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Editor's Note

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Editor's Note

The year before I began law school, the United States received undeniable evidence of prisoner abuse at Abu Ghraib prison in Iraq. A *60 Minutes* special and an article by Seymour Hersh in *The New Yorker* revealed that Iraqi detainees had suffered extraordinary cruelty and dishonor at the hands of the U.S. military.¹ By the time my law classes were starting, the U.S. Army had court martialed and dishonorably discharged nine soldiers, some receiving prison terms.² Although the United States had lost respect among many in the international community, the legal response to these incidents indicated that our country had not abandoned the rule of law. There were, thankfully, still acts that were too gruesome, too inhumane, for the U.S. government or its people to ever tolerate.

Three years later, when Michael Mukasey testified before Congress during his confirmation hearings as Attorney General of the United States, the line between the inhumanity of torture and respect for human dignity was publicly blurred.³ Mr. Mukasey, through his unwillingness to state clearly that waterboarding constitutes torture, sanctioned the U.S. government's distortion of the plain meaning of its own laws.⁴

To suggest that, in effect, drowning a man may be neither torturous nor illegal struck many as an over complication of a seemingly

¹ *60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast Apr. 24, 2004); Seymour Hersh, *Torture at Abu Ghraib*, *NEW YORKER*, May 10, 2004, at 42.

² Mark Follman & Tracy Clark-Flory, *Accountability for Abu Ghraib*, *SALON.COM*, Mar. 14, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions/.

³ *See Nomination of Michael Mukasey to be the Attorney General of the United States: Hearing of the S. Comm. on the Judiciary*, *FED. NEWS SERV. (LEXIS)*, Oct. 17, 2007.

⁴ *See* Letter from Michael B. Mukasey, Att'y Gen. of the United States, to Patrick Leahy, Chairman, S. Comm. on the Judiciary (Jan. 29, 2008) at 2, *available at* <http://www.usdoj.gov/ag/speeches/2008/letter-leahy-013008.pdf>. The issue drew significant attention at Boston College Law School when Mr. Mukasey was invited to speak at the Law School commencement and to receive the Founders Medal, the highest honor bestowed by the Law School on those who "embody the traditions of professionalism, scholarship and service which the Law School seeks to instill in its students." *See* Peter Schworm, *BC Law School Will Not Bestow Honor on Mukasey*, *BOSTON GLOBE*, Mar. 5, 2008, at B1. Many students and faculty members expressed disappointment and anger with the invitation and intended award; soon after the Law School announced that it would no longer bestow the Founders Medal on commencement speakers. *See id.*

simple question. The three men whom the United States has confessed to waterboarding—Khalid Sheikh Mohammed, Abu Zubaydah, and Abd al-Rahim al-Nashiri—undoubtedly felt as though they were tortured.⁵ And torture is explicitly illegal under U.S. law.⁶ The invitation to Mr. Mukasey to speak at our commencement, therefore, was a source of confusion and anger for many, especially in light of the articulated ideals the school endeavors to instill in its students.

As my fellow editors and I prepare to leave the Law School, I am reminded of a reading from my professional responsibility class; it is about the danger of losing one's perspective: "When one is invisible he finds such problems as good and evil, honesty and dishonesty, of such shifting shapes that he confuses one with the other, depending on who happens to be looking through him at the time."⁷ The *Boston College Third World Law Journal* was founded as part of an effort to make visible both the legal concerns of those whom history has rendered invisible and of those in the legal profession who labor to represent them.⁸ Staying silent or accepting the Attorney General's assertion that the legality of waterboarding is too complex to articulate would put our *Journal* on a sad path to invisibility.

And so we take this opportunity to make clear our understanding that waterboarding is illegal and immoral, and our insistence that those held up to us as role models in the legal profession should clearly espouse unwavering standards of professional ethics. We are grateful to Professor Daniel Kanstroom for his willingness—on very short notice—to craft the following brief essay on the illegality of waterboarding, and the basic issues torture raises in our legal system. The brevity of Professor Kanstroom's essay reflects only the *Journal's* limited time available for editing; a full articulation of his analysis is forthcoming.

⁵ See *Hearing on Worldwide Threats Before the S. Select Comm. on Intelligence*, FED. NEWS SERV. (LEXIS), Feb. 5, 2008 (statement of Michael Hayden, Director, Central Intelligence Agency).

⁶ See War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441 (2000)); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷ RALPH ELLISON, *INVISIBLE MAN* 572 (Random House 1995) (1947).

⁸ The *Journal* was founded in 1980 in hopes that "[t]hrough the dialogue that we create, issues and positions can be identified and clarified; the intellectual process of working through necessary changes can be furthered within the legal community; and the frontiers of legal thinking can be expanded to include actors and issues . . . which have heretofore been neglected." Bernard W. Greene, *Toward a Definition of the Term Third World*, 1 B.C. THIRD WORLD L.J. 13, 25 (1980).

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