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**Civics 101**

**Episode 107: Torture**

**Virginia Prescott:** [00:00:23] I'm Virginia Prescott and this is Civics 101, the podcast refresher course on the basics of how our democracy works. Earlier this week President Donald Trump proposed longtime CIA officer Gina Haspel as the new head of the CIA. Haspel's history at the agency has already drawn scrutiny. In 2002 she ran a secret prison in Thailand where the CIA detained and tortured two suspected al-Qaeda operatives. She was later involved with destroying videotapes of those interrogations.

[00:00:55] The CIA's interrogation strategy following the terrorist attacks of September 11th marked a break from our country's official position on handling prisoners of war. We spoke with Elizabeth Grimm Arsenault, a professor at Georgetown University and author of How the gloves came off, before Haspel's nomination to better understand U.S. policy on torture, a critical aspects of how the U.S. treats prisoners of war.

[00:01:21] I asked her about the roots of that policy dating back to the Revolutionary War.

**Elizabeth Arsenault:** [00:01:27] The early treatment of prisoners of war is quite a grim scenario. Prisoners were routinely starved they were treated with no regard for their their human life.

[00:01:39] And one of the things that sets the United States apart from its beginning was that right at the outset George Washington said to his troops he instructed his troops as they were crossing the frozen river to surprise the Hessians that he wanted them to treat the captured Hessians with humanity. So right from the beginning Washington tries to set out that the United States is different that that we were not going to copy the sort of horrible example of prisoner treatment that the British and quite frankly most other powers embraced at this time. I would make the argument that this idea about treating prisoners humanely. It's a uniquely American idea. It's a uniquely American norm.

**Virginia Prescott:** [00:02:19] Why do you think right from the beginning you know declaring that we're going to do it differently, why did that matter? Why so important?

**Elizabeth Arsenault:** [00:02:27] It shows that the United States right from its birth the United States was not willing to make what I think is even a debate we have today, the sort of tradeoff between security and its values. And I think right from the beginning Washington says ideas that are actually then reflected in what Barack Obama said that this is a false tradeoff. We don't have to make a decision between our values and our security that in fact living our values treating people humanely is a way of making us stronger is a way of both setting ourselves apart. But actually it allows us to do our operational missions better.

**Virginia Prescott:** [00:03:04] Did establishing those boundaries last up until let's say you know contemporary warfare World War II era?

**Elizabeth Arsenault:** [00:03:11] Even from the beginning even ideas that are aspirational are not necessarily perfectly complied with. So Washington sets this charge out to the troops and prisoner treatment still, I mean it varied quite widely.

[00:03:24] I would say the next big step that you see in advancement in prisoner treatment came during the Civil War. So in the middle of the Civil War in 1863 the North would issue what was called the Lieber code and it was literally a set of instructions that said here's how we should treat those that we capture here's that we treat those in our captivity and the idea behind the Lieber Code was that those that are captured during the war, these men aren't criminals. These men are entitled to protections deserving to them simply by nature of their humanity.

[00:03:58] I would say though that the actual impact of the Lieber Code had on the conflict was quite minimal. There were still horrible abuses at the hands of both the north and the south. But what the Lieber Code actually did was that it became the basis for subsequent manuals embraced by France embraced by Britain and embraced by Prussia and Russia for how they would then treat prisoners of war in their own conflicts.

**Virginia Prescott:** [00:04:25] When we say treatment are we talking about food, clothing, medical treatment?

**Elizabeth Arsenault:** [00:04:30] Exactly, Virginia, all of that so food, clothing, what types of work they're are allowed to do, the respect for religious expressions, prohibitions against torture,, prohibitions against inhumane treatment.

**Virginia Prescott:** [00:04:46] So today, U.S. policies towards prisoners of war are greatly influenced by the Geneva Conventions. So first of all what are the Geneva Conventions and what did they say?

**Elizabeth Arsenault:** [00:04:56] That's right so the Geneva Conventions are a series of instructions essentially so they're a set of four conventions that were issued in 1949. And the Geneva Conventions, they don't seek to eliminate war. That's not their purpose. But they they seek to minimize suffering.

[00:05:16] The one that we're the most concerned about for the sake of prisoner treatment is the third Geneva Convention. It essentially tells military forces what you can do in conflict to those that you capture in your captivity, and what you cannot do. It also lays out who is entitled to receive these protections. Again relating to just as you mentioned to things like food rations. How long they can work what they are allowed to do.

[00:05:40] In the Third Geneva Convention, there is a third article that is shared among all of the Geneva Conventions and it has ideas that are so important, it's almost considered to be a mini convention in all the conventions. And so this Common Article 3 as it's called sets out ideas that are so essential that that no derogation from them can be considered. And Common Article 3 says that no matter what, no matter who you are you cannot have outrages upon your dignity. You cannot have cruel inhumane degrading treatment.

**Virginia Prescott:** [00:06:16] How about in Vietnam, the United States was challenged there because they were fighting an insurgency in the form of the Viet Cong. This is not a uniformed army behaving like uniformed armies do.

**Elizabeth Arsenault:** [00:06:30] The Vietnam War presented a number of international legal questions. And Virginia you're right. First and foremost among them was how do we treat armed insurgents who are fighting under the communist banner. But they themselves are not actually members of the North Vietnamese Army. The United States was under no legal obligation to provide Geneva Convention protections.

[00:06:55] But early in the conflict as early as 1964 the United States actually made the policy decision that it would ascribe it would provide full Geneva Convention protections to the Viet Cong even though legally it was not entitled to. And it made this decision for a number of reasons. But first and foremost among them was that it wanted to demonstrate essentially the goodness of what the United States was attempting to do in the Vietnam conflict. The sort of goodness of the American experience the benefits of the sort of Western liberal order and I would say it's a very similar challenge a very similar legal problematic area that the United States faced with members of al-Qaeda and members of the Taliban at the beginning of the conflicts in 2001 and 2003

**Virginia Prescott:** [00:07:44] Well after Vietnam, the Department of Defense or DOD made compliance with the Geneva Conventions a central part of training for all branches of the military. So what did they change?

**Elizabeth Arsenault:** [00:07:54] After the Vietnam War, whereas treatment of prisoners of war had actually been fairly consistent with international law. It was that fourth Geneva Convention the one that relates to the treatment of noncombatants in which the United States had been less compliant and I'm sure your listeners will be familiar with the names of places like the My Lai massacre. The cases in which the United States engaged in strategic bombing engaged in the use of Agent Orange against noncombatants against civilians in Vietnam and it caused the DOD to say we need to improve our training we need to make it clear that compliance with international law is not just something that we should do. It's something that we must do as a part of being a member of the U.S. military.

[00:08:42] So the United States in 1977 instituted what was called the Law of War Program in the duty. And again as you say it made training on the Geneva Conventions training on compliance with international law mandatory both as it was pre deployment but also included in the curriculum of the various academies various training institutions and the DOD.

**Virginia Prescott:** [00:09:11] I'm going to speed forward to another defining moment this is the terrorist attacks of September 11th in the United States. The ways of waging war and a new era of foreign policy emerged and also changed our treatment of prisoners of war. How did that change?

**Elizabeth Arsenault:** [00:09:31] It's good to think back about where the United States was on September 10th 2001 to think back about this was a case in which on September 10 2001 norms of prisoner treatment were deeply embedded. Again they were they were contained in domestic law. They were contained in language of domestic institutions. But there was a great deal of questioning in the 1990s about the role and placement of international law in the U.S. context compelled by decisions with regards to the NATO intervention in Kosovo compelled by questions about the purpose and value of international law broadly but also I think it's important to remember on the eve of 9/11 that this was a case of an intelligence community that had been gutted throughout the 1990s cases in which there had been years of slow hiring or or no hiring in some cases. And this was an intelligence community that had never held terrorist detainees so with the attacks of 9/11 it compelled a set of questioning the United States about what was the type of intelligence that we needed to collect.

[00:10:40] What was the type of intelligence that we needed to collect to prevent against an attack in the future to keep Americans safe. And I think that U.S. policymakers immediately after the attacks of 9/11 believed that they faced a binary choice of whether or not to do anything that they could to collect intelligence or to not and then suffer another attack.

**Virginia Prescott:** [00:11:05] Yes you're underscoring the absolute fear and vulnerability of that moment.

**Elizabeth Arsenault:** [00:11:10] That's right and I think it is important to think back about that shattering sense of vulnerability. And I think you know almost 17 years later it's good to reflect about how much this challenge to the United States. The sense of hopelessness the sense that never again could the United States be the victims of an armed attack on our homeland. The United States believes that it was faced with this impossible choice. And so it opened the door to consider what was allowed under domestic law what was allowed under international law.

[00:11:45] And I would also say to get back to the point that you mentioned about the Viet Cong because al Qaeda was a nonstate actor because the United States believed that al Qaeda and the Taliban were not entitled to Geneva Convention protections. That seemed to in the words of my book title it seemed to allow to let the gloves off because these were not state actors. The Taliban again could reasonably considered to be a state actor but because it failed to adhere by the laws of war it was the decision that was made by the Bush administration in those early years was that it also was not allowed. It was also not guaranteed a Geneva Convention protections.

**Virginia Prescott:** [00:12:24] We know from photographs of Abu Ghraib and other stories we've learned since about extraordinary rendition that the CIA treatment of detainees did violate the Geneva Conventions and was initially kept secret. How did the American public react when it came to light these violations of a principle that as you said were sort of baked in the cake of how the nation conducted itself?

**Elizabeth Arsenault:** [00:12:48] So in the DOD you have essentially a toxic stew of conflicting guidance ambiguous guidance, guidance that was met only for high value detainees at Guantanamo. Migrating its way to Abu Ghraib for use on a population prisoners that it was never intended to. So Abu Ghraib was a case of the the DOD program. In the case of the CIA, you have around 100 people that were authorized for rendition detention and interrogation program. Of these around 100 people three of them received as we now know the waterboard.

[00:13:26] The reaction that I would say in the United States at that time, so when when this story broke in 60 minutes when Seymour Hersh published his famous piece, my sense is that the reaction was horror and I think it prompted a lot of investigation in the United States about who we were. I would argue that in a time of peace it's somewhat easy to follow the law. It's when you're truly tested at a time of war that it's hard it's hard to extend these protections to your enemies. But but that's the sign of who you are as a state. That's a sign of who you are as a country.

**Virginia Prescott:** [00:14:02] But how about now. You know many Americans cannot unsee videos that they may have seen of ISIS beheading American detainees journalists. So how do you think the conflict has changed Americans views on torture.

**Elizabeth Arsenault:** [00:14:21] One of my deep concerns is that public opinion on this question has shifted. There have been Pew surveys there have been Washington Post surveys that say that right now in fact a majority of Americans believe that torture could be can be used to compel confessions to compel extractions. And I think you're right one of the factors playing into this are the violence perpetrated by ISIS the very astute propaganda masters that they have been I think asks Americans the question of why should we continue to be led by the laws of war if our enemies are not abiding by the laws of war.

**Elizabeth Arsenault:** [00:15:00] I think there's been a robust research in the ways in which Americans exposure to pop culture has in many ways changed our expectations of what torture does compel in interrogations. So there's been a number of studies that look at the ways in which exposure to interrogation scenes in Homeland and 24 have given Americans this idea that torture is an easy and clearcut way to extract investigations. But in reality in intelligence gathering interrogations, it's confusing it's complex it's messy and ambiguous and the torture does not work. Torture compels people to talk but people will say anything when their fingernails are being pulled out when their family members are being threatened. As a source of reliable intelligence, it does not work. And in the U.S. context we need to talk loudly and longly about the ways in which complying with international laws that restrict that prevent that proscribe torture, we don't follow just because it's the right thing to do, we follow because it's who we are as Americans.