on peaceful protest inspired by Christian values and Gandhian nonviolence. While individual priests supported civil rights protesters in NI, the Catholic Church as an institution remained silent and avoided discussing "how to respond, to intervene, or to explore solutions" to the situation. (Denis Bradley, Peace Comes Dropping Slow, page 17-18). That was viewed as politics, not as something for the Church.

IRISH UNIFICATION

- Belfast/Good Friday Agreement: The two Governments: "recognize that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland." (Article 1(2)).
- A unity referendum shall be held when it appears likely to the Northern Ireland Secretary of State that "a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form a part of a united Ireland."
- The cross-community Ireland's Future group and the Irish Government's Committee on the Implementation of the Good Friday Agreement recognize that preparations must begin now for a unity referendum some time in the future. People deserve concrete answers to the myriad of questions concerning what constitutional change will mean for daily life on the island, so that they fully understand the ramifications of their vote.

GO RAIBH MILE
MAITH AGAT!

THE *IRISH STATE CASE*, INTERROGATION TECHNIQUES AND THE GLOBAL WAR ON TERROR

*Edward M. Neafsey**

In *Ireland v. the United Kingdom*, also known as the *Irish State Case*, the European Court of Human Rights ("ECHR") held that the "five techniques" of interrogation violated Article 3 of the European Convention on Human Rights.[1] In doing so, the ECHR determined that there was a significant legal distinction between conduct constituting "torture" and conduct amounting to "inhuman and degrading treatment."[2] This decision would play a critical role in U.S. government analysis of interrogation of al-Qaeda and Taliban detainees during the global war on terror. It would also be revisited by British authorities during an investigation into prisoner abuse during the Iraq Conflict. The report in that investigation—the *Baha Mousa Public Inquiry*—was released in 2011. It recommended, among other things, that the British Ministry of Defense issue standing orders, which would forbid use of the five techniques during military operations and make them subject to criminal sanction.[3] This article reviews the decision in the *Irish State Case* in Part I, and the report in the Baha Mousa case in Part II. In Part III, it analyzes how the legal issues raised by the use of special techniques to interrogate "enemy combatants" abroad have been handled in the United States.

During the course of the global war on terror, the United States has had to address whether certain kinds of coercive interrogation

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1. Ireland v. United Kingdom (*Irish State Case*), 25 Eur. Ct. H.R. (ser. A) ¶167 (1978). Article 3 of the European Convention on Human Rights and Fundamental Freedoms states that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment." Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

2. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶165.

3. SIR WILLIAM GAGE, 3 BAHA MOUSA PUBLIC INQUIRY 1267 (2011) [hereinafter 3 MOUSA INQUIRY], *available at* http://www.bahamousainquiry.org/report/index.htm; *see infra* Part I.

tactics constitute "torture" or other criminal conduct, and whether certain kinds of procedures could lawfully be employed. United States policy on this issue was first established in 2002 in legal guidance memoranda authored by members of the Department of Justice ("DOJ"). These memoranda have become known as the "torture memos."[4] In 2004, after the policy had run amok in Iraq, it was revised by additional legal guidance rendered by DOJ.[5] Congress also acted to broaden the scope of prohibited conduct by making "cruel, inhuman or degrading treatment or punishment" a crime, when it passed the Detainee Treatment Act ("DTA") in 2005.[6]

In the Baha Mousa Public Inquiry, Great Britain chose to adhere to international law and the *Irish State Case*, saying the techniques proscribed by that decision must be clearly "banned or prohibited."[7] In setting national security policy, the United States opted to chart a twisting and turning path of interpretation and application of the decision. At times the *Irish State Case* was cited by federal government lawyers to support the U.S. program of enhanced interrogation techniques ("EIT") for detainees, and at other times, the case was distinguished and deemed inapplicable to U.S. detainee

4. *See, e.g.*, Draft Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, for William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 9, 2002) [hereinafter Yoo Memorandum Jan. 9, 2002], *available at* http://www.torturingdemocracy.org/documents/20020109.pdf; Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee–Gonzales Memorandum Aug. 1, 2002], *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf; Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, for John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency (Aug. 1, 2002) [hereinafter Bybee–Rizzo Memorandum Aug. 1, 2002], *available at* http://www.justice.gov/olc/docs/memo-bybee2002.pdf. These legal documents have been called the "torture memos," because they provided the legal basis for President George W. Bush's Feb. 7, 2002 Memorandum "outlining treatment of al-Qaida and Taliban detainees." Presidential Memorandum on Humane Treatment of al-Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memorandum Feb. 7, 2002], *available at* http://www.torturingdemocracy.org/documents/20020207-2.pdf. The presidential memorandum indicated that "Common Article 3 of Geneva" did "not apply to either al-Qaida or Taliban Detainees," and that "Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.*

5. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, for James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice (Dec. 30, 2004) [hereinafter Levin Memorandum Dec. 30, 2004], *available at* https://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000045.pdf.

6. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 10 U.S.C. §801 note, 28 U.S.C. §2241(e), and scattered sections of 42 U.S.C. §2000dd (2006)).

7. 3 MOUSA INQUIRY, *supra* note 3, at 1268.

interrogations. The shift in position became necessary so that the specialized program established for interrogating enemy combatants could continue after enactment of the DTA. The inconsistent legal advice rendered by DOJ undermined, rather than supported, the war effort because military personnel and intelligence agents in the field were unable to predict whether their conduct would be viewed as lawful or illegal.[8] It has been ten years since the first memoranda addressing this subject were issued, which makes this a particularly good time to evaluate the development of U.S. policy and law in this area of national security.

I. THE *IRISH STATE CASE*

In the *Irish State Case*, the ECHR was asked to decide whether the use of the "five techniques" as an aid to interrogation in Northern Ireland violated Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment.[9] The ECHR decided the case despite the British government's argument that jurisdiction should not be exercised. The argument was based on a representation by the United Kingdom's Attorney General that the government "considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 of the Convention . . . give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation."[10] The

8. Senator John McCain, who had been tortured by the North Vietnamese while a prisoner of war, has said: "We should not torture or treat inhumanely terrorists we have captured. The abuse of prisoners harms, not helps, our war effort." Sen. John McCain, *Torture's Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34.

9. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶¶148, 150-59 (1978).

10. *Id.* ¶¶153-55. The Attorney General's representation to the ECHR had been preceded by issuance of the Lord Parker Commission Report in 1972. While the Parker Commission had concluded that the use of the five techniques during interrogations violated domestic law, the Parker Commission also considered Common Article 3 of the Geneva Conventions (Treatment of Prisoners of War) and concluded that use of the five techniques by trained interrogators, with the prior approval of senior officials and under conditions of medical and psychiatric monitoring posed a "negligible" risk of physical injury and "no real risk" of long term mental effects. The Commission highlighted both the threat presented by the IRA and the intelligence gained from using the techniques. It noted that using the five techniques had saved lives. Based on all of these considerations, the Parker Commission determined that the five techniques did not violate Common Article 3 of the Geneva Conventions. On the day Lord Parker's report was released, Prime Minister Edward Heath told Parliament that "the techniques . . . will not be used in the future as an aid to interrogation." *Id.* ¶ 101. In 2007, the Parker Commission's Common Article 3 analysis was relied upon in legal advice rendered by the Department of Justice to the U.S. Central Intelligence Agency regarding certain enhanced interrogation techniques used on high value al-Qaeda detainees. Memorandum from Steven Bradbury,

ECHR, however, determined its exercise of jurisdiction in the matter was proper because the Irish government had established that the conduct in question under Article 3 constituted a "practice."[11]

The five techniques at issue were described by the European Commission on Human Rights in its fact-finding as follows:

> (a) Wall-standing: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart with feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;"
> (b) Hooding: putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
> (c) Subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
> (d) Deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
> (e) Deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the center and pending interrogations.[12]

Northern Ireland Prime Minister, Major James Chichester-Clark, announced that "Northern Ireland is at war with the Irish Republican Army Provisionals" ("IRA"), after the IRA had shot and killed the first soldier to die in "the Troubles" in Belfast in 1971.[13] One month later, three more soldiers were killed by the IRA. Brian Faulkner replaced Chichester-Clark as Prime Minister, promising to run a "law and order" administration. As part of a new strategy to combat terrorism, Faulkner instituted internment which authorized extrajudicial deprivation of liberty.[14] Detainees could be arrested without warrant and held for forty-eight hours without bail for interrogation.[15] Detainees could then be held for unlimited duration for further interrogation or under preventive detention as deemed

Principal Deputy Assistant Attorney General, for John A. Rizzo, Acting General Counsel, Central Intelligence Agency (July 20, 2007) [hereinafter Bradbury Memorandum July 20, 2007], *available at* http://www.justice.gov/olc/docs/memo-warcrimesact.pdf.

11. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶157.

12. *Id.* ¶96. The European Commission found that the facts presented by the Irish government with regard to the use of the five techniques "constituted a practice not only of inhuman and degrading treatment but also of torture." *Id.* ¶165. The ECHR disagreed with the finding on torture. *Id.* ¶167.

13. TIM PAT COOGAN, THE TROUBLES: IRELAND'S ORDEAL 1966-1996 AND THE SEARCH FOR PEACE 133 (1996).

14. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶78.

15. *Id.* ¶ 81.

necessary by police and government authorities.[16] Judicial review of these decisions was limited to cases where detainees could make a showing that the government had acted in bad faith.[17] Thousands of nationalists were swept off the streets, labeled "terrorists" and held under internment orders.[18] Those arrested were interrogated, usually by Special Branch members of the Royal Ulster Constabulary ("RUC") who had received specialized training from British intelligence on how to use the five techniques to gather evidence or to gain intelligence about the IRA.[19]

In deciding whether Article 3 of the European Convention had been violated, the ECHR adopted the reasonable doubt standard, which had been employed by the European Commission in its review of the case.[20] After setting forth this burden of proof standard, the ECHR applied a totality of the circumstances test. It considered the duration of the treatment, its physical or mental effects, and factors related to the victim, such as age, gender and health.[21] The ECHR then set forth a two prong legal analysis: 1) related to "inhuman or degrading treatment," and 2) related to "torture." The ECHR noted that the two legal concepts are significantly different under Article 3 based on "a difference in the intensity of the suffering inflicted."[22] The finding in the *Irish State Case* distinguishing inhuman or degrading treatment from torture based on the intensity of the suffering and cruelty inflicted, would serve as a foundation for legal advice rendered by DOJ in 2002—which concluded that acts of torture are crimes under the War Crimes Act ("WCA") but that conduct which is merely cruel, inhuman, or degrading is not.[23]

The ECHR concurred with the European Commission's finding that:

> The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their

16. *Id.* ¶ 84.

17. *Id.* ¶ 82.

18. Two-thirds of those arrested under the Special Powers Act in 1971, were released after interrogation. JOHN MCGUFFIN, INTERNMENT 87 (1973). Loyalists were not interned until 1973. The internment policy in Northern Ireland ended in 1975.

19. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶97.

20. *Id.* ¶ 161.

21. *Id.* ¶ 162.

22. *Id.* ¶¶ 167-68.

23. Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 29. War Crimes Act of 1996, 18 U.S.C. §2441 (2006).

> victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[24]

Thus, the ECHR concluded that the five techniques constituted "a practice of inhuman and degrading treatment" in violation of Article 3.[25]

However, the ECHR rejected the European Commission's finding that the use of the five techniques constituted torture, stating that "[a]lthough the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although the object was the extraction of confessions, the naming of others and/or information and although they were used systemically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture."[26] The legal principle, that "torture" is different from "inhuman and degrading treatment" based on the "intensity and cruelty" of the conduct, set forth in the decision did not impact the holding in the case—that the five techniques of interrogation violated Article 3. Although the five techniques were not deemed to be torture, they were clearly illegal; the ECHR had concluded "the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3."[27] In 2002, when DOJ latched on to the legal distinction recognized in the *Irish State Case* and relied on it to justify its policy position, the ramification was more significant. It was to bestow an *imprimatur* of legality on the U.S. enhanced interrogation techniques program. Once the DTA was passed in 2005, this reliance on the *Irish State Case* had to be shunted aside to avoid handcuffing the program.

The ECHR also held that an emergency existed in Northern Ireland during the period in question, which threatened the life of the nation, and that the British government had acted properly in "derogating" from its obligations under Article 5 (right to liberty and security) and Article 6 (right to a fair trial) of the European Convention on Human Rights.[28] This conclusion upheld Northern

24. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶167.

25. *Id.* ¶ 168.

26. *Id.* ¶ 167. The ECHR also rejected the Irish government's request to direct the United Kingdom to take action against members of the security forces who breached Article 3, as well as those who condoned or tolerated such conduct. The ECHR said it lacked the power to direct a Contracting State to institute disciplinary or criminal proceedings. *Id.* ¶¶ 186-87.

27. *Id.* ¶ 168.

28. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 15, ¶1.

Ireland's policy of internment.[29] But "derogation in time of emergency" of the rights set forth in Articles 2 (right to life) and 3 of the European Convention is not permitted; thus, the British government could not evade its responsibility under Article 3.[30] The government was required to comply with its obligation to ensure that no one is subjected to "inhuman or degrading treatment." Any re-institution of use of the five techniques as an interrogation procedure would contravene Article 3.

II. BAHA MOUSA PUBLIC INQUIRY

On September 8, 2011, former Lord Justice of Appeal Sir William Gage issued his report on the Baha Mousa Public Inquiry into abuse of Iraqi prisoners by British soldiers.[31] The report concluded that superior officers had failed to prevent soldiers from using interrogation procedures—such as hooding, sleep deprivation, and making prisoners stand in painful stress positions—that had been banned since 1972, and that these tactical questioning techniques had in fact been used systemically against Baha Mousa and other prisoners.[32] The report said hooding and handcuffing were used "in order to enhance the shock of capture and improve the level of information extracted from the suspect."[33] But hooding, in particular, was found to be problematic. The report said, "[i]t is difficult to conceive how a return to the use of hoods could be justified whether militarily, legally[,] or as a matter of policy."[34] The report recognized that the five techniques of interrogation had been outlawed under the ECHR decision in the *Irish State Case*, and said that "[i]n the interests of clarity for all, the five techniques should be referred to as being banned or prohibited rather than proscribed."[35]

29. GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND 95 (1989).

30. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 15, ¶2.

31. Lord Justice William Gage had been appointed to preside under the Inquiries Act 2005 passed by Parliament to "provide a framework under which future inquiries . . . that have caused . . . public concern, can operate effectively to deliver valuable and practicable recommendations." Inquiries Act, 2005, c. 12 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2005/12/contents; SIR WILLIAM GAGE, 1 BAHA MOUSA PUBLIC INQUIRY 5 (2011), [hereinafter 1 MOUSA INQUIRY].

32. John Bingham & Andrew Hough, *Baha Mousa Inquiry: Soldiers Suspended in "Dark" Day for Army*, TELEGRAPH (London) (Sept. 8, 2011, 2:46 PM), http://www.telegraph.co.uk/news/uknews/defence/8749760/Baha-Mousa-inquiry-soldiers-suspended-in-dark-day-for-Army.html.

33. 1 MOUSA INQUIRY, *supra* note 31, at 253 (emphasis omitted).

34. 3 MOUSA INQUIRY, *supra* note 3, at 1267.

35. *Id.* at 1268.

Baha Mousa and nine other detainees had been abused and assaulted while undergoing military interrogation in 2003. Mousa had been arrested in Basra, Iraq on suspicion of insurgency and held at a British temporary detention facility. In addition to being subjected to illegal interrogation techniques, he was punched, kicked and beaten.[36] Mousa died within forty-eight hours of his arrest. The report concluded that he died as a result of his "vulnerable" state caused by a "lack of food and water, the heat, . . . acute renal failure, exertion, exhaustion, fear and multiple injuries."[37] Sir Gage concluded that "the use of hooding and stress positions" were key components in causing his death, and "that the use of hooding and stress positions" was a "standard operating procedure" for soldiers.[38] Sir Gage said that "[s]tress positions, hooding, sleep deprivation and noise should obviously not have been used to aid tactical questioning, even for short periods of time. But a distinctive feature of these events was that they were used for an excessively long time."[39] He criticized the Ministry of Defense for failing to emphasize as part of both policy and training that the five techniques had been outlawed since the ECHR decision in the *Irish State Case*, and recommended the issuance of proper instruction and training with regard to hooding.[40]

The Baha Mousa Inquiry has been described as "the biggest examination of [British] military conduct in the aftermath of the Iraq invasion."[41] The review into Mousa's death had been commissioned in 2008 by the British Secretary of Defense who acknowledged that there had been "substantial breaches" of the European Convention on Human Rights. The Ministry of Defense paid 2.83 million pounds in compensation to the Mousa family and the nine men after admitting that the army had violated Articles 2 and 3 of the European Convention.[42] The most expensive court-martial in British history

36. 1 MOUSA INQUIRY, *supra* note 31, at 263–66.

37. *Id.* at 270.

38. *Id.* at 300, 368.

39. *Id.* at 327-28. Mousa had been hooded for the majority of his "36 hours" of mistreatment at the holding facility. Sir Gage rendered no opinion on whether Mousa's mistreatment constituted torture or other criminal conduct. He viewed the terms of reference under the Inquiries Act 2005 as authorizing him only to investigate and issue a fact-finding report on the death of Baha Mousa and the treatment of those detained with him. *Id.* at 328-29.

40. *Id.* at 382.

41. Bingham & Hough, *supra* note 32.

42. European Convention on Human Rights and Fundamental Freedoms, Article 2 states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally . . . . Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more

resulted in the acquittal of six soldiers and the conviction of one in 2006. One other soldier pled guilty to the charge of inhuman treatment of prisoners. He became the first British soldier to plead guilty to a war crime.[43] He was sentenced to one year in jail and discharged from the army.

III. LEGAL ISSUES SURROUNDING SPECIAL INTERROGATION TECHNIQUES

Under the WCA, also known as the anti-torture statute, it is a crime for anyone outside the United States acting under color of law to inflict severe physical or mental pain or suffering upon someone within his or her custody or control.[44] In the 2002 memorandum to Alberto Gonzalez, DOJ said the WCA's criminal provisions applied to situations where "pain that is difficult to endure" is inflicted during interrogation.[45] The memorandum explained that torture, under the WCA, expressly covered the infliction of intense "physical pain" that would accompany "serious physical injury, such as organ failure, impairment of bodily function or . . . death;" and that, under the statute, torture covered the infliction of "purely mental pain or suffering" that would result in "significant psychological harm of significant duration."[46] "Significant duration" meant that the "significant psychological harm" would last for months or years.[47]

Since Congress had passed the WCA to implement the United Nations Convention against Torture and Other Cruel or Degrading Treatment or Punishment ("CAT"),[48] DOJ also considered CAT in delineating the scope of the law. In Article 1 of CAT, torture was defined as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession . . . when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

than absolutely necessary." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 2. Article 2 "ranks as one of the most fundamental provisions in the Convention." McCann and Others v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶147 (1995).

43. Bingham & Hough, *supra* note 32; Steven Morris, *First British Soldier to be Convicted of a War Crime is Jailed for Ill-Treatment of Iraqi Civilians*, GUARDIAN (UK), May 1, 2007.

44. War Crimes Act of 1996, 18 U.S.C. 2441(d) (2006).

45. Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 1.

46. *Id.* at 2.

47. *Id.* at 7.

48. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 112 Stat. 2681–761, 1465 U.N.T.S. 85.

an official capacity."[49] Article 16 of CAT required State parties to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1."[50] DOJ concluded that CAT required criminal penalties only for torture, "the most egregious conduct," as defined in Article 1. The memorandum said CAT did not require making conduct that is "cruel, inhuman, or degrading treatment or punishment," as set forth in Article 16, a crime.[51] Therefore, DOJ determined that conduct which can be characterized as cruel, inhuman, or degrading but which falls short of constituting torture is not a crime under the WCA. In support of this interpretation, DOJ relied on the *Irish State Case*. In citing it with approval, DOJ said that *Ireland v United Kingdom* (1978) had recognized "the same 'intensity/cruelty' distinction," and had concluded that the infliction of physical pain does not always constitute torture.[52]

Furthermore, the memorandum said that "criminal law defenses of necessity and self-defense could justify interrogation methods" which violate the law, if they are "needed to elicit information to prevent a direct and imminent threat to the United States and its citizens."[53] In particular, DOJ noted al-Qaeda plans to develop and deploy chemical, biological, and nuclear weapons of mass destruction.[54] Finally, DOJ took the position that the WCA may be unconstitutional as applied to "interrogations of enemy combatants pursuant to the President's Commander-in-Chief powers."[55] On the same day, DOJ issued a second memorandum related to the interrogation of Abu Zubaydah, which stated that interrogators do not violate the WCA unless they have a "specific intent" to cause severe pain.[56]

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49. *Id.* art. 1.

50. *Id.* art. 16.

51. Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 2.

52. *Id.* at 29.

53. *Id.* at 39.

54. *Id.* at 41.

55. *Id.* at 2.

56. Bybee–Rizzo Memorandum Aug. 1, 2002, *supra* note 4, at 16. Abu Zubaydah is a high value detainee being held at Guantanamo Bay, Cuba. He was subjected to wall standing, the waterboard, stress positions, the facial hold and facial insult slap, sleep deprivation, and cramped confinement. He was also placed in a confined space with an insect. *Id.* at 2–3. All of these procedures, including the waterboard, were approved in the memorandum, which noted that a "good faith belief" that the procedures "would not result in prolonged mental harm" existed, and that "there is no specific intent to inflict severe mental pain or suffering." *Id.* at 18. The use of enhanced interrogation techniques on Zubaydah led to the identification of Khalid Sheikh Mohammed, the mastermind of the 9/11 terrorist attacks upon the United

In 2004, DOJ issued a superseding memorandum that altered certain legal positions in the 2002 memorandum. The 2004 memorandum to Deputy Attorney General James Comey eliminated references to general defenses to liability, as well as the potential unconstitutional usurpation of a presidential authority claim.[57] The previously expressed opinion that the WCA was limited to covering acts causing "severe physical pain" was also changed. The 2004 memorandum expanded the conduct covered by the law to include acts causing "severe physical suffering,"[58] thereby increasing the kinds of behavior that constitute torture. However, the distinction DOJ recognized between acts constituting torture and acts amounting to less abhorrent cruel, inhuman, or degrading treatment was left unchanged; and DOJ continued to rely upon the *Irish State Case* to bolster legal support for this proposition.[59]

Secretary of Defense Donald Rumsfeld approved the use of stronger, enhanced interrogation procedures at the Guantanamo Bay, Cuba detention facility than had been authorized for use by Army Field Manual 34-52.[60] For example, waterboarding was not

States, and Jose Padilla. ALI H. SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA 427 (2011); JOSE A. RODRIGUEZ, JR., HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES 56–57 (2012). Padilla was convicted by a federal jury of conspiring to kill people and to fund and support terrorism. Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1. He was sentenced to seventeen years and four months in jail. Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14.

57. Levin Memorandum Dec. 30, 2004, *supa* note 5.

58. *Id.* at 10.

59. *Id.* at 7.

60. STEVEN STRASSER & CRAIG R. WHITNEY, THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ 5 (2004). Army Field Manual 34-52 (Intelligence Interrogation) was issued in 1987. It was replaced in 2006 by Army Field Manual 22.3 (Intelligence Collector Operations). The Guantanamo Bay detention camp is located on the U.S. Guantanamo Naval Base in Cuba. Combatants captured in the Afghanistan war were first brought to Guantanamo in January 2002. Despite early promises to the contrary, Guantanamo remains open to date. In accepting the 2009 Nobel Peace Prize in Oslo, Norway, President Obama said:

> [w]here force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe that the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions.

President Barack Obama, Nobel Peace Prize Acceptance Speech (Dec. 10 2009), available at http://www.huffingtonpost.com/2009/12/10/obama-nobel-peace-prize-

permitted under the Army Field Manual, but was allowed under the new program.[61] In addition to waterboarding, some of the other enhanced techniques approved by the Secretary of Defense included dietary manipulation and sleep deprivation, as well as the attention grasp, the facial hold, the abdominal slap and the facial insult slap. The purpose of the EIT program was to instill hopelessness and despair so that a detainee would decide it is better to cooperate. Part of the justification for employing enhanced techniques during the questioning of detainees was that the Geneva Conventions did not apply to unlawful combatants like al-Qaeda and the Taliban.[62] This position was set forth in additional DOJ memoranda, which said that al-Qaeda and the Taliban were "non-State actors," who cannot be parties to international agreements governing the law of war, like the Geneva Conventions.[63] The rationale for the aggressive,

a_n_386837.html. President Obama encountered significant resistance to his plan to close the facility. On May 20, 2009, the United States Senate overwhelmingly voted to withhold the funds needed to transfer prisoners held at Guantanamo to facilities within the United States. Supplemental Appropriations Act 2009, Pub. L. No. 111–32, § 14104(a), 123 Stat. 1859, 1920 (2009) ("None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the . . . United States."). On January 7, 2011 President Obama signed the 2011 Defense Authorization Bill that contained provisions restricting the transfer of detainees from Guantanamo to domestic prisons, effectively preventing the closure of the facility. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§1032-1034, 124 Stat. 4137, 4351-54 (to be codified in scattered sections of the U.S. Code). These restrictions were extended for another year by the National Defense Authorization Act for Fiscal Year 2012. Pub. L. No. 112-81, 125 Stat. 1298 (2011) (to be codified in scattered sections of the U.S. Code). A national intelligence report estimates that approximately one in four detainees released from Guantanamo have been confirmed or suspected of being recidivistic; that is, of returning to the battlefield. *Gitmo Repeat Offender Rate Continues to Rise*, FOX NEWS (Dec. 8, 2010), http://www.foxnews.com/politics/2010/12/08/gitmo-recidivism-rate-continues-rise/.
Other studies, however, have assessed the recidivism rate for released detainees returning to the battlefield to be as low as four percent. PETER L. BERGEN, THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA 307–08 (2011).

61. Compare DEP'T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION 1-7 to 1-9 (1992) (prohibiting the use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment), *with* Bybee–Rizzo Memorandum Aug. 1, 2002, *supra* note 4, at 12–18 (concluding that waterboarding does not constitute torture). Waterboarding involved securing an individual to a bench with his or her feet inclined, placing a cloth over the person's nose and mouth and saturating it. Once the cloth became saturated, the person's airflow became restricted. This produced the "perception" of suffocation, panic and drowning. RODRIGUEZ, JR., *supra* note 56, at 69–70.

62. Bush Memorandum Feb. 7, 2002, *supra* note 4, at 1; Yoo Memorandum Jan. 9, 2002, *supra* note 4, at 1.

63. "[N]either the federal War Crimes Act nor the Geneva Conventions would

enhanced interrogation techniques authorized for use at Guantanamo—where detainees were classified as "unlawful combatants"—carried over to the conflict in Iraq. Procedures, beyond those approved for use in Field Manual 34–52, and even beyond those approved for Guantanamo, were authorized by the military for use in Iraq.[64] The authorization to use the enhanced techniques in Iraq was rescinded in late 2003.[65]

In *Hamdan v Rumsfeld*, the United States Supreme Court determined that the Geneva Conventions applied to the conflicts in Iraq and Afghanistan, and that prisoners of war were protected by Common Article 3 of the Geneva Conventions.[66] The Supreme Court decision made it unmistakably clear that the legal advice rendered by DOJ on this issue in 2002 and 2003 memoranda was erroneous and unsustainable. Some interrogators in Iraq had gone far beyond what was permitted by the law of war. Increased pressure to gather actionable intelligence during detainee interrogations had been placed on interrogators. Intelligence was essential to fighting an

apply to the detention conditions in Guantanamo Bay, Cuba . . . ." Yoo Memorandum Jan. 9, 2002, *supra* note 4, at 42. In a second memorandum in 2003, Deputy Assistant Attorney General Yoo also indicated that alien combatants held abroad are not protected by the due process clause of the Fifth Amendment or from the infliction of cruel and unusual punishment under the Eighth Amendment. Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, for William J. Haynes II, Gen. Counsel of the Dep't of Def. 1 (Mar. 14, 2003) [hereinafter Yoo Memorandum Mar. 14, 2003], *available at* http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf. *But cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 631–32 (2006) (holding Geneva Conventions Common Article 3 applies to individuals held prisoner at Guantanamo Bay, Cuba). Furthermore, Yoo's 2003 legal memorandum concluded "that CAT defines U.S. international law obligations with respect to torture and other cruel, inhuman, or degrading treatment or punishment[,]" and that "U.S. obligations under CAT regarding cruel, inhuman, or degrading treatment or punishment is limited to conduct prohibited by the Eight, Fifth and Fourteenth Amendments." Yoo Memorandum Mar. 14, 2003, at 81. With regard to torture, the memorandum indicated that the "standard of conduct" was set forth "in the torture statute." *Id.* (referring to 18 U.S.C. 2441(d)). The memorandum also noted that "[a]lthough decisions by foreign or international bodies[,]" like the ECHR, "are in no way binding authority upon the United States, they provide guidance." *Id.* at 68. Yoo then went on to quote the *Irish State Case* for the proposition that there is a legal distinction between torture and cruel, inhuman, or degrading treatment or punishment, and that physical maltreatment can be cruel, inhuman, or degrading but lack the intensity required to constitute torture. *Id.* at 70 ("[t]his distinction derives principally from a difference in the intensity of the suffering inflicted." (quoting *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶167)). This was consistent with the legal position expressed in DOJ's 2002 memorandum. *See* Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 2.

64. STRASSER, *supra* note 60, at 8.

65. *Id.*

66. *Hamdan*, 548 U.S. at 629–30.

asymmetric war, like the Iraq Conflict. "Tactically, detainee interrogation is a fundamental tool for gaining insight into enemy positions, strength, weapons and intentions. Thus, it is fundamental to the protection of our forces in combat."[67] By 2003, the fighting in Iraq had become a major insurgency. There was conflation of the interrogation procedures approved by the Army Field Manual and the enhanced techniques that had been authorized for use on unlawful combatants held at Guantanamo. The use of illegal tactics in Iraq was condoned.[68] Military police units assigned to run detention facilities came to believe that they could assist military intelligence personnel by softening-up detainees for interrogation.

Abu Ghraib was the largest of the seventeen detention facilities in Iraq.[69] It held approximately 7,000 detainees by late 2003.[70] In January 2004, the first photographs of the Abu Ghraib prisoner abuse scandal began to surface, and there were calls for investigations.[71] It was determined that the Abu Ghraib scandal occurred due to a multiplicity of interrelated factors, including the lack of resources, the lack of training, the lack of oversight and accountability, the backlog of detainees for interrogation, and sadism.[72] Detainees had been physically assaulted, threatened with military dogs, stripped naked as an act of humiliation, and routinely and repetitively punished by being placed in conditions of total isolation and light deprivation without medical screening, time limits, or monitoring.[73]

In 2004, Major General Antonio Taguba issued a report—known as the *Taguba Report*—after conducting an Army Regulation 15-6 Military Inquiry into Abu Ghraib prisoner abuse.[74] The *Taguba Report* found there had been systemic abuse of detainees at Abu

67. STRASSER, *supra* note 60, at 68. Also noted was the fact that Saddam Hussein was captured by "interrogation-derived information." *Id.* Former Lieutenant General David Petraeus has noted that "[e]ffective, accurate, and timely intelligence is essential to the conduct of any form of warfare. This maxim applies especially to counterinsurgency operations." U.S. DEP'T OF THE ARMY, U.S. ARMY/MARINE COUNTERINSURGENCY FIELD MANUAL 57 (2007). The Iraq war was not a conventional conflict; it required the U.S. military to engage in counterinsurgency operations.

68. STRASSER, *supra* note 60, at 26.

69. *Id.* at 11.

70. *Id.*

71. *See* Eric Schmitt, *Inquiry Ordered Into Reports of Prisoner Abuse*, N.Y. TIMES, Jan. 17, 2004, at A7; *60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast Apr. 27, 2004).

72. STRASSER, *supra* note 60, at 66.

73. *Id.* at 111–15.

74. ANTONIO TAGUBA, THE TAGUBA REPORT ON TREATMENT OF ABU GHRAIB PRISONERS IN IRAQ (2004) [herinafter TAGUBA REPORT].

Ghraib prison that was "intentionally perpetrated" by members of the military police. The report said that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees," and it recommended "[t]hat all military police and military intelligence personnel involved in any aspect of detainee operations or interrogation operations . . . be immediately provided with training," specifically on "Geneva Convention Relative to the Treatment of Prisoners of War."[75] The 2004 DOJ memorandum, correcting legal positions taken in the earlier legal memorandums, was issued after the Abu Ghraib scandal and the Taguba Report.[76]

When the DTA became law in 2005, it prohibited the imposition of "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments" on anyone in custody regardless of location or combatant status.[77] Additionally, the Supreme Court decision in *Hamdan*, had made clear that Common Article 3 of the Geneva Conventions of 1949, was part of the applicable law of war in the conflict with al-Qaeda.[78] Violations of the Article were war crimes under federal law. The WCA was subsequently amended by the Military Commissions Act of 2006 ("MCA 06").[79] MCA 06 designated nine discrete offenses that constituted grave breaches of Common Article 3.[80]

75. TAGUBA REPORT, *supra* note 74, at 16, 20.

76. Shortly after its issuance, the classified Taguba Report became public. At a meeting with Defense Secretary Rumsfeld and other high ranking military and government officials to discuss the leak, Major General Taguba said that what had occurred at Abu Ghraib was "torture." Seymour M. Hersh, *The General's Report: How Antonio Taguba, Who Investigated the Abu Ghraib Scandal, Became one of its Casualties*, NEW YORKER, June 25, 2007, at 58, *available at* http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh.

77. 42 U.S.C. § 2000dd(d).

78. Hamdan v. Rumsfeld, 548 U.S. 557 at 629–32 (2006).

79. Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and scattered sections of titles 10, 18, 28, and 42).

80. The nine specific grave breaches of Common Article 3 proscribed by the MCA 06 are: torture, cruel and inhuman treatment, performing biological experiments, murder, maiming, intentionally causing serious bodily injury, rape, sexual assault, and taking hostages. The MCA 06 also left responsibility for defining additional U.S. obligations under Common Article 3 to the President. 10 U.S.C. § 948a. On July 24, 2007, President George W. Bush signed Executive Order 13440, which stated that Common Article 3 of the Geneva Conventions applied to the CIA's program of detention and interrogation. The Executive Order approved the EIT program provided written guidelines were issued addressing training, monitoring, and safe and professional operation of the program, and required that the program complied with specific conditions. Those conditions included prohibitions against the use of torture, acts of violence made illegal under the WCA, 18 U.S.C. § 2441(d), other acts of violence considered comparable to murder, torture, cruel or inhuman treatment, willful and outrageous acts of personal abuse done for the purpose of humiliation or degradation,

After the Supreme Court's decision in *Hamdan*, the enactment of the MCA 06, and the need to correct and rectify faulty legal advice previously provided, DOJ issued additional legal guidance to John Rizzo, Acting General Counsel to the CIA, in 2007.[81] It addressed the use of enhanced interrogation techniques on high value detainees.[82] Those enhanced techniques fell into two categories. The "corrective techniques" category involved physical contact with the detainee—facial hold, attention grasp, face slap, and abdomen slap. The "conditioning techniques" category involved dietary manipulation and extended sleep deprivation for periods up to ninety-six hours.[83] A medical professional monitored the detainee while conditioning techniques were utilized. While sleep deprivation proved to be the most effective technique, the techniques could be used in combination with one another. An interrogation plan involving the use of enhanced techniques on a detainee required the approval of the Director of the CIA. Waterboarding, which had been an authorized "coercive" technique used against detainees who still refused to cooperate despite the use of other enhanced techniques, was omitted from the 2007 memorandum to the CIA.

The new analysis addressed the legality of using these six conditioning and corrective techniques under the WCA, the DTA, and Common Article 3. The WCA prohibited three categories of criminal conduct: torture, cruel and inhuman treatment, and intentionally causing serious bodily injury. In addressing the three categories under the WCA, the 2007 memorandum adopted the definition of "torture" under the anti-torture statute as set forth in the August 2002 memorandum, treated grave breaches of Common Article 3 and violations of the DTA as constituting "cruel and inhuman treatment," and applied the statutory elements of "serious bodily injury."[84] After considering each of these elements, the memorandum concluded that the EIT program was consistent with the WCA.[85] An important component of this conclusion was the fact that there was medical

acts intended to denigrate religion, or any other acts of cruel, inhuman, or degrading treatment or punishment made illegal by the MCA 06, 10 U.S.C. § 948a, or the DTA, 42 U.S.C. § 2000dd. Exec. Order No. 13440, 72 Fed. Reg. 40,707 (July 20, 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070720-4.html.

81. Bradbury Memorandum July 20, 2007, *supra* note 10.

82. *Id.* at 1.

83. *Id.* at 8–11. None of these six enhanced techniques were explicitly prohibited under Army Field Manual 2-22.3, which had been issued in 2006. But the two conditioning techniques—dietary manipulation and sleep deprivation—had been explicitly prohibited in the prior Army Field Manual 34-52. *Id.* at 37.

84. *Id.* at 11–26.

85. *Id.* at 26.

monitoring of detainees undergoing conditioning techniques.[86]

The DTA prohibited the infliction of "cruel, inhuman or degrading treatment or punishment" contrary to the Fifth, Eighth and Fourteenth Amendments. The DTA required compliance with constitutional standards in the treatment of all persons in custody, regardless of nationality or location. Thus, substantive due process protection applied to interrogation procedures wherever deployed. Under the substantive due process analysis, the governmental interest in the EIT program—fighting terrorism and preventing attacks—must be considered. In applying a substantive due process standard, the 2007 memorandum said the ECHR failed to consider this interest in the *Irish State Case*.[87] The decision was further distinguished on the grounds that it did not take into account the medical monitoring safeguards that had been put in place.[88] Therefore, the ECHR's holding in the *Irish State Case* with regard to acts amounting to "inhuman and degrading treatment" but not constituting "torture," which had buttressed DOJ's prior legal advice, was now deemed to be irrelevant and inappropriate in analyzing substantive due process under the DTA.

A substantive due process inquiry focuses on whether the conduct by government officials was so arbitrary, oppressive and unrelated to a legitimate governmental objective that it "shocks the conscience" and violates the "decencies of civilized conduct."[89] In *County of Sacramento v. Lewis*, the Court was asked to decide whether the behavior of a Sheriff's Officer was so egregious and outrageous that it shocked contemporary conscience, when he ran over and killed a motorcyclist he was pursuing in a high-speed

86. *Id.* at 22–23.

87. *Id.* at 40.

88. The psychiatric and medical monitoring that took place while the five techniques were being employed was not discussed in the *Irish State Case*. *Id.* But it was noted in the Lord Parker Commission Report (1972), and it became one of the reasons why that Commission concluded that the five techniques presented a "negligible" risk of causing physical injury and "no real risk" of having long term mental effects. *Id.* at 72–73.

89. Rochin v California, 342 U.S. 165, 172–73 (1952) (holding that forcing emetic solution through a tube into defendant's stomach in order to extract evidence of morphine pills police observed petitioner swallow "is conduct that shocks the conscience"). In *Rochin*, the "shocks the conscience" test of the Fourteenth Amendment Due Process Clause was satisfied, requiring the suppression of the seized evidence and the reversal of the criminal conviction. *Id.* The conscience-shocking conduct was described as follows: "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." *Id.* at 172.

chase.[90] The Court answered that question no, observing that there was no malicious or improper intent on the part of the officer.[91] Additionally, the Court noted the officer was faced with "lawless behavior for which the police were not to blame."[92] The Court said, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[93] In *Chavez v. Martinez*, the Court refused to find a substantive due process violation after police questioned Martinez, who they had just shot.[94] Police and Martinez were in a scuffle. Police said Martinez took an officer's gun. Another officer shot Martinez many times, causing paralysis from the waist down and permanent blindness. Police questioned Martinez at the hospital, while he was pleading for treatment. Martinez claimed that he admitted to taking the officer's gun during coercive questioning. In finding Martinez's due process rights had not been violated by the police, the Court noted that the officers' behavior was not "'egregious' or 'conscience shocking.'"[95] The Court found "no evidence that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment."[96] In fact, Martinez was treated throughout the police interrogation. Nor was "there evidence that Chavez's conduct exacerbated Martinez's injuries."[97] The Court said the need to investigate possible police misconduct and the risk of losing evidence if Martinez had died of his injuries "constituted a justifiable government interest."[98]

The 2007 memorandum applied this substantive due process standard to each of the conditioning and corrective procedures.[99] The memorandum explained that all six enhanced techniques had a

90. 523 U.S. 833, 836 (1998).

91. *Id.* at 855.

92. *Id.*

93. *Id.* at 836.

94. 538 U.S. 760, 776 (2003).

95. *Id.* at 775.

96. *Id.*

97. *Id.*

98. *Id.*

99. Bradbury Memorandum July 20, 2007, *supra* note 10, at 29–31. The substantive due process test was not a new one. It had previously been recognized in a 2003 DOJ memorandum. Yoo Memorandum Mar. 14, 2003, *supra* note 63, at 65–68. However, by the time the 2007 legal memorandum was issued, DOJ had already rejected Yoo's opinion that criminal liability for using interrogation methods that violate the Eighth, Fifth, or Fourteenth Amendments could be defended on the grounds that "necessity or self-defense could provide justification," for such conduct. *Id.* at 81; *see* Levin Memorandum Dec. 30, 2004, *supra* note 5, at 2.

"close relationship to the important governmental purpose of obtaining information crucial to preventing future terrorist attack[s]."[100] The memorandum noted that "enhanced interrogation techniques proved particularly crucial in the interrogations of Khalid Sheikh Mohammed and Abu Zubaydah."[101] The memorandum also highlighted the fact that medical safeguards accompanied the use of any enhanced interrogation technique, and that the infliction of "any significant harm" during questioning would be avoided because of the safeguards.[102] Based on all of these considerations, it was determined that the EIT program did not violate the Due Process Clause, and that using one or more of the enhanced techniques while questioning a high value detainee would not constitute "arbitrary or egregious conduct."[103] None of the six procedures shocked the conscience or violated substantive due process tenets. Therefore, use of the enhanced techniques did not run afoul of the DTA, and U.S. officers and agents were permitted "to employ a narrowly drawn, extremely monitored, and carefully safeguarded interrogation program for high value terrorists . . . that do[es] not inflict significant or lasting physical or mental harm."[104]

Common Article 3 of the Geneva Conventions imposes an obligation on parties to a conflict to treat all prisoners of war "humanely." It prohibits violence to life, murder, mutilation, cruel treatment and torture, taking hostages, and outrages on personal dignity such as humiliating and degrading treatment. The 2007 memorandum noted that Congress had largely addressed Common Article 3 in the WCA and DTA. Based on the conclusions reached in the memorandum regarding the WCA and DTA that the use of enhanced interrogation techniques violated neither statute, it was determined that the enhanced procedures also did not violate Common Article 3 of the Geneva Conventions of 1949.[105]

Thus, the 2007 DOJ memorandum covered all of the legal bases necessary to uphold the EIT program, albeit modified to remove waterboarding. In doing so, it deftly avoided the problem prior DOJ

100. Bradbury Memorandum July 20, 2007, *supra* note 10, at 48.

101. *Id.* at 32.

102. *Id.* at 5.

103. *Id.* at 48.

104. *Id.* at 44.

105. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. (binding High Contracting parties in a conflict in their treatment of prisoners of war, protects "[p]ersons . . . placed 'hors de combat' by . . . detention," and prohibits "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all judicial guarantees . . . recognized as indispensable by civilized peoples").

memoranda had created by citing the *Irish State Case* with approval and by relying upon the "intensity/cruelty" distinction between torture and inhuman or degrading treatment the decision had recognized. The *Irish State Case* had now been distinguished. It no longer applied to U.S. legal considerations of the global war on terror. The determination in the *Irish State Case* that sleep deprivation and dietary manipulation—the two conditioning techniques under the EIT program deemed lawful in the 2007 legal memorandum—amounted to "cruel and inhuman treatment" was no longer persuasive, even though that determination had previously provided legal justification for the program.[106] The 2007 document also made a point of sharply contrasting the six approved techniques with the "outrageous conduct documented at the Abu Ghraib prison in Iraq."[107] It described the findings in the *Taguba Report* and said: "These wanton acts were undertaken for abusive and lewd purposes. They bear no resemblance, either in purpose or effect, to any of the techniques proposed for use by the CIA, whether employed individually or in combination."[108]

The 2007 policy memorandum was followed by an Executive Order—Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the CIA—which implemented it.[109] President George Bush signed the Executive Order on July 24, 2007. It was revoked by a subsequent Executive Order—Ensuring Lawful Interrogations—which President Barack Obama signed on January 22, 2009.[110] Under the subsequent Executive Order, the CIA was permitted to use only those interrogation procedures set forth in the Army Field Manual, unless the Attorney General provided additional guidance.[111] Waterboarding was deemed to be illegal and was

106. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶96, 167–68. *See generally* Bybee Memorandum Aug. 1, 2002, *supra* note 4; Levin Memorandum Dec. 30, 2004, *supra* note 99.

107. Bradbury Memorandum July 20, 2007, *supra* note 10, at 66.

108. *Id.* While heading the agency, Former CIA Directors Porter Goss and General Michael Hayden would repeatedly affirm that the CIA does not resort to torture. Intelligence officers followed the law and acted in accordance with DOJ legal advice. Goss told USA Today, "[t]his agency does not do torture. Torture does not work." John Diamond, *CIA Chief: Methods 'Unique' but Legal*, USA TODAY, Nov. 20, 2005, at 01A. General Hayden advised incoming CIA Director Leon Panetta that "[y]ou should never use 'torture' and 'CIA' in the same paragraph." JOBY WARRICK, THE TRIPLE AGENT: THE AL-QAEDA MOLE WHO INFILTRATED THE CIA 17 (2011).

109. Exec. Order No. 13,440, *supra* note 80.

110. Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf.

111. Exec. Order No. 13,491, *supra* note 110, § 3(b).

outlawed. In 2009, U.S. Attorney General Eric Holder said that members of the intelligence community who acted in "good faith" reliance on legal advice rendered in DOJ memoranda from 2002 to 2005 would not be prosecuted.[112] He explained that "[i]t would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department."[113]

In 2010, after an internal investigation by its Office of Professional Responsibility, DOJ cleared the authors of the DOJ memoranda of professional misconduct, which meant they would not face ethical consequences for their decisions or actions.[114] Jose Padilla and his mother, Estela Lebron, filed a civil lawsuit against former DOJ Office of Legal Counsel attorney John Yoo, claiming that Padilla's constitutional rights had been violated when he was subjected to a systemic program of abusive interrogation, which included incommunicado detention and torture.[115] Recently, the Ninth Circuit Court of Appeals ruled that Yoo is protected by qualified immunity for his policy-making role.[116] The court said, that the law had "not clearly established in 2001–03 that the treatment to which Padilla says he was subjected amounted to torture."[117] The court noted that "[t]here was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate, as well as the judicial decisions discussed above, we cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture."[118] The *Irish State Case* was one of the "influential judicial decisions" discussed in the Ninth Circuit opinion.[119]

More than ten years after the global war on terror began,

112. Julie Tate & Carrie Johnson, *New Interrogation Details Emerge as it Releases Justice Department Memos: Administration Reassures CIA Questioners*, WASH. POST, Apr. 17, 2009, at A01.

113. Editorial, *President Obama's Wise Decision on Dealing with the Legacy of Torture*, WASH. POST, Apr. 17, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/16/AR2009041603911.html.

114. Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to Eric Holder, Att'y Gen. (Jan. 5, 2010) [hereinafter Margolis Memorandum Jan. 5, 2010], *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

115. Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012); see also *supra* note 56.

116. Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).

117. *Id.* at 764.

118. *Id.* at 768.

119. *Id.* at 764-65.

interrogations conducted as part of our nation's conflict with al–Qaeda and others continue to present challenging legal issues that are in acute need of clarity, principled application and the development of the rule of law. On October 12, 2011, Nigerian citizen Umar Farouk AbdulMuttalab, the underwear bomber, pled guilty to attempted murder, conspiracy to commit an act of terrorism, and conspiracy to use a weapon of mass destruction. He was charged with attempting to blow up a Northwest Airlines flight on Christmas Day in 2009, as the plane was approaching Detroit for landing. He described himself as a member of al-Qaeda, who was inspired by Sheikh Anwar al-Awlaki.[120]

Originally, after arrest, AbdulMutallab was cooperative. He provided U.S. law enforcement officials information about his crimes, including his involvement with al-Awlaki and al-Awlaki's instruction to "wait until the airplane was over the United States and then to take it down."[121] He admitted to membership in al-Qaeda, and described how he intended to inject the contents of a syringe into the powder sown into his underwear to set off the blast. However, shortly after being advised of his *Miranda* rights, he stopped talking.[122] Members of Congress criticized the administration's

120. Sheik al-Awlaki, an American citizen, was targeted and killed in a U.S. drone attack in Yemen on September 30, 2011, under the "just war" concept of self-defense. In *City of God*, St. Augustine wrote: "[f]or it is the injustice of the opposing side that lays on the wise man the duty of waging [just] wars." ST. AUGUSTINE, CITY OF GOD 862 (Henry Bettenson trans., Penguin Classics reprint ed. 2003). The authority for the drone campaign is rooted in the exercise of Presidential war powers and stems from congressional enactment of a joint resolution, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (S.J. Res. 23), which authorized "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2011." *Id.* § 2(a). State Department Legal Advisor Harold Koh has said that "a State which is engaged in an armed conflict or legitimate self-defense is not required to provide targets with legal process before the State may use lethal force." Harold Koh, Dep't of State Legal Adviser, Keynote Lecture at the American Society of International Law 104th Annual Meeting: International Law in a Time of Change (March 26, 2010). Attorney General Eric Holder has identified three factors that bear on a decision to use lethal force in an operation in a foreign country. First, "the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles." Att'y Gen. Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012).

121. Supplemental Factual Appendix at 14, United States v. Abdulmutallab, No. 10-20005 (E.D. Mich. Feb. 16, 2012). On that date, Judge Edmonds sentenced Abdulmuttalab to life imprisonment without parole. Judgment at 3, United States v. Abdulmutallab, No. 10-20005 (E.D. Mich. Feb. 16, 2012).

122. In *Miranda*, the United States Supreme Court held "that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any

decision to have the Federal Bureau of Investigation give him *Miranda* warnings, because it was counter-productive."[123]

At a pre-trial motion, the trial court admitted AbdulMutallab's statements to law enforcement under the "public safety" exception to *Miranda*. The public safety exception was first recognized by the U.S. Supreme Court in *New York v. Quarles*.[124] In *Quarles*, a young woman approached police officers and told them that she had just been raped, that the man had entered a supermarket, and that he was carrying a gun. Responding to the supermarket, an officer saw a man matching the description given by the woman. The officer frisked that man and discovered an empty shoulder holster. The officer asked him where the gun was. He "nodded in the direction of some empty cartons and responded, 'the gun is over there.'"[125] He was read his *Miranda* rights after the gun was recovered, and the interrogation resumed. The Supreme Court held "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[126] Therefore, *Miranda* warnings were not required. The Court found it significant that the officer had limited his pre-rights warning questioning to the "exigency" posed by the "danger to the public safety."[127]

Based on this decision, a court could easily conclude that an interrogation conducted in a ticking–time-bomb scenario does not trigger *Miranda*. But, when confronted with that type of situation, how far may an interrogator go in applying physical and psychological pressures to compel a terrorist to make a statement without committing a crime? Waterboarding has now been described as torture and determined to be unlawful. But are there any circumstances where, as a last resort, necessity would justify its use, or where a torture warrant would be issued by the court sanctioning it? Under what circumstances could one use coercive tactics to gain

significant way and is subjected to questioning . . . . He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Miranda v Arizona, 384 U.S. 436, 478–79 (1966).

123. Kasie Hunt, *Lieberman Rips FBI on Miranda Rights*, POLITICO (Jan 25, 2010, 4:05 PM), http://www.politico.com/news/stories/0110/31969.html; Kasie Hunt, *Sen. Lindsey Graham: Miranda Rights 'Counterproductive,'* POLITICO (May 5, 2010, 11:45 AM), http://www.politico.com/news/stories/0510/36813.html.

124. 467 U.S. 649 (1984).

125. *Id.* at 652.

126. *Id.* at 657.

127. *Id.*

evidence admissible in court?[128] Lawmakers have attempted to address these questions by passing statutes that define the parameters of lawful and unlawful behavior. As the myriad of factual challenges arise, military tribunals[129] and courts will pass judgment on those determinations and decide what conduct is constitutionally permitted and what is not. The development of this jurisprudence is necessary in order to bring understanding to an area of the law, which has been muddled to date in part due to DOJ's various and conflicting interpretations and applications of the *Irish State Case*.

128. There is an obvious distinction between gathering intelligence and securing evidence for prosecution in court. The sheriff in the 1957 western, *The Halliday Brand* said, "[y]ou don't get a confession just by asking questions." THE HALLIDAY BRAND (Collier Young Assocs. 1957). But it has been long held that the Due Process Clause forbids "a conviction resting solely upon confessions obtained by violence." Brown v. Mississippi, 297 U.S. 278, 286 (1936).

129. The Military Commissions Act of 2009 ("MCA 09") authorized trials before military tribunals for enemy combatants, and those who materially support enemy groups. Pub. L. No. 111-84, 123 Stat. 2190 (2009). Statements made by detainees are admissible if "voluntarily given," or if "made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement." *Id.* § 1802. A totality of the circumstances test is applied for voluntariness rulings, which includes consideration of the details of the taking of the statement, the characteristics of the accused, and the lapse of time, change of place or change in the identity of the questioners between the statement sought to be admitted and any prior questioning. *Id.* Enhanced interrogation techniques, including waterboarding and sleep deprivation, were used against the mastermind of 9/11, Khalid Sheikh Mohammed ("KSM"). Once he became compliant, he described the 9/11 plot in detail, admitted murdering reporter Daniel Pearl in 2002, and provided other information. RODRIGUEZ, JR., *supra* note 56, at 93–95. KSM is one of the Guantanamo detainees who are facing trial before a military tribunal.

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Richard F. Klineburger III

https://klineburgerandnussey.com/richard-f-klineburger-iii/

Turlough O'Donnell SC

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