

Detention at Guantánamo Afghanistan Iraq The  
Legal Process of the Federal Government After  
September 11 Rendition and the “Black Sites” The  
Role of Medical Professionals in Detention and  
Interrogation Operations True and False Confessions:  
The Efficacy of Torture and Brutal Interrogations  
Effects and Consequences of U.S. Policies Recidivism  
The Obama Administration The Role of Congress

The Report of The Constitution Project’s Task Force on

# Detainee Treatment

The Report of The Constitution Project's Task Force on  
**Detainee Treatment**

THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

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# Preface

The Constitution Project is a national watchdog group that advances bipartisan, consensus-based solutions to some of the most difficult constitutional challenges of our time. For more than 15 years, we have developed a reputation for bringing together independent groups of policy experts and legal practitioners from across the political and ideological spectrums to issue reports and recommendations that safeguard our nation's founding charter.

The Constitution Project's blue-ribbon Task Force on Detainee Treatment follows this successful model. It is made up of former high-ranking officials with distinguished careers in the judiciary, Congress, the diplomatic service, law enforcement, the military, and other parts of the executive branch, as well as recognized experts in law, medicine and ethics. The group includes conservatives and liberals, Republicans and Democrats. (Brief biographies of the 11 members follow.) The Task Force was charged with providing the American people with a broad understanding of what is known — and what may still be unknown — about the past and current treatment of suspected terrorists detained by the U.S. government during the Clinton, Bush and Obama administrations.

This report is the product of more than two years of research, analysis and deliberation by the Task Force members and staff. It is based on a thorough examination of available public records and interviews with more than 100 people, including former detainees, military and intelligence officers, interrogators and policymakers. We believe it is the most comprehensive record of detainee treatment across multiple administrations and multiple geographic theatres — Iraq, Afghanistan, Guantánamo and the so-called “black sites” — yet published.

The Constitution Project is enormously grateful to the members of the Task Force for their diligence and dedication in completing this report. They all contributed their remarkable expertise, and staked their considerable personal and professional reputations, to produce this document. The American public owes them a debt of gratitude.

The Constitution Project also thanks the Task Force staff, which assembled, organized and analyzed the material you hold in your hands. Acting under the extremely capable leadership of its executive director, Neil A. Lewis, the Task Force staff consisted of: Kent A. Eiler, counsel; Jacob A. Gillig, administrator; Katherine Hawkins, investigator; and Alka Pradhan, counsel. The staff, and the report, benefited immensely from the assistance of: Adam Clymer, senior consultant; Nino Guruli, senior researcher; and research consultants David O'Brien and Rita Siemion. Annie Brinkmann, Jessica Kamish, Kathleen Liu, Briann Peterson, Evan



St. John and Michael Wu all served as interns. At various times in the process of developing the report, Charles Martel served as staff director; Aram Roston as senior investigator; and Chrystie Swiney as counsel.

This report was supported, in part, by grants from The Atlantic Philanthropies, Nathan Cummings Foundation, Open Society Foundations, Open Society Policy Center, Park Foundation, Proteus Fund, Rockefeller Brothers Fund, and The Security & Rights Collaborative Rights Pooled Fund, a Proteus Fund Initiative.

The Constitution Project is grateful to the following law firms for providing *pro bono* assistance and/or other in-kind support for this project: Arnold & Porter LLP; Cravath, Swaine & Moore LLP; Holland & Knight LLP; Jenner & Block; King & Spalding; Lewis Baach PLLC; Manatt, Phelps & Phillips LLP; Mayer Brown LLP; Milbank, Tweed, Hadley & McCloy LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Steptoe & Johnson LLP; Wiley Rein LLP; and, Wilmer Cutler Pickering Hale and Dorr LLP. The Constitution Project also appreciates the *pro bono* communications assistance provided by Dutko Grayling and ReThink Media.

Karol A. Keane, of Keane Design and Communications, did the design and layout for the book, Randy P. Auerbach provided line-editing and indexing, and Kreative Keystrokes developed the accompanying website, all to exacting standards under incredibly tight deadlines. TCP's communications coordinator, Hannah White, directed their efforts.

Finally, The Constitution Project gratefully acknowledges all the organizations, interviewees and individuals, too numerous to name, who shared their experience, insights and frustrations – both formally and informally, on-the-record and off – with Task Force members and staff. Without their contributions, this report would not have been possible.

The accompanying website, [www.detaineetaskforce.org](http://www.detaineetaskforce.org), provides electronic versions of this report and additional supporting information.

The Task Force makes a number of specific findings and recommendations. Some seem like common sense; others will undoubtedly generate controversy. Some can be implemented by executive action alone; others will require legislation. Regardless, we urge policymakers to give this report and these recommendations their full and immediate consideration.

Virginia E. Sloan  
President, The Constitution Project  
April 16, 2013

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## Members of The Constitution Project's Task Force on Detainee Treatment

### **Asa Hutchinson (Co-Chair)**

Asa Hutchinson is a senior partner in the Asa Hutchinson Law Group in Rogers, Arkansas, specializing in white collar criminal defense, complex litigation, international export controls and sanctions, corporate international relations, homeland security, and corporate investigations and compliance. He served in the administration of President George W. Bush as Under Secretary for Border and Transportation Security at the Department of Homeland Security from 2003 to 2005, where he was responsible for more than 110,000 federal employees housed in such agencies as the Transportation Security Administration, Customs and Border Protection, Immigration and Customs Enforcement and the Federal Law Enforcement Training Center. He was Administrator of the Drug Enforcement Administration from 2001 to 2003.

Prior to joining the Bush Administration, Hutchinson represented the 3rd District of Arkansas as a Republican Congressman, first winning election in 1996. Hutchinson served on the House Judiciary Committee along with the House Select Committee on Intelligence.

In 1982, he was appointed as United States Attorney by President Ronald Reagan, at the time the youngest person to receive such an appointment. He earned a J.D. from the University of Arkansas School of Law.

### **James R. Jones (Co-Chair)**

James R. Jones is a partner at Manatt, Phelps & Phillips, LLP. Prior to joining Manatt, he served as U.S. Ambassador to Mexico (1993-1997), where he was very successful in his leadership during the Mexican peso crisis, the passage and implementation of NAFTA and in developing new, cooperative efforts to combat drug trafficking. He also assisted U.S. businesses with commercial ventures in Mexico.

As a Democratic member of the U.S. House of Representatives from Oklahoma (1973-1987), he was Chairman of the House Budget Committee for four years and a ranking Member of the House Ways and Means Committee, where he was active in tax, international trade, Social Security and health care policy. Jones was only 28 when President Lyndon Johnson selected him as Appointments Secretary, a position equivalent to White House Chief of Staff, the youngest person in history to hold such a position.

Jones' previous experience also includes the position of President at Warnaco International, as

well as Chairman and CEO of the American Stock Exchange in New York (1989-1993). He earned a LLB from Georgetown University Law Center in 1964.

### **Talbot “Sandy” D’Alemberte**

A former President of the American Bar Association (1991-92), Talbot “Sandy” D’Alemberte was appointed President of Florida State University in 1993, serving in that capacity through January 2003. Prior to that, from 1984 to 1989, he served as Dean of Florida State University College of Law.

A member of the American Law Institute, D’Alemberte also served as President of the American Judicature Society (1982-84). He has won numerous national awards for his contributions to the profession. He is the author of *The Florida Constitution*. D’Alemberte served as a member of the Florida House of Representatives from 1966 to 1972.

He is currently a partner of D’Alemberte & Palmer, a Tallahassee firm specializing in appellate work. He continues to teach as a member of the University faculty at the FSU College of Law. He remains an active member of many legal and higher educational committees and boards. D’Alemberte received his juris doctor with honors from the University of Florida in 1962, and he has received nine honorary degrees.

### **Richard A. Epstein**

Richard A. Epstein is the inaugural Laurence A. Tisch Professor of Law at New York University School of Law. He has served as the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution since 2000. Epstein is also the James Parker Hall Distinguished Service Professor of Law Emeritus and a senior lecturer at the University of Chicago, where he has taught since 1972. Prior to joining the University of Chicago Law School faculty, he taught law at the University of Southern California from 1968 to 1972.

He has published numerous books and articles on a wide range of legal and interdisciplinary subjects, and has taught courses in administrative law, civil procedure, constitutional law, and criminal law, among many others. He served as editor of the *Journal of Legal Studies* from 1981 to 1991, and of the *Journal of Law and Economics* from 1991 to 2001. From 2001 to 2010 he was a director of the John M. Olin Program in Law and Economics at the University of Chicago.

He has been a member of the American Academy of Arts and Sciences since 1985 and has been a Senior Fellow of the Center for Clinical Medical Ethics at the University of Chicago Medical School since 1983. He received an LLD from the University of Ghent in 2003.

### **David P. Gushee**

Dr. David P. Gushee is the Distinguished University Professor of Christian Ethics and Director of the Center for Theology and Public Life at Mercer University. Gushee teaches at McAfee School of Theology and throughout Mercer University in his specialty, Christian ethics. As Director of the Center for Theology and Public Life, he organizes events and courses to advance quality conversations about major issues arising at the intersection of theology, ethics, and public policy. Gushee came to Mercer in 2007 from Union University, where he served for 11 years, ultimately as Graves Professor of Moral Philosophy.

Gushee has published fifteen books, with four more in development, and many hundreds of essays, book chapters, articles, reviews, and opinion pieces. He is a columnist for the Huffington Post and a contributing editor for *Christianity Today*, as well as an active voice on social media. He also currently serves on the board of directors of the Society of Christian Ethics, his primary professional association, and on the Ethics, Religion, and the Holocaust Committee of the United States Holocaust Memorial Museum, where he has also taught a faculty seminar course.

He earned his Bachelor of Arts at the College of William and Mary (1984), Master of Divinity at Southern Baptist Theological Seminary (1987) and both the Master of Philosophy (1990) and Doctor of Philosophy (1993) in Christian Ethics at Union Theological Seminary in New York.

### **Azizah Y. al-Hibri**

Dr. Azizah Y. al-Hibri is a professor emerita at the T. C. Williams School of Law, University of Richmond, having served on the faculty from 1992 until her retirement in 2012. She is also a founding editor of “Hypatia: a Journal of Feminist Philosophy,” and the founder and chair [president] of KARAMAH: Muslim Women Lawyers for Human Rights.

For the last two decades, al-Hibri has written extensively on issues of Muslim women’s rights, Islam and democracy, and human rights in Islam. She has published in a number of legal publications, and authored several book chapters. Al-Hibri has also traveled extensively throughout the Muslim world in support of Muslim women’s rights. She has visited fourteen Muslim countries and met with religious, political and feminist leaders, as well as legal scholars, on issues of importance to Muslim women.

In 2011, al-Hibri was appointed by President Obama to serve as a commissioner on the U.S. Commission on International Religious Freedom. She is the recipient of the Virginia First Freedom Award, presented in 2007 by the Council for America’s First Freedom, the Lifetime Achievement Award, presented in 2009 by the Journal of Law and Religion, and the Dr. Betty Shabazz Recognition Award, presented by Women in Islam in 2006. She earned a Ph.D. in Philosophy from the University of Pennsylvania in 1975 and a J.D. from the University of Pennsylvania Law School in 1985. She was also named a Fulbright Scholar in 2001.

### **David R. Irvine**

David Irvine is a Salt Lake City attorney in private practice, a former Republican state legislator, and a retired Army brigadier general.

Irvine enlisted in the U.S. Army Reserve in 1962, and received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, teaching prisoner of war interrogation and military law. He was the Deputy Commander for the 96th Regional Readiness Command. He served four terms in the Utah House of Representatives.

### **Claudia Kennedy**

Claudia J. Kennedy is the first woman to achieve the rank of three-star general in the United States Army, taking her from the Women’s Army Corps in the late 1960’s to the position of Deputy Chief of Staff for Army Intelligence in 1997-2000. She oversaw policies and operations affecting 45,000 people stationed worldwide with a budget of nearly \$1 billion.

During her military career, General Kennedy received honors and awards, including the National Intelligence Distinguished Service Medal, the Army Distinguished Service Medal, four Legions of Merits which are awarded for “exceptionally meritorious conduct in the performance of outstanding services and achievements.”

She is the Chair of Defense Advisory Committee on Women in the Services. She has consulted for Essex Corporation and for Walmart, Inc. She has appeared as a military consultant for NBC and CNN and as a guest on Larry King Live, Aaron Brown, Wolf Blitzer and ABC's Good Morning America among others. Kennedy holds a B.A. degree in Philosophy from Rhodes College.

### **Thomas R. Pickering**

Thomas R. Pickering is vice chairman of Hills & Company, an international consulting firm providing advice to U.S. businesses on investment, trade, and risk assessment issues abroad, particularly in emerging market economies. Until 2006, he was senior vice president for international relations for Boeing.

From 1997 to 2001, Pickering served as U.S. Under Secretary of State for Political Affairs. From 1989 to 1992, he was Ambassador and Representative to the United Nations. In a diplomatic career spanning five decades, he has served as U.S. ambassador to the Russian Federation, India, Israel, El Salvador, Nigeria, and the Hashemite Kingdom of Jordan. Pickering also served on assignments in Zanzibar and Dar es Salaam, Tanzania. He also served as Executive Secretary of the Department of State and Special Assistant to Secretaries William P. Rogers and Henry A. Kissinger from 1973 to 1974. Between 1959 and 1961, he served in the Bureau of Intelligence and Research of the State Department, in the Arms Control and Disarmament Agency, and from 1962 to 1964 in Geneva as political adviser to the U.S. delegation to the 18-Nation Disarmament Conference. He earned the personal rank of Career Ambassador, the highest in the U.S. Foreign Service. Most recently, he helped lead an independent State Department panel charged with investigating the attacks on the mission in Benghazi.

Pickering entered on active duty in the U.S. Navy from 1956-1959, and later served in the Naval Reserve to the grade of Lieutenant Commander. He earned a Master's degree from the Fletcher School of Law and Diplomacy at Tufts University. Upon graduation from Tufts, he was awarded a Fulbright Fellowship and attended the University of Melbourne in Australia where he received a second master's degree in 1956. He is also the recipient of 12 honorary degrees.

### **William S. Sessions**

William S. Sessions served three United States presidents as the Director of the Federal Bureau of Investigation, earning a reputation for modernizing the FBI by initiating and developing the forensic use of DNA, the development and automation of digital fingerprinting capabilities with the Integrated Automated Fingerprint Identification System, as well as recruiting of women and minorities for service in the FBI. He initiated the “Winners Don't Use Drugs” program for combating drug usage by young people.

Prior to joining the FBI, Sessions was the chief judge for the U.S. District Court for the Western District of Texas, where he had previously served as United States Attorney. He also served on the Board of the Federal Judicial Center in Washington, D.C., and on committees of both

the State Bar of Texas and as the chairman of the Automation Subcommittee of the Judicial Conference of the United States.

Sessions is a partner in Holland & Knight's Washington, D.C. office and the recipient of the 2009 Chesterfield Smith Award, the firm's highest individual recognition given to a firm partner. Sessions served as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution, for the CPR Institute of Dispute Resolution and FedNet, for arbitration and mediation of disputes by former federal judges. Sessions holds a J.D. degree from Baylor University School of Law and was named as one of five lawyers, in 2009, as an Outstanding Texas 50-year lawyer by the Texas Bar Foundation.

### **Gerald E. Thomson**

Dr. Thomson is the Lambert and Sonneborn Professor of Medicine Emeritus at Columbia University. Following his post graduate training at the State University of New York-Kings County Hospital Center, Thomson remained on the faculty there and directed one of the nation's first artificial kidney units for the maintenance of patients with end stage renal failure. He joined the Columbia faculty in 1970, serving as Director of Medicine at the affiliated Harlem Hospital Center from 1970-1985. He was Executive Vice President and Chief of Staff of the Columbia University Medical Center from 1985-1990 and Senior Associate Dean from 1990-2003. Thomson has served on and headed numerous National Institutes of Health and other agency advisory committees on hypertension, end stage renal disease, cardiovascular disease, public hospitals, minorities in medicine, human rights, and access to health care. Thomson is a 2002 recipient of the Columbia University President's Award for Outstanding Teaching.

Thomson is a member of the Institute of Medicine of the National Academies and was Chair of an Institute of Medicine committee that issued a 2006 report that reviewed the National Institutes of Health Strategic Research Plan on Minority Health and Health Disparities. Thomson is a former Chairman of the American Board of Internal Medicine and past President of the American College of Physicians.

## **Task Force Staff**

**Neil A. Lewis, Executive Director**

**Kent A. Eiler, Counsel**

**Jacob A. Gillig, Administrator**

**Katherine Hawkins, Investigator**

**Alka Pradhan, Counsel**

*Staff bios are available at [www.detaineetaskforce.org](http://www.detaineetaskforce.org).*



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# A Word on Reading This Report

For those who desire a quick read, the essence of the report can be gleaned by reading the Statement of the Task Force (p. 1) and the Findings and Recommendations (p. 9). Two of the most important findings, those that concern the questions as to whether torture occurred and whether senior U.S. leaders bear some responsibility, are accompanied by thorough memos (provided as appendices at the end of the report) that detail the foundations for the Task Force's deliberations and conclusions on those two issues.

Each of the chapters on subjects such as Guantánamo, the Obama administration, the role of the medical community, etc., is preceded by a brief summary and commentary in italics. These chapters combine previously reported material with new information gathered by the Task Force and its staff. One may, for example, read the italicized introduction to the chapter on Guantánamo to get a quick sense of the rest of the chapter.

In addition, this report contains a handful of sketches of individuals whose stories have not fully been told before. The Task Force believes the accounts of these people provide some special understanding of the history and consequences of the U.S. interrogation and detention program since September 11, 2001.

The sketches are of Albert Shimkus (the first commander of the detainee hospital at Guantánamo), Christophe Girod (an early representative of the International Committee of the Red Cross at Guantánamo), and three Libyans who helped lead the insurgency in their country against Colonel Muammar el-Gaddafi. One Libyan, Abdel Hakim Belhadj, had earlier been rendered by U.S. forces to el-Gaddafi's custody and apparently tortured there. Belhadj's story is told along with those of other Libyans who suffered the same fate. In one of its most important findings, the Task Force concluded that the extraordinary rendition program — which has inherent problems with human rights and international legal standards — was extended, and thus abused, to deal with people like the Libyans, who had nothing to do with Al Qaeda or the September 11 attacks. The ramifications of these transfers with no apparent connection to September 11 are outlined in Chapter 8, discussing the (mostly unintended) consequences of U.S. policy.

There are several features that are not included in the printed version but are available at [www.detaineetaskforce.org](http://www.detaineetaskforce.org), including transcripts of many of the interviews conducted by Task Force staff. In addition, the detainee task force website has a master timeline of important events.





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# Statement of the Task Force

This report of The Constitution Project’s Task Force on Detainee Treatment is the result of almost two years of intensive study, investigation and deliberation.

The project was undertaken with the belief that it was important to provide an accurate and authoritative account of how the United States treated people its forces held in custody as the nation mobilized to deal with a global terrorist threat.

The events examined in this report are unprecedented in U.S. history. In the course of the nation’s many previous conflicts, there is little doubt that some U.S. personnel committed brutal acts against captives, as have armies and governments throughout history.

But there is no evidence there had ever before been the kind of considered and detailed discussions that occurred after September 11, directly involving a president and his top advisers on the wisdom, propriety and legality of inflicting pain and torment on some detainees in our custody.

Despite this extraordinary aspect, the Obama administration declined, as a matter of policy, to undertake or commission an official study of what happened, saying it was unproductive to “look backwards” rather than forward.

In Congress, Sen. Patrick J. Leahy of Vermont introduced legislation to establish a “Truth Commission” to look into the U.S. behavior in the years following the September 11 attacks. The concept, successful in South Africa, Guatemala and several other countries, is predicated on recognizing the paramount value to a nation of an accurate accounting of its history, especially in the aftermath of an extraordinary episode or period of crisis. But as at the White House, Congress showed little appetite for delving into the past.

These responses were dismaying to the many people who believed it was important for a great democracy like the United States to help its citizens understand, albeit with appropriate limits for legitimate security concerns, what had been done in their name.

Our report rests, in part, on the belief that all societies behave differently under stress; at those times, they may even take actions that conflict with their essential character and values. American history has its share of such episodes, like the internment of Japanese-Americans during World War II, that may have seemed widely acceptable at the time they occurred,

but years later are viewed in a starkly different light. What was once generally taken to be understandable and justifiable behavior can later become a case of historical regret.

Task Force members believe that having as thorough as possible an understanding of what occurred during this period of serious threat — and a willingness to acknowledge any shortcomings — strengthens the nation, and equips us to better cope with the next crisis and ones after that. Moving on without such a reckoning weakens our ability to claim our place as an exemplary practitioner of the rule of law.

In the absence of government action or initiative, The Constitution Project, a nonpartisan public-interest organization devoted to the rule of law principle, set out to address this situation. It gathered a Task Force of experienced former officials who had worked at the highest levels of the judiciary, Congress, the diplomatic service, law enforcement, the military, and parts of the executive branch. Recognized experts in law, medicine and ethical behavior were added to the group to help ensure a serious and fair examination of how detention policies came to be made and implemented.

The Task Force members include Democrats and Republicans; those who are thought to be conservatives and those thought to be liberals; people with experience in and sensitivity to national security issues and those who have an understanding that the government's reach and authority is subject to both tradition and law to appropriate limits. The Task Force members also were able to bring to the project a keen collective understanding of how government decisions are made.

Although the report covers actions taken during three different administrations beginning with that of President Bill Clinton and ending with that of President Barack Obama, most of the activity studied here occurred during the administration of President George W. Bush. This is unavoidable as Bush was president when the horrific attacks on U.S. soil occurred on September 11, 2001, and thus had the burden of responding quickly and decisively to the situation.

While the report deals largely with the period of the Bush administration's response to the attacks, the investigation was neither a partisan undertaking nor should its conclusions be taken as anything other than an effort to understand what happened at many levels of U.S. policymaking.

There is no way of knowing how the government would have responded if a Democratic administration were in power at the time of the September 11 attacks and had to bear the same responsibilities. Indeed, one of the controversial methods examined here — capture and rendition of terror suspects to foreign governments known to abuse people in their custody — had its first significant use during the Clinton administration, well before September 11.

Any effort to understand how extraordinary decisions were reached on approving harsh treatment of detainees must begin with a recognition of the extraordinary anxiety that enveloped the nation after September 11. The greatest fears of Americans and their leaders in that period were of further attacks from those who had demonstrated that they were capable of wreaking havoc in New York and Washington. The abstract problems that might come with unchecked executive power were not a priority or an immediate concern for most Americans inside and outside of government.

Those already-intense anxieties were further stoked by the anthrax scares that played out in the following months.

Philip D. Zelikow, a historian at the University of Virginia who served as counselor in the State Department during the Bush administration and as executive director of the 9/11 Commission, said that following the collective national trauma of the attacks, “Officials tried to do everything they could think of, improvising frantically, making many mistakes while getting some things right.”

These officials were guided by a simple and compelling mandate from the president that was, by itself, worthy — but may have affected the way some decisions were made. President Bush’s order was to do whatever was necessary to prevent another such attack.

Task Force members generally understand that those officials whose decisions and actions may have contributed to charges of abuse, with harmful consequences for the United States’ standing in the world, undertook those measures as their best efforts to protect their fellow citizens.

Task Force members also believe, however, that those good intentions did not relieve them of their obligations to comply with existing treaties and laws. The need to respect legal and moral codes designed to maintain minimum standards of human rights is especially great in times of crisis.

It is encouraging to note that when misguided policies were implemented in an excess of zeal or emotion, there was sometimes a cadre of officials who raised their voices in dissent, however unavailing those efforts.

**Perhaps the most important or notable finding of this panel is that it is indisputable that the United States engaged in the practice of torture.**

This finding, offered without reservation, is not based on any impressionistic approach to the issue. No member of the Task Force made this decision because the techniques “seemed like torture to me,” or “I would regard that as torture.”

Instead, this conclusion is grounded in a thorough and detailed examination of what constitutes torture in many contexts, notably historical and legal. The Task Force examined court cases in which torture was deemed to have occurred both inside and outside the country and, tellingly, in instances in which the United States has leveled the charge of torture against other governments. The United States may not declare a nation guilty of engaging in torture and then exempt itself from being so labeled for similar if not identical conduct.

The extensive research that led to the conclusion that the United States engaged in torture is contained in a detailed legal memorandum attached to this report. It should be noted that the conclusion that torture was used means it occurred in many instances and across a wide range of theaters. This judgment is not restricted to or dependent on the three cases in which detainees of the CIA were subjected to waterboarding, which had been approved at the highest levels.

The question as to whether U.S. forces and agents engaged in torture has been complicated by the existence of two vocal camps in the public debate. This has been particularly vexing for traditional journalists who are trained and accustomed to recording the arguments of both sides in a dispute without declaring one right and the other wrong. The public may simply perceive that there is no right side, as there are two equally fervent views held views on a subject, with

substantially credentialed people on both sides. In this case, the problem is exacerbated by the fact that among those who insist that the United States did not engage in torture are figures who served at the highest levels of government, including Vice President Dick Cheney.

But this Task Force is not bound by this convention.

The members, coming from a wide political spectrum, believe that arguments that the nation did not engage in torture and that much of what occurred should be defined as something less than torture are not credible.

**The second notable conclusion of the Task Force is that the nation's highest officials bear some responsibility for allowing and contributing to the spread of torture.**

The evidence for this finding about responsibility is contained throughout the report, but it is distilled in a detailed memo showing the widespread responsibility for torture among civilian and military leaders. [See Appendix 2] The most important element may have been to declare that the Geneva Conventions, a venerable instrument for ensuring humane treatment in time of war, did not apply to Al Qaeda and Taliban captives in Afghanistan or Guantánamo. The administration never specified what rules would apply instead.

The other major factor was President Bush's authorization of brutal techniques by the CIA for selected detainees.

The CIA also created its own detention and interrogation facilities — at several locations in Afghanistan, and even more secretive “black sites” in Thailand, Poland, Romania and Lithuania, where the highest value captives were interrogated.

The consequence of these official actions and statements are now clear: many lower-level troops said they believed that “the gloves were off” regarding treatment of prisoners. By the end of 2002, at Bagram Air Base in Afghanistan, interrogators began routinely depriving detainees of sleep by means of shackling them to the ceiling. Secretary of Defense Donald Rumsfeld later approved interrogation techniques in Guantánamo that included sleep deprivation, stress positions, nudity, sensory deprivation and threatening detainees with dogs. Many of the same techniques were later used in Iraq.

Much of the torture that occurred in Guantánamo, Afghanistan and Iraq was never explicitly authorized. But the authorization of the CIA's techniques depended on setting aside the traditional legal rules that protected captives. And as retired Marine generals Charles Krulak and Joseph Hoar have said, “any degree of ‘flexibility’ about torture at the top drops down the chain of command like a stone — the rare exception fast becoming the rule.”

The scope of this study encompasses a vast amount of information, analysis and events; geographically speaking, much of the activity studied occurred in three locations outside the continental United States, two of them war zones. Fact-finding was conducted on the ground in all three places — Iraq, Afghanistan, and Guantánamo Bay, Cuba — by Task Force staff. Task Force members were directly involved in some of the information-gathering phase of the investigation, traveling abroad to meet former detainees and foreign officials to discuss the U.S. program of rendition.

As the Task Force is a nongovernmental body with no authority in law, the investigation proceeded without the advantages of subpoena power or the obligation of the government to provide access to classified information.

Nonetheless, there is an enormous amount of information already developed and Task Force staff and members have interviewed dozens of people over the course of the past few months; the passage of time seems to have made some people more willing to speak candidly about events.

The Task Force and its staff have surveyed the vast number of reports on the subject generated by the government, news media, independent writers and nongovernmental organizations, some more credible than others. The Task Force has attempted to assess the credibility of the many assertions of brutal treatment as far as possible. For example, accounts by former detainees, either previously reported or in interviews with Task Force staff, may be measured against the accounts of interrogators and guards who now speak more openly than they did at the time — or against such credible reports as those provided by the International Committee of the Red Cross (ICRC) and the Senate Armed Services Committee, both of which had access to confidential information not available to the public.

The architects of the detention and interrogation regimes sought and were given crucial support from people in the medical and legal fields. This implicated profound ethical questions for both professions and this report attempts to address those issues.

Apart from the ethical aspects, there were significant, even crucial mistakes made by both legal and medical advisers at the highest levels.

On the medical side, policymakers eagerly accepted a proposal presented by a small group of behavioral psychologists to use the Survival, Evasion, Resistance and Escape program (SERE) as the basis to fashion a harsh interrogation regime for people captured in the new war against terrorism.

The use of the SERE program was a single example of flawed decision-making at many levels — with serious consequences. The SERE program was developed to help U.S. troops resist interrogation techniques that had been used to extract false confessions from downed U.S. airmen during the Korean War. Its promoters had no experience in interrogation, the ability to extract truthful and usable information from captives.

Lawyers in the Justice Department provided legal guidance, in the aftermath of the attacks, that seemed to go to great lengths to allow treatment that amounted to torture. To deal with the regime of laws and treaties designed to prohibit and prevent torture, the lawyers provided novel, if not acrobatic interpretations to allow the mistreatment of prisoners.

Those early memoranda that defined torture narrowly would engender widespread and withering criticism once they became public. The successors of those government lawyers would eventually move to overturn those legal memoranda. Even though the initial memoranda were disowned, the memorable language — limiting the definition of torture to those acts that might implicate organ failure — remain a stain on the image of the United States, and the memos are a potential aid to repressive regimes elsewhere when they seek approval or justification for their own acts.

The early legal opinions had something in common with the advice from psychologists about how to manipulate detainees during interrogation: they both seemed to be aimed primarily at giving the client — in this case, administration officials — what they wanted to hear. Information or arguments that contravened the advice were ignored, minimized or suppressed.

The Task Force report also includes important new details of the astonishing account — first uncovered by Human Rights Watch — of how some U.S. authorities used the machinery of the “war on terror” to abuse a handful of Libyan Islamists involved in a national struggle against Libyan dictator Muammar el-Gaddafi, in an effort to win favor with el-Gaddafi’s regime. The same Libyans suddenly became allies as they fought with NATO to topple el-Gaddafi a few short years later.

Task Force staff also learned that procedures in place in Afghanistan to evaluate prisoners for release are not as independent as they have been presented. Decisions of review boards, in some cases, are subject to review by a Pentagon agency that often consults with members of Congress as to whether to release prisoners from Bagram.

Stepping back from the close-quarters study of detention policies, some significant, historical themes may be discerned. The first is a striking example of the interplay of checks and balances in our system, in which the three branches of government can be seen, understandably, to move at different speeds in responding to a crisis. Following the September 11 attacks, the immediate responsibility for action fell appropriately on the executive branch, which has direct control of the vast machinery of the government. It encompasses not only the nation’s military might but the president himself as the embodiment of the nation’s leadership and thus the individual best positioned to articulate the nation’s anger, grief and considered response.

The other branches of government had little impact in the early years on the policies put in place by the Bush administration. The judiciary, the “least-dangerous branch” as noted by Alexander Hamilton in the Federalist Papers, is designed to be more deliberate in its involvement; courts cannot constitutionally pronounce on policies until they are presented with a “case or controversy” on which they may render judgments. Thus, in those first few years, the executive branch was essentially unimpeded in its actions in regard to treatment of detainees.

That would change. When cases involving U.S. detention policies slowly made their way into the judicial system, a handful of judges began to push back against administration actions. Decisions ultimately handed down by the Supreme Court overturned some of the basic premises of the administration in establishing its detention regime. Officials had counted on courts accepting that the U.S. Naval base at Guantánamo, Cuba, was outside the legal jurisdiction of the United States. As such, the officials also reasoned that detainees there would have no access to the right of *habeas corpus*, that is, the ability to petition courts to investigate and judge the sufficiency of reasons for detention.

The Supreme Court upset both assumptions.

But the limits of judicial authority soon became evident. As various judges issued rulings based on the Supreme Court pronouncements, both the courts and the administration engaged warily. While often in direct disagreement, both judges and executive branch officials seemed to be always sensitive to the potential for constitutional confrontation and sought to avoid

outright conflict. Courts, ever anxious about the possibility of defiance undermining their authority, generally allowed the administration to delay action. The administration, for its part, often worked to make cases moot, sometimes even freeing prisoners who were the subject of litigation, even though officials had once described those very detainees as highly dangerous.

Congress proved even slower than the courts to take any action that would create a confrontation with the White House. That would change, however, with the election of President Obama.

Another evident trend is that the detention policies of the Bush administration may be, in a loose sense, divided into two different periods. The aggressive “forward-leaning” approach in the early years changed, notably beginning in the period for 2005 to 2006. There were, no doubt, many reasons for this, probably including the limited pushback of the courts.

A full explanation of how the aggressiveness of the detention policies was altered in this period would involve an examination of the apparent changes in the thinking of President Bush, a difficult task and generally beyond the scope of this report. One factor, however, was certainly the disclosure of the atrocities at Abu Ghraib in 2004 and the ensuing condemnation both at home and abroad accompanied by feelings of — and there is no better word for it — shame among Americans, who rightly hold higher expectations of the men and women we send to war.

Over the course of this study, it became ever more apparent that the disclosures about Abu Ghraib had an enormous impact on policy. The public revulsion as to those disclosures contributed to a change in direction on many fronts; those in the government who had argued there was a need for extraordinary measures to protect the nation soon saw the initiative shift to those who objected to harsh tactics. Task Force investigators and members believe it is difficult to overstate the effect of the Abu Ghraib disclosures on the direction of U.S. policies on detainee treatment.

The Task Force also believes there may have been another opportunity to effect a shift in momentum that was lost. That involved an internal debate at the highest levels of the ICRC as to how aggressive the Geneva-based group should be with U.S. policymakers. The ICRC, by tradition, does not speak publicly about what its people learn about detention situations. But some officials were so offended by their discoveries at Guantánamo that they argued the group had to be more forceful in confronting the Defense Department. This report details for the first time some of the debate inside the ICRC over that issue.

In the end, the top leadership of the ICRC decided against confrontation and a valuable opportunity may have been missed.

Another observation is that President Obama came to quickly discover that his promised sweeping reform of the detention regime could not be so easily implemented. A major reason for this was that Congress, when finally engaged in the issue, resisted. The opposition to President Obama’s plans was sometimes bipartisan, notably to those proposals to close Guantánamo and bring some of the detainees onto U.S. soil for trial. Many believe President Obama and his aides did not move swiftly enough, thus allowing opposition to build in Congress.

This report is aimed, in part, at learning from errors and improving detention and interrogation policies in the future. At the time of this writing, the United States is still detaining people it



regards as dangerous. But in some instances the treatment of supposed high-value foes has been transformed in significant ways.

The U.S. military, learning from its experience, has vastly improved its procedures for screening captives and no longer engages in large-scale coercive interrogation techniques. Just as importantly, the regime of capture and detention has been overtaken by technology and supplanted in large measure by the use of drones. If presumed enemy leaders — high-value targets — are killed outright by drones, the troublesome issues of how to conduct detention and interrogation operations are minimized and may even become moot.

The appropriateness of the United States using drones, however, will continue to be the subject of significant debate — indeed, it was recently the subject of the ninth-longest filibuster in U.S. history — and will probably not completely eliminate traditional combat methods in counter-terror and counter-insurgency operations in the foreseeable future. As we have seen, any combat situation can generate prisoners and the problems associated with their detention and interrogation. As 2012 ended, the U.S. military was believed to still be taking in about 100 new prisoners each month at the Bagram detention facility in Afghanistan, most of them seized in night raids around the country. But interviews by Task Force staff with recent prisoners appear to show a stark change in their treatment from the harsh methods used in the early years of U.S. involvement in Afghanistan.

While authoritative as far as it goes, this report should not be the final word on how events played out in the detention and interrogation arena.

The members of the Task Force believe there may be more to be learned, perhaps from renewed interest in the executive or legislative branches of our government, which can bring to bear tools unavailable to this investigation — namely subpoena power to compel testimony and the capability to review classified materials.

Even though the story might not yet be complete, the Task Force has developed a number of recommendations to change how the nation goes about the business of detaining people in a national-security context, and they are included in this report. We hope the executive and legislative branches give them careful consideration.

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# Findings and Recommendations

## General Findings and Recommendations

### Finding #1

**U.S. forces, in many instances, used interrogation techniques on detainees that constitute torture. American personnel conducted an even larger number of interrogations that involved “cruel, inhuman, or degrading” treatment. Both categories of actions violate U.S. laws and international treaties. Such conduct was directly counter to values of the Constitution and our nation.**

The Task Force believes there was no justification for the responsible government and military leaders to have allowed those lines to be crossed. Doing so damaged the standing of our nation, reduced our capacity to convey moral censure when necessary and potentially increased the danger to U.S. military personnel taken captive.

Democracy and torture cannot peacefully coexist in the same body politic. The Task Force also believes and hopes that publicly acknowledging this grave error, however belatedly, may mitigate some of those consequences and help undo some of the damage to our reputation at home and abroad.

*[This report includes a detailed memorandum outlining the factual basis of this finding. The memorandum cites instances in which the United States has asserted that torture was used in other cases, judicial findings in both domestic and international cases and citations to international law. See Appendix 1]*

### Finding #2

**The nation’s most senior officials, through some of their actions and failures to act in the months and years immediately following the September 11 attacks, bear ultimate responsibility for allowing and contributing to the spread of illegal and improper interrogation techniques used by some U.S. personnel on detainees in several theaters. Responsibility also falls on other government officials and certain military leaders.**

*[This report includes a detailed memorandum outlining the factual basis of this finding. See Appendix 2]*

## Recommendations

- (1) Regardless of political party, the leaders of this country should acknowledge that the authorization and practice of torture and cruelty after September 11 was a grave error, and take the steps necessary to ensure that it cannot be repeated. Torture and “cruel, inhuman, or degrading treatment” are incompatible not only with U.S. law, but with the country’s founding values. No government can be trusted with the power to inflict torment on captives.
- (2) U.S. intelligence professionals and service members in harm’s way need clear orders on the treatment of detainees, requiring, at a minimum, compliance with Common Article 3 of the Geneva Conventions. Civilian leaders and military commanders have an affirmative responsibility to ensure that their subordinates comply with the laws of war.
- (3) Congress and the president should strengthen the criminal prohibitions against torture and cruel, inhuman, or degrading treatment by:
  - a. amending the Torture Statute and War Crimes Act’s definition of “torture” to mean “an intentional act committed by a person acting under the color of law that inflicts severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”
  - b. amending the War Crimes Act’s definition of “cruel, inhuman and degrading treatment” to make clear that cruel and inhuman treatment of detainees is a federal crime even if it falls short of torture and regardless of the location or circumstances in which detainees are held or the state’s interest in obtaining information from detainees.”
  - c. amending the Uniform Code of Military Justice to define specific offenses of torture, cruel and inhuman treatment, and war crimes, whose definitions and sentences track those in the U.S. Code.

## Finding #3

**There is no firm or persuasive evidence that the widespread use of harsh interrogation techniques by U.S. forces produced significant information of value. There is substantial evidence that much of the information adduced from the use of such techniques was not useful or reliable.**

There are, nonetheless, strong assertions by some former senior government officials that the use of those techniques did, in fact, yield valuable intelligence that resulted in operational and strategic successes. But those officials say that the evidence of such success may not be disclosed for reasons of national security.

The Task Force appreciates this concern and understands it must be taken into account in attempting to resolve this question. Nonetheless, the Task Force believes those who make this argument still bear the burden of demonstrating its factual basis. History shows that the American people have a right to be skeptical of such claims, and to decline to accept

any resolution of this issue based largely on the exhortations of former officials who say, in essence, “Trust us” or “If you knew what we know but cannot tell you.”

In addition, those who make the argument in favor of the efficacy of coercive interrogations face some inherent credibility issues. One of the most significant is that they generally include those people who authorized and implemented the very practices that they now assert to have been valuable tools in fighting terrorism. As the techniques were and remain highly controversial, it is reasonable to note that those former officials have a substantial reputational stake in their claim being accepted. Were it to be shown that the United States gained little or no benefit from practices that arguably violated domestic and international law, history would render a harsh verdict on those who set us on that course.

On the question as to whether coercive interrogation techniques were valuable in locating Osama bin Laden, the Task Force is inclined to accept the assertions of leading members of the Senate Intelligence Committee that their examination of the largest body of classified documents relating to this shows that there was no noteworthy connection between information gained from such interrogations and the finding of Osama bin Laden.

The Task Force does not take any unequivocal position on the efficacy of torture because of the limits of its knowledge about classified information. But the Task Force believes it is important to recognize that to say torture is ineffective does not require a belief that it never works; a person subjected to torture might well divulge useful information.

The argument that torture is ineffective as an interrogation technique also rests on other factors. One is the idea that it also produces false information and it is difficult and time-consuming for interrogators and analysts to distinguish what may be true and usable from that which is false and misleading.

The other element in the argument as to torture’s ineffectiveness is that there may be superior methods of extracting reliable information from subjects, specifically the rapport-building techniques that were favored by some. It cannot be said that torture always produces truthful information, just as it cannot be said that it will never produce untruthful information. The centuries-old history of torture provides example of each, as well as many instances where torture victims submit to death rather than confess to anything, and there are such instances in the American experience since 2001.

The Task Force has found no clear evidence in the public record that torture produced more useful intelligence than conventional methods of interrogation, or that it saved lives.

Conventional, lawful interrogation methods have been used successfully by the United States throughout its history and the Task Force has seen no evidence that continued reliance on them would have jeopardized national security thereafter.

## Recommendations

- (1) Given that much of the information is going on 10 years old, the Task Force believes the

president should direct the CIA to declassify the evidence necessary for the American public to better evaluate these claims. To the extent that the efficacy of these methods is a relevant question, it should be examined as fully as possible in a time of relative calm so as to have a considered view before another event that could raise the issue again.

- (2) If any such information exists to demonstrate significant success in using harsh interrogation techniques that may not be disclosed without risk to national security, the Task Force believes that information should be presented in some official forum or body that would both be neutral and credible in its assessment of that claim and be able to maintain confidentiality to protect any sources or methods. If needed for these reasons, the Task Force favors the creation of some official study group or commission with appropriate high-level security clearances and stature to lend weight to any judgment on this question.
- (3) If the members of the Senate Intelligence Committee deem that the information in their possession on this subject does not endanger national security, committee members should move to disclose that information.

#### **Finding #4**

**The continued indefinite detention of many prisoners at Guantánamo should be addressed.**

#### **Recommendations**

*The Task Force was unable to agree on a unanimous recommendation on the issues of ending indefinite detention of prisoners at Guantánamo Bay and closing the detention facility there.*

*As President Obama has said that all U.S. troops will be withdrawn and the war in Afghanistan will be over by the end of next year, a majority of the Task Force members favored moving swiftly to deal with all of the prisoners currently held in Guantánamo and closing the detention facility in accordance with a cessation of hostilities by the end of 2014, as the law of war will no longer be applicable. The details of that proposal, shown below, would have some prisoners tried in U.S. courts or in military commissions that followed the same procedures as Article III civilian courts. Other prisoners would be transferred to countries where the U.S. could be certain that they would not be subject to torture. Those prisoners who are deemed to still be a threat to the safety of the U.S. and its citizens and who would be difficult (a) to prosecute because they were subjected to torture or the relevant criminal laws did not apply overseas at the time of their conduct; or (b) to transfer due to lack of suitable receiving country, would be brought to the mainland United States and held in custody until a suitable place to transfer them was found. Their cases would be subject to periodic review.*

*A minority<sup>1</sup> of the Task Force does not agree with those prescriptions. Those members believe that as troubling as indefinite detention might be, there are currently no good or feasible alternatives. Those prisoners who are deemed to be a continuing threat to the United States and for whom a trial is not currently feasible, and where there is no other suitable country that will accept them, should remain in detention for the foreseeable future. They should not be brought to the U.S., and Guantánamo remains the best location to hold them.*

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<sup>1</sup>Task Force members Asa Hutchinson and Richard Epstein.

The majority of the Task Force believes that the situation of indefinite detention is abhorrent and intolerable. The majority recommends:

- (1) The administration, using authority it currently has, should move swiftly to release or transfer those detainees at the Guantánamo Bay detention facility who have been cleared for release or transfer.
- (2) To facilitate dealing with the remaining detainees at Guantánamo Bay, Congress should lift its prohibition on any of them being brought to the mainland United States. The Task Force believes that no one should doubt that U.S. authorities are capable of holding them securely.
- (3) Following the release or transfer of cleared detainees, the remaining detainees held at Guantánamo Bay should be:
  - a. Tried wherever possible by a U.S. Article III court as a matter of preference. If Congress does not lift its ban on bringing Guantánamo detainees to the mainland United States, a U.S. district court should be designated to sit or set up at Guantánamo to clear as many remaining cases as practicable;
  - b. Should the above process fail to be capable of or sufficient to handle all remaining detainees, a military commission based on standards fully parallel if not identical to those applied by Article III courts should be used to clear any remaining cases;
  - c. Any remaining detainees who are deemed a threat to U.S. security, but cannot be tried as above, either because of a lack of evidence or tainted evidence — or where there is no adequate legal basis under which they may be tried in the U.S. — should be treated as follows, in the order noted below:
    1. U.S. authorities should seek a foreign country willing to try the detainees with the best commitments and processes the United States can obtain (in keeping with the appropriate recommendations of this Task Force) against any use of torture or cruel, inhuman or degrading treatment;
    2. In the absence of finding such a state, the detainees should be released to a state willing to receive them and with the best commitments and processes the United States can obtain (in keeping with the appropriate recommendations of this Task Force) against any use of torture or detention without trial and which is prepared to provide them an opportunity to live free of the threat of detention without trial for any known or presumed past actions for which sufficient untainted evidence cannot be produced;
    3. Failing the above, the detainees should be returned to a state of citizenship or nationality or former citizenship or nationality with the best commitments and processes the United States can obtain (in keeping with the appropriate recommendations of this Task Force) against any use of torture or detention without trial;
    4. Failing that, the detainees may be brought to the United States and kept in

the custody of the Department of Homeland Security under appropriate immigration statutes and regulations until such time as a suitable place to deport them is found. They would be subject to semiannual reviews under conditions and standards to be determined by the executive branch.

- (4) There should be a U.S. declaration of cessation of hostilities with respect to Afghanistan by the end of 2014. If there is no such formal declaration, legal authorities should recognize the situation to be the same as existed in Iraq with the withdrawal of U.S. forces by the end of 2011, thereby providing for recognition of a de facto cessation of hostilities.
- (5) Following a cessation of hostilities and clearing of all detainee cases at Guantánamo Bay in accordance with the above process, the detention facility there should be closed, and under no circumstances later than the end of 2014.

### **Finding #5**

**The United States has not sufficiently followed the recommendation of the 9/11 Commission to “engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists.”**

In the 8 ½ years since the release of the 9/11 Commission Report, the United States has failed to take meaningful, permanent steps to develop a common coalition approach toward the humane treatment and detention of suspected terrorists. As the 9/11 Commission found, so too does the Task Force find that such steps should “draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.” With the passage of time, the United States’ failure to take meaningful, permanent action in this regard has put our nation’s security at greater risk.

### **Recommendation**

- (1) The Task Force fully endorses the implementation of the 9/11 Commission’s recommendation on the necessity of a common coalition approach toward the detention and humane treatment of suspected terrorists consistent with the rule of law and our values.

## **Legal Findings and Recommendations**

### **Finding #6**

**Lawyers in the Justice Department’s Office of Legal Counsel (OLC) repeatedly gave erroneous legal sanction to certain activities that amounted to torture and cruel, inhuman or degrading treatment in violation of U.S. and international law, and in doing so, did not properly serve their clients: the president and the American people.**

**Finding #7**

**Since September 11, the Justice Department’s Office of Legal Counsel (OLC) failed, at times, to give sufficient weight to the input of many at the Department of Defense, the FBI, and the State Department with extensive and relevant expertise on legal matters pertaining to detainee treatment.**

**Recommendation**

- (1) The OLC should always consult with, and be counseled by, agencies affected by its legal advice and those agencies’ subject-matter experts. When providing legal advice contrary to the views of agency subject-matter experts, the OLC should include and clearly outline opposing legal views to its own, the legal support (if any) and reasoning for those opposing views, and the basis for why the OLC chose not to adopt those views.

**Finding #8**

**Since the Carter administration, the Office of Legal Counsel (OLC) has published some opinions, a practice that continues to this day. Transparency is vital to the effective functioning of a democracy. It is also vital that the president, during his or her presidency, be able to rely on confidential legal advice.**

**Recommendations**

- (1) To balance the need for transparency and the need of the president to receive confidential legal advice, the American people should be notified when a classified opinion is issued. The OLC should periodically review earlier confidential opinions to determine if they may be declassified and released. If any and all opinions from the OLC might someday, at the appropriate time, be disclosed, OLC attorneys would be more mindful of their responsibility to act in an impartial manner on behalf of the nation and less likely to engage in advocacy that could later prove to have been misguided.
- (2) Congress should amend the attorney general’s current notification requirement to Congress found at 28 U.S.C. § 530D and extend it beyond those cases in which the executive branch acknowledges it is refusing to comply with a statute. The Justice Department (DOJ) should have to explain not only when it determines a statute is unconstitutional, and need not be enforced, but also whenever it concludes that a certain construction of a statute is required to avoid constitutional concerns under Article II of the Constitution or separation-of-powers principles. We support efforts that have been proposed in the past but failed to come to fruition, such as the OLC Reform Act of 2008, sponsored by Sens. Dianne Feinstein and Russ Feingold, to ensure Congress is notified when the DOJ determines that the executive branch is not bound by a statute.



## Extraordinary Rendition Findings and Recommendations

### Finding #9

**It is the view of the Task Force that the United States has violated its international legal obligations in its practice of the enforced disappearances and arbitrary detention of terror suspects in secret prisons abroad.**

After September 11, 2001, the extraordinary rendition program consisted of individuals being captured in one part of the world and transferred extrajudicially to another location for the purpose of interrogation rather than legal process. The U.S. officials involved did not notify the detainees' families of their whereabouts, or provide the detainees with legal representation in any locations operated by the CIA as "black sites" or for proxy detention. The International Covenant on Civil and Political Rights, to which the United States is a party, states at Article 9(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Additionally, the practice of enforced disappearance violates international humanitarian law in both international and non-international armed conflicts, according to the first and fourth Geneva Conventions. The International Convention for the Protection of All Persons Against Enforced Disappearances, to which the United States is not a party but which codifies binding customary international law, states that "[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity."

### Recommendations

- (1) The Task Force urges the Department of State (DOS), Department of Defense (DOD), and the CIA to expeditiously declassify and release information pertaining to any secret proxy detention (upon U.S. authority or pursuant to U.S. official requests) occurring abroad. The Task Force also recommends that DOS, DOD and the CIA ensure that any detainees still held in such circumstances are allowed access to the International Committee of the Red Cross as required by international law.
- (2) In order to ensure uniform treatment and the guarantee of rights for individuals under the control of the United States, the U.S. government must clarify that the U.S. interpretation of Article 3 of the Convention Against Torture (CAT) and Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) includes both individuals within U.S. territory and individuals under U.S. jurisdiction extraterritorially, in accordance with the treaty bodies' interpretations of the CAT and the ICCPR. Such clarification would prohibit arbitrary detention by U.S. forces outside of U.S. territory.

### Finding #10

**The Task Force finds that "diplomatic assurances" that suspects would not be tortured by the receiving countries proved unreliable in several notable rendition cases, although the full extent of diplomatic assurances obtained is still**

**unknown. The Task Force believes that ample evidence existed regarding the practices of the receiving countries that rendered individuals were “more likely than not” to be tortured.**

In conducting detainee transfers subsequent to receiving inadequate and unenforceable diplomatic assurances, the United States violated its legal obligations under the Convention Against Torture, which was drafted in part by the United States and which states at Article 3(1): “No State Party shall expel, return (“refouler”), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This obligation attaches when an individual “is more likely than not” to be tortured. Under the administrations of President Bill Clinton and President George W. Bush, the extraordinary rendition program often involved transfers of terror suspects to countries where there existed a documented high likelihood of torture or cruel, inhuman, or degrading treatment. U.S. officials were sometimes involved in the interrogations of transferred detainees or received notice of detainees’ allegations regarding torture in proxy detention, and were therefore aware of conditions and treatment in the receiving countries.

## **Recommendation**

- (1) The Task Force recommends that diplomatic assurances must not be the sole or dispositive factor for U.S. satisfaction of its obligation under CAT Article 3(1) that “[n]o State Party shall expel, return (“refouler”), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Legislation should be enacted that establishes diplomatic assurances as only one of several factors informing the likelihood of torture in a receiving state, with State Department’s Human Rights Reports serving as key indicators of future conduct by host nations. Additionally, diplomatic assurances should be accompanied by guarantees of a right to monitor, a right to interview and, potentially, a right to retake custody of the individual if the United States determines that transferred individuals are tortured or subjected to cruel, inhuman or degrading treatment. When a transfer involves an individual with ties of nationality or residence to a third state, the U.S. should, wherever feasible, consult with the third state regarding our common interest in the above guarantees from the receiving state.

## **Finding #11**

**The Task Force finds that U.S. officials involved with detention in the black sites committed acts of torture and cruel, inhuman or degrading treatment.**

Ample evidence of this treatment is found in the December 2004 CIA Inspector General’s Report on Counterterrorism, Detention, and Interrogation Activities, as well as the testimony of former detainees. The use of torture and cruel, inhuman, or degrading treatment has long been considered war crimes and violations of customary international law, as well as being prohibited by the Convention Against Torture and denounced by the United States when practiced by other states.

## **Recommendation**

- (1) Due to the growing legal and political consequences of the CIA's rendition program and network of secret prisons, and the fact that officials credibly assert that both programs have been discontinued, the Task Force recommends that the United States fully comply with its legal obligations under the Convention Against Torture in cooperating with pending investigations and lawsuits in the United States and abroad.

## **Medical Findings and Recommendations**

### **Finding #12**

**After September 11, 2001, psychologists affiliated with U.S. intelligence agencies helped create interrogation techniques for use in questioning detainees. The methods were judged to be legal by the Department of Justice's Office of Legal Counsel (OLC), but the Task Force has found that many of them constituted torture or cruel, inhuman or degrading treatment.**

### **Finding #13**

**Medical professionals, including physicians and psychologists, in accordance with Department of Defense and intelligence agency operating policies, participated variously in interrogations by monitoring certain interrogations, providing or allowing to be provided medical information on detainees to interrogators, and not reporting abuses.**

### **Finding #14**

**Prior to September 11, 2001, ethical principles and standards of conduct for U.S. physicians regarding military detainees included prohibition against involvement in torture, monitoring or being present during torture, or providing medical care to facilitate torture. From 2006 to 2008, after information was available on the treatment of detainees, additional medical professional ethical principles and guidance were established by medical associations, including the duty to report abuses and prohibitions against conducting or participating in or being present during interrogations, and providing detainees' medical information to interrogators.**

### **Finding #15:**

**After September 11, 2001, military psychologists and physicians were instructed that they were relieved of the obligation to comply with nonmilitary ethical principles, and in some cases their military roles were redefined as non-health-professional combatants.**

Rules, regulations and operating procedures were altered to guide and instruct physicians in their involvement in detention and interrogation procedures including

the provision of detainees' medical information to interrogators, being present or monitoring interrogations, engaging in medically and ethically improper practices in dealing with hunger strikers, and not reporting abuses.

## Recommendations

- (1) The Department of Defense (DOD) and CIA should ensure adherence to health professional principles of ethics by using standards of conduct for health professionals that are in accordance with established professional standards of conduct, including the prohibition of physicians from conducting, being present, monitoring or otherwise participating in interrogations – including developing or evaluating interrogation strategies, or providing medical information to interrogators. In addition, physicians should be required to report abuses to authorities. The DOD should discontinue classifications of health professionals as non-health-professional combatants. It should also adopt standards with respect to confidentiality of detainee medical and psychological information that prohibit the use of medical information, whether obtained in clinical treatment or through an assessment for any other purpose, from being shared with interrogators.
- (2) Standard periodic military reviews of the conduct and performance of health professionals should be based on their compliance with military detention standards, regulations and operating procedures that are in accord with professional ethical principles and standards established by U.S. medical associations. Violations should be dealt with under the Code of Military Justice and the findings shared with existing civilian agencies for action, including the National Practitioner Data Bank, state licensing boards, medical associations, and specialty certifying boards.
- (3) The Department of Justice should formally prohibit the Office of Legal Counsel from approving interrogation techniques based on representations that health providers will monitor the techniques and regulate the degree of physical and mental harm that interrogators may inflict. Health professionals cannot ethically condone any deliberate infliction of pain and suffering on detainees, even if it falls short of torture or cruel treatment.

## Finding #16

**For detainee hunger strikers, DOD operating procedures called for practices and actions by medical professionals that were contrary to established medical and professional ethical standards, including improper coercive involuntary feedings early in the course of hunger strikes that, when resisted, were accomplished by physically forced nasogastric tube feedings of detainees who were completely restrained.**

## Recommendations

- (1) Forced feeding of detainees is a form of abuse and must end.
- (2) The United States should adopt standards of care, policies and procedures regarding detainees engaged in hunger strikes that are in keeping with established medical professional ethical and care standards set forth as guidelines for the management of hunger strikers in the 1991 World Medical Association Declaration of Malta on Hunger Strikes (revised 1992 and 2006), including affirmation that force-feeding is prohibited

and that physicians should be responsible for evaluating, providing care for and advising detainees engaged in hunger strikes. Physicians should follow professional ethical standards including: the use of their independent medical judgment in assessing detainee competence to make decisions; the maintenance of confidentiality between detainee and physician; the provision of advice to detainees that is consistent with professional ethics and standards; and, the use of advance directives.

- (3) The Task Force recognizes that as a matter of public policy the United States has a legitimate interest regarding detainees whom it is holding to prevent them from starving to death. In doing so, it should respect the findings and processes reflected in the above-noted standards and recommendations.

## Consequences Findings and Recommendations

### Finding #17

**It is the view of the Task Force that it is harmful for the United States to release detainees without clear policies or practices in place for the re-introduction of those individuals into the societies of the countries of release.**

Detainees held at Guantánamo Bay and abroad are released to home countries or third countries, in many cases, without contacts or the means to support themselves, and suffering from mental and physical problems resulting from their time in U.S. detention. Such prolonged physical and mental effects have the potential to manifest in acts of recidivism for those detainees who previously fought against U.S. forces, or in increasing anti-U.S. sentiment in a vulnerable population.

### Recommendation

- (1) The United States should establish agreements with all countries receiving detainees upon release to establish standard procedures by which those without family or other means may be properly monitored on their ability to secure housing, medical and other necessities in order to fully integrate them into society.

## Recidivism Findings and Recommendations

### Finding #18

**The Task Force finds a large discrepancy between the recidivism figures published by government agencies such as the Defense Intelligence Agency and the Subcommittee on Oversight and Investigations of the House Committee on Armed Services, and nongovernmental organizations (NGOs) such as the New America Foundation. The Task Force believes that it is not possible to determine an accurate rate of re-engagement (or engagement for the first time) in terrorist activity without systematic and detailed data indicating whether each particular individual is “confirmed” or “suspected” of such activity.**

## Recommendation

- (1) The Task Force recommends that the Defense Intelligence Agency disclose all criteria used to make determinations on whether individuals fall into the “confirmed” or “suspected” categories, including clear guidelines on acts that constitute each category. The Task Force notes that Pentagon spokesman Todd Breasseale said in March 2012 that individuals on the “suspected” list may pose no threat to national security. The Task Force therefore recommends that the DIA issue separate numbers for the categories of “confirmed” and “suspected” recidivists, establishing the rate of recidivism based solely on the “confirmed” numbers for greater accuracy. Finally, the Task Force recommends that the DIA publish a list of “confirmed” recidivists with details of their terror-related activities.

## Obama Administration Findings and Recommendations

### Finding #19

#### **The high level of secrecy surrounding the rendition and torture of detainees since September 11 cannot continue to be justified on the basis of national security.**

The black sites have apparently been shut down, and the “enhanced interrogation techniques” have been ended. The authorized “enhanced” techniques have been publicly disclosed, and the CIA has approved its former employees’ publication of detailed accounts of individual interrogations. Unauthorized, additional mistreatment of detainees has been widely reported in the press and by human rights groups.

Ongoing classification of these practices serves only to conceal evidence of wrongdoing and make its repetition more likely. As concerns the military commissions at Guantánamo, it also jeopardizes the public’s First Amendment right of access to those proceedings, the detainees’ right to counsel, and counsel’s First Amendment rights.

### Recommendations

- (1) Apart from redactions needed to protect specific individuals and to honor specific diplomatic agreements, the executive branch should declassify evidence regarding the CIA’s and military’s abuse and torture of captives, including, but not limited to:
  - The Senate Intelligence Committee’s report on the CIA’s treatment of detainees.
  - The Report of the Special Task Force on Interrogation and Transfer Policies.
  - The CIA Office of the Inspector General (OIG) reports on the deaths of Gul Rahman, Manadel al-Jamadi, and Abed Hamed Mowhoush; the rendition of Khaled El-Masri; the non-registration of “ghost” detainees; the use of unauthorized techniques at CIA facilities; and all OIG reports on the CIA’s interrogation, detention and transfer of detainees.
  - Investigations by the Armed Forces’ criminal investigative divisions, the chain of command, and the Department of Defense into abuses of detainees by Joint Special Operations Command Special Mission Unit Task Forces in Iraq and Afghanistan.

- (2) Apart from any steps needed to prevent security threats against individual intelligence agents, the executive branch should cease its attempts to prevent detainees from providing evidence about their treatment in CIA custody. Guantánamo detainees obviously hold no security clearances and have never signed nondisclosure agreements with the United States government, and were exposed to “intelligence sources and methods” only involuntarily.
- (3) Congress should pass legislation that makes clear that acts of torture, war crimes, and crimes against humanity are not legitimate “intelligence sources and methods” under the National Security Act, and evidence of these acts cannot be properly classified, unless their disclosure would endanger specific individuals or violate specific, valid, agreements with foreign countries.

### **Finding #20**

**The Convention Against Torture, in addition to prohibiting all acts of torture, requires that states ensure in their “legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” The United States has not complied with this requirement, in large part because of the government’s repeated, successful invocation of the state-secrets privilege in lawsuits brought by torture victims.**

### **Recommendation**

- (1) The state-secrets privilege should not be invoked to dismiss lawsuits at the pleadings stage. Invocations of the privilege should be subjected to independent judicial review, which do not automatically defer to the executive’s conclusions on the need for secrecy. Instead, courts should be able to evaluate the evidence (*in camera* where appropriate) and restrict invocation of the privilege to cases where it is necessary to guard against specific, non-speculative harms to national security.

### **Finding #21**

**The Convention Against Torture requires each state party to “[c]riminalize all acts of torture, attempts to commit torture, or complicity or participation in torture,” and “proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” The United States cannot be said to have complied with this requirement.**

No CIA personnel have been convicted or even charged for numerous instances of torture in CIA custody — including cases where interrogators exceeded what was authorized by the Office of Legal Counsel, and cases where detainees were tortured to death. Many acts of unauthorized torture by military forces have also been inadequately investigated or prosecuted.

## Recommendation

- (1) Congress should amend the War Crimes Act and the Torture Statute to make clear that in the future, in situations where a person of ordinary sense and understanding would know that their treatment of a detainee inflicts or is likely to result in severe or serious physical or mental pain or suffering, reliance on advice of counsel that their actions do not constitute torture or war crimes shall not be a complete defense.

## Finding #22

**The Obama administration’s standards for interrogation are set forth in the Army Field Manual on Interrogation. In 2006, a small handful of changes were introduced to the Manual that weakened some of its key legal protections.**

For over 50 years, the Army Field Manual has been an invaluable document guiding American soldiers away from abusing prisoners, with its clear prohibitions on cruel, inhuman or degrading treatment and torture. However, the 2006 version deleted language that explicitly prohibited the use of sleep deprivation and stress positions, and its Appendix M authorizes an interrogation technique called “separation,” which could inflict significant physical and mental anguish on a detainee.

Under Appendix M, a combatant commander could arguably authorize a detainee to be interrogated for 40 consecutive hours with four-hour rest periods at either end. Appendix M also takes off the table a valuable interrogation approach, noncoercive separation, and puts it out of reach in situations where it could be employed humanely and effectively.

## Recommendation

- (1) The Army Field Manual on Interrogation should be amended so as to eliminate Appendix M, which permits the use of abusive tactics and to allow for the legitimate use of noncoercive separation. Language prohibiting the use of stress positions and abnormal sleep manipulation that was removed in 2006 should be restored.

## Finding #23

**Detainees’ transfer from United States custody to the custody of the National Directorate of Security (NDS) in Afghanistan has resulted in their torture. The United States has a legal obligation under Article 3 of the Convention Against Torture not to transfer detainees to NDS custody unless it can verify that they are not likely to be tortured as a result.**

## Recommendations

- (1) The executive branch and Congress should clarify that Article 3 of the Convention Against Torture is legally binding on the U.S. government even for transfers occurring outside of U.S. territory.



- (2) The United States should ensure that transfers of detainees to Afghan custody by U.S. special operations forces and intelligence agencies are subjected to the same limitations as transfers by the military, including ongoing monitoring by both U.S. personnel and the Afghanistan Independent Human Rights Commission.
- (3) Intelligence appropriations should be subject to the limitations of the “Leahy Law,” which restricts U.S. funds to

any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.

The Director of National Intelligence should have the authority to waive this restriction if “extraordinary circumstances” require it, just as the Secretary of Defense does under existing law. The Director of National Intelligence should be required to report to the congressional intelligence committees on the extraordinary circumstances and the human rights violations that necessitate such a waiver.

#### **Finding #24**

**The available evidence suggests that the Obama administration has dramatically improved the process of notifying the International Committee of the Red Cross (ICRC) of detainees’ status, and providing access to detainees.**

Ensuring that detainees cannot be “disappeared” is a crucial part of preventing them from being subjected to torture and cruel treatment. However, because these changes have only been announced in anonymous leaks to the press, it is unclear whether they will bind future administrations.

#### **Recommendations**

- (1) The administration should publicly confirm its requirements for ICRC notification and access.
- (2) If it has not already done so, the United States should formally adopt regulations regarding ICRC notification and access for individuals detained pursuant to armed conflict.
- (3) The United States should sign and ratify the International Convention for the Protection of All People from Enforced Disappearance.

# Detention at Guantánamo

*Soon after September 11, Guantánamo Bay became the most prominent public stage for many of the nation's detention policies, which were then played out before attentive audiences in America and the rest of the world. Once Guantánamo became the nation's designated jail for suspected terrorists, it came to serve many symbolic and actual roles.*

*It was a major testing ground for the government's policy of engaging in highly coercive interrogation techniques, practices designed to visit torment on detainees in the expectation or hope they would give up important and usable intelligence to help fight the new style of war in which the United States found itself.*

*It was the principal place where the government's mostly unannounced shift in policy from detention for prosecution to detention for interrogation occurred. The initial pledges of senior government officials that the horrific events of September 11 would be avenged by bringing terrorists to swift justice in the courts or military tribunals was quietly replaced with a new model. Detainees would not be brought quickly before some tribunal. Instead, they would be held at length for another purpose — interrogation. The view of the detainees as an intelligence resource to be mined contributed to the rapid escalation of the coercive techniques deemed acceptable.*

*(Colonel Lawrence Wilkerson told the Task Force that his boss, Secretary of State Colin Powell, wondered aloud why many of the detainees couldn't just be repatriated to places in which they could be held securely. He said that he and Powell eventually came to understand that senior officials wanted to retain custody because they did not want to risk losing an opportunity to interrogate someone who might divulge some information. He said those officials, especially Secretary of Defense Donald Rumsfeld, were eager to be the ones who could bring the president some new piece of intelligence, especially about the subject in which he was most interested: some connection between Al Qaeda and Iraq.)*

*Guantánamo was the epicenter of what became the de facto U.S. posture that it was permissible, even preferable, to detain any and all people who conceivably might have connections to our enemies. Under this approach, there were few reservations about the fact that this necessarily meant that many people who had no role in September 11 or in fighting against allied forces would remain in custody under conditions of extreme privation for long periods. Although never stated explicitly, senior officials thought it better to detain any number of innocent people than to run the risk of setting free anyone who might be*

*a threat. This approach turned on its head a traditional notion of justice (better to let many guilty go free than imprison one innocent person), which many policymakers justified because they believed the nation was facing an existential threat. For them, the situation was extraordinary enough to set aside many of the nation's venerable values and legal principles.*

*While that may have been an understandable response to the situation following the shock of September 11, this approach would eventually be taken to an extreme and generate serious problems. It ensured that Guantánamo would become a symbol of the willingness of the United States to detain significant numbers of innocent people (along with the guilty) and subject them to serious and prolonged privation and mistreatment, even torture. There can be no argument today about the fact that many people were held in custody for no reasonable security reason. The notion that Guantánamo was a place where the United States willingly held many innocent people has proved a powerful tool for the nation's enemies and a source of criticism from many friends. This problem has never been fully mitigated, as the underlying situation persists today: There are still a significant number in Guantánamo who are deserving of release — a judgment contested by no serious person — but who nonetheless remain in custody, victims of the complex legal and geopolitical politics the detention situation has produced.*

*As a legal matter, Guantánamo — what it represented, whether it was within reach of U.S. law, and what it said about the extent of the powers of the executive branch of government — also produced major litigation culminating in landmark rulings across the judiciary, including the Supreme Court.*

*We begin our discussion of Guantánamo with one of the handful of personal sketches in this report, this one of retired Navy Captain Albert Shimkus, who commanded the detention medical center at Guantánamo from January 2002 to July 2003. Captain Shimkus served as an important spokesman for Guantánamo to the outside world in those early days, attesting convincingly to the humane treatment afforded inmates there. Much later, he said, he discovered that the story he was tasked with telling the public — and which he did with enthusiasm — was untrue. He spoke to the Task Force about his deep remorse for the role he played.*

*Captain Shimkus, now a faculty member at the U.S. Naval War College, provides a special perspective on how military authorities who believed it was permissible to engage in coercive techniques that could fairly be deemed torture nonetheless sought to hide their activities. They understood that what they apparently thought was justified and necessary could not withstand any public scrutiny.*

*The report moves next to a brief discussion of how prisoners were collected at the beginning of the war after the U.S. invasion of Afghanistan. Afghanistan was the initial and largest source of the detainees who were sent to the detention center in Cuba. After the early successes on the battlefields of Afghanistan, commanders in the field found themselves suddenly dealing with more prisoners than they could handle while still trying to win the war. We examine who those initial detainees were, how they were selected for transfer to Guantánamo, and the exigencies under which hard-pressed U.S. forces operated when dealing with detainees.*

*Beyond those circumstances of collecting the initial prisoners, the report, in a later chapter, contains a far broader discussion of the role of Afghanistan. The collection of prisoners in the war in Afghanistan*

set off a search among high-level policymakers for an appropriate place to keep them. The report details how this search was undertaken and describes a process that became a version of an old geography game: “Where in the world can we imprison Carmen Sandiego (if we believed Carmen Sandiego was a terrorist)?”

Once Guantánamo was chosen, policymakers then turned their attention to finding the best ways to extract intelligence from those in custody. There was limited practical expertise in interrogation practices for this situation. The CIA did not have the skills. The military had a set of venerable interrogation practices, but many leaders thought them inappropriate and too gentle for the new circumstances, a decision that would prove controversial and consequential.

We discuss here and in another chapter, on the role of medical personnel, how policymakers quickly seized on — or were sold on — the SERE program as the answer. The SERE (Survival, Evasion, Resistance and Escape) program subjected military personnel to harsh conditions to prepare them to resist torture. The program was developed after the Korean War as a training technique to teach selected categories of U.S. military personnel, such as pilots, how to resist coercive treatment (and torture), which was expected to be inflicted on American prisoners of war in an effort to obtain false confessions of war crimes and other propaganda-related admissions. U.S. intelligence doctrine did not consider the SERE model to be Geneva Conventions-compliant, nor, until 2001, a means of obtaining reliable information. In hindsight, it seems apparent that the SERE program was an especially unsuitable model upon which to craft an interrogation program aimed at getting true answers. But that view was also apparent to several people at the time, whose advice was brushed away as SERE was eagerly embraced by senior officials who were looking for an interrogation method approved by some psychologists, thus lending the trappings of scholarship and authority to their recommendations.

But the application of those techniques fostered dissension among those on the ground. The most important example involved members of the Naval Criminal Investigative Service (NCIS), under the leadership of David Brant and Mark Fallon, who witnessed and were appalled by some of the techniques being used. Word of the new techniques also troubled Alberto Mora, the general counsel of the Navy. Mora persistently sought to raise objections and was persistently rebuffed. The report details his interactions with senior Pentagon officials, who responded by trying to work around him. By then, the JAGs (Judge Advocate General’s Corps) from the uniformed services (the top career military lawyers), had also adopted Mora’s stance. The service JAGs were vociferously united in their belief that using coercive techniques would prove a disastrous mistake, would place the U.S. military on the wrong side of history and the law, and would endanger American forces.

Another arc in the Guantánamo story involves the change from a closed system — from which all information as to what was happening there emanated from the military — to one in which the Defense Department no longer was in exclusive control of the accounts that reached the public. The Pentagon seemed to have proceeded from a belief that it could maintain a complete atmosphere of secrecy as to how the detention and interrogation regime was being run. But it is a fundamental truth, if one chronically elusive to policymakers, that few such ventures can remain secret if they involve the participation of hundreds or thousands of people. While the Pentagon controlled the narrative completely at the beginning,

**“...detainees... were told their chances of favorable treatment, and possible release, would be hurt if they had legal representation.”**

*there were eventually news reports based on accounts of former guards and translators who had returned home after their tours of duty. But the dam finally broke after Supreme Court rulings ensuring that defense lawyers would be able to visit Guantánamo and actually speak to detainees as clients.*

*The accounts resulting from news leaks and, then, the visits of defense lawyers produced a set of competing narratives to the military's. Until that point, defense officials had been offering an account of admirably humane treatment; now, defense lawyers presented starkly different accounts, some even complaining of atrocities against detainees. The Department of Defense reacted strongly. One of its senior lawyers, Charles "Cully" Stimson, grew so exasperated that he blasted the lawyers representing detainees and called for U.S. corporations to end their associations with the top law firms involved.<sup>1</sup>*

*Former detainees from Guantánamo recalled to Task Force members that they were told by officials at Guantánamo that their attorneys were Jewish, gay, or secretly working for the government, in an attempt to discredit the lawyers.<sup>2</sup> Thomas Wilner, an attorney representing 12 Kuwaitis at Guantánamo, reported to *The New York Times* similar treatment of his clients. "The government should not be trying to come between these people and their lawyers. ... And I'm especially offended that they tried to use the fact that I'm Jewish to do it," he said.<sup>3</sup> A spokesman for the joint task force at Guantánamo denied the accusation.<sup>4</sup> Bisher al-Rawi, a former detainee, was inaccurately told that his attorney, Clive Stafford Smith, was Jewish: "They spread rumors about him that he is a Jew and that you shouldn't trust him. And that was a standard thing in GTMO, really standard."<sup>5</sup> Distrust from their clients also became a common problem for the lawyers representing detainees who were told their chances of favorable treatment, and possible release, would be hurt if they had legal representation.<sup>6</sup>*

*Even when the defense attorneys managed to gain their clients' trust, further interrogations followed their visits. Moazzam Begg met with an attorney named Gita Gutierrez in August 2004. He remembers her efforts to establish trust and what followed: "[S]he'd come to my cell in Camp Echo and [had] gone to great pains to meet with my father and others and get things that only he would have known about my childhood so that she related to me, so I could trust her. And she managed to establish that. So [within 20 minutes of her leaving] the interrogators came along first asking all about her, who is she and whatever and then they suggested that she is really just one of us anyway."<sup>7</sup>*

*Journalists who had been a captive audience of the military in its tightly controlled tours in the early stages began to learn of and report some of what was really occurring. For example, *The New York Times* reported a relatively benign version of what the camp was like, based on what its journalists had been shown on an early tour, albeit with appropriate caveats as to the restrictions. But eventually, the newspaper and others began to report on some of the cruel and common practices that base commanders had sought to conceal. Tracking down sources across the country, typically former translators, guards and interrogators, the *Times* reported how prisoners were made to strip down, were shackled, the air-conditioning turned up, all the while being forced to listen to loud music and endure flashing strobe lights. Those who cooperated were sometimes rewarded with a visit to a place called "the love shack," where the detainees were given access to magazines, soft-core porn movies, books, and were allowed to relax while smoking aromatic tobacco from Middle Eastern water pipes.<sup>8</sup>*

*Further, several emails between FBI agents at Guantánamo and their superiors in Washington, which were disclosed in a military investigation, contained reports of detainees left shackled for hours and a detainee soiling himself and pulling out his hair.<sup>9</sup> Some of the techniques with which the FBI took issue were officially sanctioned. The FBI also reported agents refusing to participate in interrogations, most notably the interrogation of Abu Zubaydah, because the techniques were “borderline torture.”<sup>10</sup> The FBI director, Robert Mueller, instructed his agents “not [to] participate in interrogations involving techniques the FBI did not normally use in the United States, even though the [Office of Legal Counsel] had determined such techniques were legal.”<sup>11</sup>*

### **Profile: Albert Shimkus**

By early 2003, Guantánamo was attracting increased public attention, and U.S. policymakers decided there was a pressing need for some new and favorable public exposure for the detention facility on Cuba’s southeastern tip. One impetus to showcase Guantánamo was the authorities’ frustration with its depiction in press; when international media referred to Guantánamo, they often used photos of blindfolded and shackled detainees, clad in orange jumpsuits, kneeling in what appeared to be outdoor cages.<sup>12</sup> Those photos were of Camp X-Ray, the primitive detention facility initially used to house the first detainees. Camp X-Ray was in operation only for the first four months of the detention operation and the stark, even brutal images became quickly outdated.<sup>13</sup>

However, those photos were the only images that the media had obtained of the Guantánamo detention facility. They had been allowed to be taken at a time closer to September 11, when little thought was given to the idea that images of thoroughly abased, kneeling prisoners might be seen as unacceptable or needlessly harsh. After all, these people were described as and understood by most Americans to be those who contributed to the heinous acts of September 11. But attitudes were changing and questions were being raised as to who was at Guantánamo and what was happening there. That, the authorities decided, made it time for a large-scale image initiative.<sup>14</sup>

In 2002, the military had built Camp Delta. Although grim in its own right, Delta was an improvement over X-Ray in many ways.<sup>15</sup> The ventilated, prefabricated structures built from material for metal shipping containers afforded each detainee an individual cell with a sleeping platform topped by a thin mattress, a toilet, decent shelter from the weather, occasional showers and tiny recreation areas.<sup>16</sup> The military began offering organized tours to small, select groups of journalists and congressional delegations.<sup>17</sup> These were tightly controlled events; visitors were shown only what authorities chose to put before them. No one was permitted to come in contact with or speak to any detainees.<sup>18</sup> By then, authorities had also provided most detainees with some personal toilet items, marked the cell floors with arrows to show the direction of Mecca to aid them in their daily prayers and provided each a copy of the Koran.<sup>19</sup> To keep the holy book off the floor — there was no table or surface space in the cell — each inmate was given a surgical mask that could be rigged as a sling; the book would be cradled in the mouth portion and the ends would be tied to the metal grates of the cell walls to hold the book off the floor.<sup>20</sup>

The tours of Camp Delta were carefully designed to show the facility at its best and to portray

conditions as admirably humane. (Over the next few years, when photos of Camp Delta were widely available, authorities would complain, with justification, that some media outlets continued to use the photos of X-Ray.<sup>21</sup>) But as would later be evident, the facility exhibited to visitors resembled a village whose construction could have been overseen by Count Potemkin, Catherine the Great's clever courtier. Perhaps the most impressive element of the tour was the visit to the detainee clinic/hospital in the middle of Camp Delta. It was clearly a clean and modern facility.<sup>22</sup>

The tour of the hospital was conducted by Captain Albert Shimkus of the U.S. Naval Medical Corps, who was in charge of the facility. Captain Shimkus, amiable and articulate, evinced considerable pride as he described to visitors the medical treatment given and available to the detainees at Guantánamo.<sup>23</sup> His descriptions made the detainees appear almost fortunate — at least in regard to their medical treatment — to have been shipped halfway across the world to the remote prison. They were, he enthusiastically asserted, receiving care equivalent to that given to America's own fighting men and women. It was a remarkable demonstration of civilized behavior, even generosity, to one's presumed mortal enemies in time of war.<sup>24</sup>

Secretary of Defense Donald Rumsfeld had decreed that no matter the medical situation of a detainee, none was to be taken off the base for medical treatment. That meant, Captain Shimkus said, he had the authority to summon quickly from the mainland any specialized expertise for problems that could not be treated optimally by the resident staff of about a dozen doctors. Shimkus, originally trained as a military nurse, told the visitors that on several occasions he had brought to the base hospital highly skilled surgeons for operations like placing stents in some detainees' coronary arteries, a procedure far beyond that which they could have expected in their home countries. He proudly noted that he had also established a psychiatric unit inside the hospital.<sup>25</sup>

Captain Shimkus would be remembered by many of those early visitors as one of the most effective boosters of Guantánamo as an exemplary, humane place, a showcase of the kind of decency that separated U.S. forces from the behavior of most other militaries and governments.<sup>26</sup>

But in a few years, Shimkus would become deeply embarrassed and contrite about the role he had played in selling Guantánamo to the public. By that time, he said, he had begun to learn from articles in the media about the systematic abuse of many prisoners that had been occurring during his tenure there. He said he now believes that the commanders to whom he reported wanted to wall him off from that dimension, to use him as a spokesman about the virtues of Guantánamo. They were, he said, successful in keeping the interrogation regime out of his view. He was, he said, thus stunned and intensely chagrined to later discover that he had allowed himself to have been enlisted in an effort to make the place seem humane and worthy of pride.<sup>27</sup>

Shimkus, now retired from active service, is a professor at the U.S. Naval War College in Newport, R.I.<sup>28</sup> His courses on leadership and medical ethics all include segments that touch upon his experience in Guantánamo. In an interview with Task Force staff at the Naval War College, Shimkus said he has reflected at length “on what had gone on during my watch.” He came to the dismaying conclusion, he said, that he had been “used as a tool,” by those who wanted to convey a false impression of the detention facility at Guantánamo.<sup>29</sup>

When he was a senior medical officer in Italy in 1999, Shimkus and his wife had gone on a tour with other top military officials of the site of the Auschwitz concentration and death camp in Poland. He said he was not only suitably horrified, but the experience made him determined to do whatever he could in his career to underline the difference in how U.S. forces behaved when involved in combat or conflict. Shimkus had left Guantánamo when he said he first learned about the coercive interrogation techniques that were used — first from leaked information appearing in press reports, and eventually in the military’s own investigations. He said he was stunned. “I was disappointed to discover that in our military there was a culture that would accept that kind of behavior.”<sup>30</sup> He learned from those reports of the observations of disgusted FBI agents who reported seeing detainees in interrogation shackled unattended for so long that they had defecated on themselves and pulled their hair out in despair.

There have been complaints that some detainees had medication withheld to motivate them to cooperate with interrogators. Two former detainees interviewed by Task Force members and staff in London in April 2012 gave detailed accounts as to how they had experienced this.<sup>31</sup> Shimkus said that while he believes nothing like that happened at the hospital, he now realizes it is possible that interrogators could have persuaded low-ranking corpsmen, charged with distributing or administering the drugs, to cooperate with their efforts to break the detainees’ will.<sup>32</sup>

As he has looked back, Shimkus has pondered whether he could have or should have done anything differently. In response to a question from Task Force staff, he said that no detainee he came in contact with ever complained to him about abuse. He now realizes that some of the symptoms he observed might well have been the result of abusive interrogations, like dehydration and injuries such as cuts and bruises. But he said that he took the dehydration instances as natural in a tropical climate and thought nothing unusual about the minor injuries (the only injuries were minor during his time). Besides, it was understood that detainees could and would be roughed up permissibly when they refused to come out of their cells and had to be forcibly extracted by teams of soldiers wearing riot gear who went in with force. Shimkus said he believes that an important element in his ignorance as to what was occurring was that he wasn’t looking for any signs of willful abuse. He had assumed there wouldn’t be any.<sup>33</sup>

He is, as distinct from most other senior Guantánamo figures, contrite about his participation and acknowledges some responsibility as he has pondered his own behavior straightforwardly. As to those signs that might have been plainly in view, he said, “there were things I should have picked up on, but didn’t.” While he noted he was not a forensic practitioner, he said that “an astute person would have figured it out, perhaps. I did not.” Shimkus said he understands that because of his role at Guantánamo, especially in serving as a spokesman and vouching for the place, he bears some continued measure of responsibility. “I’m always going to be historically connected with this,” he said wistfully. “This is part of my life now. Forever.”<sup>34</sup>

So he relives it over and over in his courses, hoping it will benefit the senior officers who are his students at the Naval War College. Those chosen to attend the Naval War College are those who are predicted to rise in the Navy, perhaps achieving flag rank. Shimkus said he tells military medical personnel in his classes they must always be prepared to challenge superior officers; most importantly, they should raise questions at the smallest provocation. He tells the student-officers that even if it affects their careers, they bear an unavoidable obligation to do so. He recognizes such complaints and inquiries will probably not yield results. “But it will at least get



a second look at the situation,” he said. And, most importantly, even if it affects your career, Shimkus tells the officers, they should insist on transparency as to how prisoners in their care are treated by others outside the medical setting.<sup>35</sup>

Among Shimkus’ continuing critics are some who have suggested he aided interrogators by approving and initiating a regime of prescribing anti-malaria medication for all the detainees, at dosages far higher than those normally used for prevention rather than treatment of malaria. The drug, mefloquine, had side effects that could include paranoia, hallucinations, and depression, theoretically making recipients more vulnerable to interrogation.<sup>36</sup> But Shimkus denied that this was the purpose of the anti-malarial medication, and the allegations that it was prescribed to assist in interrogation are speculative. Shimkus said he agreed with the medical decisions of others, including senior military medical officers, to conduct the medication program, and had consulted with officials at the Centers for Disease Control. He said that no one involved in the interrogation regime had any role in the decision or discussed the matter with him.<sup>37</sup>

According to press reports from February 2002, malaria was far more prevalent in Afghanistan than in Cuba, where it was largely eradicated, and Cuban doctors had raised the issue of malaria prevention in meetings with Shimkus.<sup>38</sup> In 2011, a Pentagon spokesperson told *Stars and Stripes* that the high doses of medication were appropriate because “[t]he potential of reintroducing the disease to an area that had previously been malaria-free represented a true public health concern. ... Allowing the disease to spread would have been a public health disaster.”<sup>39</sup>

## Afghanistan: The Gateway to Guantánamo

In response to the September 11 attacks, President George W. Bush issued an ultimatum that was, in reality, a declaration of war on a delayed fuse. He told the Taliban that ruled Afghanistan that it would face an invasion unless it handed over the members of Al Qaeda who had used the country as a base from which to plan the attacks.<sup>40</sup> No one expected the Taliban to comply.

On October 7, 2001, the U.S. military launched its invasion of Afghanistan and found remarkably quick success in a country that had frustrated other great powers across two earlier centuries.<sup>41</sup> For the British, the Russians and, more recently, the Russians again, this time under a Soviet banner, Afghanistan was a confounding place that was to become an unexpected graveyard for their soldiers and policies.<sup>42</sup>

But the United States, fighting a war with the overwhelming public support for military action, prevailed.<sup>43</sup> Beginning with an air campaign and followed by a series of combat victories — in which the Northern Alliance (a group of loosely affiliated Afghan fighters who had been battling the Taliban since the mid-1990s) provided most ground forces — Operation Enduring Freedom routed the Taliban regime from power.<sup>44</sup>

Afghanistan would become the birthplace of the United States' post-September 11 detention and interrogation practices. Most of the detainees who would come to populate Guantánamo began their time in U.S. custody in Afghanistan. The notion that detainees could be treated brutally also first took root there, fertilized by the anger over the September 11 attacks.

Just exactly who were the people in Afghanistan who would become captives of the United States and thus the source of a stubborn problem that would have no easy solution and remain a vexing issue for U.S. commanders and policymakers for years? “Every one of these guys says they went there to help some charity or to find a bride,” one official would later say with robust skepticism.<sup>45</sup> Experienced law-enforcement officials know that the innocent *and* the guilty can proclaim their innocence with equal fervor.

A glimpse of the backgrounds of most Guantánamo detainees yields a picture both less monstrous and more ambiguous than the initial description of the inmates as “the worst of the worst,” by Defense Secretary Donald Rumsfeld. A little-known study of Guantánamo detainees' accounts, conducted by the U.S. Army from 2003 to 2004, sought to uncover who these men were before September 11 and how they came to be in Afghanistan.<sup>46</sup> The investigation portrayed a group of mostly young men brought to Afghanistan by theologically laced propaganda that presented their journey as a sacred rite of passage. For some, the spiritual appeal took hold through the universally prevalent socio-economic roots of criminal behavior — specifically, unemployment and lack of education.<sup>47</sup> Once recruited, they were brought to training camps in Afghanistan by “facilitators,” a network of supporters of a radical jihadist view of Islam scattered across Europe, the Middle East and Northern Africa.<sup>48</sup> During their journey the recruits gave up their identification and adopted aliases, a fact that would cost some of them dearly. Many of those with empty pasts were left to have the gaps filled in by the worst assumptions of their captors.<sup>49</sup>

After reaching the training camps in Afghanistan, the situation often took an unexpected turn for the worse. The recruits received no vaccinations and the training camps did not have medical

facilities, personnel, or supplies to care for the sick.<sup>50</sup> The poor water quality and sanitation in Afghanistan led to a quarter of the recruits falling ill. Being underprepared and under-informed permeated the experience of the recruits who became detainees. Following September 11, the men were told by the elders in their training camps to applaud the victory of their brethren and not to fear retaliation.<sup>51</sup> When the U.S. forces began the air campaign in Afghanistan, the recruits were left to scatter and leave Afghanistan or risk being captured. Some were left in hospital beds, while others scattered and tried to flee Afghanistan. All those without proper identification quickly found themselves in the hands of the Northern Alliance.<sup>52</sup> They were dazed and confused in the initial days, and that condition persisted as they became detainees of the U.S. forces.

Dr. Najeef bin Mohamad Ahmed al-Nauimi is a former justice minister in Qatar who nominally represented nearly 100 of the detainees in the early months. While maintaining the innocence of all his clients, he offered some clues as to how many came to be regarded suspiciously and detained. For the most part, he said, they were sympathizers with the Taliban and supported the idea of a fundamentalist Islamic state. Most, he said, attended summer camps in Pakistan where leaders taught them how to use weapons and preached strong negative views of the United States and Israel. "They learn to make jihad, yes," he said in an interview. "But that's not illegal."<sup>53</sup> He said that going to the military camps was, for many in the Islamic world, a kind of summer ritual, kind of like going to an adventure camp.<sup>54</sup> For many of those who did fight, their jihad was against the Northern Alliance, not the United States. They were "protecting" Muslims from Ahmad Shah Massoud and General Abdul Rashid Dostum of the Northern Alliance, he said. Prior to September 11, the United States was not an important factor in their thinking.<sup>55</sup>

In late November 2001, the collapse of the Taliban came suddenly: Kunduz, Kabul and Kandahar all fell within weeks of each other.<sup>56</sup> Though Special Forces and the CIA were all embedded with the Northern Alliance fighters as the Taliban fell, it would take some time before U.S. forces would implement an integrated detention system and policy.

By Christmas of 2001, a month after the president's military order authorizing detainee sites, detention facilities were open and running, and interrogations were taking place.<sup>57</sup> Afghanistan was, in the beginning, where prisoners were gathered and interrogated, not just from the war going on there, but those sent from Pakistan and other countries. Detainees from the Far East, from Africa, and from the Middle East were all transferred to detention facilities in Afghanistan, which became the entrance point for most on their path to Guantánamo.<sup>58</sup>

It should be stressed that many who were detained were indeed acting against American forces. But it is also now clear that many of those sent to Guantánamo were simply not a significant part of the conflict, if they were involved at all.<sup>59</sup> Torin Nelson, an interrogator working at Guantánamo in the first few months "realized that a large majority of the population just had no business being at Guantánamo."<sup>60</sup> There were three categories of prisoners who were sent directly to Guantánamo: "anyone on the FBI's most wanted list; foreign (mainly Arab) fighters; and Taliban officials."<sup>61</sup> Why these categories? Did they lead to the capture of the "worst of the worst"? In a review of the written determinations of the U.S. military prepared for the Combatant Status Review Tribunals, only 8 percent of Guantánamo detainees are identified as "fighters" for either Al Qaeda or the Taliban, and 45 percent as having committed a hostile act against the United States or its allies.<sup>62</sup> Hostile acts include fleeing from an area under bombardment by U.S. forces.<sup>63</sup> Ninety-three percent of the detainees were not captured by U.S. or coalition forces<sup>64</sup>; most

were handed over to the United States by Pakistani or authorities listed as “not stated” when the United States was offering a reward for terrorist suspects.<sup>65</sup> All Arabs in custody in Afghanistan (*i.e.*, non-Afghans) were sent to Guantánamo without exception, no matter what the interrogators personally thought after the interviews. “Every Arab was supposed to go,” writes Chris Mackey in *The Interrogators*, but “not every Arab should have been sent.”<sup>66</sup> There was mounting pressure to transfer detainees out of Kandahar airport facility to Guantánamo. Mackey described the intense curiosity with which Army personnel at Kandahar watched the progress on the construction of Camp Delta at Guantánamo, awaiting their reprieve.<sup>67</sup>

## Guantánamo as the Only Option

By late 2001, commanders in Afghanistan thought they were reaching the saturation point in terms of managing people taken captive on the battlefields. Policymakers in Washington began thinking about where best to imprison the prisoners who were now coming in a steady flow. The Defense Department and the State Department each established groups of officials to brainstorm as to the ideal place for a military prison. Different places were tossed out, many of them exotic.

At the Defense Department, the Joint Chiefs of Staff asked the general counsel’s office to take on the task. Richard Shiffrin, the Pentagon’s deputy counsel for intelligence, said that a small group in the office (“about three or four people”) tossed around names of places. He said that the paramount consideration was security, but there was discussion about finding a place that would be free of the jurisdiction of federal courts. “Guantánamo was mentioned, but most of them were in the Pacific,” he recalled of locations that figured in the early discussions. The locations included Guam, Wake Island, the Commonwealth of the Northern Mariana Islands, and even Johnson Atoll, a tiny (little more than one square mile) set of coral islets so remote that it had been used in the 1960s to test atomic weapons.<sup>68</sup>

The sites in the Pacific were eventually rejected. “They didn’t have the facilities and it would be too expensive to build new ones,” he said. Shiffrin had been a federal prosecutor in Miami and knew well that Guantánamo had been used to house large numbers of illegal Haitian refugees. The process of elimination, he said, made it pretty clear that when he spoke to the group about Guantánamo, it beat the other potential locations.

The litigation involving the Haitians also provided some clues to the Pentagon lawyers as to how the courts would view the issue of jurisdiction over a detention facility at Guantánamo. The lawyers considered whether detainees held at Guantánamo could avail themselves of the writ of *habeas corpus*, that is, have federal courts inquire into the reasons for detention. The consensus, Shiffrin recalled, was that “habeas would not be available at Guantánamo.” That would turn out to be an incorrect presumption.<sup>69</sup>

(In the first years of Guantánamo’s use as a prison for detainees, visitors, including journalists and members of Congress, were required to “clear customs” when returning to the United States even though they had only traveled between Guantánamo and the U.S. mainland. This charade was apparently an effort to underscore the contention that Guantánamo was outside the United States).<sup>70</sup>

**“A glimpse of the backgrounds of most Guantánamo detainees yields a picture both less monstrous and more ambiguous than the initial description of the inmates as ‘the worst of the worst...’”**

At the State Department, a similar seminar involving geography and the law was taking place. Pierre-Richard Prosper, the ambassador-at-large for war crimes, was summoned back from his Thanksgiving holiday to find a suitable detention site. Prosper had been put in charge of an interagency group to consider legal issues about prisoners taken in combat in Afghanistan. But along with other senior government officials, he was stunned to learn that a small council of officials actually wielded the influence on these issues. This group, which came to be called the “War Council,” included David Addington, a lawyer for Vice President Dick Cheney; John Yoo from the Justice Department’s Office of Legal Counsel; and William “Jim” Haynes II, the Pentagon’s general counsel (and Shiffrin’s boss). Now, tasked with finding a place for the prisoners, Prosper began discussions with his group and recalled that one of the younger lawyers, Dan Collins, said suddenly, “What about Guantánamo?” To everyone at the meeting, Guantánamo suddenly seemed the best choice.<sup>71</sup>

## Evolution of the Interrogation Techniques

On December 27, 2001, Secretary of Defense Donald Rumsfeld announced the plan to open the naval base at Guantánamo Bay, Cuba, as a detention center. Soon after the location was announced, though, another round of debate began, this time over whether the detainees sent there would be protected by the Geneva Conventions. General Tommy Franks, the commander of U.S. forces in Afghanistan, had ordered the military to apply the conventions’ requirements on October 17, 2001.<sup>72</sup> But, as described in detail in Chapter 4, the Secretary of Defense and President Bush overrode that decision, on the advice of the Office of Legal Counsel and over the objections of the State Department.

Brigadier General (now Major General) Michael Lehnert,<sup>73</sup> the first commander of the prison, and Colonel Manuel Supervielle, the lead military lawyer at SOUTHCOM (U.S. Southern Command), had made repeated requests up the chain of command to authorize the presence of the International Committee of the Red Cross (ICRC) in Cuba prior to the first transfer of prisoners. With a request still pending, and the first transport of prisoners set to leave Afghanistan, Supervielle simply called Geneva and invited the Red Cross himself. Department of Defense General Counsel Jim Haynes later made clear that he disagreed with this decision, but Supervielle’s chain of command decided it was too late to disinvite the ICRC. Supervielle also thoroughly analyzed each article of the Third Geneva Convention, and recommended that U.S. troops comply fully with most of them.<sup>74</sup>

One of Supervielle’s recommendations, that the United States conduct individual hearings to determine detainees’ status under Article 5 of the Third Geneva Convention in case of doubt, was rejected by his superiors.<sup>75</sup> In an interview with Task Force staff, State Department Legal Advisor William H. Taft IV said that in addition to the legal arguments for Article 5 hearings, they would have had the additional benefit of determining whether detainees were combatants at all, or whether “actually it just turns out that he’s a person the other person hates, just had a family feud. ... [Y]ou should be a little careful about that.”<sup>76</sup> But no hearings were held.

The first detainees to arrive at Guantánamo Bay in January 2002 were not preceded by biographies but were accompanied by hyperbole, and terrifying memories. Colonel Terry Carrico, head of military police at Guantánamo at the time, recounted to Task Force staff that all the military was given were the detainees’ “supposed names, and how many there were,

and whether they were in satisfactory health or not, just basic information ... [n]ot the reason they were sent to GTMO. [The men] were scrawny, malnourished, and docile. Initial impression ... I was struck by how small they were. They were as scared as anything else, because the security measures they had no sensory perception — headphones, blindfolds — when they stepped off the plane into the heat.”<sup>77</sup>

**“Al Qahtani was interrogated for approximately 20 hours a day for seven weeks...”**

The detainees were met with the methodical procedures prepared to handle dangerous prisoners, “people that would gnaw hydraulic lines” to bring down the plane transporting them, in the words of one commander.<sup>78</sup> Military police (MP) met the Air Force security police at the plane. Air Force police de-shackled the detainees from their seats and walked them down the ramp, off the airplane. The MPs took control of the detainees and walked them over to the bus. Inside the bus, with the seats removed, three marines were positioned to shackle the detainees to the floor. The bus was surrounded by four Humvees and a reaction team, in the event a detainee tried to run. There were dogs positioned by the bus for added security.<sup>79</sup> They traveled from the airstrip to Camp X-Ray blindfolded, ears covered by headphones, sitting with their legs crossed. Once they arrived at the camp, the detainees were placed in a holding area. With the eye and ear protection on, the detainees were made to kneel and await processing. They would move through eight or ten stations where they were disrobed, showered, deloused, fingerprinted, examined and reclothed. Finally, each detainee was led to his cell. “[W]e called them cells,” says Carrico, “but they were chain linked fences with a tin roof on top and a concrete pad underneath.”<sup>80</sup> Carrico later characterized the wire-mesh cells as “essentially dog pens.”<sup>81</sup>

Despite the conditions, Carrico stated that he told the troops under his command at that early stage to treat the detainees as prisoners of war, and that MPs observed interrogations to ensure that there was no abuse.<sup>82</sup>

I said fundamentally, the Geneva Conventions required that we treat people humanely and that’s what we are going to do, and I told my men that if I got wind of anyone mistreating a prisoner they would be disciplined. It was sensitive because some of the reserve units had a couple of soldiers that had their relatives die in the towers. At that time you know America was an emotional place to be, and this was no different. I just tried to say “we got a job to do whether we like it or not, but we have to do it.”<sup>83</sup>

In February 2002, the Department of Defense set up a new task force, JTF-170, to run military interrogations at Guantánamo. The task force’s first commander was Major General Michael Dunlavey. Donald Rumsfeld had personally selected Dunlavey for the job, and told Dunlavey to report directly to him each week about the interrogations of detainees Rumsfeld had described as “among the most dangerous, best trained vicious killers on the face of the earth.”<sup>84</sup> Dunlavey later told author Philippe Sands, “No one ever said to me ‘the gloves are off.’ But I didn’t need to talk about the Geneva Conventions, it was clear that they didn’t apply.”<sup>85</sup>

Dunlavey’s subordinates included Lieutenant Colonel Jerald Phifer, JTF-170’s head of intelligence; David Becker, the head of Guantánamo’s Interrogation and Control Element (ICE), and Lieutenant Colonel Diane Beaver, his staff judge advocate.

During the summer of 2002, a military psychiatrist, psychologist, and psychiatric technician

were deployed to Guantánamo Bay, and told that they had been assigned to a Behavioral Science Consultation Team (BSCT or, colloquially, “biscuit team”) in support of interrogations. In September, the three BSCT members and four interrogators received training in SERE techniques at Fort Bragg, N.C. On October 2, 2002, the BSCT team wrote a memo requesting authorization to use additional interrogation techniques. “Category II techniques” included stress positions; the use of isolation for up to 30 days (with the possibility of consecutive 30-day periods if authorized by the chain of command); deprivation of food for 12 hours; handcuffing; hooding; and consecutive 20-hour interrogations once a week. “Category III” techniques included daily 20-hour interrogations; isolation without access to medical professionals or the ICRC; removal of clothing; exposure to cold or cold water; and “the use of scenarios designed to convince the detainee he might experience a painful or fatal outcome.”<sup>86</sup> While these and even harsher techniques had been authorized for use against high-value detainees in CIA custody, this would apply to a far larger population in military custody at Guantánamo. At its peak in 2003, the prison in Cuba held 680 inmates, with a total of 779 detainees being held there since 2001.<sup>87</sup>

On October 11, 2002, General Dunlavey submitted a request to SOUTHCOM’s commanding general, James Hill, for authorization to use Category I, II and III techniques. In addition to the Category III techniques listed in the BSCT memo, there was another, which had been discussed at the October 2 meeting with the CIA: “use of a wet towel and dripping water to induce the misperception of suffocation.”<sup>88</sup> The list of techniques stated, however, that Category III techniques were only intended for use against “exceptionally resistant detainees ... less than 3%” of the detainee population at Guantánamo,<sup>89</sup> which at that time numbered close to 600.<sup>90</sup>

Dunlavey’s request was accompanied by a legal memorandum by Lieutenant Colonel Beaver, who wrote that neither the Geneva Conventions nor the dictates of the Army’s interrogation field manual were binding at Guantánamo. She wrote that the “enhanced” techniques would not violate the Torture Statute

because there is a legitimate governmental objective in obtaining the information necessary ... for the protection of the national security of the United States, its citizens, and allies. Furthermore, these methods would not be used for the “very malicious and sadistic purpose of causing harm.”<sup>91</sup>

Beaver acknowledged that the techniques might “technically” violate several articles of the Uniform Code of Military Justice (UCMJ). She nevertheless recommended that they be approved, and suggested that “it would be advisable to have permission or immunity in advance ... for military members utilizing these methods.”<sup>92</sup>

Beaver’s analysis has been widely criticized, and she herself has stated that she did not have adequate time to research it:

I wanted to get something in writing. That was my game plan. I had four days. Dunlavey gave me just four days. But I was in Guantánamo, there wasn’t access to much material, books and things.<sup>93</sup>

On October 25, General Hill forwarded Dunlavey’s request to General Richard Myers, chairman of the Joint Chiefs of Staff, who sent it to the individual services for comment. JAGs

from all four services recommended against approval of the techniques without more careful review. The Air Force, Army, and Marine Corps JAGs warned that several techniques could subject service members to prosecution under the Torture Statute or the UCMJ. The Guantánamo Criminal Investigative Task Force (CITF), which carried out interrogations and conducted investigations of potential war crimes by detainees, had similar concerns.<sup>94</sup>

Captain Jane Dalton, the legal counsel to the Joint Chiefs, began her own legal review, finding Lieutenant Colonel Beaver's analysis "woefully inadequate."<sup>95</sup> General Myers, however, instructed her to stop the review, telling Dalton that Haynes was concerned about too many people seeing the paper trail.<sup>96</sup> On November 27, Haynes recommended to Rumsfeld that he approve all of the Category I and II techniques and one Category III technique (noninjurious physical contact). Rumsfeld gave his sign-off on December 2, adding the following handwritten note: "However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?"<sup>97</sup>

Haynes's recommendation contained no legal analysis. Beaver later told Senate investigators that she was "shocked" that her opinion, which she expected the chain of command to review thoroughly and independently, "would become the final word on interrogation policies and practices within the Department of Defense."<sup>98</sup>

Before Rumsfeld approved them for more general use at Guantánamo, the techniques were being implemented against detainee number 63, Mohammed al Qahtani. Al Qahtani was suspected of being the intended 20th hijacker in the September 11 attacks. In October 2002, he was interrogated with military dogs present, deprived of sleep, and placed in stress positions, all while in isolation.<sup>99</sup> When this failed to yield intelligence, JTF-170 halted the interrogation and began developing a new "Special Interrogation Plan." Al Qahtani remained in isolation, however, and according to an FBI agent, by the end of November he was "evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)."<sup>100</sup>

In November 2002, Task Force 160 and Task Force 170 were combined to form Joint Task Force Guantánamo (JTF-GTMO). Major General Geoffrey Miller was given command of the new task force.

A publicly released interrogation log, dated from November 23, 2002, to January 11, 2003, shows that al Qahtani's treatment only became harsher after Miller's appointment.<sup>101</sup> Al Qahtani was interrogated for approximately 20 hours a day for seven weeks; given strip searches, including in the presence of female interrogators; forced to wear women's underwear; forcibly injected with large quantities of IV fluid and forced to urinate on himself; led around on a leash; made to bark like a dog; and subjected to cold temperatures. Not surprisingly, his condition deteriorated further. On December 7, 2002, al Qahtani's heartbeat slowed to 35 beats per minute, and he had to be taken to the hospital for a CT scan of his brain and ultrasound of a swollen leg to check for blood clots.<sup>102</sup>

In August of 2003, Major General Miller visited detention facilities in Iraq, most notably Abu Ghraib, and delivered a series of recommendations to reform detention operations. With a

**“Baker, a member of a military police unit from Kentucky, suffered traumatic brain injury from a beating administered during a training mission in January 2003, when other MPs thought he was a Guantánamo detainee and not a U.S. soldier.”**



focus on enhancing intelligence-gathering meant to shore up counterinsurgency operations, the Miller Report emphasized a need to integrate detention and intelligence operations.<sup>103</sup> General Miller's advice called for the involvement of military police in facilitating interrogations.<sup>104</sup> The Abu Ghraib abuses took place starting in October of 2003. In a report of the investigation into the detainee abuses conducted by Major General Antonio M. Taguba, the recommendation that guard forces "set the conditions" for interrogations was listed as a contributing factor.<sup>105</sup> In April of 2004, Miller was appointed deputy commander for detainee operations for Multinational Forces-Iraq and the command of JTF-GTMO moved to Major General Jay W. Hood.<sup>106</sup>

The Schmidt-Furlow Report, the official Department of Defense investigation into allegations of abuse at Guantánamo, found that "every technique employed against [al Qahtani] was legally permissible under the existing guidance," but "the creative, aggressive, and persistent interrogation of [al Qahtani] resulted in the cumulative effect being degrading and abusive."<sup>107</sup> It criticized Miller for failing to adequately supervise al Qahtani's interrogators, which "allowed subordinates to make creative decisions." The investigation nevertheless concluded that al Qahtani's interrogation "did not rise to the level of inhumane treatment."<sup>108</sup>

Others have strongly disagreed. Susan Crawford, the convening authority of the Guantánamo military commissions during the latter part of the Bush administration, told *The Washington Post* in January 2009 that "[w]e tortured Qahtani. ... His treatment met the legal definition of torture."<sup>109</sup>

Al Qahtani was not the only detainee subjected to the cruel techniques. In an interview with Task Force staff, former detainee Sherif El-Mashad said he still carries scars to this day from his treatment at Guantánamo: "The worst for me was being stripped naked and being beaten directly, being kept in solitary confinement, there are things left on my body to this day, marks."<sup>110</sup>

Sami al-Hajj, a Sudanese journalist for Al Jazeera, recalled to Task Force staff that "when I told them I don't want to talk, they leave me like that, shackle me, and leave me for 18 hours like that."<sup>111</sup> He recalled being kept awake for two days<sup>112</sup> and the escalating brutality of the procedures during cell extraction: "Sometime they say for you to lie down and if you talk they use that spray, and if you refuse definitely they use the spray in your eyes and then they come, about 5 to 7 people, they come beside you and they start beating you and shackle you and take you away. And during that they put your face inside your toilet."<sup>113</sup>

Detainees' allegations about guards' use of excessive force during cell extractions have been corroborated by the experience of Specialist Sean Baker, a Gulf War veteran who re-enlisted shortly after September 11. Baker, a member of a military police unit from Kentucky, suffered a traumatic brain injury from a beating administered during a training mission in January 2003, when other MPs thought he was a Guantánamo detainee and not a U.S. soldier. "If he was doing that to me, he was doing it to detainees," Baker, in an interview with Task Force staff, said of the guard who beat him.<sup>114</sup> No one was ever charged for his abuse; an Army criminal investigative division investigation into the incident was opened in June 2004 and closed a year later.<sup>115</sup> Baker was retired from the Army on 100 percent disability and still suffers seizures. He is unable to work but free of bitterness; his deepest wish is to get back in the Army, in any capacity. "I will take the worst job in the worst assignment in the armpit of the world for the rest of my life if they would allow it," he said.<sup>116</sup>

## The Battle Within the Pentagon Over Interrogation Techniques

“Do you want to hear more?” David Brant asked carefully.<sup>117</sup> Brant was the head of the Navy’s Criminal Investigative Service (NCIS). He was standing in the Pentagon office suite of Alberto Mora, the Navy’s general counsel. Brant had just finished telling Mora there were troubling reports of detainee abuse coming from NCIS investigators at Guantánamo Bay. Brant’s investigators weren’t involved in the abuse but they were certain it was happening. It was December 17, 2002. Throughout the summer and fall of 2002, as plans for “enhanced” interrogations had taken shape, investigators from the Defense Department’s criminal investigation task force had objected.<sup>118</sup> They had felt these new techniques were not only ineffective but illegal. By December 2002 however, the investigators knew these were no longer just plans and proposals. At the time of Brant’s conversation with Mora in Mora’s office, Mohammed al Qahtani’s brutal interrogation at Guantánamo had been underway a little more than three weeks.<sup>119</sup>

**“Though senior Bush administration and Pentagon officials had first raised the idea of military tribunals as a means of demonstrating swift justice, they were in no hurry to conduct them...”**

Mora had been appointed as the Navy’s general counsel by President George W. Bush. He was an admirer of President Reagan and had served in the administration of George H.W. Bush. As Mora listened to Brant, he recognized Brant was giving him an opportunity to distance himself from these reports of detainee abuse.<sup>120</sup> Mora and Brant had a good working relationship. Mora was anxious. His parents, a Hungarian mother and a Cuban father, were familiar with harsh tactics that Mora only associated with abusive regimes. The Mora family itself had narrowly escaped Cuba’s Castro. Mora’s answer to Brant was clear “I think I *have* to know more.”<sup>121</sup> Mora thought these actions had to be those of a rogue operation. The next day Mora and Brant met again, along with Michael Gelles, the chief psychologist for NCIS, and several other Pentagon officials. The rumor, according to Brant, was that these practices had been approved at high levels in Washington. As recounted by Mora in a later statement to the Navy’s inspector general,

[Gelles] believed that commanders [at Guantánamo] took no account of the dangerous phenomenon of “force drift.” Any force utilized to extract information would continue to escalate, he said. If a person being forced to stand for hours decided to lie down, it probably would take force to get him to stand up again and stay standing. ... [T]he level of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached.<sup>122</sup>

Mora picked up the phone after their meeting and called his counterpart for the Army, Steven Morello, and asked him whether he’d heard about any of these rumors.<sup>123</sup> Yes, Morello had heard. “Come on down,” Morello instructed Mora, clearly not wanting to discuss the matter over the phone. Morello’s answer almost knocked Mora off his chair.<sup>124</sup> Morello met Mora in an out-of-the-way office at the Pentagon.<sup>125</sup> “We tried to stop it, but were told to go away,” Morello told Mora, as he pushed toward Mora a copy of Rumsfeld’s December 2 authorization of enhanced techniques.<sup>126</sup> “Don’t tell anybody where you got this.”<sup>127</sup>

As Mora went through the document he saw a handwritten note from Rumsfeld at the end (“I stand for 8–10 hours a day. Why is standing limited to 4 hours?”). Mora thought it was probably

an off-the-cuff remark — that the secretary had intended to be humorous — but it could be damaging. The document Rumsfeld had signed contained no limits on any of the behaviors. Mora immediately thought the Defense Department general counsel, William J. Haynes, had “missed it” — it was a mistake. Haynes, Mora thought, had relied on subordinate attorneys to conduct the underlying legal research and had missed the memo’s incorrect conclusions, which could be read to allow techniques that amounted to torture. Convinced that the authorization signed by the Secretary of Defense had been a gross oversight, Mora went to see Haynes the next day.<sup>128</sup>

Mora warned Haynes that the memo he had seen authorized torture. “No it doesn’t,” Haynes quickly replied. “What did some of these things really mean?” Mora pressed him. What did “deprivation of light and auditory stimuli” mean? Could a man be locked in darkness for a month? Could he be deprived of light until he went blind or insane? With no limitations there were no boundaries, Mora argued.<sup>129</sup> As for Rumsfeld’s signature, it would be portrayed by defense attorneys at subsequent trials of detainees as a nod and a wink to interrogators that the limitations listed in the memo could be ignored.

Haynes’s practice was to listen, and he was often hard to read when he was listening. When Mora had finished, Haynes nodded and thanked Mora for bringing this to his attention. Mora, as he left Haynes’ office that afternoon, thought Haynes was now in agreement, and was relieved. The mistaken memo would soon be withdrawn. Mora could now go on his planned vacation with his family to Florida over the holidays, free from concern.

In early January, halfway through his vacation, Mora’s phone rang. It was Brant. The abuse in Guantánamo was continuing. Mora was shocked. On January 9, 2003, Mora went back to see Haynes and told him flatly he was surprised and disappointed to hear the abuse was continuing. As Mora lobbied, it was again hard for him to read Haynes. Mora reiterated his concerns about the illegality of the techniques and laid out the political implications as well. If news of these practices became public, allies might be reluctant to cooperate with the United States; it had the potential to scandalize and threaten Rumsfeld’s tenure as secretary of defense, and it could even damage the president. “Jim, protect your client!” Mora told Haynes before he left.<sup>130</sup>

Mora was relieved when, once again, it seemed Haynes was taking his concerns seriously. Haynes set up meetings between Mora and top lawyers at the Pentagon, offering Mora the opportunity to lobby for reconsideration of the interrogation policy.<sup>131</sup> Mora met with the legal counsel for the Joint Chiefs of Staff and the top military attorneys in the JAG Corps. In those meetings Mora reviewed the contents of the Rumsfeld authorization and repeated the arguments he had given to Haynes about why the policy had to be rewritten.<sup>132</sup>

On Wednesday, January 15, Mora handed to his assistant an unsigned draft memo and asked her to take it to Haynes that morning. It contained all the objections he had presented previously to Haynes. Mora hadn’t yet signed the document; once he did, it would become an official record. Mora told Haynes he would be signing it later that day unless the interrogation techniques were suspended. Haynes asked Mora to come see him. “I don’t know what you’re trying to do with this memo,” he said Haynes told him.<sup>133</sup> Mora first thought “How dare you?” but then the next words out of Haynes’s mouth were, “Surely you must know the impact your words have had on me.”<sup>134</sup> Mora laughed. “No, Jim. I don’t. I have no idea if you agree with me totally, or disagree, or come out somewhere in the middle because you never say anything.”<sup>135</sup> Haynes informed Mora that Rumsfeld was considering suspending his authorization for the techniques later that

afternoon and Haynes would get back to him. The call from Haynes came just a few hours later. Rumsfeld had suspended the use of the techniques.

At the same time, Rumsfeld created a task force, the “Detainee Interrogation Working Group,” within the Department of Defense to examine the legal issues associated with detainee interrogation. The group consisted of JAGs as well as civilian attorneys at the Pentagon. Mary Walker, the Air Force general counsel — Mora’s counterpart for the Air Force — had volunteered to lead the Working Group, which would ultimately produce a report with its findings. Rumsfeld wanted the work to be done quickly — the group had a tight deadline.

Rather than solely rely on the Working Group’s process, Haynes reached out to John Yoo at the Justice Department’s Office of Legal Counsel (DOJ OLC). When they spoke, Haynes asked Yoo if he would “put together an analysis that defines the corners of the box of what’s legal.”<sup>136</sup> Yoo had already written memoranda in August 2002 that authorized the CIA to engage in “enhanced” interrogation techniques (EITs). Yoo’s memo for the Defense Department effectively mirrored the legal advice he provided to the CIA. [See Chapter 4]

Retired Air Force Lieutenant General Jack L. Rives recalled how, at the start of the war in Afghanistan, he and his fellow uniformed lawyers, when discussing how the United States should deal with detainees, were comfortable with the idea of using military commissions to try those captured in the fighting in Afghanistan and elsewhere. In February 2002 Rives, who had been promoted to be the deputy JAG for the Air Force, arrived in Washington asking questions about the lack of progress with the commissions. He learned the Department of Defense general counsel had kept the commissions under its control, rather than delegating them to one of the Armed Services to conduct. Rives was aware of how military commissions had been conducted throughout the country’s history and heard rumblings that concerned him. “They could have started right away.” Rives said “We didn’t need to be unfair. . . . [T]rials by military commission could have been very fair, conducted along the lines of the Uniform Code of Military Justice.”<sup>137</sup>

But events did not move quickly. Though senior Bush administration and Pentagon officials had first raised the idea of military tribunals as a means of demonstrating swift justice, they were in no hurry to conduct them. They would have to take second place behind what had come to be judged as a more important and immediate need: interrogating the prisoners to extract intelligence.

This was one of the markers at the beginning of an important divide in how the United States would treat its detainees. If they were to be held, questioned, and detained with the purpose of putting them on trial for possible crimes, they would have to be dealt with differently than if they were solely an intelligence source. This dichotomy runs through much of law-enforcement and national-security theory and practice. But it is unclear how much of this was appreciated at the time in the new reality of fighting and capturing suspected terrorists.

As Bush administration officials rejected using the Uniform Code of Military Justice for trying suspected terrorists — it was judged inappropriate and too lenient because of its safeguards intended for U.S. service members — a new system had to be developed from the ground up.

In practice, this meant a laborious trial-and-error process of creating new rules for a new legal

**“...decisions made about how captives were treated could potentially affect how U.S. personnel would be treated when they were captured.”**

proceeding. Declining to use the well-tested procedures for courts-martial, the Department of Defense opted to ask some military lawyers, including some called back from retirement, to write rules regarding a huge array of issues, including handling of witnesses, evidence and classified information. In addition, the system had to deal with the composition of the court, appeals and possible sentences. It was not unlike a fledgling nation developing its criminal justice system for the first time.

And because the proceedings were supposed to showcase the United States' reliance on fair principles, it was all supposed to be done in public. The procedures were published, vetted and commented on, quite often very critically by lawyers and scholars. The first few proceedings were widely criticized. Many in uniform who were proud of the military justice system were not happy with the *ad hoc* approach the Defense Department chose to pursue. Some military lawyers said outright they were embarrassed.

At the same time, the other regime for interrogation or intelligence-gathering was put into place relatively quickly, and was conducted largely out of public view.

A draft of a memorandum for the Pentagon from John Yoo — the lawyer from DOJ's OLC — on interrogation was delivered to Mary Walker, the Working Group's leader. The memo had been requested by Haynes, and Walker alone kept a copy of the legal analysis. If any of the other Working Group members wanted to review the memo, they had to come to her office. The memo was kept in a safe in a secure room and, some of those who came to read it were observed while doing so. Rives read the Yoo memo but, as with Mora and others who reviewed it, he could not make any copies of it or even take notes. Nevertheless, Rives said his review was enough for him to report to his colleagues that it was deeply flawed in that it granted almost unlimited power to the executive. "I read an undated, unsigned document that had some remarkable things in it," he recalled, "and I was not prepared to be bound by any draft document like that."<sup>138</sup>

The meetings of the Working Group were contentious, and "Haynes was frustrated that he couldn't make it just go away," Rives recalled.<sup>139</sup> Rives said he chose to take a more assertive role. "Things needed to be done," he said, and the military lawyers were the ones to do it. Rives and his fellow JAGs were becoming concerned, especially as it became clear by late January 2003 that their consistently expressed objections in the Working Group were going to be ignored in the group's final work product. Walker had proved to be an adamant supporter of the harsh detention and interrogation regimes, and believed strongly that the JAGs were overstepping their bounds in pressing their objections.<sup>140</sup>

"JAGs don't work for the general counsel," Rives said. He said that some people in the Pentagon wanted to believe that the uniformed lawyers work for them, although they do not. Certain political appointees at the Pentagon were particularly disturbed by the independence of the military lawyers, including Haynes and his mentor David Addington, former DOD general counsel who was now Vice President Dick Cheney's counsel and chief theoretician in developing a robust and legally uninhibited response to the post-September 11 threat. In January 2002, when the administration had been debating the applicability of the Geneva Conventions to members of the Taliban and Al Qaeda, Addington had made clear he did not want the JAGs involved.<sup>141</sup>

The Working Group was, Walker maintained, bound by the legal conclusions contained in the memo from John Yoo. Rives understood that the OLC where Yoo worked spoke for the executive branch. But Rives was adamant that he did not have to accept something in an undated, unsigned memo and was free to disagree with its conclusions.<sup>142</sup> JAGs had an independent obligation as lawyers to opine on the proposals, Rives argued; they were non-political officers, schooled in the laws of war and had in mind the interests of U.S. service personnel, in that they were sensitive that decisions made about how captives were treated could potentially affect how U.S. personnel would be treated when they were captured.

Rives said that he and his fellow military lawyers objected not only to the policy but to the fact that, in the last draft of the report the JAGs were ever shown, their objections and concerns had been excluded. “We had to lay down a marker,” he said. “It was hijacked. They totally ignored our inputs. . . . If the Secretary of Defense had been briefed by Jim Haynes and Mary Walker he wouldn’t have been told about [our] objections.”<sup>143</sup> On February 5, he drafted the first of his memoranda objecting to the Working Group’s approach and his fellow military lawyers in the Army, Navy and Marines concurred. Rives had his assistant walk his memo over to Walker’s office, “so I was sure it got delivered.” It produced a roiling fight with Mary Walker. “How can you say this?” she demanded over the telephone. Walker said that if he had specific objections he should detail them. Rives wrote a second memo the following day, February 6, with greater specificity. Rives said he received “a blistering” email in return. Walker told him that he did not have the right to object to the policy and that he could not disagree with Yoo’s conclusions. He replied by email that Yoo and the other officials “don’t speak from Mt. Sinai” and that he was free to explain his disagreement. Navy JAG Admiral Michael Lohr documented his objections the same day, February 6.<sup>144</sup> The Army’s top JAG, Major General Thomas Romig, and the Marine Corps’ Brigadier General Kevin Sandkuhler also memorialized, in writing, their objections.<sup>145</sup>

On February 10, Mora went to see Haynes. Haynes wanted Mora’s thoughts about the Working Group’s latest draft, the same one that had been shown to Rives six days earlier.<sup>146</sup> Mora was not pleased. Every answer to every question posed to the Working Group was being dictated by Yoo’s memo. Mora had met with Yoo personally and challenged him if he believed the conclusions of his memo could be taken to their logical end. Mora asked Yoo whether the president could lawfully order a detainee to be tortured. Yes, the president could authorize torture, he said was Yoo’s response.<sup>147</sup> Yoo said that whether the techniques *should* be used wasn’t a legal question, but rather it was a policy question. When Mora pressed him, where, precisely, were such policy questions supposed to be addressed and decided? Without hesitation, Yoo had replied “You know I don’t know — at the Pentagon, you guys are the experts on the law of war.”<sup>148</sup>

Neither Haynes nor Yoo responded to the Task Force’s requests for an interview.

When Haynes asked Mora his thoughts about the report, Mora said:

Jim, Navy will not concur with this memorandum when it’s circulated for it is deficient in any number of ways, permits the use of cruel, inhuman and degrading treatment, doesn’t adequately deal with the various issues under consideration, it’s just a bad piece of work. Here’s my recommendation to you. I would call Mary into the room. I would shake her hand and thank her for her service to the country, then I would put the memorandum in my top desk

drawer and never let it see the light of day again. You don't want to do it and again, so you know, Naval will not concur.<sup>149</sup>

Haynes, as was his way, was quiet, Mora recalled. Haynes stood and shook Mora's hand and thanked him for coming by.<sup>150</sup>

The Working Group report was finalized and issued on April 4, 2003.<sup>151</sup> In addition to the Army Field Manual techniques, it recommended the approval of hooding; isolation; "sleep adjustment"; 20-hour interrogations; sleep deprivation "not to exceed four days in succession"; prolonged standing (not to exceed four hours); "mild physical contact"; "dietary manipulation"; "environmental manipulation" (which could include raising or lowering the cell temperature); "false flag" (convincing a detainee that individuals from another country were interrogating him); the threat of transfer "to a third country...[that would] subject him to torture or death"; forcibly shaving detainees' hair and beards; forcing detainees to exercise; slapping the detainee on the face or stomach ("limited to two slaps per application, no more than two applications per interrogation"); nudity; and "increasing anxiety by use of aversions," such as the presence of a dog.<sup>152</sup>

On April 16, 2003, Secretary Rumsfeld authorized a list of techniques that included dietary manipulation, environmental manipulation, sleep adjustment, false flag, and isolation — although the last was authorized only if the SOUTHCOM commander were to "specifically determine that military necessity requires its use and notify me in advance."<sup>153</sup> Other additional techniques were available if the commander sent a written request. Rumsfeld's memorandum concluded by stating that "[n]othing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees" — most likely a reference to the practices of Guantánamo's Extreme Reaction Force, which forcibly removed detainees from cells for disciplinary action and was repeatedly accused of using excessive force.<sup>154</sup>

The final Working Group report was never sent to the lawyers who had objected to the techniques, nor had they even known it had been completed. None had seen a draft since early February, so Mora and the JAGs assumed their objections had ground the Working Group process to a halt. Throughout the spring of 2003, Mora had been waiting for the final report to emerge and planned to file a strong dissent.<sup>155</sup> In June 2003, news reports began to emerge that detainees were being abused. Vermont Senator Patrick Leahy wrote a letter to National Security Advisor Condoleezza Rice to express his concern over these reports. Haynes wrote a letter back to Sen. Leahy that became public. Haynes' letter included the exact type of language Mora had hoped to see in the Working Group's report. The letter said the Pentagon's policy had always been to never engage in torture or cruel, inhuman, or degrading treatment. Mora was relieved — Haynes had done the right thing, he thought, and shelved the Working Group's report. Mora later sent an appreciative note to Haynes, saying he was glad to be on the team.<sup>156</sup>

In May 2004, as the images of the Abu Ghraib scandal were splashed across the globe, Mora was saddened. The very thing he and his allies within the Pentagon had worked so hard to try to stop had come to pass. As Mora watched Senate hearings about Abu Ghraib on C-SPAN, a witness referenced the Working Group's report, which had been provided to the military's leaders in Iraq.<sup>157</sup> Mora was stunned. This was the first he'd heard anything about the report since 2003, when he'd told Haynes it was deeply flawed and should be shoved in a drawer. It had been promulgated simply by going around the objectors — like himself.

## ***Habeas, Hunger Strikes & Suicides***

In June 2004, in *Rasul v. Bush*,<sup>158</sup> the U.S. Supreme Court ruled that Guantánamo detainees had a right to challenge the legality of their detention with a writ of *habeas corpus*. Attorneys' visits began later that year. Even before the lawyers came, though, the Department of Defense began holding Combatant Status Review Tribunals (CSRTs) for detainees.

The CSRTs were the first hearings that Guantánamo inmates had, but they had clear procedural deficiencies. Detainees had no attorneys, and no means of obtaining witnesses outside of Guantánamo. Moreover, the evidence in favor of detention was presumed to be reliable unless the detainee could disprove it — and virtually all of the evidence was classified and withheld from detainees.<sup>159</sup> In addition to allowing multiple levels of hearsay, the CSRTs allowed, and at times relied on, evidence obtained under torture.<sup>160</sup> In some cases, when the tribunal cleared a detainee — or rather, in DOD parlance, found him to be “no longer an enemy combatant” — a new panel of officers was convened, and reversed the decision.<sup>161</sup> The CSRTs led to few detainees being released from custody.

In the summer of 2005, Guantánamo detainees began the largest and longest hunger strike since the prison opened. The press reported that as many as 200 detainees had gone on a hunger strike protesting their living conditions, the treatment at the hands of the guards, and their indefinite detention.

Hunger strikes had been used at Guantánamo before, most often to protest allegations of guards desecrating the Koran.<sup>162</sup> According to *Camp Delta Standard Operating Procedures*, MPs are instructed to “avoid handling or touching the detainee’s Koran whenever possible” and may only do so when security requires it under strict guidelines which include the presence of a chaplain or a Muslim interpreter.<sup>163</sup> According to news reports, a Koran was kicked, withheld from detainees and put in a toilet. Sami al-Hajj told Task Force staff of his first hunger strike at Guantánamo as a protest, “We use[d] it for one day, two days when they do something bad for our holy Koran.”<sup>164</sup> He was not aware of the hunger strike as a means of peaceful resistance until a fellow Guantánamo inmate, Shaker Aamer, explained the history, meaning and power of the practice in Western culture.<sup>165</sup>

At the time of the 2005 hunger strike, the commander of Guantánamo was Major General Jay Hood, who took over command after the Abu Ghraib scandal and public reports of “enhanced” interrogations at Guantánamo Bay. General Hood and Colonel Mike Bumgarner, the commander of the Joint Detention Group, approached camp discipline with an explicit intent to move the procedures and treatment at the detention facility more in line with the Geneva Conventions. Bumgarner reached out to the detainees during the summer hunger strikes in an attempt to open dialogue and improve conditions at the camp. His efforts led to a change in meal plans; the abandonment of the tiered system of punishment and reward for an “all or nothing” approach (the tiered system was so complicated that to the detainees, the rewards and punishments appeared to be an arbitrary exercises of power); and a brief establishment of a council of six detainees (headed by Aamer, the last British resident remaining at Guantánamo today despite being cleared for release since 2007), to discuss their grievances, and speak with him about what could be resolved.<sup>166</sup>

During the second meeting of the six detainees, the talks broke down. The council meeting was



brought to an end because the six detainees were trying to pass notes to each other in order to communicate in private.<sup>167</sup>

After the talks fell apart, Hood extended benefits to the detainees who complied with the rules — for example, the detainees who did not disrupt the running of the facility were given Gatorade and Power Bars during recreation periods. Conversely, the general tightened discipline in blocks where the disruptions continued and moved one of the leaders involved in the talks, Shaker Aamer, to isolation.

As Hood prepared to hand over command to Rear Admiral Harry B. Harris Jr. in March of 2006, he was proud of the changes that had come to Guantánamo during his tenure:

We are going to establish the most world-class detention facilities, and we are going to show the world that we're doing this right. ... Every provision of the Geneva Conventions related to the safe custody of the detainees is being adhered to. Today at Guantánamo — and, in fact, for a long time — the American people would be proud of the discipline that is demonstrated here.<sup>168</sup>

It is around this time that the Bush administration offered the first indications that it wished to close Guantánamo as a detention facility. In an interview with a German television station, President Bush said “I very much would like to end Guantánamo. I very much would like to get people to a court.”<sup>169</sup> [For more on the hunger strikes, see Chapter 6.]

A few weeks later, on June 9, 2006, three men died at Guantánamo.<sup>170</sup> Mani Shaman al-Utaybi, Yasser Talal al-Zahrani and Salah Ahmed Al-Salami were found with cloth stuffed down their throats, hanging in their cells. The military ruled the deaths as suicides, although media speculation regarding the means of death has continued for years.<sup>171</sup> Admiral Harris characterized the suicides as another attack: “They are smart, they are creative, they are committed. ... They have no regard for life, neither ours not their own. I believe this was not an act of desperation, but an act of asymmetrical warfare waged against us.”<sup>172</sup> The NCIS investigation of the deaths found violations of guard procedures, in part due to the evolving nature of the standard operating procedures at the time, which led to gaps in coverage of the cells.<sup>173</sup>

## Guantánamo Today

In many ways, the detention facility at Guantánamo Bay looks very different today than during the Bush administration. During a visit by Task Force staff in February 2012, the commander of JTF-GTMO at the time, Rear Admiral David Woods, was quick to point out the facility's motto: “Safe, Humane, Legal, Transparent.”<sup>174</sup> Detainees are mainly housed in three camps; Camp 5 for “high-risk” detainees, Camp 6 for those considered compliant, and Camp 7 where former CIA detainees (including Khalid Sheikh Mohammed, Abd al-Rahim al-Nashiri, and Walid bin Attash) are held.<sup>175</sup> The location of Camp 7 is classified. Admiral Patrick Walsh, who visited Camp 7 in 2009, described conditions there as similar to a “SuperMax” prison.<sup>176</sup> There is an annex on the ground of Camp 5, referred to as Camp Five-Echo, which “serves as a disciplinary block for non-compliant detainees in Camps 5 and 6.”<sup>177</sup> This block has elicited complaints from detainee counsel who claim that their clients are held there in prolonged solitary confinement.<sup>178</sup> Additionally, there is a small facility called Camp Iguana, originally used for juvenile detainees and which, at the time of this report, was used to house the three remaining Uighur detainees, who have expanded privileges there.<sup>179</sup>

After President Obama's failure to close Guantánamo in his first year of office, modifications were made to Camp 6 in a conscious attempt by military officials "to make Camp 6 feel more like a dorm and less like a SuperMax for the men, most held for eight years, all without charge or trial."<sup>180</sup> Much touted during the Task Force staff visit was detainee access to TV (including the occasional PlayStation console), educational lessons including language instruction, and socializing with other detainees in Camp 6.<sup>181</sup> Conditions in Camp 5 are more severe, with special interrogation cells and a number of detainees held in solitary confinement. According to Woods, interrogation across the detention facility is now voluntary, indicating the official recognition that they have exhausted any possible value from the detainees' intelligence after as many as 10 years in prison.<sup>182</sup> Woods said, in fact, that what he referred to as ongoing "interrogations" only cover camp conditions rather than anything associated with the battlefield. It is, in fact, the stark change in the mission at the Guantánamo detention center from what officials regarded as a potentially valuable source of information to be mined, often through harsh methods, to its current role solely as a repository to hold people.

Guards described to Task Force staff their regimen of constant surveillance, which includes visually checking on each detainee every three minutes around the clock.<sup>183</sup> It was in his isolation cell at Camp 5 that Yemeni detainee Adnan Latif was found dead in September 2012. U.S. officials ruled his death a suicide, and an NCIS investigation is due to be completed in 2013.<sup>184</sup> Latif had made several suicide attempts during his 10 years in U.S. custody.<sup>185</sup>

During the visit, Task Force staff were introduced to a representative from the International Committee of the Red Cross (ICRC), who appeared to have a positive relationship with senior members of JTF-GTMO, including Woods.<sup>186</sup> This marks a departure from the acrimony that had characterized relations between the ICRC and U.S. officials during the early years of detention at Guantánamo.<sup>187</sup> In 2007, a confidential 2003 manual for Guantánamo operations detailed the policy of barring access of some detainees to ICRC monitors — a violation of international law — and ICRC spokesman Simon Schorno commented that between 2002 and 2004, the ICRC was aware that it did not have access to all detainees at the facility.<sup>188</sup> This time period coincides with some of the worst reports of abuse at the facility, and Schorno noted that the policy ran "counter to the manner in which the ICRC conducts its detention visits at Guantánamo Bay and around the world."<sup>189</sup> Additionally, a confidential ICRC memo containing detailed allegations of torture by U.S. forces at Guantánamo was leaked in 2004.<sup>190</sup> Since 2007, ICRC statements confirm that relations have improved. ICRC President Jakob Kellenberger stated in 2009 that "the ICRC's work to improve conditions of detention and treatment has been enormous. ... [W]e have been very tenacious and it wasn't easy."<sup>191</sup> A 2012 update from Schorno also briefly outlined specific initiatives undertaken by the ICRC at Guantánamo, including facilitating phone conversations between detainees and their families.<sup>192</sup>

Despite the progress at Guantánamo, there remain troubling aspects of detention policy. During his presentation, Woods described the continued practice of force-feeding detainees who engage in hunger strikes, characterizing such hunger strikes as "a tool used by [detainees] to stay in the fight."<sup>193</sup> A Defense Department official accompanying Task Force staff commented that the tactic is "in the Manchester Manual (an alleged Al Qaeda training document) — that's why they do it."<sup>194</sup> When asked to clarify whether any distinction is made between detainees who engage in hunger strikes to protest their indefinite detention and detainees who have been found to have links to Al Qaeda and the Manchester Manual, Woods said, "We consider anyone undertaking hunger strikes to be continuing the fight against the U.S. government."<sup>195</sup>

As previously discussed, this generalization is outdated and based on the disproven premise that all Guantánamo detainees are affiliated with Al Qaeda or otherwise took up arms against the United States and are therefore “continuing” their fight.<sup>196</sup> Woods’s statement, however, echoes a 2007 press document issued by JTF-GTMO that discusses the Manchester Manual and asserts that “[a]lthough many of the detainees are illiterate and have not read the manual, a JTF source said there is a segment of the detained population who were trainers in the various terrorist camps and that these trainers have either, by example or through different modes of communication, disseminated the document’s principles to the larger detainee population.”<sup>197</sup> The JTF release additionally acknowledges that “[a]lthough not all detainees held in detention centers here are directly associated with al Qaeda, the manual is believed to be intended as a guide for all extremist Islamic fighters engaged in paramilitary training. ... [A JTF source added that] whether the detainees here are directly affiliated with al Qaeda or not is irrelevant. What is relevant, he said, is that they have paramilitary combat skills and the willingness to apply those skills when they are so inclined to use them.”<sup>198</sup>

Task Force staff was also shown the legal facilities at Guantánamo, including the rooms in which detainees may meet with counsel. An emerging issue is the question of detainee access to counsel once *habeas corpus* petitions have been resolved. In July 2012, attorney David Remes along with several other detainee counsel filed a motion before the U.S. Court of Appeals for the D.C. Circuit arguing that the Department of Justice (DOJ) has begun requiring counsel to sign a “highly restrictive” memorandum of understanding (MOU) if attorneys seek to continue contact with their clients.<sup>199</sup> According to Remes, the MOU would negate the right to *habeas* conferred on Guantánamo detainees by the Supreme Court in *Boumediene v. Bush*.<sup>200</sup>

Beyond giving JTF total [control over] attorney contacts with their detainee clients, the MOU appears calculated to prevent counsel from using information gleaned from the client to (1) continue to advocate the client’s release through the media, collaboration with human rights groups, or proceedings in other forums, (2) share such information with counsel for other detainees, or even use such information in the case of another client, (3) discuss the client’s possible transfer with potential receiving countries, or, (4) apparently, even prepare for Privilege Review Board (PRB) and military commission proceedings. The MOU will also apparently prevent us from preparing adequately for new habeas petitions if circumstances change.”<sup>201</sup>

In its reply, the government argued that the MOU provided for continued detainee access to counsel. The lawyers would not, however, have access to classified documents prepared for the previous *habeas* cases without specific requests for such information which would be evaluated by the Department of Defense.<sup>202</sup> The government’s brief acknowledged that counsel’s continued access to detainees and classified information would be at the “final and unreviewable” discretion of the JTF-GTMO commander, as opposed to mandated by the judicial protective order governing detainee access to counsel that followed *Boumediene*.<sup>203</sup>

In a September 6, 2012 ruling, Judge Royce Lamberth agreed with detainee counsel, stating that

In the case of Guantánamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek *habeas* relief. It follows that petitioners have an ongoing right to access

the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself.<sup>204</sup>

On November 2, 2012, the Department of Justice filed a notice of appeal of Lamberth's ruling to the D.C. Circuit Court of Appeals — before which no Guantánamo detainee has ever won a *habeas* case<sup>205</sup> — but the government reversed course six weeks later, asking the D.C. Circuit instead to dismiss the appeal.<sup>206</sup>



Perhaps the most troubling aspect of Guantánamo today remains the indefinite nature of detention at the facility. Detainee counsel Joseph Margulies emphasizes that

Guantánamo has changed. It is not that prison anymore. And when the administration — the Bush administration or the Obama administration — describe it as a very different facility, in significant respects they're right. Guantánamo's moral bankruptcy now is not that it's built around the creation of debilitating despair. Its moral bankruptcy now is that these guys are held without ever having been charged or tried or convicted of anything.<sup>207</sup>

Even those cleared for release are subject to continued detention due to the difficulty of transfers from Guantánamo. As of 2012, the names of 30 Yemeni detainees who cannot be returned to Yemen (per President Obama's suspension of transfers to Yemen in 2010) and the names of the 46 detainees to be held indefinitely remained classified.<sup>208</sup> Human rights advocates and detainee counsel have called for all detainee names to be declassified so that attorneys can publicly push for their transfers to third countries.<sup>209</sup> It remains to be seen what, if any, changes President Obama during his second term will make to this policy or to the continuation of Guantánamo as a detention facility.

### **Profile: The International Committee of the Red Cross and the Role of Christophe Girod**

It is difficult to overstate the effect the revelations about Abu Ghraib prison, first publicized in April 2004, had on the entire detention and interrogation regime, not only in Iraq but at Guantánamo and elsewhere.<sup>210</sup> The revulsion unleashed by the photos of abused and humiliated prisoners was perhaps the single most influential factor in shifting the momentum away from those within the government who advocated the appropriateness and necessity of coercive interrogation techniques and torture.

The repugnant images from Abu Ghraib and accounts of abuse at Guantánamo were not, however, a surprise to officials at the International Committee of the Red Cross (ICRC).<sup>211</sup> The discovery of those conditions led to an intense debate within the organization about its role and under what circumstances it should speak out publicly in such situations more frequently, despite a strong tradition of not doing so.<sup>212</sup> An examination of the role of the ICRC at Guantánamo and Abu Ghraib by the Task Force inevitably raises the question as to whether the abusive

techniques might have been halted earlier if the group had departed from its usual practice and taken a more aggressive public stance. As the outrage over the Abu Ghraib photos had such an influence, another way of expressing the question is whether more public condemnation from the ICRC would have had a similar, hastening effect on changing practices.

The ICRC has a strong reputation for acting without fear or favor in evaluating humanitarian conditions in wartime. Its heritage dates to more than 150 years ago when Henry Dunant, who cared for wounded soldiers at the Battle of Solferino in 1859, lobbied for a treaty to protect all wounded soldiers in times of war, regardless of their allegiance.<sup>213</sup> Typically, only the most autocratic regimes, those most likely to have obvious deficiencies in treatment of prisoners, deny the Red Cross access to their detention facilities. (The ICRC recently even gained access to an Al Qaeda affiliate's jail in Yemen.<sup>214</sup>) Moreover, the culture and history of the ICRC hold that while its representatives generally have free access to detention conditions, they do not publicly disseminate any critical judgments they may make about humanitarian deficiencies. Instead, the Red Cross usually delivers its complaints about treatment privately to the involved government.<sup>215</sup> It is, in effect, a trade-off: access for an agreement to keep findings confidential.

But in some rare circumstances ICRC officials will allow the publicizing of problems they might find; they say they do so when they find the government has been notified of the problems repeatedly and remains unresponsive to requests to make improvements.

Some Red Cross officials concluded on several occasions between 2002 and 2005 that they were forced to resort to suggesting publicly there were problems at Guantánamo.<sup>216</sup> This was a decision not universally applauded within the tradition-bound ICRC. It resulted in intense internal debates over how to deal with the U.S. government.<sup>217</sup> In those years, there were two levels of interaction between the Red Cross and the United States, which has long been a major supporter of the ICRC both philosophically and financially. At the operational level, the ICRC team based in Washington, who handled the visits to Guantánamo, had a difficult, even at times hostile relationship with authorities who ran the detention center there. There was a more formal diplomatic relationship between the senior officials of the Red Cross in Geneva and administration officials, which was conducted in a quieter fashion.<sup>218</sup> In the end, the latter faction prevailed in the internal ICRC debate as to whether to raise the level of public criticism of the U.S. treatment of Guantánamo prisoners.

A major actor in the drama was Christophe Girod, the head of the ICRC office in Washington at the time and a firm believer that the organization, with its well-founded reputation, had many cards to play. His efforts to push the ICRC would lead him into conflict with the organization's senior managers and eventually result in his departure from the Red Cross.

The relationship between ICRC investigators who actually visited prisoners and the military and administration were fractious from the beginning, as recounted by several people in interviews. The first issue arose when ICRC officials were disturbed that the U.S. authorities were citing the fact of the Red Cross visits as a kind of seal of approval of the practices at the facilities. Whenever questions were raised about the treatment of the Guantánamo prisoners, for example, the Pentagon would respond with a statement that everyone was being treated humanely, emphasizing that representatives of the Red Cross regularly visited the facility.<sup>219</sup> This seemed to imply there were no problems with the conditions at Guantánamo. In fact,

it concealed the fact that the teams of ICRC representatives had found many criticisms of what was occurring there but were generally inhibited from saying so publicly. It produced considerable annoyance on the part of the Washington office of the ICRC, which repeatedly insisted that the Defense Department not suggest that Red Cross visitation implied any approval. Red Cross officials notified some in the media of this view.

Then, in October 2003, Girod had an especially contentious meeting in Guantánamo with the commander of the base, Major General Geoffrey D. Miller, according to several witnesses.<sup>220</sup> Voices were raised. Girod complained about the condition of the detainees and said U.S. authorities were doing little to remedy issues brought to their attention. General Miller told Girod that he did not approve of the Red Cross' role — he had no use at all for the inspections — but he was obliged to endure the visits. Their body language when they emerged from a meeting was striking; reporters saw them walk out of a building tight-lipped and angry.<sup>221</sup>

Girod then made a rare public statement about the treatment of the detainees. He told *The New York Times* that conditions were unacceptable because the prisoners were being held indefinitely and their uncertainty was producing mental health problems.<sup>222</sup> “One cannot keep these detainees in this pattern, this situation, indefinitely,” he said in an interview with *The Times* at the base in Guantánamo. He said it was intolerable that the complex was used as “an investigation center, not a detention center,” which was a hint about the mistreatment the Red Cross was learning about during interrogation sessions.<sup>223</sup> “The open-endedness of this situation and its impact on the mental health of the population has become a major problem,” Girod continued.<sup>224</sup> He put a similar statement on the organization's website that day.

Some officials at the ICRC's headquarters in Geneva were troubled by Girod's actions. They believed the ICRC should hew to its traditional stance of refusing to disclose any of its observations publicly and share such findings only with the U.S. government.

At about the same time as Girod was battling Miller and beginning to take his case to the public, Red Cross inspectors in Iraq were so unsettled by what they found at the Abu Ghraib prison that they broke off a visit abruptly and demanded an immediate explanation from the military prison authorities.<sup>225</sup> In a report disclosed first by *The Wall Street Journal*, the ICRC had privately informed senior U.S. officials of prisoner abuses in Iraq many months before the Abu Ghraib abuses became public.<sup>226</sup> The Red Cross also said its president raised the issue with senior administration officials in January 2004, an assertion U.S. officials would come to dispute. In February, the ICRC sent the U.S. government a detailed 24-page report about problems at Abu Ghraib. It was based on interviews by ICRC inspectors of prisoners in Iraq conducted between March and October 2003. Many of those findings had been transmitted to U.S. military officials as they occurred, ICRC officials said.<sup>227</sup>

However, there was no dispute as to whether the U.S. government had received the February report about Abu Ghraib. It said that prisoners were being kept “completely naked in totally empty concrete cells and in total darkness” for several days. The report, which was not made public by the Red Cross, also documented the kind of behavior that produced a firestorm after the Abu Ghraib photographs were published. It cited “acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women's underwear over the heads for prolonged periods — while being laughed at by guards, including female guards,

and sometimes photographed in this position.”<sup>228</sup> The accounts of when the Red Cross raised alarms contradicted several statements by senior Pentagon officials as to when they first learned of potential abuses in Iraq. When the scandal erupted in May 2004 senior officials said they had no inkling of the problems until a private at the prison turned over photos of the abuse to Pentagon investigators on January 13.<sup>229</sup>

Lieutenant General Lance Smith, the deputy commander of the central command that oversaw Iraq, testified before Congress in May 2004 appeared, and was asked whether there were complaints about detainee treatment before January 13.<sup>230</sup> “There were reports there was trouble in those places, but not of the character we’re talking about here,” he replied. He suggested prison officials were working quietly with the Red Cross to deal with the complaints.<sup>231</sup>

Back in Guantánamo, after a June 2004 visit by one of its inspection teams, the ICRC charged in a confidential report to U.S. officials that the American military had engaged in intentional physical coercion that was “tantamount to torture.”<sup>232</sup> It was the first time the ICRC used that term in a physical sense.<sup>233</sup> The report’s findings were rejected by administration and military officials, and the Red Cross, as is customary, did not make its complaints public. In November 2004, *The New York Times* obtained a summary of the ICRC report and wrote about its contents and the administration’s subsequent rejection of its findings on the front page.<sup>234</sup>

The ICRC report stated that its investigators said they had discovered a system devised to break the will of the prisoners and make them wholly dependent on their interrogators through “humiliating acts, solitary confinement, temperature extremes, used of forced positions.”<sup>235</sup> The report said that Guantánamo “cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.”<sup>236</sup> In addition to persistent exposure to loud and persistent noise and prolonged cold, it said, detainees were subjected to some beatings.

The decision at the Red Cross was not to publicize or even confirm the report. Beatrice Megevand-Roggo, a senior ICRC official in Geneva, told *The Times* that the organization does not comment on the substance of reports submitted to authorities. Megevand-Roggo acknowledged the issue of confidentiality was a dilemma for the organization and that, “many people do not understand why we have these bilateral agreements of confidentiality.”<sup>237</sup>

Girod was interviewed in April 2012 by Task Force staff in Cyprus, where he was working in a humanitarian capacity for the United Nations. He said he felt strongly that in dealing with U.S. authorities, it would have been justifiable for the ICRC at times to have publicly expressed disappointment with inadequate efforts to address complaints about conditions.<sup>238</sup> Public condemnation by the ICRC, used sparingly, can be important and can help reduce abuse and perhaps save lives, he said.

“It’s different with the U.S.,” Girod said of the potential influence of the ICRC. For example, he said that “Assad [the Syrian leader] doesn’t care if the ICRC condemns his behavior. It won’t bring change.” But U.S. leaders would be deeply reluctant to engage in behavior that could bring condemnation by the Red Cross.<sup>239</sup>

After *The Times* published a summary of the confidential ICRC report in November 2004 that said that what the military interrogators were doing at Guantánamo was “tantamount

to torture,” the organization hurriedly arranged a visit to Washington for its top official, Jakob Kellenberger.<sup>240</sup> It appeared that Kellenberger would convey the group’s strong displeasure directly to senior policymakers. He met with Secretary of State Colin Powell, Defense Secretary Donald Rumsfeld, and Condoleezza Rice, the national security adviser to the president. Although there had been considerable anticipation of a kind of showdown, there turned out to be little fanfare accompanying his visit; he came and went quietly, with little comment from either the government or the ICRC. Red Cross officials said that on earlier visits to Washington, Kellenberger would always pare down the list of concerns he was given by ICRC staff members to raise with the American officials. Kellenberger was known to have little appetite for confrontation.

The inspections by the ICRC’s staff members under Girod made other discoveries; they found that medical personnel at Guantánamo were aiding interrogators in several ways. The memo discussed how some military psychologists were organized into Behavioral Science Consultation Teams (BSCT), known colloquially as “biscuits,” and that detainees’ medical files were often used to help them devise strategies for interrogators. The existence of the “biscuits” was first disclosed to the public in *The Times* article about the ICRC report. The ICRC believed much of what it found was a violation of standard medical ethics practices.<sup>241</sup>

In his interview with Task Force staff, Girod described his meetings with U.S. officials as consistently frustrating. He said that he regularly met at the Pentagon with a Defense Department Task Force of military officers to deliver criticisms and suggestions.<sup>242</sup> “When we did so, there was no reaction whatsoever from them,” he said. “It seemed nobody would dare say anything. They were all looking at each other. ... They would say ‘thank you’ and that was it.”<sup>243</sup> He never received any feedback or substantive acknowledgement of any complaint. “They didn’t say, ‘we’ll take care of it.’ Nothing like that. And we never got any feedback.”<sup>244</sup>

He described the experience of ICRC inspectors at Guantánamo as difficult in the beginning. At first, he said, “detainees were in real fear of what would happen to them [if they talked to us].”<sup>245</sup>

Girod said that officials at Guantánamo tried to sow distrust of the ICRC among the prisoners. “Some interrogators told the detainees that the ICRC works with the prison camp’s authorities and noted that the red cross of their insignia was the same as U.S. medics wore.”<sup>246</sup>

Girod said that the revelations about Abu Ghraib had an enormous impact, including at Guantánamo. “After Abu Ghraib, everything changed,” he said. “It was an awakening, media-wise and political-wise.”<sup>247</sup>





# Afghanistan

*Afghanistan was the birthplace of post-September 11 detention and it continues there today over a decade later. In March 2012, the United States reached an agreement with the Karzai government on the custody of the then-estimated 3,200 detainees in Afghanistan. The agreement called for an accelerated transfer of detainees from U.S. to Afghan control, but it also provided Americans a veto over which detainees could be released. To some, the March 2012 custody agreement signaled the beginning of the end of the United States' involvement in detainee affairs in Afghanistan. However, in September 2012, The New York Times reported the U.S. military, over Afghan objections, would maintain control indefinitely over at least a few dozen foreign detainees in Afghanistan. Thus, there appears to be no clear end in sight to the U.S. role as a jailer in Afghanistan.*

*It is unclear from the available evidence the degree to which instances of illegal violence in Afghanistan can be attributed to the fog of war, to individual bad actors, or to policy decisions of senior leaders. The United States has had two detention programs in Afghanistan over the last 10 years — an officially acknowledged program and an unofficial, classified program. The official detention program has been run by the U.S. military during and following the invasion of Afghanistan in the fall of 2001. Estimates on the number of detainees in that program at any one time over the last decade have varied, up to several thousand. The second detention program has involved a secret network of jails, the existence of which was long unacknowledged by U.S. officials, and is believed to have been used to detain only a small fraction of those in the military's detention program. In both programs detainees have been mistreated and some have died. In some instances abusive, illegal interrogation tactics utilized in Afghanistan later found their way to Iraq. Notoriously, two detainees died within a week of each other at Bagram Air Base in December 2002 after they were interrogated by members of the 519th Military Intelligence Battalion. The battalion left Afghanistan in the summer of 2003, went to Iraq, conducted interrogations at Abu Ghraib prison, and became the subject of controversy when, months later, the infamous photographs of the abuses at Abu Ghraib prison emerged.*

*A review of the United States' experience in Afghanistan over the last decade demonstrates several different points of failure in the nation's post-September 11 detention process. Not only were detainees treated improperly and illegally at times, but the decision processes on whether to detain someone and whether to continue to do so were deeply flawed. Marine Major General Doug Stone, who in 2007–08 significantly revised the U.S. detention program in Iraq, was sent to review the situation in Afghanistan.*

*In 2009, he recommended that 400 of the 600 detainees held at Bagram Air Base be released. He said their continued detention was counterproductive to the interests of the United States.*

*Today, quietly, the United States seems to have learned at least some lessons from the last 11½ years in Afghanistan. Since May 2010, at the urging of General David Petraeus, the detention sites operated by the military's Joint Special Operations Command are reportedly open to inspection by Afghan officials and the International Committee of the Red Cross. More generally, the Red Cross appears today to have an improved relationship with the Department of Defense.*

## The Fog of War?

On the night of October 7, 2001, the first night of the Afghanistan war, an unmanned Predator drone (equipped with two Hellfire missiles) identified the Taliban's leader, Mullah Mohammad Omar, fleeing Kabul in a convoy.<sup>1</sup> The drone's infrared scanner tracked the convoy, but by the time the request to fire made its way to Central Command headquarters in Tampa Bay, Fla., Mullah Omar had managed to escape.

The United States and its allies had precious little intelligence about who, precisely, they were fighting on the ground in Afghanistan in the first months of the war. Overlap between Taliban and Al Qaeda members, many U.S. officials thought at the time, was high. After all, the Taliban had just jeopardized its hold on power throughout most of Afghanistan in order to protect Osama bin Laden and Al Qaeda. In truth, the overlap between the two organizations in 2001 was far smaller than believed.<sup>2</sup> Osama bin Laden had returned to Afghanistan in 1996 after four years in Sudan. Al Qaeda and the Taliban mutually co-existed together throughout the late 1990s in Afghanistan, but there seems to have been little coordination between the two. "In 1996 it was non-existent, and by 2001, no more than 50 people [overlapped]."<sup>3</sup>

While it is true that thousands of foreign fighters trained at Al Qaeda training camps, Mullah Omar was said to have maintained a parochial outlook, interested in the consolidation of the Taliban's power within Afghanistan, and was uneasy with bin Laden's goal of global jihad.<sup>4</sup> Omar was reported to be in talks to betray bin Laden to the Saudis until President Bill Clinton ordered air strikes against Afghanistan in 1998.<sup>5</sup> After the U.S. attack on Afghan soil, Omar refused any deal.<sup>6</sup>

The war against the Soviet occupation, and the ongoing Afghan civil war between the Taliban and the Afghan Northern Alliance, had brought many non-Afghans to Afghanistan over the years to fight with the Taliban to establish a "pure Islamic" state in Afghanistan. Additionally, Afghanistan, as a broken state in 2001, offered a variety of militant Muslim groups a comparatively safe haven in which to conduct training operations. Uighur separatists, members of an ethnic group who sought independence for their homeland in western China, operated there as did members of the Libyan Islamic Fighting Group (LIFG), which sought the removal of Colonel Muammar el-Gaddafi from power. By 1998, the Libyan government had succeeded in crushing LIFG's Libyan operations, and many of its members had fled to Afghanistan.<sup>7</sup> While many non-Afghans in Afghanistan had been prepared to fight the Northern Alliance for the establishment of a "pure Islamic" state, many of them were not prepared for September 11 and the ensuing U.S.-led invasion and "War on Terror," in which many of them would come to be seen as terrorists.<sup>8</sup> Leonid Syukiainen, a Russian academic, suggested parallels between some of the foreign fighters found in the aftermath of the U.S. invasion and the idealistic Westerners who had moved to the Soviet Union, following the 1917 Bolshevik Revolution, to build a socialist society.<sup>9</sup> "Of course, there had to be a combination of reasons for these people to flee to Afghanistan," Professor Syukiainen said, "but I believe that their strongest motive was that they sincerely sought a fair Islamic society there."<sup>10</sup> One candidate that appeared to meet Professor Syukiainen's description, a vagabond who sought to help build a theocratic Islamic state, was an American citizen — John Walker Lindh who earned the sobriquet "the American Taliban."

**“Omar was reported to be in talks to betray bin Laden to the Saudis until President Bill Clinton ordered air strikes against Afghanistan in 1998.”**

Lindh was born in Washington, D.C., and his family had moved to California when he was 10 years old. As a teenager, at a time of great turmoil in his parent's marriage, Lindh became deeply interested in Islam. He converted to the faith when he was 16. The following year, Lindh traveled to Yemen where he lived for 10 months studying Arabic and the Koran. After trips back and forth between the United States and Yemen, he left Yemen for Pakistan in 2000 and studied at a madrassa until May of 2001 when, at 20 years old, he left Pakistan to join the Taliban. Lindh's capture came in November 2001 after heavy fighting at Kunduz.

Lindh later said he had met Osama bin Laden while he was in Afghanistan but was only vaguely aware of his reputation at the time.<sup>11</sup> He claimed that prior to September 11 he had never heard of Al Qaeda, which terrorism experts found plausible.<sup>12</sup> "There were two kinds of training at Al Farooq (the training camp in Afghanistan Lindh attended) — Al Qaeda training, to fight civilians, and military training, to fight the Northern Alliance," explained Bruce Hoffman, a terrorism expert at the Rand Corporation in Washington. "Lindh took only the military training. Seventy thousand people were trained in general warfare at these camps, but perhaps only a tenth received advanced terrorist training."<sup>13</sup> Lindh claimed he was oblivious to terror plotting around him but admitted he had once been taken aside toward the end of his training by an Egyptian official named Abu Mohammed al-Masri, later identified as a confirmed member of Al Qaeda.<sup>14</sup> "He asked me whether I'd like to do a martyrdom operation" in the United States or Israel, according to Lindh. "I said no, I'm not interested in that. I came to fight the Northern Alliance, not other countries."<sup>15</sup> Al-Masri is said to have accepted Lindh's demurral but warned him that, whatever else he did, he was not to mention their conversation to anyone.<sup>16</sup>

Lindh's capture and detention is a useful, illustrative example of the controversy and confusion surrounding detainee matters in the early stages of the war. There were many foreign fighters in Afghanistan like Lindh. The collapse of the Taliban had come suddenly: Kunduz, Kabul and Kandahar — all under the control of the Taliban — had fallen to the United States and the Northern Alliance within just weeks of one another.<sup>17</sup> The light U.S. footprint designed for the military campaign by Secretary of Defense Donald Rumsfeld and the Pentagon embedded Special Forces and the CIA with the Northern Alliance's fighters. Following the initial battles in Afghanistan, Special Forces conducted village raids, going house to house, and rounded up suspected insurgents.<sup>18</sup> It was these elite U.S. forces and their allies who first dealt with prisoners taken from the battlefield.

Kunduz, where Lindh was captured, was the last city to fall in the north. Many Taliban and Al Qaeda soldiers, routed in other cities, had regrouped to Kunduz. Under relentless bombardment by the Americans and surrounded by the Northern Alliance, an estimated 450 foreign fighters agreed to surrender in Kunduz to the Northern Alliance warlord, General Abdul Rashid Dostum, who is today Afghanistan's chief of staff for the commander in chief of the Afghan army.<sup>19</sup> Afghan Taliban foot soldiers, most of whom deserted when the war's outcome became apparent, were welcomed by their counterparts on the other side. Senior Taliban leaders meanwhile, in many cases, were rescued by the Pakistani intelligence service, which had spent years supporting the Taliban.<sup>20</sup> Left behind were foreigners like Lindh. Mullah Faisal, Lindh's Taliban commander, had reached an agreement to pay Dostum around \$500,000 in exchange for his unit's safe passage out of the country.<sup>21</sup> Lindh had hoped to escape to Pakistan and then return to America. The foreign fighters at Kunduz, only after being disarmed, however, realized Mullah Faisal had been double-crossed and they were to be imprisoned rather than allowed to return to their home

countries. After a tense standoff, the prisoners were taken to Qala-i-Jangi, a prison fortress built in the 19th century. There, a CIA officer, Johnny “Mike” Spann interrogated Lindh briefly before a grisly prison riot broke out. Spann was killed in the ensuing riot.

The events that followed in response to the prison riot have been called a massacre and human rights violation. After Spann’s death, the non-Afghan prisoners overpowered their guards and were said to have broken into the armory.<sup>22</sup> Air strikes were called in against the prisoners. Twenty-four hours after the air strikes, oil was poured into the facility and set ablaze. The following day, as the clean-up of corpses was underway, four shots rang out from the basement and two rescue workers were injured.<sup>23</sup> Realizing people were still alive in the fortress, the Northern Alliance, along with the support of American advisors, devised a plan to divert a local water supply to flood the basement and finish off any remaining survivors.

Remarkably, 86 detainees survived the air strikes, oil and water attacks at Qala-i-Jangi. As they slowly emerged, a guard called out their varied nationalities: “Uzbekistan! Arab! Pakistan! Yemen! Chechnya!”<sup>24</sup> Amongst the survivors there were early clues of the complex issues each non-Afghan fighter would pose to his captors. One survivor of Qala-i-Jangi told Luke Harding, a reporter for *The Observer*, “we wanted to surrender on Thursday. But there was a group of seven Arabs who wouldn’t let us.”<sup>25</sup> A Uighur survivor of the riot at Qala-i-Jangi, told his Guantánamo Combatant Status Review Tribunal that a Uighur friend of his was killed there during the riot, but “I did not participate in the riot. They dropped bombs and I was injured. I was not a soldier. I have nothing against the Americans. Why would I participate in the riot.”<sup>26</sup> Of the 86 survivors, at least 50, including 21 Saudis and nine Yemenis, would be transferred to Guantánamo, where their alleged participation in the prison riot was used to justify their continued detention.<sup>27</sup>

As the uprising at Qala-i-Jangi was beginning, a far larger group of Taliban soldiers, at least 1,100 and possibly as many as 13,000 — together with an unknown number of fleeing civilians — surrendered to General Dostum five miles west of Kunduz, in the city in Yerghanek.<sup>28</sup> Very few of those from Yerghanek, perhaps 70 at most, were eventually transferred to Guantánamo. Many more might have wound up in Guantánamo had they survived. The trip from Yerghanek to Sheberghan, crowded into shipping containers without adequate ventilation or water.

According to the British journalist Andy Worthington, both the Taliban and the Northern Alliance had previously used shipping containers as a means of killing the other side’s prisoners. In 1997, a brutal Uzbek general for the Northern Alliance murdered 1,250 Taliban prisoners by leaving them in containers without food, air or water.<sup>29</sup> The Taliban had responded with similar behavior. Three British nationals, who would later come to be known as the “Tipton Three” because they all came from Tipton, England, survived their journey to Sheberghan from Yerghanek by licking the moisture from the sides of their shipping container to get water. They described their ordeal after being released from Guantánamo in March 2004. The Tipton Three, two of whom were 20 years old at the time of their capture, would later successfully sue to have their right to challenge, in U.S. courts, their detention at Guantánamo Bay. That landmark case, *Rasul v. Bush*,<sup>30</sup> was handed down by the Supreme Court in June 2004, three months after the Bush administration had already released Rasul and the other members of the Tipton Three.

The shipping container that took the Tipton Three from Yerghanek to Sheberghan arrived

at night, the whole spectacle allegedly illuminated by spotlights operated by U.S. Special Forces soldiers.<sup>31</sup> Of the 200 men originally in their container, according to the Tipton Three, only 20 survived. Physicians for Human Rights conducted a forensic assessment of the gravesites in early 2002.<sup>32</sup> It is unknown exactly how many hundreds or thousands of detainees died in the convoy.

What remains unclear is the participation of U.S. Special Forces in these acts, in late November and early December of 2001, and the extent of U.S. knowledge about the Northern Alliance's actions. No investigation was ever undertaken to unravel these questions. Several U.S. officials told *The New York Times* that American officials were "reluctant to pursue an investigation — sought by the FBI, the State Department, the Red Cross and human right groups — because [General] Dostum was on the payroll of the CIA and his militia worked closely with United States Special Forces in 2001." Additionally, Dostum was still serving in the American-supported government of President Hamid Karzai.<sup>34</sup> U.S. interrogators later became well aware of what happened because the survivors, many of whom ended up at Guantánamo, told them about the atrocities. As evidence mounted about the deaths, Secretary of State Colin L. Powell assigned Pierre-Richard Prosper, the U.S. ambassador-at-large for war crimes, to look into them in 2002.<sup>35</sup> Upon facing stiff resistance from both U.S. and Afghan officials, Prosper dropped his inquiry. "They made it clear that this was going to cause a problem," said Prosper, speaking in 2009 of the Afghan officials he dealt with in 2002. "They would say, 'We have had decades of war crimes. Where do you start?'"<sup>36</sup> In a July 2009 CNN interview, President Barack Obama said he had authorized a preliminary probe into the matter:

The indications that this had not been properly investigated just recently was brought to my attention. ... So what I've asked my national security team to do is to collect the facts for me that are known, and we'll probably make a decision in terms of how to approach it once we have all of the facts gathered up.<sup>37</sup>

Whether or not the White House ever indeed gathered facts about the alleged atrocities in the fall and winter of 2001, or whether it took any action, remains unknown.

## The Early Setup

On October 7, 2001, the U.S. military launched its invasion of Afghanistan and found quick military success in a country that had frustrated other superpowers.<sup>38</sup> On November 13, 2001, President George W. Bush issued an order authorizing the creation of detainee sites by the U.S. military, and by Christmas of 2001 facilities were open, running, and interrogations were ongoing.<sup>39</sup> The last Taliban city stronghold, Kandahar, fell December 6. There was a race to ready interrogation operations. The U.S. was collecting detainees fast. In late December there were 37 detainees in U.S. custody at Kandahar.<sup>40</sup> A month later, in late January 2002, the number was about 500.<sup>41</sup> On January 19, 2002, Defense Secretary Rumsfeld relayed to the Joint Chiefs that General Tommy Frank's order to observe the Geneva Conventions, issued October 17, 2001, had been rescinded.<sup>42</sup> There were a variety of holding sites out in the field, often called DIFS (Division Internment Facilities) and BIFS (Brigade Internment Facilities), but there were two important military sites to which a detainee was eventually sent if the detainee was to be kept in military custody in Afghanistan for any significant period of time: the Kandahar airport facility<sup>43</sup> and a larger site at Bagram Air Base, first called Bagram Collection Point (BCP) and later called the Bagram Theater Internment Facility.<sup>44</sup> The two sites became the first stop on the path to

Guantánamo Bay, Cuba. Of the early detention operations at Bagram, retired General Stanley McChrystal later wrote in his memoir “I had been deeply unimpressed with the interrogation facilities at Bagram when I first deployed to Afghanistan in 2002.”<sup>45</sup>

Army troops that dealt with detainees in Afghanistan fell into one of two groups: military police and military intelligence. Military police (MP) were those troops responsible for detention operations whereas military intelligence (MI) interrogators were responsible for gaining intelligence from human intelligence (HUMINT) subjects. The Army’s Center for Law and Military Operations released a report in August of 2004 that found there was virtually no guidance on detainee operations or policy in Afghanistan through formal channels to the field until June 2002, when the Combined Joint Task Force-180 (CJTF-180), a corps-level headquarters, was established.<sup>46</sup> On the interrogation side, the 202nd Military Intelligence Battalion (202nd) established the initial interrogation operations in Afghanistan. The 202nd reportedly produced nearly 1,500 intelligence reports in just over seven months, in a reports database that was called “superb” at the time by the Army’s first task force director for counterintelligence and human intelligence in Afghanistan.<sup>47</sup> Two military intelligence personnel from the 519th Military Intelligence Battalion (519th) were assigned to augment the 202nd. In August and September of 2002, the 202nd was replaced by the 519th, and two members from the 202nd stayed and trained the 519th on the local practices developed by the 202nd.<sup>48</sup>

Conditions and treatment both in Kandahar and at Bagram were, by accounts from detainees and soldiers alike, brutal. Conditions were reported slightly better, though only comparatively so, at Kandahar compared with Bagram. In-processing of detainees at both facilities was designed to shock new detainee arrivals in an effort to recreate “point of capture” shock in the hope new captives would be more compliant. The behavior included yelling, nakedness, body cavity searches, alleged beatings, sleep deprivation and barking military dogs. The behavior toward detainees was exhibited across both military police and military interrogation units. Many of these same techniques would later be found in Iraq and indeed several members of the 519th deployed to Iraq in the summer of 2003 to initiate interrogation operations there. Just as at Bagram, the 519th’s assistant operations officer, Captain Carolyn Wood, assumed duties as the interrogation officer in charge in Iraq.<sup>49</sup> In the fallout of the Abu Ghraib scandal, Captain Wood later told the Senate Armed Services Committee that interrogators had used sleep deprivation and stress positions in Afghanistan and that she “perceived the Iraq experience to be evolving into the same operational environment as Afghanistan.”<sup>50</sup>

Guidance to the field was lacking. The executive summary of the Church Report, a report the secretary of defense commissioned in May of 2004 to examine Department of Defense (DOD) interrogation operations, found that the interrogators in Afghanistan, in the absence of clear orders regarding interrogation, had been forced to “fall back on their training and experience” and “rely on a broad interpretation” of Army Field Manual (FM) 34-52.<sup>51</sup> Notably, only the executive summary of the Church Report is available to the public. However, in January 2011 an unclassified, public document filed in the United States military commission case against Noor Uthman Muhammed made several references to facts and findings supposedly contained within the complete Church Report that conflict with the public unclassified executive summary. While the Army Field Manual was theoretically in place according to the Church Report, unofficially, interrogators were pressured to utilize whatever tactics they could that were thought might gain intelligence.

Demand for information, demand for intel, we need raw intel we need this



information as soon as you can get it. Get it now, get it, get it, get it, get it, get it, get it. Great, how do you suggest we go about getting it? We don't. Get it, get it, get it, get it. That's all we got for like six months straight. We're like — Is there anything else? ...

Take the kid gloves off, stop playing nice. We were told get information, get it fast. It's not like we were sitting there going, ok, you don't want to talk to me, ok, have a nice day. It's not like we could do that. It's like every time you go to the interrogation room, you've got to go, ok, this guy knows information that could save a hundred of my friends. How do we get that information out of them?<sup>52</sup>

At Kandahar, Lieutenant Colonel Paul Keith Warman was in command at the detention facility in the days after the fall of the Taliban.<sup>53</sup> Kandahar was in crisis mode: space was inadequate, resources were inadequate, and there was constant pressure to empty cells. Detainees, as well as an interrogator, described how one interrogator at Kandahar always shouted the same question at arriving prisoners: "When did you last see Osama bin Laden?"<sup>54</sup> Sami al-Hajj, a cameraman for Al Jazeera who spent years in detention, first in Afghanistan and later at Guantánamo, says Kandahar seemed to him like a strategic collection site, as opposed to Bagram, where he was only ever asked about bin Laden.<sup>55</sup> Amongst the indignities al-Hajj recalled were being beaten, deprived of sleep, stripped naked, and being anally probed with an instrument when he was captured and brought to Kandahar.<sup>56</sup>

Anal cavity searches of detainees were a common source of complaint. The Australian David Hicks, who pleaded guilty to charges of providing support for terrorism and was returned to his home in Australia in 2007, wrote of the same experience. In his autobiography, Hicks described how he and a number of other detainees were flown from the USS Bataan to Kandahar where they were met and then forced to lie down while a soldier walked on their backs, stepping on one detainee after the other. Hicks described how he was then shaved entirely before a medical inspection.<sup>57</sup> Of the rectal probe he wrote:

I was bent over and held down by two soldiers who were escorting me. The soldier at this station held a large piece of white plastic and shoved it up my anus. As this was done, I heard a nearby soldier say, "Extra ribbed for your pleasure."<sup>58</sup>

On the practice of full-body nudity and anal cavity searches, in June 2004 the Jacoby Report, an internal military investigation of Afghanistan's prisons launched in the wake of the Abu Ghraib scandal, found there was no evidence rectal examinations were useful, either from a medical or a security standpoint.

There has been no evidence to reinforce the need for rectal or hernia examinations, and little or no justification for requiring full-body nudity as a part of exams or inspections. Guidance removing these processes from our procedures has been issued as part of this inspection.<sup>59</sup>

The practice was widespread enough that in January 2005, Deputy Defense Secretary Paul Wolfowitz issued a policy statement memorandum and guidelines on body cavity searches of detainees in DOD control. "The United States has a significant and legitimate interest in performing appropriate security searches and medical exams" the memo began. "However,

the use of body cavity exams and searches may conflict with the customs of some detainees.”<sup>60</sup> Body cavity searches were no longer to be routine and were only to be performed when there was a reasonable belief an item would be concealed that presented a security risk.<sup>61</sup>

Why were these techniques used as a part of in-processing? One interrogator said it appeared to many to have been a way to set the stage for later interrogation:

What’s the best way to get someone to talk to you? The direct approach. Ask a question, get an answer. What’s the best way to put them in that frame of mind? Fear! Of the unknown. The best way is adrenaline pumping through your body. Your mind isn’t thinking clearly. So: dogs, loud music, lots of light, no light, eyes covered. ...

Again, you are trying to jack up their level of aggravation. You are trying to create this balance between what they are frightened of and what’s going on. Usually they are in the hood at the time so they couldn’t just stare around and block out the sound. You take out the ability to block the sound by taking another sense away. So they’ll be sitting there listening to this music they hate, it’s blaring at them, so their entire body’s adrenaline is rushing, their heart is pounding cause they are aggravated. You’d walk in, turn it off.<sup>62</sup>

**“Even in those instances where interrogators felt a detainee shouldn’t be transferred to Guantánamo, their recommendations were often overruled.”**

## Afghanistan’s Road to Guantánamo

Afghanistan was, in the beginning, where prisoners were gathered and interrogated, and not just those captured in Afghanistan. Detainees from the Far East, from Africa, and from the Middle East all found themselves transferred to Kandahar and/or Bagram. One such detainee was Moazzam Begg, a dual-citizen of Great Britain and Pakistan who was apprehended at his rented home in Islamabad in early 2002.

After his release from Guantánamo in 2005, Begg remained a controversial figure.<sup>63</sup> In 2010, a cable from the State Department praised Begg for his work in Europe persuading European governments to take in remaining detainees at Guantánamo.<sup>64</sup> Begg was raised in an educated, middle-class family in Birmingham, and was sent to a Jewish elementary school.<sup>65</sup> Throughout the 1990s, Begg traveled to Pakistan, Afghanistan and Bosnia, he said, to learn more about his heritage and to work with Muslim charities.<sup>66</sup> Those travels included visits to Bosnian battle zones and to two Afghan training camps. While living in Peshawar, Pakistan, in 1998, Begg was suspected of having met Khalil Deek, an associate of Abu Zubaydah, and assisting him in crafting a CD-ROM version of a terror manual.<sup>67</sup> Begg acknowledged meeting Deek and collaborating on a business idea to sell traditional clothing, but says he never met Abu Zubaydah.<sup>68</sup> Begg returned to the U.K. with his family in 1998 and opened an Islamic bookstore in Birmingham, which he described as a meeting place for young Muslims.<sup>69</sup> The store was raided twice in 1999 and 2000 by British police, but Begg was never charged with a crime.<sup>70</sup> Begg stated that he had believed the security establishment’s interest in his store was “a silly mistake or a fishing trip” until the second raid. In the summer of 2001, Begg moved his family to Kabul, where his stated plan was to start a girls’ school and oversee a project digging wells.<sup>71</sup> After the September 11 attacks and the initiation of the U.S. war in Afghanistan, Begg

evacuated his family to Pakistan.<sup>72</sup> Begg's 2004 Guantánamo *habeas* petition stated he was seized at his rented home by Pakistani officials on January 31, 2002.<sup>73</sup> Begg claims he was first interrogated by Pakistani interrogators for several weeks before he was turned over to American CIA officers, who threw him into the trunk of a car and took him to Bagram.<sup>74</sup>

With the prisoners in their custody, interrogators faced a dilemma. In the face of inadequate intelligence they had to make a decision in many cases whether detainees should be either repatriated or transferred to Guantánamo. Even in those instances where interrogators felt a detainee shouldn't be transferred to Guantánamo, their recommendations were often overruled. Joshua Claus, one of Moazzam Begg's former interrogators said of Begg, "Nicest guy who ever got screwed in his life!"<sup>75</sup> Claus pleaded guilty to assault, prisoner maltreatment, and lying to investigators in 2005 and was sentenced to five months in prison for detainee abuse and for his role in the death of a detainee known by the single name of Dilawar. When Claus was asked why Begg was sent to Guantánamo rather than repatriated, he told Task Force staff:

Because no one listens to us. No one listens to us. Our recommendations don't mean shit. We told them, "Moazzam is a good guy. He got snatched up because he was in the wrong place [at] the wrong time and because he's a London English speaker." People were all bent out of shape about him. They were just hard core: Moazzam had to be evil. They couldn't prove it. That's why he was there so long. And then finally they were saying: just send him with the crew! "Why? We're telling you, send him home!"<sup>76</sup>

Strong evidence suggests that at least some U.S. officials were aware public statements claiming that Guantánamo only housed "the worst of the worst" were incorrect. An outside 2006 review of the military's own data on detainees was striking in this regard. The study found only 8 percent of Guantánamo detainees were identified as "fighters" for Al Qaeda.<sup>77</sup> Forty-five percent of detainees were identified as having committed a hostile act against the United States or its allies.<sup>78</sup> Hostile acts could include fleeing an area under bombardment by U.S. forces.<sup>79</sup> Ninety-three percent of the detainees were not captured by U.S. or coalition forces.<sup>80</sup> A majority were handed over to the United States by Pakistani or "not stated" authorities when the U.S. was still offering bounties for terrorist suspects.<sup>81</sup>

Initially, all Arabs in custody in Afghanistan were sent to Guantánamo without exception. It did not matter what the interrogators personally thought after the interviews. "Every Arab was supposed to go," wrote Chris Mackey in *The Interrogators*, but "not every Arab should have been sent."<sup>82</sup> Torin Nelson, an interrogator working at Guantánamo in the first few months, "realized that a large majority of the population just had no business being at Guantánamo."<sup>83</sup> In the spring of 2002, during a short lull in transfers to Guantánamo from Afghanistan, Major General Dunlavey, the head of Guantánamo's Task Force 170, visited Kandahar to demand changes. The prisoners being sent to Guantánamo from Kandahar, Dunlavey felt, weren't "the worse of the worst."<sup>84</sup> Of Dunlavey's visit Mackey wrote, "Dunlavey complained Kandahar wasn't being nearly selective enough in filling out its transfer lists."<sup>85</sup>

Following Dunlavey's visit, a few changes were made to the screening process. The process began with the interrogators making a recommendation about each detainee. The categories were: hold in Afghanistan, transfer to Guantánamo, or repatriate. After hearing a

recommendation, the operations officer would ask additional questions about the reasoning before presenting selected individuals at a weekly meeting.<sup>86</sup>

Since many detainees had no identification or biographical information beyond what they themselves volunteered to the interrogators, a great deal of uncertainty surrounded each detainee and each recommendation. Recruits had been brought to training camps in Afghanistan by “facilitators,” a network of supporters aiding the militant cause in Europe, the Middle East and Northern Africa. During their journey recruits gave up their identification and adopted aliases. Detainees with empty pasts were left to have the gaps filled in, often by the worst assumptions of their captors.<sup>87</sup> As former United States ambassador-at-large for war crimes Pierre-Richard Prosper explained “[w]hat people need to realize is that, in the fog of war, you are picking up individuals who have literally nothing but litter in their pockets. Maybe scrap pieces of paper. We have no idea who they are.”<sup>88</sup> Retired Army Colonel Stuart Herrington recalled in an interview with Task Force staff that, when he arrived at Guantánamo in 2002, he was told by interrogators they were uncertain if they had the real names of up to 60 percent of the detainees who were there.

**“...only 8 percent of Guantánamo detainees were identified as ‘fighters’ for Al Qaeda.”**

One of the first men to be released from Guantánamo was a man by the name of Faiz Mohammed. Faiz was later described by a fellow detainee:

He was a very old man. Two soldiers harshly dragged him into the tent and dropped him on the floor. He was ordered to stand but neither could he stand nor was he able to understand the men. ... On the second day when he was called for interrogation and had to lie down to be tied up, he did not understand again. Soon the soldiers let their passions loose and kicked him to the ground ... All the while the old man was shouting. He thought he was going to be slaughtered and screamed, “Infidels! Let me pray before you slaughter me!” ...

When he came back I sat down to talk to him. He said he was from Uruzgan province and that he lived in Char Chino district. He told me he was 105 years old and eventually he was the first man to be released from the Hell of Guantánamo.<sup>89</sup>

*The New York Times* described Faiz Mohammed after his 2002 release from Guantánamo.

One of them, Faiz Mohammed, said he was 105. Babbling at times like a child, the partially deaf, shriveled old man was unable to answer simple questions. He struggled to complete sentences and strained to hear words that were shouted at him. His faded mind kept failing him. First he said that American soldiers took him away twelve months ago. Then he said he was five years old during the rule of the Afghan King Amanullah, which would make him at least 78, and that he spent eight months in an American prison. He was asked if he was angry at the American soldiers who arrested him. “I don’t mind,” he said, his face brightening. “They took my old clothes and gave me new clothes.”<sup>90</sup>

Detentions were in many cases not just unjust, but especially counterproductive. Detainees in U.S. custody included former prisoners of the Taliban *itself*, the very regime the U.S. had just overthrown. The Taliban had considered some of its prisoners spies, but ironically, and

incomprehensibly, the arrival of Western forces was little help to them, as they were not freed, but taken in as detainees, and, at least in some cases, taken to Guantánamo.<sup>91</sup>

Ali Shah Mousavi was a Shiite from a prominent family in Gardez. He had been a doctor and was chosen as a representative for the Loya Jirga (an assembly of regional leaders and tribal chiefs) in Kabul to help form the new Afghan government. Not only had he been an enemy of the Taliban, but he had worked extensively with the Americans and Europeans. One day in 2002 he simply disappeared and no one knew he had been taken to Bagram and later to Guantánamo.<sup>92</sup> Similarly Haji Rohullah Wakil, an important Afghan figure, was shipped to Guantánamo and released two years later.<sup>93</sup> After his release, Wakil met frequently with Afghan president Hamid Karzai and other senior Afghan government leaders.

As important as the road from Afghanistan to Guantánamo was for many detainees, there were at least some instances where non-Afghan detainees, captured overseas, were held at Bagram and *not* sent to Guantánamo. In 2006, *habeas* petitions were filed by three men at Bagram — one captured in Thailand, one in Dubai, and one in Pakistan — none of whom was Afghan.

## The Deaths of Detainees Mullah Habibullah and Dilawar at Bagram in December 2002

Documented incidents of abuse that took place in the detention process in the Afghan theater included: use of “compliance blows” on restrained detainees, use of pressure point control tactics to inflict pain, use of loud music to disorient detainees, sleep deprivation, routine hooding, military working dogs, shackling of detainees from their wrists to a ceiling to keep them standing so they couldn’t fall asleep, rough physical handling and medical exams during detainee in-processing, extended isolation, shackling for punishment, stress positions, male and female interrogators touching a detainee or acting toward a detainee in a sexual manner, physical assaults, and threats of physical assault.<sup>94</sup>

The Bagram Collection Point (BCP) was set up at the very beginning of 2002, in a giant old machine shop at Bagram. The uninterrupted space was vast, like a huge warehouse. It was more than 50 feet high and 300 feet long, with a cement floor. Detainees were held in what were essentially four to six pens, or cages, with each pen separated from one other by razor wire walls. Functionally, there were no walls, other than those of the razor wire. The razor wire was manipulated to form doors.

The door space, called a sally port, was where the MPs interacted with the detainees. In some instances, detainees were sometimes chained in standing positions for days at the sally port. Claus described the place as “Orwellian”:

You can smell it about 10 feet before you open the door. ... And then you open the door. We walked into a warehouse that stank worse than most people’s garbage cans that have been left out in the heat for three months. ... You get hit by these waves of stench. And then after three days you never notice it again.<sup>95</sup>

For the first year that Bagram operated, detainees there were told to remain completely silent except when being interrogated, likely because interrogators were concerned that detainees

would collude with one another. The typical punishment for speaking to a fellow detainee in the pen would be various stress positions or standing. Al Jazeera cameraman Sami al-Hajj said he was beaten upon entry at Bagram in 2002 and stripped naked while dogs barked and soldiers yelled.<sup>96</sup> He said he waited, for 10 days, in the cage with other detainees, with whom he was forbidden to talk.

There were four interrogation rooms at the BCP, which weren't soundproof, and there were several "isolation" rooms, where MPs could hold detainees for punitive measures or for isolation. The facility had no climate control and the windows were open so it was freezing cold in the winter and immensely hot in the summer. Toilets were 50-gallon drums cut in half and laid at the rear of each pen.<sup>97</sup> Detainees were forbidden from using drinking water to wash their hands after using the toilets. Well-behaved detainees would, every few days, be forced to pick up the drums and carry them outside to mix the contents with diesel fuel for incineration as the MPs were, at times, understaffed.

December 2, 2002, was notable for several reasons. On that day, Secretary Rumsfeld had, in his office at the Pentagon, approved a controversial list of harsh interrogation tactics for use in Guantánamo and even scrawled a note that questioned why detainees were only forced to stand for four hours at a stretch while he, himself, would voluntarily stand for eight hours a day. On the same day at the BCP, Mullah Habibullah, an Afghan whose innocence or guilt was never known, was found dead, hanging by his shackled wrists in an isolation cell. Habibullah had, by many accounts of his interrogators, been noncompliant. He had been disdainful of his captors and disrespectful and as a result had made himself a target of their anger and frustration. Habibullah's Army autopsy report indicated the cause of death had been a pulmonary embolism caused by blunt force trauma.<sup>98</sup> Most likely a blood clot, caused by severe injuries to his legs, had traveled to his heart blocking his blood flow. Less than a week later, another death occurred. Dilawar, the second man to die, had been held for days, and had, in fact, been approved for release. Dilawar was a 22-year-old Afghan taxi driver known by his single name. He had been picked up as he was driving passengers past a remote American base that had been under rocket attack just hours earlier. The members of the 377th MP Company would knee prisoners in their thighs for being unruly or disobedient, a powerful pressure point control tactic. By the time of his final interrogation with Joshua Claus, Dilawar's legs had been kicked mercilessly as he had hung from the doorway and he could barely walk. Dilawar was delirious, and believed his wife had died and that her ghost had come to the interrogation cell. Dilawar was so badly beaten that he could not adequately respond to questions, and Claus figured the inability to answer was an indication of guilt. Claus believed Dilawar, who was subsequently demonstrated to be an innocent taxi driver, had been practicing what was taught in Al Qaeda's training manual to resist interrogation techniques:

At this point in the interrogation I thought he was reverting back to Al Qaeda's training manual, of how to avoid interrogation. Have you heard of that? He did five out of the six things. Almost in a row: can't understand the interpreter, pretend you're sick, ask for special things, pretend you can't hear. He went through all those things. Turned out he got his ass beat and I didn't know.<sup>99</sup>

In 2001, investigators in Manchester, England, while searching the home of a suspected Al Qaeda operative, had discovered a crude manual that sought to instruct Al Qaeda recruits on how to

**“Dilawar’s legs were beaten so badly they had been ‘pulpified’; his injuries were similar to those that would have resulted from being run over by a bus, and would have required amputation had he survived.”**

avoid giving up intelligence during interrogations.<sup>100</sup> To interrogators, and policymakers back in Washington, it was touted as a document of immense significance, because it seemed to suggest Al Qaeda had developed techniques to resist what was in the Army Field Manual.<sup>101</sup> As valuable as it may have seemed, there were troubling assumptions made based upon it. What would have ordinarily been taken as normal behavior by a detainee, like denials, requests for help, or lack of comprehension, could now be construed as incriminating indicators of Al Qaeda membership.

After Claus finished his interrogation, Dilawar was taken away by MPs. As with Habibullah, he was found dead the next day, hanging by his shackled wrists in an isolation cell.<sup>102</sup> An Army pathologist reported that Dilawar's legs were beaten so badly they had been "pulpified;" his injuries were similar to those that would have resulted from being run over by a bus, and would have required amputation had he survived.<sup>103</sup> For reasons that remain unclear, it was not until April 2004 — the same month that the garish photos from Abu Ghraib splashed across American television sets, 16 months after the two deaths — that investigators even began to question officers who had served on the command staff at Bagram in late 2002.<sup>104</sup> A June 2004 Military Justice Field Report stated:

CPT was (and currently still is) the Company Commander of the 377th MP Co, which was deployed to Afghanistan in the fall of 2002. In December 2002, at Bagram Detention Facility, 2 Afghan detainees died while in the custody and control of US forces, specifically members of the 377th MP Co and an active duty MI Company, A Co, 519th MI Bn. The deaths were determined to be a result of blunt force trauma by various members of the 377th and 519th.<sup>105</sup>

The captain referenced in the report was Captain Christopher M. Beiring. In a sworn statement Army JAG then-Major Jeff A. Bovarnick recalled a November 26, 2002, meeting he had with captains Beiring and Wood, less than a week before Habibullah's death, when Major Bovarnick directed changes:

I remember a lot of friction between CPT Wood, MI Commander and myself and CPT Beiring, MP Commander, when I directed changes. CPT Beiring was a very weak commander, but he did not want responsibility for warming their food, getting them clean clothes, simple stuff that made sense. He was very resistant to changing anything. I worked with a couple of the MP Lieutenants, whose attitude was much better.<sup>106</sup>

Charges against Captain Beiring were later dropped.<sup>107</sup> As for Captain Wood, while the Army did have an interrogation school at Fort Huachuca in Arizona, and a field manual governing interrogations, few of the interrogators deployed to Bagram in Wood's unit had ever been trained at that school.<sup>108</sup> Even those who were trained were told to forget the Cold War-based training they had received and to forget what they knew when they arrived. Claus said:

Our first briefing was "this is nothing like you learned before! Everything you've learned is great basics, none of it is going to actually work." We were supposed to make interrogation books, you have different sections for you know, units information, things like that. We were told these things are absolutely useless don't even bother bringing them.<sup>109</sup>

The interrogators frequently forced detainees into stress positions, painful kneeling or squatting “daily” one later said in a sworn statement.<sup>110</sup> Sleep deprivation, referred to as sleep adjustment, lasted for up to 72 hours.<sup>111</sup> Coincidentally, or perhaps not, the 72-hour time frame for sleep deprivation was the same that the CIA permitted for sleep deprivation in its secret facilities.<sup>112</sup> The cruelest and most unusual part of sleep deprivation at Bagram was that it was enforced by MPs who simply chained the detainees to the doorframes by their wrists. It was in this position that Habibullah and Dilawar were both discovered. Sleep deprivation had morphed into forced standing. Army criminal investigator Angela Birt, who began investigating the deaths in 2003, described it this way:

**“To me it was a great big billboard: ‘Murder, Murder, Murder!’ You don’t accidentally hang someone from a ceiling and beat them to death.”**

The MPs were brutal, and they were brutal, we believed, as a function of being the arm of the MI [military interrogator] folks. The captain who was in charge of the 377 at the facility, Christopher Beiring, was previously branched MI. He had just gone to MP officer school before he deployed but his familiarity and his comfort zone was with the Military Intelligence mission. So when Captain Wood came in, she had a very strong personality. She told him what she wanted and he was very familiar with the MI mission and not so familiar with the MP mission. Well she asked to keep these guys awake. ... [T]hey were doing it at Kandahar in the STIF but they were not doing it by chaining people to the ceilings. They would just go by and say, hey, wake up. There was no physical violence. ...

The 377th was just lazy: they wanted to be able to keep these guys awake so they chained them in a standing position. And doing that you can cause deep vein thrombosis, just like you can get on an aircraft, and that was one contributing thing that killed one of the detainees. One of them had very serious thrombosis in his lower legs.<sup>113</sup>

The initial investigation into the deaths was stillborn. Notably, the MPs had convinced the first set of criminal investigators that the blows they had dealt to the legs of Dilawar and Habibullah were completely authorized and routine. Angela Birt was shocked investigators didn’t pursue it:

I’ll be really candid [the investigators] drank the Kool-Aid. They wrote reports saying these were authorized use of force and that these were accidental deaths. ... They really believed it was authorized, and I could never understand where they got that from. So many people at the prison had told them that it was authorized that they believed it. ...

To me it was a great big billboard: “Murder, Murder, Murder!” And it was on the death certificate: Homicide. And I didn’t understand how we got from there to “Oh, it was just an accident.” You don’t accidentally hang someone from a ceiling and beat them to death.<sup>114</sup>

Private William Brand was one of the MPs who caused Dilawar’s death by kneeling him repeatedly in the thigh. His court-martial panel found him guilty of maiming, assault, maltreatment and making a false statement, but the panel sentenced him to only a reduction



in rank. Brand was honorably discharged. Following the court-martial, a battalion commander who had sat on Brand's jury had been asked how he had viewed the defendant.

This individual was an American citizen who had been called up. ... He had volunteered, and when they called upon him to perform his duties in a time of war, he did it without question.<sup>115</sup>

One after one, military court-martial panels were reluctant to punish comrades who had been following the operating procedures in place and listening to the instructions of their leadership. At the court-martial of Private Damien Corsetti, Captain Wood, who had been granted prosecutorial immunity in exchange for her testimony, recounted constant efforts on her part to seek clarification on permissible interrogation techniques.<sup>116</sup> Wood said that sleep deprivation and stress positions were authorized.<sup>117</sup> Following the December 2002 deaths, in January 2003, Lieutenant Colonel Robert Cotell produced a memorandum describing "current and past" interrogation techniques used by CJTF-180 interrogators that included up to 96 hours of isolation, the use of female interrogators to create "discomfort" and gain more information, sleep adjustment, deprivation of light and sound in living areas, the use of a hood during interrogation, and mild physical contact.<sup>118</sup>

Cotell's memo approved the use of those techniques and recommended use of five additional techniques, including: "deprivation of clothing" to put detainees in a "shameful, uncomfortable situation"; "food deprivation"; "sensory overload — loud music or temperature regulation"; "controlled fear through the use of muzzled, trained, military working dogs"; and "use of light and noise deprivation."<sup>119</sup> Colonel Theodore Nicholas, Director of Intelligence for the Army's Task Force in Afghanistan, said in a sworn statement "I was aware of [the practice of shackling detainees] and observed at least one individual standing with his arms shackled and attached to the entrance door at waist level."<sup>120</sup> Precisely how high up the chain of command knowledge about the interrogation program went is unknown, but many of the MPs and interrogators saw senior officials visit their site on a regular basis. According to Claus,

We had dignitaries, generals. If anyone large came to Bagram they wanted to have a tour of us. ... And everyone's saying [OK] and then walking out. I had people sit in interrogations because they wanted to see them. ...

We would randomly see [Captain Wood] wandering through with eagles, stars, and in suits and ties. ... So I don't understand why people kept bitching at us saying we are evil. Everybody who was anybody in the world walked through that place.<sup>121</sup>

## **The Other Government Agency: The CIA and The Salt Pit**

The CIA had been granted sweeping new legal authority to hunt down, capture or kill suspected terrorists anywhere in the world in the wake of September 11, but the agency had virtually no trained interrogators. On September 12, 2001, the CIA had numerous polygraphers, psychological profilers, and agents highly skilled in debriefing defectors, but ever since Vietnam, the CIA had stayed away from interrogation.<sup>122</sup> An outside adviser to the CIA

said “they had very little experience with interrogation. When 9/11 hit, it was fifty-two-card pick-up.”<sup>123</sup>

Many inside the CIA had misgivings. “A lot of us knew this would be a can of worms,” according to a former operative who was involved. “It was going to get a lot uglier. We warned them, it’s going to be an atrocious mess. ... What are you going to do with these people? The utility of someone [like Abu Zubaydah] is at most six months to a year. You exhaust them. Then what?”<sup>124</sup> However, former CIA Acting General Counsel John Rizzo, who has spoken out in defense of the agency’s program, and to whom John Yoo addressed one of the now infamous Torture Memos, told Task Force staff that never — not once — did any member of the agency ever approach him to express concerns about its “enhanced interrogation program.”

What sustained me, it was the people who were involved, the lifers, the career CIA people who were involved in this program believed in it. And they were not myopic, they knew as it was getting increasingly controversial, that they were likely going to wind up in investigation, and recriminations. ... [T]hey knew all that. And yet they were steadfast in believing in the value of the program.<sup>125</sup>

At least some within the CIA were uncomfortable, as internal complaints about the program triggered a highly critical 2004 report from the agency’s inspector general.

CIA detainee operations in Afghanistan must be examined separately from those run by the military. The CIA is believed to have operated under “different rules” and at a different site or sites, at least one of which, based in Kabul, came to be called the “Salt Pit.” Initially CIA operations were disorganized and impromptu but later became more systematic. Accounts of former detainees subjected to CIA renditions between the years 2002 and 2005 showed standardized treatment during transfer.<sup>126</sup>

In most cases, the detainee was stripped of his clothes, photographed naked, and administered a body cavity search (rectal examination). Some detainees described the insertion of a suppository at that time. The detainee was then dressed in a diaper. His ears were plugged, headphones were placed on his head, he was blindfolded or provided black goggles, and his head was wrapped with bandages and adhesive tape. The detainee’s arms and legs were shackled and he was put into the transportation vehicle.<sup>127</sup>

Five former members of the Libyan Islamic Fighting Group (LIFG) told Human Rights Watch they were detained in prisons run by the CIA in Afghanistan for between eight months and two years. Abuse there allegedly included

being chained to walls naked sometimes while diapered in pitch dark, windowless cells, for weeks or months at a time; being restrained in painful stress positions for long periods of time, being forced into cramped spaces; being beaten and slammed into walls; being kept inside for nearly five months without the ability to bathe; being denied food and being denied sleep by continuous, deafeningly loud Western music.<sup>128</sup>

**“So I don’t understand why people kept bitching at us saying we are evil. Everybody who was anybody in the world walked through that place.”**

Significantly, the Salt Pit appears to have been a hub of the CIA program, and many high-value detainees transitioned through the Salt Pit, at one point or another. CIA detainees were often released and given to the military when the CIA was done with them or convinced they were not a threat. Often the CIA handed over detainees without information about the detainee.

The military had to not only deal with detainees from the CIA, ubiquitously referred to as “Other Government Agency” or OGA, but also from their own special forces. Detainees from U.S. special forces were constantly dropped off, often times without disclosing their names or what they were doing there. “Capture tags” — tags that identified information about a detainee — were often missing. Military interrogators came to believe that many had been innocent “dirt farmers” and shouldn’t have been picked up in the first place. As to the actions of any OGA, the Church Report executive summary sought to make clear the actions of any such agency were beyond the scope of its report:

[I]t was beyond the scope of our tasking to investigate the existence, location or policies governing detention facilities that may be exclusively operated by OGAs, rather than by DoD however senior [DoD] officials expressed clear expectations that DoD-authorized interrogation policies would be followed during any interrogation conducted in a DoD facility.<sup>129</sup>

As in the official military detention system, deaths occurred in the CIA’s program. At least one man died at the Salt Pit: Gul Rahman. a suspected Afghan militant, died on November 20, 2002, three weeks before Dilawar and Habibullah were killed at Bagram. Rahman was kept in chains outside the Salt Pit overnight as temperatures near Kabul dipped to freezing. The subsequent forensic exam on Rahman determined he had frozen to death.<sup>130</sup>

Rahman’s death is not the only known death in the CIA system. David Passaro, a CIA contractor, beat Abdul Wali at a U.S. base in Kunar Province until Wali died on June 21, 2003. Passaro was charged and convicted of felony assault with a dangerous weapon and three counts of misdemeanor assault, for which he was sentenced in 2006 to eight years and four months in prison. Passaro was assisted in his interrogation by nearby soldiers from the 82nd Airborne Division. While the beating and death of Wali was not linked to the CIA’s approved “enhanced interrogation program,” the federal appeals court reviewing Passaro’s conviction described “Passaro’s brutal attack” “as including repeatedly throwing Wali to the ground, striking him open handed, hitting him on the arms and on the legs, with a heavy Maglite type flashlight.”<sup>131</sup> The interrogation was videotaped by a soldier named “Sgt. Sellers” but the taping stopped, Sellers testified, when Passaro pushed Wali against a wall.<sup>132</sup> Two days prior, Passaro had told the military guards “to maintain Wali in a series of ‘stress positions’<sup>133</sup> Significantly, Passaro “told the guards that while they could not strike Wali, he had different rules which permitted him to administer any force so long as it was not life threatening.”<sup>134</sup> On June 21, two days after Wali’s interrogation had begun, Wali collapsed. Passaro kicked him one final time while he lay there, and Wali was pronounced dead 20 minutes later.<sup>135</sup>

Passaro remains the only individual affiliated with the CIA to have been charged for misconduct in connection with detainees. On August 30, 2012, Attorney General Eric Holder announced the completion of an investigation into the deaths of two individuals in U.S. custody overseas. The investigation, by Assistant U.S. Attorney John Durham, resulted in no subsequent prosecutions of any CIA officials.<sup>136</sup>

## The Development of the Counterinsurgent Strategy (COIN)

Following Abu Ghraib, a series of examinations and reports were initiated. The Jacoby Report, mentioned earlier in this chapter, solely focused on Afghanistan. It recommended that only qualified school-trained interrogators (from Fort Huachuca) conduct interrogations. The report found allegations of detainee abuse had been substantiated.<sup>137</sup> It found that a “lack of thoroughly authorized, disseminated, and understood guidance and procedures create opportunities for detainee abuse and the loss of intelligence value throughout the process.”<sup>138</sup> The problem, as the report saw it, was with low-level troops: “While there was a near universal understanding in [the Combined Joint Task Force] that humane treatment was the standard by which detainees would be treated, guard awareness and application of standard operating procedures (SOP) was lacking.”<sup>139</sup> The report also found:

Improved interrogation training leading to the certification of all interrogators will improve intelligence gathering and dissemination of actionable intelligence as well as improve the detainee screening process. Interrogators need training on Afghan culture, traditions and history to be able to get the most intelligence from detainees. Additionally, combat commanders at all levels need training on interrogation and detainee chain of custody to ensure that unit actions do not interfere with or negatively affect the interrogation of detainees.<sup>140</sup>

An enclosure to the Jacoby Report is a March 26, 2004, memorandum from CJTF-180 to an unknown distribution list. The subject line of the memo read “CJTF-180 Authorized Interrogation Approaches and Strategies.”<sup>141</sup> The purpose of the memo was to “identify approved interrogation techniques and strategies to be used at Battlefield Interrogation sites throughout the CJTF-180 AOR and at the Joint Interrogation Facility located in Bagram, Afghanistan.”<sup>142</sup> It referenced three sources: the Army Field Manual; a memo on counter-resistance techniques in the “War on Terror” dated April 18, 2003; and “Working Group on Detainee Interrogations in the Global War on Terrorism (GWOT),” dated January 15, 2003. The Jacoby Report’s enclosure demonstrates that the Pentagon’s Working Group memo, which had generated considerable controversy within the Pentagon [see Chapter 1], had indeed made its way to the troops in the field in Afghanistan.

After 2004, treatment of detainees improved at Bagram, though conditions remained primitive and legal processes and reviews remained largely inadequate. In March 2005, the Church Report was completed and released. Its focus was to investigate whether DOD had promulgated interrogation policies that had directed, sanctioned or encouraged the abuse of detainees. At least in the public unclassified summary, the report found DOD had not done so; it “found no link between approved interrogation techniques and detainee abuse.”<sup>143</sup>

Significantly, nothing in our investigation of interrogation and detention operations in Afghanistan or Iraq suggested that the chaotic and abusive environment that existed at the Abu Ghraib prison in the fall of 2003 was repeated elsewhere.<sup>144</sup>

As discussed above, the complete report remains classified; however, references to the classified

report appear in other publicly available documents and it appears the classified report may, if not contradict, at least undermine, some of the findings in the unclassified executive summary.

Even from the Church Report's executive summary, it was clear interrogation policy was fluid and constantly changing. To that point however, the report nonetheless found that

[e]ven if interrogators were "confused" by the issuance of multiple interrogation policies within a short span of time, as some have hypothesized regarding Abu Ghraib, it is clear that none of the approved policies — no matter which version the interrogators followed — would have permitted the types of abuse that occurred.<sup>145</sup>

Of pressure being placed on interrogators to gain actionable intelligence, the Church Report stated:

Finally, there has been much speculation regarding the notion that undue pressure for actionable intelligence contributed to the abuses at Abu Ghraib, and that such pressure also manifested itself throughout Iraq. It is certainly true that "pressure" was applied in Iraq through the chain of command, but a certain amount of pressure is to be expected in a combat environment.<sup>146</sup>

The report didn't find fault solely with individual actors. It also found blame with unit leadership: "there was a failure to react to early warning signs of abuse" and "a breakdown of good order and discipline in some units could account for other incidents of abuse." "As documented in previous reports (including MG Fay's and MG Taguba's investigations), stronger leadership and greater oversight would have lessened the likelihood of abuse."<sup>147</sup>

After taking office, President Obama issued an executive order calling for review and reform of detainee operations.<sup>148</sup> In 2009, U.S. Special Envoy for Afghanistan Richard Holbrooke invited Marine Major General Doug Stone to examine the Afghan detention system.<sup>149</sup> General Stone, as also discussed in Chapter 3, had been widely praised for changing the detention methods used in Iraq in 2007 and 2008, focusing on the rehabilitation and reintegration of detainees in Iraq during "The Surge." At Holbrooke's request, Stone launched a review of the Afghan system. In 2008, U.S. forces were struggling with transferring prisoners from the crude and overcrowded Bagram facility into Afghan prisons.<sup>150</sup> General Stone observed to Task Force staff that Bagram was "inappropriate, there were supply cages packed with guys."<sup>151</sup>

Moreover, Stone estimated that of the 600 detainees at Bagram in 2009, two-thirds should not be in custody.<sup>152</sup> Specifically, he reported that two out of every three detainees were either innocent or posed no security threat. Stone provided an extensive report on suggested changes to the detention program in Afghanistan.

That same year a new facility replaced Bagram, called the Detention Facility at Parwan (DFIP), which is today considered a vast improvement, at least insofar as its physical plant and facilities are concerned. The new facility has large cells, temperature-controlled facilities, a soccer field, and classrooms.<sup>153</sup> As of the date of this report, the volume of detainees churning through DFIP remains large. In June 2011, it was estimated that over 1,700 detainees were in custody at Parwan, up from over 600 at the end of the Bush administration.<sup>154</sup> The numbers

increased from 1,100 detainees in September 2010 to 3,110 detainees in March 2012.<sup>155</sup> By contrast, in 2004 there had been just 100 detainees at Bagram.<sup>156</sup>

In 2006 and 2007, both civilian casualties from U.S. airstrikes and the detainee population in Afghanistan rose significantly, which led to a backlash from the civilian population.<sup>157</sup> An upsurge in arrests within a short period — giving the impression of indiscriminate captures — continued to directly cause a decline in local support for the presence of U.S. troops.<sup>158</sup> The crucial lesson was that detention facilities were inseparable from the kinetic battlefield. According to General Stone, the attacks on hotels and guesthouses in Afghanistan in October of 2009 (leading up to the presidential election on November 7 between Hamid Karzai and Abdullah Abdullah), were planned from within detention facilities.<sup>159</sup>

They are planning operations from the inside. That actually clearly happens in Iraq prisons, [and certainly] in Afghan prisons. That was one of the major observations that I made while over there, that most of the operations, most of the major bombings in the hotels, etc., were being planned for and run by detainees.”<sup>160</sup>

In his 2009 review of Afghanistan operations, General McChrystal recognized detainee operations as a key component of the U.S. strategy for success in Afghanistan. As to detainee operations, the report seemed to draw from the perceived lessons and successes of General Petraeus and General Stone in Iraq.

As always, the detention process must be effective in providing key intelligence and avoid ‘catch and release’ approaches that endanger coalition and [Afghan National Security Forces] ANSF. It is therefore imperative to evolve to a more holistic model centered on an Afghan-run system. This will require a comprehensive system that addresses the entire “life-cycle” and extends from point of capture to eventual reintegration or prosecution.<sup>161</sup>

Currently, Taliban and Al Qaeda insurgents represent more than 2,500 of the 14,500 inmates in the increasingly overcrowded Afghan Corrections System (ACS). These detainees are currently radicalizing non-insurgent inmates and worsening an already over-crowded prison system. Hardened, committed [I]slamists are indiscriminately mixed with petty criminals and sex offenders, and they are using the opportunity to radicalize and indoctrinate them. In effect, insurgents use the ACS as a sanctuary and base to conduct lethal operations against GIRoA [government of the Islamic Republic of Afghanistan] and coalition forces (e.g., Serena Hotel bombing, GIRoA assassinations, governmental facility bombings). . . .

The U.S. came to Afghanistan vowing to deny these same enemies safe haven in 2001. They have gone from inaccessible mountain hideouts to recruiting and indoctrinating hiding in the open, [sic] in the ACS. There are more insurgents per square foot in corrections facilities than anywhere else in Afghanistan.<sup>162</sup>

The report warned:

Detention operations, while critical to successful counterinsurgency operations,

also have the potential to become a strategic liability for the U.S. and ISAF [International Security Assistance Force]. With the drawdown in Iraq and the closing of Guantánamo Bay, the focus on U.S. detention operations will turn to the U.S. Bagram Theater Internment Facility (BTIF). Because of the classification level of the BTIF and the lack of public transparency, the Afghan people see U.S. detention operations as secretive and lacking in due process.

The desired end-state, McChrystal reported,

is the turnover of all detention operations in Afghanistan, to include the BTIF, to the Afghan government once they have developed the requisite sustainable capacity to run those detention systems in accordance with international and national law. This will empower the Afghan government, enable counterinsurgency operations, and restore the faith of the Afghan people in their government's ability to apply good governance and Rule of Law with respect to corrections, detention, and justice.<sup>163</sup>

In his 2013 memoir, General McChrystal recalled his frustration and the steep learning curve that existed in managing detainee operations from the previous decade.

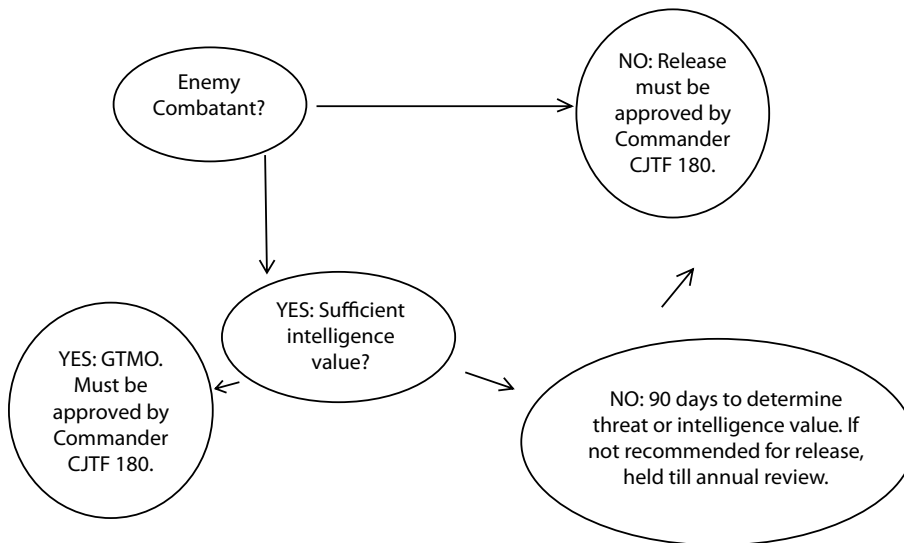
I reemphasized my concern that we suffered from a shortage of trained interrogators. ... The interrogator shortage wasn't [General] George Casey's fault or a problem he could solve, and I knew that. Half a dozen corners of the military — from the Pentagon to the services to training centers — had a part in producing and fielding a professional interrogator. ... On 9/11, our shortage was understandable. By 2005, it was indefensible.<sup>164</sup>

Of his own inexperience in detainee operations, McChrystal recalled:

I was one of the leaders who lacked experience in detainee custody and exploitation. I had studied history and understood the theory but had never done anything remotely like running a prison. My peers and subordinates were similarly positioned.<sup>165</sup>

McChrystal declined several invitations from the Task Force to be interviewed about Afghanistan and Iraq.

The military's procedures for reviewing detention decisions in Afghanistan, the then-called Detainee Review Boards (DRBs), underwent a series of changes in September 2009. The United States revamped release procedures of the re-christened DRBs to hasten release of detainees from the swelling facilities.<sup>166</sup> The DRBs had evolved since the beginning of the war. From the beginning of the war in Afghanistan until January of 2010, detention operations in Afghanistan were under the control of tactical level command.<sup>167</sup> The initial structure (from 2002 to 2005) is sketched in the diagram below:<sup>168</sup>



*Note: The decision to release had to be approved by the Commander of CJTF-180, whereas no such requirement existed if a detainee were held. Detainees were not present during, or notified of, the board review.*

In 2005, the boards were renamed Enemy Combatant Review Boards (ECRBs), and again in 2007 the review boards were re-branded Unlawful Enemy Combatant Review Boards (UECRBs).<sup>169</sup> These cosmetic changes to the title of the review boards, to polish and rebrand, were also accompanied by some structural and procedural advances. Detainees were notified of their review. Detainees could attend the first review and read a statement to the board. They were still not questioned by board members, nor did they have a representative. Each case was to be reviewed every six months with the detainee invited only for the first meeting.<sup>170</sup> Those found to be Low Level Enemy Combatants (LLEC) would be referred to the Detainee Assessment Board for prosecution, if there was sufficient evidence, through the Afghan criminal justice system. If there was not sufficient evidence for a trial, the detainees continued to be held in U.S. interment facilities.<sup>171</sup>

The DRB's post-2009 procedures govern detention operations under the U.S. military command, USFOR-A (U.S. Forces, Afghanistan), and not the International Security Assistance Force (ISAF). USFOR-A is subject to the AUMF (Authorization for Use of Military Force) and international laws of war for its authority and accountability. While ISAF is authorized through a U.N. Security Council resolution and has 78,430 U.S. troops under its mandate, USFOR-A is the continuation of Operation Enduring Freedom (OEF) and has 17,000 U.S. troops under its command.<sup>172</sup> Along with the new procedures, the reform introduced a new command to control detention operations under USFOR-A, Joint Task Force 435 (or, more formally, Combined Joint Interagency Task Force-435) (CJIAF-435). Under the new procedures, detainees were given a representative throughout the process, received timely notifications, were able to attend hearings, call witnesses, and question government witnesses.<sup>173</sup> Once captured, a detainee could be held for 14 days before being assigned an interment serial number (ISN) and the Red Cross given access. The DRB hearing had to take place within 60 days of capture. A personal representative (PR) was to be assigned within 30 days and the PR was to meet with the detainee to explain the process and read the unclassified version of the file.<sup>174</sup>



Conversely, combatants captured by ISAF had to be turned over to Afghan authorities within 96 hours of capture. However, U.S. forces under ISAF have extended their timeframe for transfer to within 14 days of capture.<sup>175</sup> The improved procedures were designed to reduce the detainee population and legitimize the surviving practices.<sup>176</sup> One lieutenant colonel reviewing the new detention operations observed: “The considerable effort made to bring live witnesses to the DRBs, at least anecdotally, has also spread the word throughout Afghanistan that the DRB process is fair and legitimate and, perhaps more importantly in light of past missteps, that the treatment of the detainees in the new DFIP is exceptional.”<sup>177</sup>

According to at least some human rights organizations with access to detention facilities, the procedures still have problems. While there have been substantial improvements, it is argued that detainees still lack a meaningful opportunity to challenge the evidence against them.<sup>178</sup> After observing several DRB sessions, Human Rights First reported: “Not a single witness was called to testify in any of the hearings observed. In some cases, the evidence against the detainee appeared to be as thin as a mere claim by U.S. soldiers that they found bomb-making materials in a house nearby. No public evidence was presented connecting the individual detainee to that house.”<sup>179</sup> However, according to another study of the DRBs, there were 411 live testimonies and 125 phone testimonies from March 6, 2010, through June 30, 2010, alone.<sup>180</sup> The difference in these observations could be due to the fact that the majority of the DRBs do not involve witness testimony. Another criticism is of the “personal representatives” appointed for the detainees. Some allege these military officers, not attorneys, failed to effectively question the evidence presented through the detainees’ files. “The result, in cases we observed, is that these representatives appeared to do little or nothing on behalf of the detainees.”<sup>181</sup> While there is a classified portion of the review, which neither the detainee nor human rights organizations can attend, the perception the public hearings create undermines the effort to establish legitimacy through the “rule of law.”<sup>182</sup> There is a prohibition against using information obtained through torture; however, when the statements and identities of witnesses are classified, there is no mechanism for discerning which statements are elicited through cruel and inhumane treatment, which statements are given because of personal grudges, and which statements resulted from erroneous information.

Finally, the Task Force has learned that there are a number of detainees cleared for release by the DRBs who remain in detention because DRBs do not have the ultimate authority over releases.<sup>183</sup> A Pentagon spokesman, Lieutenant Colonel Todd Bresseale, told Task Force staff in an email exchange that if a detainee is a third-country national, it is the deputy secretary of defense who has the authority to approve the transfer or release, following a thorough assessment of the security and humanitarian conditions in the detainee’s home country and after receipt of appropriate diplomatic assurances. In such cases, the Pentagon even consults with members of Congress prior to release. According to Bresseale, members of Congress are consulted “as appropriate” following release determinations made in the case of third-country nationals.

General Stone’s other detention policies from Iraq migrated to Afghanistan at the same time changes occurred in the DRB process.<sup>184</sup> First, determined to move away from mass housing in favor of segregation of hardliners from those who could be rehabilitated, Stone recommended overhauling release procedures aimed at increasing the rate of release, thereby strengthening the rule of law through transparency and engagement.<sup>185</sup> Detention centers and commanders began to focus on distinguishing the irreconcilables, those constituting an ongoing threat, from individuals who could be rehabilitated. Detainees who could be de-radicalized were presented

with greater security and in-prison programs for rehabilitation. The release boards were revamped to allow for timely release in conformity with the rule of law. Finally, the coalition forces invested in long-term development of the local criminal justice mechanisms. The task was and remains enormous.

The prisoners would have access to vocational courses, be taught by local imams about moderate Islam, and be allowed visits by their family members.<sup>186</sup> Additionally, the military introduced pay-for-work programs to provide a source of income for detainees and develop their trade skills. These skills were a tool for reconstruction and a source of economic security for the detainees upon their release.<sup>187</sup>

The social programs from Iraq extended to Afghanistan in 2009. An Afghan instructor, who taught the first class of detainees at Parwan about health and identifying prevalent diseases, said “there was good communication between [them]” and that “the participants seemed very interested.”<sup>188</sup> The detainees were also instructed on geography, government, civics, and trade skills such as tailoring, agriculture and baking.<sup>189</sup> The long-term success of these programs has yet to be measured, and once the detainees are released and re-enter Afghan society, they may continue to face serious problems [see Chapter 8]. Dr. Sima Samar (chairperson of the Afghanistan Independent Human Rights Commission) said on the occasion of the release of the Fifth Report on the Situation of Economic and Social Rights in Afghanistan, “[Given] the volume of assistance and commitments made by the Afghanistan government over the past several years, economic and social rights has not improved with satisfactory [sic] and even in some areas shows regression.”<sup>190</sup> However, the survey conducted by CJIATF-435 of the first group of Parwan detainees who went through the newly instituted programs found a recidivism rate of just 1.2 percent. “CJIATF-435 assesses that reintegration programs are working to prevent previously detained individuals from rejoining the insurgency.”<sup>191</sup> The recidivism rate has dropped to below 1 percent, according to the 2012 report.<sup>192</sup>

## The Future of Detention in Afghanistan and the U.S. Role

The ongoing insurgency continues to provide daunting challenges. As 2012 wound down, Washington was engaged in intense discussions as to what kind of presence the U.S. would have in Afghanistan after the 2014 date for the withdrawal of most American troops. The proposals ranged from having a large civilian (*i.e.*, diplomatic), presence with a few thousand troops to as many as 14,000 troops.<sup>193</sup> The Task Force sought to interview U.S. military officials in Afghanistan. Mid-level officials initially indicated we would be shown the Parwan facility as well as be briefed or even sit in on sessions of a DRB hearing, which prisoners are afforded every six months to see if they are eligible for release. But Lieutenant General Keith Huber, who commanded the military detention operations in Afghanistan in late 2012, formally declined to permit Task Force staff to tour the Bagram facilities. Entreaties from two retired three-star generals asking him to reconsider were unavailing. A spokesman for Huber said the reason for denying the Task Force’s request was that the U.S. military was getting out of the detention operation business, which was being turned over to Afghan military and government authorities. There exists considerable evidence that total disengagement by the United States from detention operations in Afghanistan is largely a fiction.

The insurgency provides a mechanism for dispute resolution and accountability, thereby

undermining efforts of the official government of Afghanistan. As General McChrystal noted in his 2009 assessment: “They appoint shadow governors for most provinces, review their performance, and replace them periodically. They establish a body to receive complaints against their own ‘officials’ and to act on them.”<sup>194</sup> One step toward realizing the sovereign rule of the Afghan government was ISAF-mandated transfer of prisoners to Afghan custody. Despite recognition of the fundamental importance of supporting the Afghan government as the primary, effective and legitimate sovereign in Afghanistan by means of transferring responsibility of detainee operations, efforts to reform the system met with resistance as ISAF attempted to overcome decades and decades of entrenched, chronic problems.

In 2005, a Government Accountability Office (GAO) report titled *Afghanistan Security* identified ongoing challenges in training and preparing Afghan forces to assume control:

A number of difficult conditions hamper the effort to rebuild the police in Afghanistan. Newly trained police often return to community police stations staffed by poorly trained, illiterate conscripts or former militia members who have little loyalty to the central government. According to State/and Defense officials, many of the untrained officers remain loyal to local militias in an environment dominated by ethnic loyalties. Working with untrained colleagues, newly trained policemen often find it difficult to apply the principles they learned during training. For example, according to several DynCorp trainers, some recently trained police were forced to give their new equipment to more senior police and were pressured by their commanders to participate in extorting money from truck drivers and travelers.<sup>195</sup>

The two-week training program with limited follow-up visits in the field proved inadequate for the circumstances faced by the newly trained police.

In March of 2012, the Obama administration reached an agreement to transfer control of the Parwan Detention Facility to Afghanistan. “It is a matter of pride for us to acquire responsibility for the prison,” Nasrullah Stanikzai, the legal adviser to President Hamid Karzai said.<sup>196</sup> The formal ceremony to mark the transfer of control went ahead as scheduled on September 10, but the U.S. continued to control hundreds of detainees in the facility.<sup>197</sup> As of September 2012: some 600 new detainees remained under U.S. control, along with nearly 30 of those originally slated for transfer. The ongoing tension about the 30 or so originally slated for transfer stems from whether Afghans would continue to hold those 30 without trial, as the U.S. had demanded and stipulated under the transfer deal.<sup>198</sup>

The day after *The New York Times* reported that the United States would have a continuing role in Afghanistan detention operations after the planned September 2012 handover,<sup>199</sup> a report from the Open Society Foundations suggested there had been fundamental misunderstandings between the two sides as to the detention relationship moving forward:

Though numerous Afghan officials have told Open Society Foundations researchers that they believe Afghan internment will come to an end in September 2012, when they assume the detention transition will be complete, U.S. statements and actions suggest otherwise. U.S. forces have continued to capture individuals in military operations and detain them on the “U.S. side”

or part of the DFIP since the transition process began in March 2012, adding around 600 detainees to the facility. So even though they have almost completed the transfer of the 3100 that were being held in March, these additional captures and detentions make it all but impossible for them to meet the Afghan government expectation of a full handover of the facility.<sup>200</sup>

The Afghan national security advisor, Dr. Rangin Dadfar Spanta, has said: “We cannot allow allies and friendly countries to have detention centers here. This is illegal.”<sup>201</sup> The United States has used internment in Afghanistan for many years since September 11, detaining persons rather than accusing them of a crime and placing them on trial. Afghanistan today remains an operational environment for American troops who continue to conduct raids and make arrests. There exists the risk that detainees could be freed only to come back and later stage attacks. The Afghan government, in cooperation with the United States, created its own internment regime, closely resembling the U.S. system in order to facilitate the transfer of detainees interned by the U.S. military. Though the Afghan government has chosen to transfer many detainees to a criminal court, more than 50 are being held by the Afghan government without charge or trial through this new internment power. Senior Afghan officials told the Open Society Foundations they believed the new system was unconstitutional.

**“...more than half of the 635 detainees interviewed for the report (326 detainees) had experienced torture and ill-treatment.”**



While visiting Afghanistan in November 2012, sources told Task Force staff that U.S. troops were continuing to arrest about 100 Taliban suspects a month in nighttime raids and bringing them to DFIP. Some journalists have refused to call the detention facility at Parwan by its “new” name because they say it was only created as an inventive way to try to disown the bad reputation that lingered from the BCP. The rate of prisoners taken in the nighttime raids in November 2012 was about the same as the rate that has prevailed over the last two years. The raids have been a source of great friction among the Afghan population.<sup>202</sup> Task Force staff spoke with recent prisoners taken in nighttime raids and they offered a familiar story of sudden and unjustified raids on their rural homes, after which they were taken by helicopter to Parwan. While these former prisoners complained about what happened, they did not say they were mistreated at the prison, a marked change from detainee accounts in earlier years.<sup>203</sup>

Additionally, adding to the complexity of the political problem, concerns remain about the Afghan commitment to the legal rights of prisoners held in Afghan-run facilities. An Afghanistan Independent Human Rights Commission report in March 2012 found evidence of torture in nine separate Afghan NDS facilities.<sup>204</sup> (The National Directorate of Security, or NDS, is Afghanistan’s intelligence agency.) Afghan prisoners were beaten, suspended from the ceiling, subjected to electric shock, and sexually abused in order to secure confessions or to elicit other information.<sup>205</sup> In September 2012 Afghan President Hamid Karzai announced the appointment of Asadullah Khalid as the new head of the NDS. Khalid has been accused of running an unauthorized secret prison in Kandahar where torture was routine.<sup>206</sup> NATO forces had stopped transferring captured combatants to Afghan facilities in September 2011, following the U.N.’s findings of systematic abuse and torture in those facilities. Transfers resumed on a conditional basis in February 2012, after NATO forces extended training and reform to Afghan facilities.<sup>207</sup> A January 2013 report from the U.N. found “multiple credible and reliable incidents of torture and ill-treatment” across different Afghan detention

facilities.<sup>208</sup> The report went on to say there existed “sufficiently credible and reliable evidence” that more than half of the 635 detainees interviewed for the report (326 detainees) had experienced torture and ill-treatment.”<sup>209</sup>

Furthermore, non-Afghan detainees, third-country nationals, held at DFIP represent yet another major unresolved issue. Little is publicly known about the 50 or so third-country nationals currently held without charge at DFIP. The September 2012 Open Society Foundations report noted that “[g]iven the lack of progress thus far in repatriating, releasing, or resettling these detainees, many are at risk of falling into the kind of indefinite detention limbo reminiscent of Guantánamo Bay.”<sup>210</sup> President Obama in 2008 pledged to close Guantánamo, and while no detainees have been brought to Guantánamo since that time, it is unknown how many, if any, of the 50 or so third-country nationals currently at Parwan have been captured and kept at DFIP since transfers to Guantánamo became politically untenable in the United States. DFIP may have served, and may still be serving, as a Guantánamo Bay substitute, a place where individuals may be held indefinitely, since its completion in 2009.

Domestic political sensitivities in the United States are still at play. Congress imposed restrictions on the Obama administration’s ability to transfer detainees from Guantánamo, and the U.S. military likely does not want its hands to be similarly tied in Afghanistan.<sup>211</sup> Republican lawmakers recently criticized a decision to turn over to Iraqi custody a detainee accused of helping to kill American troops during the Iraq war.<sup>212</sup> The Republican chairmen of the House Armed Services Committee and the House Judiciary Committee released a press statement on August 3, 2012, critical of the administration’s decision to turn over the Iraqi to Iraq’s security forces before the withdrawal of U.S. forces in Iraq, and urged the administration “to extend all efforts to ensure that this tragic mistake is not repeated with terrorists currently in U.S. custody in Afghanistan.”<sup>213</sup> Sen. Lindsay Graham supported closing the detention facility at Guantánamo Bay in 2009, but no longer believes it is feasible to do so. As he told Task Force staff:

So I’ve embraced the fact that we’re not going to close GITMO; let’s use it. You’ve got people at Bagram — you got 52 third country nationals, something like that, somewhere around 50 third country nationals that are not Afghans, they gotta go somewhere. And all of them are not gonna be repatriated back to their host country for different reasons. And Afghanistan is not going to be the U.S. jailer forever ... so we need to do something with those folks.<sup>214</sup>

On November 19, 2012, Karzai ordered Afghan forces to take control of the Parwan facility and accused American officials of violating its agreement to hand over the facility.<sup>215</sup> In March 2013, Karzai announced that his government might unilaterally act to take control of the prison if there were further delays in the Parwan handover. Karzai later agreed to give the United States another week. Given the repeated missed deadline as of the writing of this report, there appears to be no end in sight to the U.S. role as a jailer in Afghanistan. Unresolved, the continued detention of “enemy combatants” in Afghanistan or Guantánamo leaves the United States and its allies vulnerable to criticism.

# Iraq

*When the Abu Ghraib photographs were released, U.S. officials were, appropriately, horrified. They quickly promised a full investigation which would result in bringing the perpetrators to justice.*

*President George W. Bush told an Arabic-language television station that “people will be held to account. That’s what the process does. That’s what we do in America. We fully investigate; we let everybody see the results of the investigation; and then people will be held to account.”*

*Secretary of State Colin Powell described telling foreign audiences:*

*Watch America. Watch how we deal with this. Watch how America will do the right thing. Watch what a nation of values and character, a nation that believes in justice, does to right this kind of wrong. Watch how a nation such as ours will not tolerate such actions. . . . [T]hey will see a free press and an independent Congress at work. They will see a Defense Department led by Secretary Rumsfeld that will launch multiple investigations to get to the facts. Above all, they will see a President — our President, President Bush — determined to find out where responsibility and accountability lie. And justice will be done.*

*Secretary of Defense Donald Rumsfeld also said the soldiers’ actions were completely unauthorized, and promised a full investigation. He testified to Congress that troops’ “instructions are to, in the case of Iraq, adhere to the Geneva Convention. The Geneva Conventions apply to all of the individuals there in one way or another.”*

*There were multiple investigations into the abuses at Abu Ghraib, and many of the soldiers involved were prosecuted. Seven military police (MPs), two dog handlers, and two interrogators were convicted of abusing prisoners. Corporal Charles Graner received the longest sentence: 10 years in prison, of which he served over six. Sergeant Ivan “Chip” Frederick was sentenced to eight years, and served three. But not every photograph resulted in a conviction, or even a prosecution. Army investigators determined that many photographs were too closely tied to military intelligence techniques that were, if not strictly authorized, “standard operating procedures.”*

*Abuses in Iraq were not restricted to Abu Ghraib. But attempts to prosecute abuses in other Iraqi prisons*

*were even less successful, due to a lack of resources for investigators and widespread confusion about the rules for prisoner treatment. This was particularly true in cases of “ghost” detainees held by the CIA or by a secretive Joint Special Operations Command (JSOC) task force, known over time as Task Force 20, Task Force 121, Task Force 6-26, and Task Force 143. The JSOC task force was part of a highly classified Special Access Program, which reported to a different chain of command from other U.S. forces in Iraq and was subject to different rules. Contrary to Rumsfeld’s congressional testimony, the task force did not consider detainees in its custody entitled to the protections of the Geneva Conventions. Neither the International Committee of the Red Cross (ICRC) nor most criminal investigators had access to its detention facilities. Two witnesses, retired Air Force Colonel Steven Kleinman and retired Army interrogator Colonel Stuart Herrington, described their attempts to report and stop abuses by JSOC troops at a detention facility at Baghdad International Airport in interviews with Task Force staff. They were both unsuccessful — and in Kleinman’s case, he was threatened as a result.*

# Special Forces and the CIA

## The Battlefield Interrogation Facility

According to a comprehensive report by the Senate Armed Services Committee, the first reports of abuses by the JSOC task force in Iraq came from the Iraq Survey Group (ISG), formed in June 2003 to look for evidence of weapons of mass destruction in Iraq. As part of that effort, the ISG interrogated high-value prisoners at a facility near Baghdad International Airport. Many had been captured by the JSOC task force or the CIA.

A civilian employee of the Department of Defense (DOD) who ran the high-value detainee interrogation center, identified in one DOD inspector general's report as "Mr. Q,"<sup>1</sup> said he first heard about abuses by JSOC forces in the first week of June 2003, when a military interrogator told him that a detainee she was interrogating had alleged physical abuse by task force personnel.<sup>2</sup> By the middle of June, Q told investigators, the abuse reports had become "a pattern." He relayed a report from a British interrogator in the last week of June about a detainee whose "back was almost broken, his nose was probably broken, and he had two black eyes, plus multiple contusions on his face."<sup>3</sup>

Q reported these allegations to Major General Keith Dayton, the commander of the Iraq Survey Group. Dayton said the interrogation center chief had described the abuses as "a disaster waiting to happen," and told him that the ISG had to "slam some rules on this place to basically keep ourselves from getting in trouble and make sure these people are treated properly."<sup>4</sup> But another official involved with the JSOC task force, whose name and position are redacted in the Senate Armed Services Committee Report, told Dayton that he would hear "rumors" of abuse but "it's all untrue."<sup>5</sup>

Dayton described a "notorious case" of alleged detainee abuse, in which "special forces guys" brought a badly burned detainee to the Iraq Survey Group facility, claiming he had burned himself on the floor of a Humvee.<sup>6</sup> An FBI report identifies that detainee as Ibrahim Khalid Samir al-Ani, the Baathist intelligence officer who was erroneously reported to have met with Mohammed Atta in Prague before the September 11 attacks.<sup>7</sup>

Al-Ani was captured on July 2, 2003. He alleged to criminal investigators that when he was captured, he was put on the floor of a car with his hands cuffed behind his back. His captor

put his foot on my back and started screaming and cursing me in English, which I do understand. And after 15 minutes, I felt that one side of my belly and thigh started to burn due to the heated air that was coming out of the car. And the back of my feet started to burn. I asked the responsible [person] to be careful but he did not care.<sup>8</sup>

Al-Ani said he remained on the floor of the vehicle for an hour. When he arrived at Camp Cropper, he fainted, and woke up in a hospital over a month later after being anesthetized. He remained hospitalized until mid-October. Al-Ani alleged that his injuries included the partial amputation of his right thumb; the complete loss of use of his right forefinger; severe burns on both the palm and back of his left hand, resulting in the partial loss of use of his hand; and burns on both of his legs, feet and abdomen, requiring multiple surgeries.<sup>9</sup> His medical records



and photographs corroborated these allegations, as did statements from U.S. troops stationed at Camp Cropper.<sup>10</sup> Investigators from the Army Criminal Investigation Command (CID) confirmed that troops from a JSOC task force captured al-Ani, but they could not identify or locate the individuals involved, in part because al-Ani's captors had used pseudonyms on the capture documents.<sup>11</sup>

According to retired Army colonel and veteran interrogator Stuart Herrington, Q's reports of abuses by the JSOC task force failed to stop them. Herrington told Army investigators that Q

finally was sufficiently upset about the problem by early July that he basically didn't want to associate himself with it anymore. ... [H]is words to me were he gave up and asked to leave. Asked to depart theater. He didn't want to have anything do with it.<sup>12</sup>

Some of JSOC task force's harsh treatment was explicitly authorized. According to the DOD inspector general and the Senate Armed Services Committee, the JSOC task force's written standard operating procedures (SOP), dated July 15, 2003, authorized sleep deprivation, loud music, stress positions, light control, and the use of military dogs.<sup>13</sup> Although not in the written SOP, nudity was also commonly used, reportedly with the knowledge of the JSOC task force's commander and legal advisor.<sup>14</sup>

The July 15, 2003, interrogation policy was unsigned, although the task force commander's name was on the signature block. The commander, Brigadier General Lyle Koenig,<sup>15</sup> told Senate committee staff that he did not recall approving or even seeing an interrogation policy, though he did acknowledge that he knew about some of the harsh techniques in use.<sup>16</sup> But two task force legal advisors — one who served in July and August 2003, and another who arrived in late August — said that they had repeatedly showed the policy to the commander and tried to get his signature on it.<sup>17</sup> The Senate committee reported that according to the second task force legal advisor,

it got to the point where he would print out a fresh copy of the policy every night and give it to [redacted] aide. The Legal Advisor said that he knew the Commander had received copies of the policy from his aide, but that he had a habit of repeatedly "losing" the draft policy. He said the exercise became "laughable."<sup>18</sup>

In addition to the specific authorization of abusive techniques, the JSOC task force took the position that, contrary to later official statements in the wake of Abu Ghraib, detainees in its custody were not protected by the Geneva Conventions because they were "unlawful combatants."

In the summer of 2003, General Koenig, then the head of the JSOC task force, asked Colonel Randy Moulton, the commander of the Joint Personnel Recovery Agency (JPRA), for help with interrogation. Moulton later testified to Congress that "before I sent the team over, I talked to the task force commander and asked him what the legal status was. I was told they were DUCs [Detained Unlawful Combatants] and not covered under the Geneva Conventions."<sup>19</sup>

JPRA sent a team of three people: Lieutenant Colonel Steven Kleinman, its senior intelligence officer; Terrence Russell, a civilian employee who had previously trained interrogators in

SERE (survival, evasion, resistance, escape) techniques at Guantánamo; and Lenny Miller, a contractor.<sup>20</sup> In an interview with Task Force staff, Kleinman said the team arrived in Iraq at the end of August and departed in early October.<sup>21</sup>

On September 6, Kleinman “walked into an interrogation room all painted black.”<sup>22</sup> A detainee was kneeling on the floor, and a Special Forces interrogator was asking him questions, and slapping his face with every response.<sup>23</sup> Miller and Russell, who were already in the room observing, told Kleinman this had been going on for a half hour. Russell’s report of the trip to Iraq said that he and Miller told Kleinman that “we saw nothing wrong with what was going on,” but over their objections, Kleinman stopped the interrogation and told the interrogator it was a violation of the Geneva Conventions.<sup>24</sup> Kleinman later stopped interrogators from implementing a plan that called for sleep deprivation and holding a detainee in stress positions for hours at a time.<sup>25</sup> Kleinman called Moulton and told him what he had done, but Moulton, after consulting with the JSOC task force commander, told Kleinman that the JPRA team was authorized to use the full range of SERE techniques on prisoners, including “walling, sleep deprivation, isolation, physical pressures (to include various stress positions, facial and stomach slaps, and finger pokes to the chest, space/time disorientation, [and] white noise).”<sup>26</sup>

Kleinman testified to the Senate Armed Services Committee that after his conversation with Moulton, he intervened in a third interrogation, in which his two JPRA colleagues

ripped [a detainee’s] Abaya off — not cut — they ripped it off. ... [R]ipped off his underwear, took his shoes, they’d hooded him already, then they — they had shackled him by the wrist and ankles. ... And then the orders were given that he was to stand in that position for 12 hours no matter how much he asked for help, no matter how much he pleaded, unless he passed out, the guards were not to respond to any requests for help.<sup>27</sup>

Kleinman said he told his colleagues that this was “unlawful,” and stopped it.<sup>28</sup> Kleinman’s colleagues at the JPRA gave different accounts of this interrogation. Terrence Russell testified that both he and Miller had removed the detainee’s clothing, while Miller said that only Russell had.<sup>29</sup> Russell denied that Kleinman had objected to the interrogation, and said the detainee was naked only for “however long it took to have his clothes taken off and put the new [clothing] on.”<sup>30</sup>

Kleinman attempted to address his concerns with the JSOC task force’s commanding general and its legal advisor. Both seemed to agree with him, he said, when he raised the issue, but the commander “never once issued an order.”<sup>31</sup>

Others soldiers at the Battlefield Interrogation Facility were “very hostile” to Kleinman’s objections, and in some cases “literally threatening.”<sup>32</sup> Several accosted him and tried to take his camera away, until Kleinman told them it would be an enormous mistake to assault a senior officer. One Army Ranger — who was not an interrogator, but went out on raids based on information obtained from detainees and had heard that Kleinman was “coddling terrorists” — made his point by sharpening a knife near Kleinman, and warned him not to sleep too soundly.<sup>33</sup> Kleinman reported this to the JSOC task force’s legal advisor, who responded that he should be careful.<sup>34</sup> The legal advisor had expressed concern about his own safety to officers visiting from Guantánamo shortly before Kleinman traveled to Iraq. According to the Senate Armed Services Committee’s Report:

According to LTC Beaver the SMU TF Legal Advisor raised concerns with her about physical violence being used by SMU TF personnel during interrogations, including punching, choking, and beating detainees. He told her he was “risking his life” by talking to her about these issues. ... [T]he SMU TF Legal Advisor said he had also raised these issues with the Commander of the SMU TF, but that [redacted] was not receptive to his concerns.<sup>35</sup>

After Kleinman returned from Iraq, Moulton asked him to write a memo on how JPRA could assist the interrogation effort. Kleinman said he refused, because he believed making the recommendations Moulton wanted would be unlawful, and suggested that Terrence Russell could write a report instead. After that, “I was a pariah. ... My access to anything was cut off when we got back from Iraq.”<sup>36</sup>

Russell’s report, released in response to a Freedom of Information Act request, describes a JSOC task force officer as “very angry and frustrated” with Kleinman. The officer “told us he was going to recommend ... the earliest possible departure” for Kleinman because “his presence was counter-productive and was a direct impediment for his people to conduct interrogation operations.” Russell suggested that “under different circumstances and under a different team chief JPRA could re-engage with TF-20.”<sup>37</sup>

The next report about abuses by the JSOC task force came from retired Army Colonel Stuart Herrington, who had extensive interrogation experience in the Vietnam War, Operation Just Cause in Panama, and the first Gulf War. Colonel Herrington traveled to Iraq in December of 2003, at the request of Major General Barbara Fast, to assess U.S. intelligence operations there. Shortly before Herrington went to Iraq, Mr. Q, the former head of the high-value detainee interrogation center at Camp Cropper who first reported abuses by the JSOC task force, told Herrington what he had witnessed, and Herrington did his best to investigate further in Iraq.

Herrington provided Task Force staff with a copy of his report, which states that his team learned from an officer serving at the ISG detention and interrogation facility at Camp Cropper (separate from Herrington’s original source) that

prisoners arriving at his facility who had been captured by Task Force 121 showed signs of having been mistreated (beaten) by their captors. Medical personnel supporting the [interrogation center] examine each detainee upon his arrival to document pre-existing conditions. Detainees captured by TF 121 have shown injuries that caused examining medical personnel to note that “detainee shows signs of having been beaten.” ... I asked the officer if he had reported this problem. He replied that “Everyone knows about it.”<sup>38</sup>

Herrington’s report also describes discussions with “an interagency representative,” most likely from the CIA, who told him that the CIA had been directed not to have contact with JSOC task force’s interrogation facility “because practices there were in contravention to his Agency’s guidance on what was and what was not permissible in interrogating detainees.”<sup>39</sup> This is consistent with a later *New York Times* report that the CIA had barred its personnel from working at the interrogation facility at Camp Nama in August 2003.<sup>40</sup> Herrington concluded, “[I]t seems clear that TF 121 needs to be reined in with respect to its treatment of detainees.”<sup>41</sup>

In March or April of 2004, the Combined Joint Task Force 7 (CJTF-7) legal advisor's office wrote to Herrington that they had investigated his sources' allegations and found no evidence of mistreatment. Herrington said he expressed "blunt dismay" and incredulity at this conclusion, and said his source "could be excused for thinking this is a cover-up."<sup>42</sup>

An interrogator based at the Battlefield Interrogation Facility in Camp Nama in the first half of 2004 later spoke to Human Rights Watch about ongoing abuses there, including one incident in which a detainee "was stripped naked, put in the mud and sprayed with the hose, with very cold hoses, in February. At night it was very cold ... this happened all night."<sup>43</sup> He and several colleagues had gone to the colonel in charge of the facility, and told him they were "uneasy" with the detainees' treatment

And within a couple hours a team of two JAG officers, JAG lawyers, came and gave us a couple hours slide show on why this is necessary, why this is legal, they're enemy combatants, they're not POWs, and so we can do all this stuff to them and so forth. ... And then they went on to the actual treatment itself ... that's not inhumane because they're able to rebound from it. And they claim no lasting mental effects or physical marks or anything, or permanent damage of any kind, so it's not inhumane.<sup>44</sup>

Because of the high level of secrecy surrounding the camp, and its unusual chain of command, the interrogator had little other recourse:

I didn't have any contact with my normal uniformed battalion. [Task Force 121/6-26] was my new chain of command for several months. ...

We called the colonel by his first name, called the sergeant major by his first name. ... I couldn't tell you the sergeant major's last name if I tried. Same with the colonel. A lot of my fellow interrogators, I didn't know their last names either. ... [W]hen you asked someone their name they don't offer up the last name. ... [M]ore often than not, when they gave you their name it probably wasn't their real name anyway.<sup>45</sup>

In addition to Special Forces personnel, the interrogator said, he worked with the CIA, who were stationed at another building nearby. Because of the level of secrecy, "[w]e knew that we were only a couple steps removed from the Pentagon, but it was a little unclear, especially to the interrogators who weren't really part of that task force."<sup>46</sup>

The interrogator said that neither the Red Cross nor the Army's Criminal Investigative Division had access to Camp Nama. Theoretically, he could have gone to his normal unit's chain of command and reported to CID, but he had been told on his first day at the camp that he was not allowed to disclose anything that happened at the Special Forces facility to his normal command.<sup>47</sup>

According to Army CID investigator Angela Birt, if he had reported to Army CID there was little they could have done:

[A]ny investigations that came out of [JSOC facilities] were referred to a couple of agents embedded with the folks at Fort Bragg. And they operate and work directly for them. And as soon as we saw something visible to us that

belonged to them we had to hand it over. You don't see it again. We'd hear about it from other detainees but as soon as we referred something it went into a black hole and we never saw it again.<sup>48</sup>

But the reports of abuse kept coming. On June 25, 2004, an FBI agent emailed his superiors and alleged that a detainee captured by the JSOC task force had suspicious burn marks on his body, which he said came from torture by his captors.<sup>49</sup> The same day, Vice Admiral Lowell Jacoby wrote to Undersecretary of Defense for Intelligence Stephen Cambone, asserting that two Defense Intelligence Agency (DIA) personnel had observed

[p]risoners arriving at the Temporary Detention Facility in Baghdad with burn marks on their backs. Some have bruises, and some have complained of kidney pain.

One of the two DIA/DH interrogators/debriefers witnessed TF 6-26 officers punch a prisoner in the face to the point the individual needed medical attention. ...

One DIA/DH interrogator/debriefer took pictures of [a detainee's] injuries and showed them to his TF 6-26 supervisor, who immediately confiscated them.

TF 6-26 personnel have taken the following actions with regards to the DIA/DH interrogators/debriefers:

- Confiscated vehicle keys
- Instructed them not to leave the compound without specific permission, even to get a haircut at the PX
- Threatened them
- Informed them that their e-mails were being screened
- Ordered them not to talk to anyone in the U.S.<sup>50</sup>

The next day, Cambone wrote a handwritten note on Jacoby's report to his deputy, Lieutenant General William G. Boykin, ordering him to "[g]et to the bottom of this immediately. This is not acceptable."<sup>51</sup> Boykin's review has never been made public, but a spokesman told *The New York Times* that he found no pattern of abuse.<sup>52</sup>

A 2006 DOD inspector general's report states that "the disagreements between the DIA and special mission units were not reconciled to the benefit of all those conducting interrogation operations in Iraq." Instead, the Department of Defense seems to have concluded that the problem was "disaffected interrogators from DIA who were not prepared for the demanding and exacting pace of operations."<sup>53</sup>

Shortly after the Abu Ghraib scandal broke, and a month before Cambone's note to Boykin, investigative journalist Seymour Hersh had reported that the abuses were linked to a highly classified Special Access Program (SAP) run by Cambone and Rumsfeld, code named Copper Green. Hersh reported that his source described the program, which predated the Iraq war, as operating at the highest level of secrecy:

Do the people working the problem have to use aliases? Yes. Do we need dead drops for the mail? Yes. No traceability and no budget. And some special-access programs are never fully briefed to Congress.<sup>54</sup>

Hersh wrote that it was Rumsfeld's and Cambone's decision to expand the program to Iraq, and Cambone's decision to bring

some of the Army military-intelligence officers working inside the Iraqi prisons under the SAP's auspices. "So here are fundamentally good soldiers — military-intelligence guys — being told that no rules apply," the former official, who has extensive knowledge of the special-access programs, added. "And, as far as they're concerned, this is a covert operation, and it's to be kept within Defense Department channels."<sup>55</sup>

Cambone and Rumsfeld declined interview requests from Task Force staff. At the time, Larry DiRita, a spokesman for Donald Rumsfeld, called Hersh's story "the most hysterical piece of journalist malpractice I have ever observed," and CIA spokesman Bill Harlow said the story was "fundamentally wrong. There was no DOD/CIA program to abuse and humiliate Iraqi prisoners."<sup>56</sup>

Many details of Hersh's report are unconfirmed, and some may not be accurate, but the existence of "Copper Green" has been reported by others. A 2010 memoir by U.S. Army intelligence officer Lieutenant Colonel Anthony Shaffer about his service in Afghanistan in 2003 refers to an "enhanced" interrogation program run by the CIA and JSOC task force and authorized by the Pentagon's leadership, called "Copper Green."<sup>57</sup> A more recent book by Marc Ambinder and D.B. Grady states that "Copper Green" was another name for a classified operation called "MATCHBOX" that "included direct authorization to use certain interrogation techniques in the field."<sup>58</sup>

Moreover, government documents show that the JSOC task force's abuse of prisoners were part of a Special Access Program. In April 2005, a regular Army CID investigation team wrote to the commander of Criminal Investigation Command that it had been unable to thoroughly investigate over 20 cases of alleged detainee abuse,

due to the suspects and witnesses involvement in Special Access Program's (SAP) and/or the security classification of the unit they were assigned to during the offense. Attempts by Special Agents ... to be "read on" to these programs ha[ve] been unsuccessful.<sup>59</sup>

Some of those cases involve uncorroborated allegations of abuse, which investigators did not find credible. Others were far more serious.

Another memo, written on February 11, 2005, describes in more detail the obstacles that CID agents faced in trying to investigate the JSOC task force:

A review of this case file and investigative reports revealed this detainee was captured and detained by Task Force 6-26. ... An Information Report was provided to this office which stated fake names were used by the 6-26 members. The only names identified by this investigation were determined to be fake

names used by the capturing soldiers; however, the abuse allegedly occurred during the interrogation of the detainee. The 6-26 CID agent related that the capturing soldiers would not know who the interrogators were. 6-26 also had a major computer malfunction which resulted in them losing 70 percent of their files; therefore, they can't find the cases we need to review.

This investigation meets the necessary requirements and does not need to be reopened. Hell, even if we reopened it we wouldn't get anymore information [than] we already have.<sup>60</sup>

### **Five Suspicious Deaths**

There are at least five suspicious detainee deaths in Iraq that appear to be linked to the CIA's operations or the JSOC task forces. Four were classified as homicides by medical examiners, but only one, the death of Abed Hamed Mowhoush, resulted in a successful court-martial conviction. The interrogator convicted in that case, Chief Warrant Officer Lewis Welshofer (a regular Army interrogator, not a CIA officer or Special Forces soldier), received a sentence of two months confinement to barracks and a fine of \$6,000.

#### ***Dilar Dababa***

On June 13, 2003, a detainee named Dilar Dababa died in the custody of the JSOC task force, at an annex to the Battlefield Interrogation Facility in Camp Nama. Documents from the investigation of Dababa's death show that after he died, medics from the Battlefield Interrogation Facility drove Dababa to a field clinic, and falsely told the clinic staff that the patient "had walked up to a guard post and collapsed."<sup>61</sup> Early entries in the investigative file also state that Dababa died of "an apparent heart attack,"<sup>62</sup> but his autopsy contradicted this, finding instead that his death was a homicide caused by traumatic brain injury and hemorrhage. The autopsy also describes dozens of abrasions and bruises, concentrated but not limited to the head and neck, and injuries from handcuffs around the wrists and ankles. Many of these injuries were not present at the time of his capture.<sup>63</sup>

Investigators encountered a number of obstacles. No physical evidence was collected, because Dababa's cell was cleaned and another high-value detainee placed there before investigators could analyze the crime scene. According to a memorandum in the file from August 7, 2003, "[a]ll of the guards on duty at the time of the detainees' death were not interviewed nor were they retained in Baghdad until interviewed by CID."<sup>64</sup> Interpreters and other detainees at the facility were never interviewed. The death certificate and autopsy report were not finalized until May 2004.<sup>65</sup>

The JSOC task force guards and interrogators who were interviewed said that they had been "smoking the prisoner" and "putting the detainee under stress," subjecting him to nudity, sleep deprivation, forced exercise, and using "pressure points and bone manipulation"<sup>66</sup> if he did not comply with orders. One guard also admitted making a "stink bomb" in Dababa's cell using Tabasco sauce and the heater from an MRE packet.<sup>67</sup> They said, though, that they had only struck Dababa in self-defense after he tried to grab their weapons in an escape attempt.<sup>68</sup> Guards described Dababa being blindfolded and flex-cuffed at the hands and feet before his escape attempt; it was unclear how he had gotten out of his restraints, and how he received most of his injuries.

An agent who reviewed the file in August 2004 wrote that while there were inconsistencies in the soldiers' statements, and between the statements and the autopsy, "[t]he only way we solve this now is with a confession."<sup>69</sup> No confession ever occurred. The case was eventually ruled a justifiable homicide in September 2006, though at least one investigator "non-concur[red]" with that conclusion.<sup>70</sup>

### ***Manadel al-Jamadi***

Manadel al-Jamadi is sometimes called the "Ice Man," because there are notorious photographs of Abu Ghraib guards Sabrina Harman and Charles Graner posing with his ice-packed corpse. On November 4, 2003, he was arrested by a team of Navy SEALs and CIA agents. Al-Jamadi struggled violently; even after he was subdued he was reportedly struck and "body slammed into the back of a Humvee". He was interrogated in a CIA facility, and then driven to Abu Ghraib.<sup>71</sup>

Several of the military police present when al-Jamadi arrived have spoken to government investigators and journalists about what happened next. One MP, Jason Kenner, told military investigators that al-Jamadi was naked from the waist down when he arrived at the prison, with a bag over his head. Two CIA personnel (whom guards referred to as "OGA," an abbreviation for "Other Government Agency"), an interrogator and a translator, asked Kenner and another MP to take him to tier one. Kenner said they placed al-Jamadi in an orange jumpsuit and steel handcuffs, which was "common procedure" for CIA prisoners, and

walked the prisoner to the shower room on Tier 1B. ... The OGA personnel followed behind us. The interrogator told us that he did not want the prisoner to sit down and wanted him shackled to the wall. I got some leg irons and shackled the prisoner to the wall by attaching one end of the leg irons to the bars on the window and the other end to the prisoner's handcuffs.<sup>72</sup>

The window was five feet off the ground. According to Kenner and another MP, Dennis Stevanus, there was enough slack that al-Jamadi could stand with his legs supporting his weight, but not if he slumped forward or kneeled. The MPs exited the shower room, leaving al-Jamadi with CIA interrogator Mark Swanner and a contract interrogator.<sup>73</sup>

According to a National Public Radio (NPR) report, the CIA personnel involved told investigators that al-Jamadi had been talking "about the city of Mosul and hating Americans, when all of a sudden he dropped, falling to at least one knee. ... [T]hey immediately called for a medic."<sup>74</sup>

The MPs contradicted this. Walter Diaz stated that Swanner had called the MPs in, and asked them to re-shackle al-Jamadi's hands higher on the window frame, even though his arms were already

almost literally coming out of his sockets. I mean, that's how bad he was hanging. The OGA guy, he was kind of calm. He was sitting down the whole time. He was, like, 'Yeah, you know, he just don't want to cooperate. I think you should lift him a little higher.'<sup>75</sup>

Diaz asked for help from two other MPs, Jeffrey Frost and Dennis Stevanus, to lift al-Jamadi up and re-fasten the handcuffs. Frost said that Swanner assured them the detainee was just "playing possum,"<sup>76</sup> but when they released him,



[h]e didn't stand up. His arms just kept on bending at this awkward — not awkward position, but it was — you know, I was almost waiting for a bone to break or something and just thinking, you know, this guy — he's really good at playing 'possum.<sup>77</sup>

The MPs removed al-Jamadi's hood, and realized that he was dead. When they lowered him to the floor, according to Frost, "blood came gushing out of his nose and mouth, as if a faucet had been turned on."<sup>78</sup> The military autopsy classified the death as a homicide, caused by "compromised respiration" and "blunt force injuries" to the head and torso, including several broken ribs. Other pathologists who reviewed the autopsy report believed that what was fatal was the combination of the broken ribs and al-Jamadi's position. Dr. Michael Baden, the chief forensic examiner for the New York State Police, told Jane Mayer, "You don't die from broken ribs. But if he had been hung up in this way *and* had broken ribs, that's different. ... [A]sphyxia is what he died from — as in a crucifixion."<sup>79</sup>

Lieutenant Andrew Ledford, a Navy SEAL from the unit that captured al-Jamadi, was court-martialed, but acquitted based on evidence that he did not cause al-Jamadi's death. No CIA officer was ever charged. According to the Associated Press, a grand jury was convened, and focused not on Swanner but on the role of a former CIA officer named Steve Stormoen, who ran the agency's "detainee exploitation cell" at Abu Ghraib. The AP reported that Stormoen had processed al-Jamadi into Abu Ghraib, but was not present in the room where he died, and that he had been reprimanded after an internal CIA probe for permitting agents to "ghost" prisoners, *i.e.*, detain them without registering them or acknowledging their identity, without headquarters authorization. The grand jury also reportedly heard testimony about a CIA employee nicknamed "Chili" who was at Abu Ghraib the day al-Jamadi died and still works for the agency.<sup>80</sup>

But the grand jury did not lead to any indictments, and it is unclear whether the Department of Justice (DOJ) ever proposed any indictments. On August 30, 2012, Attorney General Eric Holder released a statement that no charges would be brought because "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."<sup>81</sup> DOJ declined to elaborate further, or respond to questions about the investigation.

Charles Graner, the soldier who received the longest prison sentence for abusing prisoners at Abu Ghraib, spoke to Army investigators about Chili in April 2005. Graner said that Chili had said he was an FBI contract worker, but "lo and behold he ends up being the interrogator over the analyst that the fellow in the shower dies with."<sup>82</sup> He also described another incident where Chili and his colleagues were interviewing a detainee in the back stairwell, and "drug him back unconscious to his cell."<sup>83</sup>

The MPs' handwritten log books corroborate Graner's allegations about CIA involvement in interrogation, though they use euphemisms. The entry that, according to Graner, corresponded to the detainee being carried unconscious from the stairwell reads simply: "OGA in cell 13 was taken away will be taken off of the count at this time."<sup>84</sup> The only record of al-Jamadi's death is an entry stating: "Shift change Normal relief 1 OGA in IB shower not to be used until OGA is moved out."<sup>85</sup>

One entry from November 11, 2003, is more explicit, stating:

The 4 new OGA's are in 2, 4, 6, and 8 they are to have no contact with each other or anyone else — they are not to sleep or sit down until authorized by OGA personnel also we were informed that all four are neither hungry nor thirsty.<sup>86</sup>

Walter Diaz also reported that the CIA routinely interrogated “ghost prisoners” at Abu Ghraib. According to Diaz, the agency “would bring in people all the time to interview them. We had one wing, Tier One Alpha, reserved for the O.G.A. They’d have maybe twenty people there at a time.” Diaz said, “We, as soldiers, didn’t get involved. We’d lock the door for them and leave. We didn’t know what they were doing,” but “we heard a lot of screaming.”<sup>87</sup>

Major General Antonio Taguba and Major General George Fay confirmed that MPs held “ghost detainees” for the CIA. Taguba reported that one MP unit had helped hide detainees from a visiting Red Cross survey team.<sup>88</sup> Fay found that Lieutenant Colonel Steven Jordan “became fascinated with the “Other Government Agencies,” a term used mostly to mean CIA, and “allowed OGA to do interrogations without the presence of Army personnel.”<sup>89</sup>

In addition to the criminal investigation, the CIA’s Office of the Inspector General (OIG) investigated al-Jamadi’s killing before the case was referred to DOJ. But the OIG report itself remains classified, and courts have ruled that the CIA is not required to disclose it under the Freedom of Information Act.

The Army CID file on al-Jamadi’s death does provide some clues as to the CIA OIG’s conclusions. According to the CID file, OIG personnel “advised their investigation had revealed that the CIA personnel involved in the interrogation of [al-Jamadi] had not been entirely truthful in their accounts of the incident, but declined to provide specifics.”<sup>90</sup> One individual whom the CIA OIG interviewed “had admitted removing the sand bag that was used to hood [al-Jamadi],” and his explanation for its removal was “not believable.”<sup>91</sup> The individual in question claimed that he had taken the bag to keep it secure in the event of an investigation, and had given it to a security officer, but “further information had not corroborated this statement.”<sup>92</sup> The hood was never recovered.

### ***Abed Hamed Mowhoush***

On November 10, less than one week after Manadel al-Jamadi’s death, former General Abed Hamed Mowhoush turned himself in to U.S. troops at Forward Operating Base (FOB) Tiger near the border with Syria. On November 21, he was moved to a temporary detention facility in an old train station, known as the “Blacksmith Hotel.” Chief Warrant Officer Lewis Welshofer, a former SERE trainer, took charge of Mowhoush’s interrogation.

On November 24, according to classified documents obtained by *The Washington Post*, Mowhoush was interrogated by a CIA operative referred to as “OGA Brian” and a team of Iraqi paramilitaries working for the CIA, known as “the Scorpions.” The Iraqis “were hitting the detainee with fists, a club, and a length of rubber hose.”<sup>93</sup> The documents state that this was not uncommon treatment for uncooperative detainees at the Blacksmith Hotel.<sup>94</sup>

At Welshofer’s court-martial, the CIA’s role in Mowhoush’s interrogation was discussed only

obliquely. One witness who testified at the court-martial did so anonymously and behind a tarp, to conceal his identity from the public and press.<sup>95</sup> At one point a defense attorney asked the witness if he had reported something “to the CIA,” but then stopped himself and apologized to the judge for the reference to the agency.<sup>96</sup>

Several witnesses did testify about the November 24 interrogation. Specialist Jerry Loper, testifying under a grant of immunity, said that he had escorted Mowhoush to the interrogation room and waited outside. While waiting, “I heard loud thuds and screams. It sounded like he was being beaten.” When Mowhoush was brought out half an hour to an hour afterwards, “[h]is hands were severely swollen, and he couldn’t walk. His breathing was labored. . . . It took five of us to get him back.”<sup>97</sup> Warrant Officer Jefferson Williams gave a very similar account to Loper’s.<sup>98</sup>

Todd Sonnek, a chief warrant officer with the Army Special Forces unit Operational Detachment Alpha, testified that Welshofer had brought in Special Forces troops, civilians, and Iraqis to interview Mowhoush with a “fear-up” technique, and supplied the Iraqis with the questions to ask. Sonnek testified that “from start to finish, this was Chief Welshofer’s interrogation,” though he acknowledged that Welshofer was not actually the one asking the questions and did not have “supervisory or operational control over the Iraqis.” Sonnek claimed that Mowhoush had tried to “strike out” and needed to be subdued, and denied that Mowhoush was unable to walk unassisted afterwards.<sup>99</sup>

Testifying in his own defense, Welshofer acknowledged that he was present for the November 24 incident but denied he was in control of it:

5 minutes into his interrogation, when he continued to deny, deny, deny, I noticed other people in the hallway. . . . I passed control of the interrogation over to these individuals in the hallway. It is not correct that I was in control of the interrogation and that the others were just assisting me. I did not feel I had any command control over those people. . . . When the general left the room, it was under his own power. I saw what looked like a straight piece of radiator hose, a little bit softer material but of the same diameter, as well as a piece of something like insulation that might go around a door, only it was thicker and hollow on the inside with a camouflage net pole down in one end of it. These devices were used to beat the general. There were also some kicks, some slaps.<sup>100</sup>

CIA Director George Tenet refers in his memoirs to “the Agency-sponsored Iraqi paramilitary group known as ‘the Scorpions,’ ”<sup>101</sup> but details of their involvement with Mowhoush’s death have not been declassified. The CIA OIG prepared a report on Mowhoush’s death, but that also remains classified.

OGA and the Scorpions do not appear to have directly caused Mowhoush’s death. According to court-martial testimony, on November 26, Mowhoush was having obvious breathing difficulties at the beginning of an interrogation, but Welshofer nonetheless put him into a sleeping bag, and wrapped it in a cord to hold it in place. (Welshofer said that Mowhoush did not appear to require medical assistance, and he concluded he was using a “resistance technique” of “acting excessively fatigued.”) Welshofer asked Mowhoush questions while sitting on his chest, and

sometimes obstructing his nose or mouth.<sup>102</sup> Mowhoush died soon after of “asphyxia due to smothering and chest compression,” according to the autopsy report.<sup>103</sup>

Welshofer was convicted of negligent homicide, but was sentenced to only two months of confinement to barracks. This was in part because of evidence that his commanding officers knew of the sleeping bag technique and allowed him to use it on a number of detainees. They also condoned a similar technique that involved placing detainees in wall lockers.<sup>104</sup>

Welshofer and his unit continued to use “close confinement” after Mowhoush’s death. Major Christopher Layton testified that while investigating the homicide in mid-January 2004, he had traveled to FOB Rifles near Al Asad, where Welshofer’s unit was based. He saw a sleeping bag and wall lockers in an interrogation room there.<sup>105</sup> Another witness, Gerald Pratt, said that after Mowhoush’s death, CID took the original sleeping bag, but “Chief Welshofer procured another one. A detainee came in with a sleeping bag, and Chief got it.”<sup>106</sup>

Welshofer has denied that his actions caused Mowhoush’s death. In a 2009 interview with CBS, he said he only did what was necessary: “I helped save soldiers lives. I’m 100 percent convinced of that.”<sup>107</sup>

### **Abdul Jameel**

Welshofer’s unit, the Third Armored Cavalry Regiment, operated out of FOB Rifles in Al Asad. Another detainee, 47-year-old Abdul Jameel, died there on January 9, 2004. According to Jameel’s autopsy, his death was a homicide, caused by

blunt force injuries and asphyxia. ... According to the investigative report provided by U.S. Army CID, the decedent was shackled to the top of a doorframe with a gag in his mouth at the time he lost consciousness and became pulseless.

The severe blunt force injuries, the hanging position, and the obstruction of the oral cavity with a gag contributed to this individual’s death.<sup>108</sup>

Another document summarizing the autopsy report describes the circumstances of death as: “Q by OGA, gagged in standing restraint.”<sup>109</sup> In addition to being gagged and shackled, the detainee had suffered “the fracturing of most of his ribs and multiple fractures of some of his ribs,” and a fractured hyoid bone.<sup>110</sup>

CID investigators concluded that a series of incidents had contributed to Jameel’s death. Jameel was captured by Operational Detachment Alpha 525 of the 5th Special Forces Group on January 4, 2004. CID found that one soldier had kicked Jameel in the chest several times after he was already restrained in zip-ties.

On January 6, 2004, guards and other detainees saw masked interrogators take Jameel out for interrogation. He returned with severe bruises on his abdomen, and told other detainees and guards that he had been beaten.<sup>111</sup> One detainee said Jameel had difficulty breathing. Three soldiers in ODA 525 and one interpreter claimed that Jameel had attacked them, attempted to grab one of their weapons during interrogation, and they had been forced to strike

him repeatedly for one to two minutes in order to subdue him because “[h]e was strong and fought back,” demonstrating “extreme resistance.”<sup>112</sup> CID investigators noted this conflicted with other descriptions of Jameel as appearing to be frail and in poor health.<sup>113</sup> The summary of Jameel’s interrogation on January 6 did not mention any struggle, and CID concluded that the interrogators’ account of the incident could not credibly account for the extent of Jameel’s injuries.<sup>114</sup>

At approximately 2:00 a.m. on January 9, Jameel allegedly tried to escape from the isolation/sleep deprivation area. After he was re-captured, a soldier in the 3rd ACR (Armored Cavalry Regiment) used a military police baton to force Jameel to a standing position, by placing the baton under Jameel’s chin and lifting. CID investigators concluded that this had broken Jameel’s hyoid bone, an injury that directly contributed to his death. CID also found that several soldiers had conspired to give a false account of the details of Jameel’s attempted escape.<sup>115</sup>

Finally, shortly after 7:00 a.m. on January 9, Jameel was “repeatedly ordered ... to stand as part of a mass punishment” of detainees for talking.<sup>116</sup> Jameel did not obey. According to military doctors, based on the number and manner of Jameel’s broken ribs and other injuries, he “would have been in great pain and would have had great difficulty breathing and would not have been able to walk.”<sup>117</sup> Soldiers handcuffed him to the door frame of his cell in a standing position, and forced a gag into his mouth after he “refused to stop making noises.”<sup>118</sup> Five minutes later, he was dead.<sup>119</sup>

No one was ever prosecuted for Jameel’s death, despite criminal investigators’ recommendation of charges against 11 soldiers. According to an Army document:

The command, with the assistance of advice of command legal counsel, determined that the detainee died as a result of lawful applications of force in response to repeated aggression and misconduct by the detainee.<sup>120</sup>

### ***Anonymous Detainee***

There may have been an additional homicide at Al Asad shortly before Jameel’s death. On January 4, 2004, a detainee died of anoxic brain injury at a military hospital in Balad, after being medically evacuated from Al Asad Air Base.<sup>121</sup> According to witnesses, he was brought to a medical unit in Al Asad by a civilian SUV.<sup>122</sup> The patient was unconscious and had a bruise on his forehead, approximately 4 centimeters in diameter.<sup>123</sup> The person who brought him in said the individual had collapsed during interrogation, and might be diabetic.<sup>124</sup> A medic described the person who brought the patient as

over 6’0” tall, sandy blonde hair, wearing a baseball hat, thin, fair complexion, no glasses, wearing civilian clothes. I thought I had seen him in the hospital in the past. There were some people in civilian clothes that would frequent the hospital from time to time like this person and would carry 9 mm pistols. I never saw any identification and I don’t think I ever questioned them about who they were. ... I think that I was told by someone that they were maybe Special Forces or other government agent (OGA). This particular night I did not question the individual who brought the patient in.<sup>125</sup>

A CT scan was performed on the unidentified detainee at Balad, which revealed brain hemorrhages caused by blunt force trauma.<sup>126</sup> The death was reported to CID shortly after it occurred, but the doctors who treated the detainee were never interviewed, nor was an autopsy performed.<sup>127</sup> An investigation was opened after a colonel re-reported the incident in the wake of Abu Ghraib, but the deceased detainee could not be conclusively identified and the perpetrators could not be identified at all.

### **The CIA's and JSOC's Response to Allegations of Abuse**

In an interview with Task Force staff, former CIA General Counsel John Rizzo said that headquarters had sent “detailed cables” that gave CIA personnel in Iraq clear limits on their role in interrogations:

Don't hold prisoners yourself. Defer to the military on questioning. Only participate when invited to do so. Don't try to force yourself into these interrogations. Obviously no enhanced interrogation techniques. The bottom line of the guidelines was defer to the military; these were prisoners under their control, their auspices. Help, support them, when you're asked to participate in interrogations, do it, but just stay a step back.<sup>128</sup>

But, Rizzo said, “either some people ... didn't understand it, or chose in the heat of battle to go beyond it.” He said a CIA station chief and two other officers “were fired because they went beyond the guidelines. They started participating in these interrogations. They actually were capturing, helping the military capture Iraqi prisoners, and then lied about it.”<sup>129</sup>

The Associated Press has reported that CIA officers in Iraq were disciplined, but depicts those decisions somewhat differently. According to the AP, CIA officer Steve Stormoen, who ran the detainee unit at Abu Ghraib, received a letter of reprimand for running an unauthorized “ghosting” program in Iraq and failing to have a doctor examine Manadel al-Jamadi when he arrived at the prison. Stormoen retired, but later returned to the intelligence work as a contractor for SpecTal. The CIA also disciplined the Baghdad station chief, Gerry Meyer, and his deputy. Meyer resigned rather than be demoted. His deputy was temporarily barred from overseas work but later was promoted to run the Pakistan-Afghanistan department within the Counterterrorism Center. Another officer involved in al-Jamadi's death, Chili, remains employed by the CIA as of the date of the report.<sup>130</sup>

General Stanley McChrystal has written that in September 2003, the first day he assumed control of the JSOC task forces,

Lyle Koenig, the air force brigadier general then commanding our task force in Iraq, called me from Baghdad to welcome me to the command. After pleasantries, he stated flatly, “Sir, we need to close the screening facility we're operating at our base at [Baghdad International Airport]. We don't have the expertise or experience to do this correctly.”<sup>131</sup>

McChrystal visited the facility about a week later, and “was unimpressed with both the facility and our ability to staff it.”<sup>132</sup> He wrote that he told JSOC staff regarding detainee treatment that “[t]his is our Achilles' heel. ... If we don't do this right we'll be taken off the battlefield.”<sup>133</sup>

His memoirs do not specify what he saw, but reporters Dana Priest and William Arkin have reported that during McChrystal's visit, several detainees were being kept naked and their cells were guarded by dogs.<sup>134</sup>

In January 2004, the *Army Times* reported that Koenig was retiring "under a cloud of secrecy." After several weeks of inquiries about rumors that Koenig had been relieved of command, an Air Force spokesman told the newspaper that he was on terminal leave pending retirement. The spokesman said there were no "ongoing investigations at this time" regarding Koenig, and refused to elaborate further.<sup>135</sup>

In summer 2004, the JSOC task force moved its headquarters to Balad and built a new screening facility. McChrystal wrote that the new facility was "as internally transparent as possible," open to visits by representatives from the FBI, the regular military, and other agencies as well as U.S. allies.<sup>136</sup> McChrystal does not state whether the ICRC had access to the facility in Balad, however, and British journalist Mark Urban has written that the Red Cross did not.<sup>137</sup>

McChrystal's memoir does discuss a visit by Sen. Carl Levin, who toured the facility

in its first weeks of use, when the cells had been built smaller than some others in Iraq and were painted black. They weren't dirty, and the paint choice had been made with no particular intent. But it sent a negative message. Senator Levin said nothing during the visit, and I judged him satisfied with what he saw. But soon afterward I received a letter he'd sent to the secretary of defense, expressing concern with the black cells. ... [W]e immediately painted the cells a brighter color.<sup>138</sup>

McChrystal wrote that the screening facility was expanded with new cells "that matched exactly with the standards that had begun to be carried out across all of" Iraq, but did not specify whether the small cells remained in use.<sup>139</sup>

According to Urban, one British official who visited the Balad detention facility said that "the cells there were like dog kennels — tiny."<sup>140</sup> Britain eventually told JSOC that its Special Forces could not transfer prisoners to the Americans unless the U.S. agreed not to send them to Balad.<sup>141</sup> Urban states that one visit by British intelligence occurred shortly before a November 2004 operation in Falluja<sup>142</sup> — which implies that the cramped cells remained in use despite Levin's objections.

McChrystal acknowledged that

[a]s late as the spring of 2004, six months into my command, I believed our force needed the option of employing select, carefully controlled "enhanced" interrogation techniques, including sleep management. I was wrong. Although these techniques were rarely requested or used, by the summer of that year we got rid of them completely, and all handling inside our centers followed the field manual used by the Army.<sup>143</sup>

Other reports seem to confirm the ongoing use of "enhanced techniques" that included "close confinement" as well as sleep deprivation into the spring of 2004. An investigation into Special Forces task forces' treatment of detainees by Brigadier General Richard Formica documented

one incident in April or May 2004, in which detainees were held for periods between two and seven days in “small cells measuring 20 inches (wide) x 4 feet (high) x 4 feet (deep),” which did not provide enough room “to lie down or stand up. They were removed from the cells periodically for latrine breaks, to be washed, and for interrogations,” and were “not kept in the cells for 72 continuous hours.” The same detainees were sometimes kept naked, “blindfolded, sometimes with duct tape,” and loud music was played to prevent them from communicating with each other and for “sleep management.”<sup>144</sup>

Formica recommended against disciplining soldiers for these incidents. He acknowledged that the tiny cells were “inappropriate for long-term detention,” but said they were not used for this purpose:

Rather, special forces secured combative, resistant detainees in these cells for short periods of time in order to elicit tactical intelligence. ... It is reasonable to conclude that this would be acceptable for short periods of time. ... [T]wo days would be reasonable; five to seven days would not.<sup>145</sup>

Formica also accepted the explanation that detainees were blindfolded with duct tape “for purposes of force protection and to prevent escape,” and found that this was not inhumane. In part, this was because an interrogation policy for Special Forces troops disseminated in February 2004 permitted interrogation techniques that had been rescinded for ordinary troops, including sleep deprivation, stress positions and environmental manipulation.<sup>146</sup>

Formica stated, consistent with McChrystal’s memoirs, that this had been corrected in May 2004. However, in interviews conducted by attorneys in July 2007, two former detainees gave detailed descriptions of being imprisoned in tiny cells that detainees called “black coffins” in January 2006.<sup>147</sup> They were arrested together and interrogated about the kidnapping of the *Christian Science Monitor* reporter Jill Carroll, and then taken to a prison near Baghdad airport.<sup>148</sup> There, they alleged, they were held in small wooden cells, painted black, at most one meter wide and one meter high. One detainee stated that he was held there for over a week, and the other for 16 days.<sup>149</sup> Both said that they were continuously handcuffed and hooded, and allowed out of the cells only to use the toilet. One of the detainees said that he fainted twice inside his box, was taken out and given an IV nearby, but afterwards he was returned to the cell: “Everything was just the same.”<sup>150</sup> These accounts, while detailed and consistent with each other, could not be independently corroborated.

McChrystal wrote in his memoirs that even after special operations troops were restricted to interrogation methods in the Army Field Manual, “[t]here were lapses of discipline, but they were never tolerated. Never a wink and a nod.”<sup>151</sup> As an example of this, McChrystal describes an incident where task force troops interrogating a detainee about Abu Musab al-Zarqawi’s location “mistreated the detainee by electrically shooting him several times with a Taser.”<sup>152</sup>

McChrystal wrote:

[A]t the conclusion of the investigation, we acted swiftly. Included in the punishment of those responsible was expulsion from the unit, a uniquely difficult blow for soldiers whose very identity relied upon being part of the finest unit of its kind in the world. They weren’t the first to fall short of our standards and values, nor were they the last. But each time we acted.<sup>153</sup>



Pentagon spokesman Lawrence Di Rita told a press conference in December 8, 2004, in an apparent reference to the same incident, that four individuals associated with the JSOC task force “received administration punishments for excessive use of force. In particular I’m advised that it was the unauthorized use of Taser.”<sup>154</sup> Two of the four were removed from the unit.<sup>155</sup>

Di Rita described other investigations involving the JSOC task forces, but most resulted in letters of reprimand or other administrative punishments:

The unit has issued overall 10 letters of reprimand relating to all allegations of detainee abuse, other allegations that have arisen as well over time. The Navy Special Warfare Command has two special courts-martial pending. Two personnel have already received non-judicial punishment. There are four other non-judicial punishments pending. And there are two investigations of a — what we call Article 32 nature ongoing.<sup>156</sup>

According to journalist Marc Ambinder, at some point McChrystal

ordered deputy commanding general Eric Fiel to quietly review the practices at Camp Nama. The review, which remains classified and locked in a vault at Pope Army Airfield, resulted in disciplinary action against more than forty JSOC personnel. Several promising careers — including that of the colonel responsible for Nama at the time of the abuses — were ended.<sup>157</sup>

Ambinder does not specify whether the “disciplinary action” included criminal proceedings, perhaps due to ongoing classification.

## The Regular Military

### Rules of Engagement for Conventional Forces in Iraq

At congressional hearings after the Abu Ghraib scandal, a series of Defense Department and military officials testified that unlike Taliban and Al Qaeda suspects in Guantánamo and Afghanistan, detainees in Iraq were protected by the Geneva Conventions. Secretary of Defense Donald Rumsfeld testified to Congress that troops’ “instructions are to, in the case of Iraq, adhere to the Geneva Conventions. The Geneva Conventions apply to all of the individuals there in one way or another.”<sup>158</sup> General Ricardo Sanchez has written that in mid-June 2003, he “put out an order to all my units stating that the Geneva Conventions applied to all detainees for all interrogations and handling.”<sup>159</sup>

During the summer of 2003, 10 or 12 members of the 519th Military Intelligence Battalion, the same unit linked to two detainee deaths in Afghanistan, traveled to Abu Ghraib to set up interrogation operations there. Captain Carolyn Wood became the officer in charge. On July 26, 2003, Wood sent a proposed interrogation policy that included sleep management, “comfort positions,” the presence of military dogs, 20-hour interrogations, isolation and light control.<sup>160</sup> Wood said she understood Sanchez’s order to apply Geneva in Iraq created a different legal situation, which was why she sought command approval for the techniques. But she “perceived the Iraq experience to be evolving into the same operational environment as Afghanistan,” and thought the same techniques would be useful.<sup>161</sup>

Wood did not hear back from her command about the proposal, and resubmitted it on August 27, 2003. This time, two lawyers from CJTF-7 visited Abu Ghraib, and told her that “they did not see anything wrong with it,” and would approve it and forward it to higher-ranking officers for review.<sup>162</sup>

In early September, Major General Geoffrey Miller visited Iraq to advise personnel there about improving interrogations. Several soldiers who met with him recalled him saying that they were treating detainees too leniently. For example, Major General Keith Dayton, also of the Iraq Survey Group, remembered Miller telling him that ISG is “not getting much out of these people” because “you haven’t broken [the detainees] psychologically.”<sup>163</sup>

On September 14, CJTF-7 issued its first theater-wide interrogation policy, signed by General Sanchez. The policy stated that the Geneva Conventions applied, but nonetheless authorized sleep “adjustment,” stress positions, the presence of military dogs, yelling, loud music, light control, environmental manipulation, and isolation. The policy went into effect immediately. According to Sanchez’s autobiography, his legal advisor, Colonel Marc Warren, told him there was “unanimous agreement” among legal experts in Iraq that “every one of these is authorized by the Geneva Conventions.”<sup>164</sup>

At a hearing on May 19, 2004, Sen. Jack Reed asked Warren how he could have concluded that those techniques complied with Article 31 of the Fourth Geneva Convention, which states that “physical or moral coercion shall not be exercised against protected persons, in particular to obtain information from them or from third parties.” Warren stated that they were permitted “when applied to security internees, in this case who are unlawful combatants,” and who “would have been permissibly under active interrogation.”<sup>165</sup>

A December 24, 2003, letter from the military to the Red Cross explains this interpretation in more detail. Warren apparently relied on Article 5 of the Fourth Geneva Convention, which states that if a party to a conflict

is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. ... [S]uch persons shall nevertheless be treated with humanity.

The letter cites this provision to argue that security detainees are not eligible for full protection under the Fourth Geneva Convention, and “in the context of ongoing strategic interrogation ... we consider their detention to be humane.”<sup>166</sup>

At Central Command, Major Carrie Ricci disagreed with Warren’s interpretation. She stated that many of the techniques in the September 14 policy violated the Third and Fourth Geneva Conventions, and should not be authorized.<sup>167</sup> On October 12, 2003, Sanchez released a new directive, which listed only techniques included in the Army Field Manual, and stated that requests for unlisted techniques had to be submitted to him in writing.<sup>168</sup>

## **Abu Ghraib**

Many have argued that Sanchez’s second memo demonstrates that any subsequent abuses in

Iraq were a function of undisciplined, sadistic soldiers, not policy. This is particularly true of the notorious Abu Ghraib photographs. Many of those pictures depict cruelty and humiliation for no discernible purpose, and it was these incidents on which the court-martial convictions of Charles Graner, Ivan Frederick, Lynndie England, and the other night-shift MPs rested. Christopher Graveline, the lead Army prosecutor on the cases, later stated that his team had avoided “charging MPs if there was even a hint of MI [military intelligence] involvement that may have led to confusion about how detainees should be treated.”<sup>169</sup> Instead, Graveline focused on a few incidents where the detainees involved were never interrogated by MI — a fact that he believed put “a stake in the heart” of the defendants’ claim that they were just following orders from interrogators.<sup>170</sup>

On October 24, three prisoners who were accused of raping a juvenile were brought to Tier 1 of Abu Ghraib. The MPs stripped them naked, and handcuffed them together in sexual positions. The same night, Graner dragged a naked prisoner nicknamed “Gus” out of his cell with a leash around his neck. He handed the leash to Lynndie England, and took a picture of the incident. Two weeks later, on November 7, the guards subjected seven detainees accused of starting a riot in another part of the prison to a litany of abuses: they were hooded, punched and kicked (in at least one case, to the point of unconsciousness), stripped, stacked into a pyramid and photographed, and forced to masturbate. As Graveline anticipated, courts-martial rejected the soldiers’ attempt to argue that interrogators were ultimately responsible for those incidents.

But other photographs depict abuses that began before Graner’s unit arrived at the prison, and were widely condoned if not actually authorized. The “Fay Report,” an investigation by Major General George Fay into military intelligence personnel’s role in the Abu Ghraib abuses, found that

The MPs being prosecuted claim their actions came at the direction of MI. Although self-serving, these claims do have some basis in fact. The environment created at Abu Ghraib contributed to the occurrence of such abuse and that it remained undiscovered by higher authority for a long period of time. What started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised soldiers and civilians.<sup>171</sup>

Major General Antonio Taguba (in the “Taguba Report” investigating MP abuses) also found a link between MI and the MP guards’ abuses:

Military Intelligence (MI) interrogators and Other US Government Agency’s (OGA) interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses. . . . I find that personnel assigned to the 372nd MP Company, 800th MP Brigade were directed to change facility procedures to “set the conditions” for MI interrogations.<sup>172</sup>

In an interview with Task Force staff, General Taguba said he had originally been assigned only to interview MP personnel at Abu Ghraib, but he had interpreted his authority broadly in order to speak to some of the key figures in military intelligence. Taguba said he thought the MPs had been “exploited,” and that there had been a failure both within the military and in Congress to hold those at the top responsible. “It has to be the generals,” Taguba said. In the Navy “if that ship runs aground, who gets relieved? The captain.”<sup>173</sup> Instead, Taguba said, there were several

officers complicit or involved in abuse who “got away, or got their fourth star.” He did not want to name specific individuals, however.<sup>174</sup>

Brent Pack, the CID agent who examined the Abu Ghraib photographs, later told journalists that he asked of each photo, “does this one actually constitute a crime or is it standard operating procedure?” Pack regarded nudity and stress positions as “standard operating procedures.”<sup>175</sup>

Damien Corsetti, an MP from the 519th Military Intelligence Brigade, has stated, regarding stress positions, nudity, and sleep deprivation, that his unit “set the same policies in Abu as we set at Bagram. The same exact rules.”<sup>176</sup> A September 16, 2003, entry from the logbooks kept by the 72nd MP Company corroborates this, stating that a detainee “was stripped down per MI and he is [naked] and standing tall in his cell.”<sup>177</sup>

The Fay Report found that at Abu Ghraib, nudity was “employed routinely and with the belief it was not abuse. ... CPT Reese, 372 MP CO, stated upon his initial arrival at Abu Ghraib, ‘There’s a lot of nude people here.’ ”<sup>178</sup> Fay also said “interrogators believed they had the authority to use ... stress positions, and were not attempting to hide their use.”<sup>179</sup>

The Red Cross came to a similar conclusion based on visits to Abu Ghraib in mid-October 2003, where they “witnessed the practice of keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days.”<sup>180</sup> When they demanded an explanation, “[t]he military intelligence officer in charge of the interrogation explained that this practice was ‘part of the process.’ ”<sup>181</sup> The ICRC also witnessed sleep deprivation, threats, and detainees being “handcuffed either dressed or naked to the bed bars or the cell door.”<sup>182</sup> Its medical officer observed both physical and psychological symptoms resulting from this treatment, including bruising and cuts around the wrist, “incoherent speech, acute anxiety reactions, abnormal behavior, and suicidal tendencies.”<sup>183</sup>

Sabrina Harman arrived at Tier 1A of the prison on October 18 or 19. She was one of the MPs assigned to handle the night shift. On October 20, she wrote to her partner, Kelly, that she had seen a detainee, nicknamed “the taxi cab driver,” being handcuffed to his window and his bed frame for hours, naked and with underwear over his face, until he was “yelling for Allah.”<sup>184</sup> “Taxi Driver’s” real name was Amjad Ismail Waleed,<sup>185</sup> and there are multiple photographs of him in the position Harman described. According to Harman, his interrogator was Steve Stefanowicz, a contractor who worked for CACI International, Inc.<sup>186</sup> Stefanowicz was not present that night, but Charles Graner told CID investigators that “Big Steve” had instructed him to place Waleed in that position:

With Taxi Driver he was supposed to just be stood up in his cell with—strip him out and have his underwear on his head and yelling at him, harass him. You know, what if he doesn’t want to stand there? Well, cuff him to his bed for x amount of time.<sup>187</sup>

Graner said this was part of an interrogator’s “sleep plan,” in which MPs allowed detainees to sleep for only four hours out of every 24. During those four hours, though, detainees were interrogated, so “for those guys, initially, they didn’t get much sleep starting out.”<sup>188</sup>

**“...some detainees arrive at [Abu Ghraib] who were detained because the correct target of a raid was not home, so a family member was taken in his place...”**

Waleed gave a statement to CID investigators on January 21, 2004, in which he described these and other incidents of being beaten and handcuffed in painful positions until unconsciousness. He also described being sodomized with a police baton.<sup>189</sup> Both Taguba and Fay found that his testimony was credible and corroborated by other detainees' and soldiers' reports.<sup>190</sup> Waleed testified at greater length for Sabrina Harman's court-martial defense, both in a February 2005 deposition and during Harman's trial. At the February 2005 deposition, for example, he directly attributed the abuse to instructions from "Interrogator Steve," who "used to come and watch the torture and laugh, sometimes he spits, and hit me once or twice."<sup>191</sup> No soldiers were ever charged for Waleed's abuse.

In his post-conviction interview with CID, Charles Graner said that in addition to Stefanowicz, a sergeant from a Guantánamo Bay interrogation training team had instructed him to use stress positions. Graner stated that the previous MP company stationed at Abu Ghraib would sometimes handcuff detainees to the cell bars as punishment for talking, but it was the Guantánamo sergeant who "got into the exotic positions," like handcuffing them "from behind the back, up on the toes or up high enough just not to be standing and low enough just not to be kneeling."<sup>192</sup>

Ivan Frederick, another Abu Ghraib MP convicted of abusing prisoners, corroborated Graner's claims.<sup>193</sup> At the court-martial of Army dog handler Michael Smith, Frederick described Stefanowicz telling guards to menace one detainee with military dogs.<sup>194</sup> Both the prosecution and defense stipulated that Stefanowicz had written in his interrogation notes that working dogs were being used during interrogations with command approval.<sup>195</sup> Frederick also testified to CID that a Guantánamo interrogator had taught Graner about stress positions shortly after the unit's arrival at the prison.<sup>196</sup>

Stefanowicz has denied these allegations through counsel. His attorney at the time of the Smith court-martial, Henry E. Hockheimer Jr., told reporters that "we deny that Mr. Stefanowicz conspired with anyone to commit any kind of unlawful act."<sup>197</sup> Hockheimer has also noted that the MPs convicted of the worst Abu Ghraib abuses have inherent credibility problems.<sup>198</sup> Stefanowicz's former employer, CACI International, has asserted that its internal investigation "could not confirm the suspicion of the Taguba Report about Stefanowicz or find any credible evidence of abuse by CACI interrogators."<sup>199</sup> Although Taguba and Fay both found that Stefanowicz had instructed MPs to abuse detainees, and made false statements to investigators,<sup>200</sup> the United States has never charged him with any offense.

The Fay Report draws a sharp distinction between the use of nudity and stress positions and "violent and sexual abuses."<sup>201</sup> But Abu Ghraib detainees who spoke to Army investigators described the use of stress positions as one of the most common and painful forms of abuse. Detainee number 150542 told investigators that "Graner used to hang prisoners by the doors and windows in a way that was very painful for several hours and we heard them screaming."<sup>202</sup> Detainee number 151362 said

they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion. They ordered me to thank Jesus that I'm alive. And I did what they ordered me. This is against my belief. They left me hang from the bed and after a little while I lost consciousness. When I woke up, I found myself still hang[ing] between the bed and the floor.<sup>203</sup>

Detainee number 150247 described being “cuffed ... to the window of the room about 5 hours.”<sup>204</sup> Detainee number 7787 said a night guard “took the clothes and left us naked and handcuffed to the bed” for the guard’s entire shift.<sup>205</sup> Detainee number 152529 said that a soldier with glasses had “grabbed my head and hit it against the wall and then tied my hand to the bed until noon the next day.”<sup>206</sup> Detainee number 151108 said Graner had

cuffed my hands with irons behind my back to the metal of the window, to the point my feet were off the ground and I was hanging there for about 5 hours just because I asked about the time, because I wanted to pray. And then they took all my clothes and he took the female underwear and he put it over my head. After he released me from the window, he tied me to my bed until before dawn.<sup>207</sup>

**“Once detained, it was almost impossible for detainees to get released even if they were innocent.”**

Colonel Stuart Herrington visited Abu Ghraib in mid-December 2003, after the worst of the abuses had ended. Even then, he found it to be “a sewer,” and “as wrong as wrong could be.”<sup>208</sup> The prison was dangerously overcrowded, in part because some units were detaining people on vague suspicions. In some cases,

we were told, some detainees arrive at [Abu Ghraib] who were detained because the correct target of a raid was not home, so a family member was taken in his place (either “voluntarily” or against his will), who would then be released when the target turns himself in. This practice, if it is being done, has a “hostage” feel to it.<sup>209</sup>

Once detained, it was almost impossible for detainees to get released even if they were innocent. The prison was subjected to regular mortar attacks, resulting in casualties. MPs were still keeping detainees off the books for the CIA. Herrington did not see any detainees being mistreated on his visit, but he did see cells with sheets covering the bars. He was told they were there to give female detainees some privacy. After the photographs were released, he suspected that this was untrue, and the cells had actually held naked male prisoners.<sup>210</sup>

### **Abuses by Conventional Forces Outside Abu Ghraib**

Abuses in Iraq were not limited to Abu Ghraib. John Sifton of Human Rights Watch told a reporter that detainee abuse in Iraq was

widespread, but that doesn’t mean it’s all the same. There’s been spontaneous abuse at the troops’ level; there’s been more authorized abuse; there’s been overlap — a sort of combination of authorized and unauthorized. And you have abuse that passed around like a virus; abuse that started because one unit was approved to use it, and then another unit which wasn’t started copying them.<sup>211</sup>

The abuses by both OGA and the 3rd Armored Cavalry at the Blacksmith Hotel and Al Asad Air Base are one example of abuse being “passed around like a virus.” Two nearby detention facilities in Mosul were another. One was a detention site for Navy SEAL Team 7, one of the units affiliated with the JSOC task forces. The other was a “Brigade Holding Area” (BHA) for the 2nd Brigade Combat Team, a unit of the 101st Airborne Division.

Specialist Tony Lagouranis, an interrogator with the 202nd Military Intelligence Battalion who was stationed in Mosul, described prisoners' accounts of being abused by the SEALs at the base. One detainee dropped off by the SEALs in March 2004, whom Lagouranis called "Fadel," had swollen and black feet, and burns on his legs. Fadel, crying "the entire time," told Lagouranis he had been blindfolded, stripped naked, and placed on a plywood floor. He felt cold water and ice poured over him, and started to shiver. A thin tube was inserted into his rectum. Interrogators played loud noises, and when he removed his blindfold there was a flashing light. Then he was moved to a chair, where someone beat his feet and burned his legs.<sup>212</sup>

Lagouranis wrote,

It was not the last I heard about these techniques. At least a half dozen prisoners told me about ice water, beatings, or the strobe and music treatment. These prisoners were separated by space and time, so I believe these were not coordinated stories.<sup>213</sup>

Lagouranis said that a guard who sometimes worked with the SEALs described similar techniques, including the use of a rectal thermometer to ensure that the detainee's body temperature did not drop too low.<sup>214</sup> Staff Sergeant Shawn Campbell, the leader of Lagouranis's interrogation team, corroborated his account to journalist Joshua Phillips. Campbell said he remembered one detainee "shivering ... He looked like he [became] hypothermic."<sup>215</sup>

A detainee named Fashad Mohammed died at the SEAL compound in Mosul on April 5, 2004. He was lying on a sheet of plywood at the time of his death.<sup>216</sup> According to his autopsy, "[d]uring his confinement, he was hooded, sleep deprived, and subjected to hot and cold environmental conditions, including the use of cold water on his body and hood."<sup>217</sup> Mohammed also had "multiple minor injuries" on his body, including two black eyes, but none significant enough to cause his death. The autopsy found that Mohammed "was subjected to cold and wet conditions, and hypothermia may have contributed to his death," but "the cause of death is best classified as undetermined, and the manner of death is undetermined."<sup>218</sup> Mohammed's death was the subject of a preliminary inquiry by the Navy Special Warfare Group, which in contrast to the final autopsy rapidly "ruled out the possibility that the detainee was even mildly hypothermic" because his temperature was measured at 97.5 degrees Fahrenheit approximately half an hour prior to death.<sup>219</sup> *The Washington Post* reported in September 2004 that several Navy SEALs were charged with assaulting and mistreating Mohammed,<sup>220</sup> but in June 2006 a Navy Special Warfare Command public affairs officer said his office had no information about anyone being disciplined in the case.<sup>221</sup>

Lagouranis and Campbell said that with the encouragement of the warrant officer who ran interrogations at Mosul, the regular Army interrogators began adopting many of the same tactics as the SEALs, including sleep deprivation, stress positions, threatening detainees with dogs, subjecting them to hot and cold temperatures.<sup>222</sup>

These allegations are consistent with several detainees' accounts of the detention facilities in Mosul. Detainees referred to both the Navy SEAL and Army facilities as the "Disco," or "Disco Mosul," because of the loud sounds and flashing lights. Some of their reports predated Lagouranis's deployment to Mosul. Similarly, in December 2003, a teenaged detainee

alleged that a soldier broke his jaw while he was doing stress exercises. An Army investigation into that incident found that detainees in Mosul

were being systematically and intentionally mistreated (heavy metal music, bullhorn, hit with water bottles, forced to perform repetitive physical exercises until they could not stand, having cold water thrown on them, deprived of sleep, and roughly grabbed off the floor when they could no longer stand). ... The 3rd & 4th Geneva Conventions were violated in regard to the treatment afforded to these detainees.<sup>223</sup>

Ben Allbright, an MP guard with the 82nd Airborne told Human Rights Watch that he saw similar techniques used at FOB Tiger in Al Qaim. Allbright said that “standard procedure” was to deprive detainees of sleep for the first 24 hours of their detention by blindfolding them, handcuffing them in zip-ties behind their backs, and forcing them to stand inside a metal shipping container where the temperatures could reach 135 or 145 degrees.<sup>224</sup> After this, detainees were taken to be interrogated for the first time. The interrogators were

[s]ometimes, military interrogators. Sometimes, civilian personnel. We had a lot of various different — we could have CIA rolling through — it was chaos. We had special forces, CIA, everybody — various people at different times. The civilian people, I couldn’t really tell you who they were, you know, they weren’t wearing tags or tapes or anything. You couldn’t really know, unless you went up and asked them.<sup>225</sup>

Allbright said that he repeatedly witnessed interrogators beat or threaten detainees; he estimated that “about half the guys to 60 percent of the guys got at least one gut shot — either punched or the butt of the rifle in the stomach.”<sup>226</sup> He said in general, civilian interrogators seemed more likely to be violent.<sup>227</sup>

Before Allbright, three other soldiers in the 82nd Airborne spoke to Human Rights Watch about abuses they witnessed. Two of them corroborated his allegations of mistreatment at FOB Tiger. But all three said the worst abuses they knew of were at FOB Mercury, near Falluja, in late 2003 and early 2004. One sergeant, who did not give his name, alleged that he had participated and witnessed daily beatings of detainees, and “smoked” detainees by putting them “in stress positions until they get muscle fatigue and pass out. That happened every day.” The same sergeant alleged that he had witnessed a soldier break a detainee’s leg with a baseball bat, and another incident where soldiers broke open chemical light sticks and beat detainees with them.<sup>228</sup>

The unit did not have much interaction with OGA or Special Forces in Falluja. According to the sergeant and Captain Ian Fishback, they did witness OGA “stress” prisoners in Afghanistan, and had some interactions with them at FOB Tiger. They also had instructions from military intelligence to keep prisoners awake. But much of the abuse was spontaneous, a function of soldiers without training in detention or interrogation guarding the same prisoners who had shot at their unit. The sergeants who spoke to Human Rights Watch were not military police. The first sergeant, who made the most serious allegations of abuse, said

I was an Infantry Fire Team Leader. The majority of the time I was out on

**“But much of the abuse was spontaneous, a function of soldiers without training in detention or interrogation guarding the same prisoners who had shot at their unit.”**



mission. When not on mission I was riding the PUCs [Person Under Control]. We should have had MPs. We should have taken them to Abu Ghraib [which] was only 15 fucking minutes drive. ... We should never have been allowed to watch guys we had fought.<sup>229</sup>

Captain Fishback, who repeatedly heard about abuses from noncommissioned officers but witnessed fewer directly, agreed:

It's army doctrine that when you take a prisoner, one of the things you do is secure that prisoner and then you speed him to the rear. You get him out of the hands of the unit that took him. Well, we didn't do that. We'd keep them at our holding facility for I think it was up to seventy-two hours. Then we would place him under the guard of soldiers he had just been trying to kill. The incident with the detainee hit with a baseball bat; he was suspected of having killed one of our officers.<sup>230</sup>

Fishback did directly witness some abuses, such as the use of stress positions and forced exercise to exhaust detainees, "that I knew were violations of the Geneva Conventions when they happened but I was under the impression that that was U.S. policy at the time."<sup>231</sup> After Abu Ghraib, when Rumsfeld testified that U.S. troops in Iraq were to follow the Geneva Conventions, Fishback sought guidance from his chain of command, without success. On September 16, 2005, he wrote to Sen. John McCain about his attempts:

For 17 months, I tried to determine what specific standards governed the treatment of detainees by consulting my chain of command through battalion commander, multiple JAG lawyers, multiple Democrat and Republican Congressmen and their aides, the Ft. Bragg Inspector General's office, multiple government reports, the Secretary of the Army and multiple general officers. ... Despite my efforts, I have been unable to get clear, consistent answers from my leadership about what constitutes lawful and humane treatment of detainees.<sup>232</sup>

Fishback described to Human Rights Watch a particularly frustrating conversation with a JAG officer:

So I went to JAG and ... he says, "Well the Geneva Conventions are a gray area." So I mentioned some things that I had heard about and said, "Is it a violation to chain prisoners to the ground naked for the purpose of interrogations?" and he said, "That's within the Geneva Conventions." So I said, "Okay. That is within the Geneva Conventions." And then there is the prisoner on the box with the wires attached to him, and to me, as long as electricity didn't go through the wires, that was in accordance with what I would have expected US policy to be and that he wasn't under the threat of death. And he said, "Well, that is a clear violation of the Geneva Conventions." And I said, "Okay, but I'm looking for some kind of standard here to be able to tell what I should stop and what I should allow to happen." And he says, "Well, we've had questions about that at times." ... If I go to JAG and JAG cannot give me clear guidance about what I should stop and what I should allow to happen, how is an NCO or a private expected to act appropriately?<sup>233</sup>

Six soldiers in the 1st Battalion, 68th Armor Regiment — a tank battalion with no experience in detainee operations — told reporter Joshua Phillips that they had regularly tortured detainees at a makeshift jail near FOB Lion, in Balad.<sup>234</sup> Techniques included sleep deprivation, beatings, using zip ties to force detainees into painful positions, and choking detainees with water. The sleep deprivation was requested by military intelligence, but many other techniques were improvised — though several soldiers said their command discouraged them from reporting abuse.<sup>235</sup>

The unit had no experience or training in interrogation or detainee handling, but “[w]e were getting shot at all the time so we needed to know what they knew,” according to Adam Stevenson.<sup>236</sup> A medic, Jonathan Millantz, told Phillips that it was reckless

to give that much power and responsibility to a bunch of guys who were full of hate and resentment — getting shot at and watching their friends get killed ... seeing people decapitated [in videos] — and then putting those guys in direct control of the people who did these things.<sup>237</sup>

Millantz committed suicide in 2009. Based on Phillips’ interviews with Millantz, his friends and family members, it seems clear that his death was linked to remorse over his role in torturing prisoners. Another soldier from Battalion 1-68, Sergeant Adam Grey, died in August 2004 in another likely suicide, though the military officially ruled his death “accidental.”

The confusion about standards of detainee treatment was not universal in Iraq. Most units — too many to thoroughly record or document here — followed the Geneva Conventions’ and Army Regulations’ requirements regarding the treatment of prisoners, though there were individual violations. To give one example, Colonel Herrington and Major Douglas Pryer have cited the First Armored Division, commanded by Major General Martin Dempsey, for its professional and ethical treatment of captives.<sup>238</sup> Reports of abuses by U.S. forces also declined dramatically after Abu Ghraib, as a result of clearer rules and greater oversight.

A report on U.S. detention operations by Admiral Albert Church found that abuses of captives in Iraq represented “a tiny proportion of detainee operations,” given that over 50,000 detainees had been in coalition custody. Church wrote, “As of September 30, 2004, 274 investigations of alleged detainee abuses in Iraq had been initiated ... 160 investigations have been closed, of which 60 substantiated abuse.”<sup>239</sup>

That number, though, should not be taken as an estimate of the number of detainees who were abused, even for the time period in question. First, many substantiated cases of abuse involved more than one detainee, a factor that was particularly relevant where abuses were “standard operating procedure” at a facility. Second, many abuses likely went unreported, or were reported without leading to a formal investigation. Church wrote that while soldiers, civilians and contractors understood their obligation to report abuse, they had “widely varied” descriptions of what constituted abuse, and to whom they should report it.<sup>240</sup> Third, military criminal investigators faced enormous obstacles in investigating cases.

Five members of the Detainee Abuse Task Force, a CID unit charged with investigating cases in the vicinity of Camp Victory in Baghdad — the largest concentration of detainees in Iraq — explained to journalist Joshua Phillips the difficulties they faced. Six full-time agents were responsible for investigating hundreds of cases. Given the agents’ caseload, tracking down

corroborating witnesses was extremely difficult, particularly Iraqi victims who had been released from prison. The investigators themselves did not have a clear working definition of what constituted unlawful abuse. Jon Renaud, who headed the task force, said

I was an interrogator for a year in 2003. I ran the Detainee Abuse Task Force, and I can't give you an absolute definition of what detainee abuse is — and none of my bosses can. ... Everyone thinks that every interrogator in theater had read a list of enhanced interrogation techniques. Nobody knew what those were.<sup>241</sup>

Renaud assumed that some complaints never reached CID because military intelligence commanders believed the techniques were authorized: “If you believe your folks didn't do anything wrong ... why would you report it?”<sup>242</sup> Another member of the task force, former Sergeant Cooper Tieaskie, said that sometimes the task force would receive reports of abuse from military intelligence units that were heavily redacted for “operational security reasons”: “Sometimes, it was just like, ‘Here's what we're going to give you — one sentence.’”<sup>243</sup> This problem was especially acute for Special Forces units, but not limited to them. None of the members of the task force could recall a single one of their cases proceeding to a court-martial — even in cases where there was clear physical evidence that a detainee had been beaten. Renaud said he viewed the task force's work as “a whitewash.”<sup>244</sup>

A 2006 study by a group of human rights organizations reviewing various public sources found “at least 330 cases” where U.S. personnel were credibly alleged to have abused detainees, involving at least 600 alleged perpetrators, 460 detainees, and “more than 1,000 individual criminal acts of abuse.”<sup>245</sup> Two-thirds of those cases occurred in Iraq. In all theaters, the report found that 10 individuals had received sentences of one year or more in prison. None of them were officers.<sup>246</sup>

The Department of Defense said these numbers were inaccurate at the time, and even if completely accurate they are obviously dated. DOD does not, however, compile its own statistics on disciplinary proceedings for abuse, and did not respond to Task Force staff's requests for statistical information on detentions and disciplinary proceedings.

### **Changes After Abu Ghraib**

After Abu Ghraib, abuses by U.S. forces declined dramatically, but other problems arose as the prison population continued to grow. Major General William Brandenburg, who became head of detention operations in Iraq in November 2004, said that by the time he arrived, as a result of the Abu Ghraib scandal, “[w]e had very defined rules in place for interrogation. ... There was no grey areas.”<sup>247</sup>

Brandenburg stated that when he took over command of Iraq's prisons, his predecessor, General Geoffrey Miller, told him that they planned to reduce the population from approximately 7,000 to 4,000. But “the enemy always gets a vote, and circumstances on the ground,” and the desire for improved security before the first Iraqi election, “translated to more detainees.”<sup>248</sup> Brandenburg said that by November 2005, shortly before he was replaced by Lieutenant General Jack Gardner as the head of detention operations, the population stood at “13,000 plus.”<sup>249</sup> The population rose further with the “surge”; by August 2007, *The New York Times* reported that it had reached 24,500.<sup>250</sup>

Some of them were doubtless civilians, unaffiliated with the insurgency. In an interview with Task Force staff, Gardner discussed the difficulties this raised:

If you hold somebody that's not really linked to it, you know, you're either going to alienate him or his family or both, or his community and that doesn't help counter-insurgency, it doesn't help anything. And then, he's susceptible to being recruited potentially inside.<sup>251</sup>

Gardner described conducting “a counterinsurgency” inside the tent compounds at Abu Ghraib in March or April 2006 to try to identify people who were “either recruiting or didn't fit in that compound.”<sup>252</sup> Brandenburg also described recruitment as a problem:

A guy who was paid \$100 to dig the hole for the IED [improvised explosive device] is doing that to feed his family. He's ... at worst, neutral. He goes into the theater internment facility. He rubs up against Al Qaeda and Iraq guys. You release him, and the next thing you know, you find him dead, as he's participated in some major heinous act somewhere.”<sup>253</sup>

Major General Douglas Stone, who followed Gardner as commander of detention operations in Iraq, said that some detainees were planning attacks from inside the prisons.<sup>254</sup> There was also escalating sectarian violence within U.S. detention facilities after the February 2006 bombing of the Askariya Shrine in Samarra. Stone said that “the detainees were burning, they were killing each other, they were maiming each other.”<sup>255</sup> This was not an exaggeration; autopsy reports released to the ACLU under the Freedom of Information Act show a number of cases where detainees appear to have been beaten to death, stabbed, or strangled by other inmates.<sup>256</sup> Military officials told the Associated Press in July 2008 that some of these killings were carried out by self-styled “sharia courts” organized by extremists in the prisons.<sup>257</sup> Stone confirmed this in an interview with Task Force staff.<sup>258</sup>

Brigadier General Rodney L. Johnson told a newspaper that the total number of detainees tried by the “sharia courts” was in the double digits.<sup>259</sup> One of them was 31-year old Mohammed Ajimi al-Isawi, who was strangled and beaten to death in Camp Bucca in 2007. According to his autopsy report, he was “murdered by members of the [redacted] and buried in a grave inside the detention facility compound. ... He was allegedly sentenced to death by the [redacted] for speaking against the compound's [detainee] leadership.”<sup>260</sup>

Stone said that one of the primary problems with the detention system was that “the system is designed for you to go in, but never for you to come out. ... Even if you shouldn't have been in there.”<sup>261</sup> In March of 2008, Stone estimated that of the 24,000 detainees in Iraq, “one-third are genuinely continuing and imperative security risks. ... But that means two-thirds are not, or at least remain a question mark.”

Stone said he viewed this as a strategic problem:

[O]ne out of every ten Iraqis had a personal experience with detention. So, what is the biggest strategic disadvantage to the Surge, in my judgment? And the answer, to me, was, the biggest strategic disadvantage is if anything goes wrong in that detention camp — and it was already going wrong.<sup>262</sup>

Stone instituted a number of changes. He created administrative boards to determine whether individuals in detention remained an “imperative security risk.”<sup>263</sup> The boards did not offer detainees much in the way of formal procedural protections — detainees did not have lawyers, or access to all of the evidence the board did — but at least gave them a genuine opportunity to be heard, and roughly 45 to 50 percent of hearings resulted in a recommendation for release.<sup>264</sup> The boards also helped identify extremists within the prison, so they could be sequestered from more moderate detainees.<sup>265</sup> There was a concerted effort to improve conditions for most detainees, with measures including literacy and job training courses and other educational programs, greater opportunity for family visits, and teleconferences for families who could not safely travel to visit their detained relatives.<sup>266</sup>

Stone said that contrary to what might have been feared, these measures decreased rather than increased the recidivism rate, from approximately 5–10 percent to 1 percent. Riots and other violent incidents within the prisons also declined dramatically.<sup>267</sup>

## Accounts from Former Iraqi Detainees

In August of 2012, Task Force staff traveled to Iraq and interviewed dozens of people in U.S. detention about their experiences, to preserve their stories and to help assess the detention and interrogation programs. There is no way empirically to evaluate these accounts; they can neither be reliably corroborated nor dismissed. There are, however, factors that make the accounts, at least significant parts of them, generally plausible and credible. The most important is that they comport with what could be expected in a war waged by a military hurriedly trying to learn a foreign culture and society; add to that the confusion inherent in an urban military engagement where the enemy is in civilian clothes and scattered among the population. The initially poor understanding by U.S. occupation forces of the sectarian and tribal enmities that existed, combined with an uncertain and hostile environment, meant that there was a reduced awareness that some people would see the confusion as an opportunity to lodge false accusations to gain advantages over their rivals.

One of the most common complaints from detainees was that they were locked up for years, with no opportunity to see or rebut any evidence against them.<sup>268</sup> Former detainee Nuri Nejem Abdullah said he was detained in September 2003, and held in Abu Ghraib for three months and Camp Bucca for 2½ years. “Till now, I don’t know why they arrested me,” he said. His interrogators “didn’t know anything about me,” Abdullah said. “They kept asking me two questions. They asked about Al Qaeda and about Saddam.”<sup>269</sup> When he was released he was told he had been kept in detention because of a rifle found in house, a weapon that he said most Iraqi households have for protection. Abdullah said, “We were so happy [when the Americans came]; we believed they would save us from Saddam. We used to curse him but now we send blessing to Saddam’s soul.”<sup>270</sup> Abdullah said he suffered a tragedy during the American occupation and the chaotic violence that followed: his son, Akhil, born in 1986, disappeared one day in 2006 and to this day Abdullah does not know what happened to him.<sup>271</sup>

Most of the former detainees alleged being physically abused by U.S. forces, with excessive force at the point of capture being the most common allegation.<sup>272</sup> Some said they still suffered from the injuries they sustained: Saddam Rahm said that he had been kicked in the groin repeatedly, and is unable to have children or perform sexually as a result.<sup>273</sup> Tay Rahm Addularida, who

was held at Camp Bucca for two years and one month, said that the troops who arrested him broke his ribs with their boot, and smashed his teeth. He said he still suffers pain as a result.<sup>274</sup>



Each former detainee interviewed by Task Force staff said that before his release, he signed a paper attesting that he had not been mistreated. Translated from Arabic, the form reads:

I know that one of my rights is to give notice of any mistreatment and I know that one of my rights is to complain about any mistreatment I got during the period of my arrest.

And I understand that no one will punish me because of this notification. And I know also that any notification with regard to this issue will not have an effect on the order to release me.

Choice 1: I did not suffer from any mistreatment. [check box]

Choice 2: I suffered from mistreatment during my period of arrest. [check box]

All those interviewed said they believed the assurances on the release form that they could report abuse without suffering any consequences were meaningless. They said that they had no choice but to say they had not been mistreated. To do otherwise, they believed, would have been foolish.



# The Legal Process of the Federal Government After September 11

*“The Generals’ War”<sup>21</sup> was the title of an excellent history of the first Gulf War, an allusion to the fact that the conflict was a set-piece of modern military strategy conducted by the nation’s top soldiers. In some significant ways, the prolonged conflicts that occurred after September 11 could be thought of as “The Lawyers’ War.”*

*From the beginning, the detention and interrogation of prisoners was less dependent on the decisions of generals, and more influenced by government attorneys. Both those in uniform and those in the CIA looked to government lawyers to guide them and set limits. Never before in the history of the nation had attorneys, and the advice they provided, played such a significant role in determining the treatment of detainees.*

*The horror of September 11 quickly threw up questions about the obligations of the United States and its agents under domestic and international law. Before then, U.S. detainee policy had arisen, almost exclusively, in connection with armed conflicts, fought on foreign soil, between nation states. Some government attorneys came to argue that the “unique nature” of the post-September 11 conflicts, allowed — if not required — some significant reinterpretations of U.S. legal obligations.*

*Events after September 11 did not occur in a legal vacuum. The U.S. Constitution at least implicated detainee treatment within our borders. The Geneva Conventions, which the United States had been instrumental in shaping decades earlier, contained international humanitarian laws of war that were adopted as U.S. law. The War Crimes Act in 1996 made it a crime under U.S. law to violate the Geneva Conventions and other international laws of war ratified by the United States. The U.S. had also been an early and enthusiastic supporter of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment during the Reagan administration, and in 1994, the United States eventually passed the Torture Statute, 18 U.S.C. §§ 2340–2340A, in order to comply with the treaty’s requirement to enact enabling legislation.*

*Yet, despite the laws in place, some attorneys for the federal government advised the nation’s political leaders that a variety of techniques used by agents of the United States were permissible. Several of those techniques were later deemed by many, including this Task Force, to amount to torture. Almost all the significant legal advice formally issued by the federal government pertaining to detainee treatment after September 11 came from the Office of Legal Counsel of the Department of Justice. The Office of Legal*



*Counsel pronounced on the legality and constitutionality of behavior for the White House, giving it a special role, a kind of internal Supreme Court. Despite playing an important part in the implementation of detainee policy, and despite significant institutional experience in the subjects of law enforcement, interrogation, national security and counterterrorism, subject-matter experts at the Department of Defense, the FBI, the Department of State, and other federal agencies, for the most part, had only a minor role — or none at all — in establishing the legal parameters for U.S. policy during this period. Individuals at agencies outside the Department of Justice would press to have their say, but it was the advice of the Office of Legal Counsel, and a few select individuals, that provided the legal foundation in the post-September 11 era.*

*John Yoo, a deputy attorney general in the Office of Legal Counsel from 2001 to 2003, was instrumental in shaping the office's early response after September 11 on matters of national security. Though Jay Bybee was the assistant attorney general in charge of the office at the time, and Yoo his deputy, Yoo was the national-security specialist. Yoo met occasionally with a group of influential lawyers: David Addington, legal counsel to the vice president; Alberto Gonzales, White House counsel; Timothy Flanigan, deputy White House counsel; and William "Jim" Haynes II, general counsel, for the Defense Department to discuss legal issues affecting national security. The informal group became known as the "War Council," despite the fact that the five attorneys themselves had little experience in law enforcement, military service or counterterrorism. The precise effect these individuals had on the advice provided by Office of Legal Counsel from 2001 to 2003 remains imprecise, but that they had an effect is amply demonstrated in documents, books, emails and interviews.*

*Even before the issuance of the 2002 memos that became notorious for appearing to authorize acts constituting torture, Office of Legal Counsel issued a number of significant legal opinions in the "War on Terror" that reinterpreted the power of the president in wartime in a greatly expanded fashion. The president, OLC determined, had authority to: unilaterally suspend the Geneva Conventions; dispense with the Fourth Amendment's warrant and probable-cause requirements in the execution of domestic military operations; detain U.S. citizens as enemy combatants; ignore specific laws that prohibited the surreptitious surveillance of Americans' communications; and deploy military force preemptively against terrorist organizations and the states that harbor them, whether or not those organizations and states were linked to September 11.*

*The Torture Memos, as they've become known, were drafted in the spring and summer of 2002. The memoranda examined behavior under the law to determine what actions constituted torture. The authors determined the proposed acts could cause pain, and could be degrading, but could still be administered without producing pain and suffering intense enough to constitute torture. Ten controversial interrogation techniques, including the use of the infamous "waterboard," were approved in August 2002.*

*As the personnel in the Office of Legal Counsel changed, so too did the office's legal advice; however, the office never determined that the tactics approved by Yoo and Bybee had violated the law. Jack Goldsmith III became the assistant attorney general in charge of Office of Legal Counsel after Jay Bybee left in 2003. When Goldsmith issued legal advice that constrained the president's policy options, he was criticized by remaining members of the War Council. When news of the controversial earlier legal*

*advice became public, Goldsmith withdrew Yoo and Bybee's work but he did not remain in his post long enough to issue new guidance to replace it. His successor, Daniel Levin, issued new legal guidance. Levin concluded, however, in a footnote, that none of the interrogation techniques used in the past was illegal under his new legal guidance. Similarly, Levin's successor, Steven Bradbury, determined that dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap, abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation, and even waterboarding did not violate the law. Though Yoo's successors at Office of Legal Counsel offered different legal advice and differing rationales, they still agreed that the methods themselves were legal.*

*Yoo has remained an aggressive, vocal defender of the advice he and others provided the administration, while most of his colleagues from the time have remained silent. Their silence, however, cannot and should not be confused with repudiation. Though relatively few attorneys now vocally support Yoo's work, the debate on the appropriateness of the legal advice he and others gave continues. As long as the debate continues, so too does the possibility that the United States could again engage in torture. In the last days of the Bush administration, Steven Bradbury offered an explanation as to why it was understandable that Yoo, Bybee and others issued legal advice that later came to be criticized so strongly. "It is important to understand the context of the [memo]. It was the product of an extraordinary — indeed, we hope, a unique — period in the history of the Nation; the immediate aftermath of the attacks of 9/11." On January 15, 2009, Bradbury subsequently retracted and cautioned against relying on nine different memoranda issued by the Office of Legal Counsel.*

*As this chapter illustrates, more than a decade after September 11, much still remains classified by the United States that could shed light on how the legal processes of the United States contributed to a situation in which torture was allowed to occur.*



# Overview of the Legal Framework in the United States on September 11

U.S. law on detainee treatment prior to September 11 was contained primarily in treaties ratified by the United States and laws enacted by Congress, based on long-standing principles of international law.

## The U.S. Constitution

Three constitutional amendments implicate detainee treatment domestically. The Fifth Amendment establishes the right against compelled self-incrimination and the right to due process prior to any deprivation of liberty by the federal government.<sup>2</sup> The 14th Amendment requires that a person deprived of liberty be afforded due process by the states, and establishes the right to equal protection under the law.<sup>3</sup> The Eighth Amendment prohibits cruel and unusual punishment.<sup>4</sup> The rights contained in these three amendments prohibit treatment that “shocks the conscience.”<sup>5</sup> As will be discussed further, U.S. statutory law on detainee treatment applies Eighth Amendment standards.

## The Geneva Conventions

The Geneva Conventions are a collection of four conventions<sup>6</sup> containing international humanitarian laws of war.<sup>7</sup> The four conventions have been ratified by every nation in the world,<sup>8</sup> and therefore constitute both international and U.S. law.<sup>9</sup> The humane treatment of all war victims, including detainees, has been described as the “fundamental theme running throughout the Conventions.”<sup>10</sup> Official commentary on the Conventions notes that “[e]very person in enemy hands must have some status under international law” as “[n]obody in enemy hands can be outside the law.”<sup>11</sup>

Upon ratification of the four current versions in 1955,<sup>12</sup> the United States reconfirmed its commitment to the humanitarian laws of war, stating that our nation “fully supports the objectives of this Convention.”<sup>13</sup> The United States was instrumental in shaping the four Conventions, actively participating in the various conferences that led to their emergence.<sup>14</sup> U.S. commitment to the Conventions continues.<sup>15</sup> The U.S. military has incorporated the Conventions into its internal regulations,<sup>16</sup> and designated its implementation as a key objective of wartime detentions.<sup>17</sup> The United States has enacted laws prohibiting breaches of the Conventions.<sup>18</sup>

The Geneva Conventions create obligations that protect detainees and other persons not actively involved in combat. The most fundamental of those obligations are set forth in what is often referred to as “Common Article 3,” a provision that is repeated in all four Conventions.<sup>19</sup>

Common Article 3 enumerates the minimum level of protections for detainees.<sup>20</sup> Acts banned by Common Article 3 are “prohibited at any time and in any place whatsoever” for individuals no longer actively involved in hostilities, specifically including detainees.<sup>21</sup> The prohibited acts include torture, outrages upon personal dignity, and cruel, humiliating and degrading treatment, among others.<sup>22</sup> Common Article 3 also creates an affirmative obligation that detainees “shall in all circumstances be treated humanely.”<sup>23</sup>

Two of the Geneva Conventions create additional protections for certain classifications of people subject to detention. The Third Geneva Convention protects persons who meet the Convention's definition of "prisoners of war" (POWs).<sup>24</sup> The Fourth Geneva Convention protects civilians.<sup>25</sup> Both Conventions establish protections above and beyond those afforded by Common Article 3.

Two related principles are critical to understanding the Conventions' protections for detainees. The first is the distinction between "international armed conflict" and "noninternational armed conflict."<sup>26</sup> An international armed conflict is an armed conflict between two nations; all other conflicts, including internal civil wars, are noninternational.<sup>27</sup> This distinction is significant because POW status, which carries the array of protections outlined in the Third Geneva Convention, applies only in international armed conflicts.<sup>28</sup> The laws of war do not contemplate POW status in noninternational armed conflicts.<sup>29</sup> Also, the full protections of the Fourth Convention only apply in international armed conflicts.<sup>30</sup>

The second principle involves the extensive reach of Common Article 3. According to its language, Common Article 3 applies to "armed conflict not of an international character."<sup>31</sup> However, it is generally recognized that Common Article 3 is customary international law<sup>32</sup> that applies in all conflicts, whether international or not.<sup>33</sup>

Common Article 3 states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed [outside of combat] by sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely ...*

To this end, the following acts are and shall remain prohibited *at any time and in any place whatsoever ...*

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ...
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment ...
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>34</sup>

Despite its explicit association with noninternational armed conflict, it is broadly accepted that Common Article 3 establishes the minimum standards applicable to all detainees in all conflicts.<sup>35</sup> The U.S. Supreme Court, in a 2006 decision, would find Common Article 3 applied to the conflict with Al Qaeda.<sup>36</sup>

Several key principles in Common Article 3 appear in other international and U.S. laws. Those principles include:

- The ban on torture<sup>37</sup>
- The ban on cruel, inhuman or degrading treatment<sup>38</sup>
- The requirement that detainees be treated humanely<sup>39</sup>
- Universal application of these obligations without exception for place or circumstance<sup>40</sup>

**“No exceptional circumstance whatsoever, whether a state of war or a threat of war, political instability or any other public emergency, may be invoked as a justification for torture.”**

According to Common Article 3(1)(d), no sentences should be passed, nor executions carried out, without a prior judgment issued “by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>41</sup>

The phrase “regularly constituted court” is not specifically defined in Common Article 3 or its accompanying commentary. The International Committee of the Red Cross (ICRC) has defined “regularly constituted court” for the purposes of Common Article 3 as a court “established and organized in accordance with the laws and procedures already in force in a country.”<sup>42</sup> The ICRC definition would later be adopted by the U.S. Supreme Court in *Hamdan v. Rumsfeld*.<sup>43</sup>

The Third Geneva Convention (GCIII) governs the treatment of POWs. Much debate in the White House after September 11 focused solely on GCIII, which can be divided into four major parts. First, GCIII restates and reapplies Common Article 3 as a minimum standard for treatment.<sup>44</sup> Second, it defines POWs who are entitled to the additional protections created by GCIII.<sup>45</sup> Third, it requires that a detaining state determine whether detainees are POWs and, where any doubt exists, to assume POW status.<sup>46</sup> Fourth, GCIII sets forth a series of protections for POWs in addition to those required by Common Article 3.<sup>47</sup>

Article 4 of GCIII defines six categories of individuals who qualify as POWs.<sup>48</sup> They include members of the armed forces as well as militias or volunteers.<sup>49</sup> They also include other belligerent forces who meet certain criteria, such as command for subordinates, wearing a distinctive insignia, carrying arms openly, and acting in accordance with the laws and customs of war.<sup>50</sup>

Article 5 of GCIII requires that (1) POW status apply from capture until release,<sup>51</sup> and (2) where any doubt as to status exists, POW treatment is assumed “until such time as their status has been determined by a competent tribunal.”<sup>52</sup>

GCIII requires that POWs be humanely treated at all times,<sup>53</sup> and protected from torture or coercion.<sup>54</sup> In addition to these protections, which resemble those provided under Common Article 3, GCIII sets forth a series of obligations toward POWs regarding living conditions, medical treatment, religious practices, transfer, and due process guarantees for those charged with crimes.<sup>55</sup>

The Fourth Geneva Convention (GCIV) governs the treatment of detained civilians, with civilians defined as persons who are neither members of the armed forces nor individuals actively involved in hostilities.<sup>56</sup> GCIV contemplates that detention of civilians, either by a party to armed conflict or an occupying power, will be atypical and provides for protective internment of civilians in rare instances.<sup>57</sup> There are only two sets of circumstances where

civilians can be detained without the full array of protections provided under GCIV. First, in occupation settings, protected civilians forfeit their “rights of communication” contained within GCIV if caught acting as a spy or saboteur “in those cases where absolute military security so requires.”<sup>58</sup> Second, where civilians are located “in the territory of a Party to the conflict,” and a civilian is “definitely suspected of or engaged in activities hostile to the security of the State,” they are not entitled to claim “such rights and privileges as would be prejudicial to the security of such State.”<sup>59</sup> In both instances such detainees are to be “treated with humanity,” “be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power,” and, in case of trial, afforded the “rights of fair and regular trial.”<sup>60</sup>

The decision to detain a civilian must be made on a case-by-case basis,<sup>61</sup> and the reasons for detention must be reviewed at least once every six months.<sup>62</sup> Civilian detention determinations shall be made according to a regular procedure to be prescribed by the “occupying power” in accordance with the provisions of GCIV.<sup>63</sup> “Unlawful confinement,” which presumably includes confinement not adhering to the above standards, constitutes a “grave breach” under the Geneva Conventions.<sup>64</sup> Civilians detained as security threats must be released “as soon as the individual ceases to pose a real threat to state security.”<sup>65</sup>

GCIV affords civilians similar protections as those afforded to POWs as to family rights, religious convictions and practices, humane treatment, and protection against all acts of violence, threats, insults and public curiosity.<sup>66</sup>

Under GCIV, detained civilians are entitled to have the reasons for their detention reconsidered as soon as possible by an appropriate court or administrative board. If internment is continued, the court or board shall periodically review the case at least twice annually with a view to favorable amendment of the initial decision to detain.<sup>67</sup>

### **The Convention Against Torture**

The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by the Senate in 1994, forms part of international and U.S. law.<sup>68</sup> Prior to drafting CAT, the prohibition on torture was recognized as a nonderogable norm of customary international law, and included in the Geneva Conventions.<sup>69</sup> However, CAT provided a legal definition of torture, added a series of affirmative substantive requirements and prohibitions, and prohibited cruel, inhuman or degrading treatment, as further described below.<sup>70</sup> A U.N.-administered Committee Against Torture was created to implement CAT. This committee is the enforcement body for CAT, and states party to CAT are obliged to submit periodic reports to the committee on their compliance with CAT.<sup>71</sup>

CAT reflects that the ban of torture is one of the bedrock principles of international law. The prohibition of torture is absolute, without exception for war or national emergency.<sup>72</sup> Detainees may not be transferred to countries where they would face a serious risk of torture, and information acquired through torture can never be used in court except as evidence against those accused of torture.<sup>73</sup> States are required to criminalize all acts of torture or complicity in torture, and to ensure that they have jurisdiction over torture committed on their territory or by their citizens. A state must “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that

an act of torture has been committed in any territory under its jurisdiction,” and ensure the prosecution or extradition of the perpetrators. CAT also requires training of detention personnel and interrogators to ensure they understand the prohibition on torture and cruelty, and requires that torture victims have a legally “enforceable right to fair and adequate compensation” in the courts. CAT similarly bans any “acts of cruel, inhuman or degrading treatment or punishment” against detainees even if they fall short of torture.<sup>74</sup>

**“CAT provides that evidence acquired by torture is inadmissible except as evidence against an alleged torturer.”**

The United States was an early and enthusiastic supporter of CAT, and was actively involved in the negotiations that led to CAT’s adoption by the U.N. General Assembly in 1984.<sup>75</sup> The State Department described U.S. participation in the negotiation of the treaty as evidence that “[t]he United States has long been a vigorous supporter of the international fight against torture.”<sup>76</sup> President Ronald Reagan similarly noted that the United States participated “actively and effectively” in the drafting of CAT. Although he said that “it was not possible to negotiate a treaty that was acceptable to the [U.S.] in all respects,”<sup>77</sup> Reagan urged ratification of CAT based on its central principle — the categorical ban of torture. After signing the treaty, he confirmed the United States’ support for such a ban:

By giving its advice and consent to ratification of this Convention, the Senate of the United States will demonstrate unequivocally our desire to bring an end to the abhorrent practice of torture.<sup>78</sup>

The following section describes the key provisions of CAT applicable to detainee treatment and the relevant U.S. reservations, understandings, and declarations.<sup>79</sup>

Under Article 1 of CAT, torture is (1) an intentional infliction of severe pain or suffering, whether physical or mental; (2) to obtain information or a confession, to punish for an act or suspected act, to intimidate or coerce, or for discrimination of any kind; (3) when such pain or suffering is inflicted by, at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.<sup>80</sup>

Upon ratification, the United States stated that its understanding<sup>81</sup> of the definition of torture included a “specific intent” requirement: “... in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.”<sup>82</sup> The requirement of specific intent means that infliction of severe physical and mental pain would not be torture unless the violator specifically intended to cause such pain.<sup>83</sup>

Severe physical pain is defined as injury that involves (1) substantial risk of death, (2) extreme physical pain, (3) serious burn or disfigurement, or (4) significant loss or impairment of a body part, organ or mental faculty.<sup>84</sup>

“Severe mental pain or suffering” is defined as “prolonged mental harm” caused by or resulting from one of the following:

- Intentional infliction or threatened infliction of severe physical pain
- The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality



- The threat of imminent death
- The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality<sup>85</sup>

In addition to prohibiting torture, CAT also bans “cruel, inhuman or degrading treatment or punishment [CID] which do[es] not amount to torture ...”<sup>86</sup> This provision was the subject of a significant U.S. reservation, with the United States stating that CID is limited to the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or 14th Amendments to the U.S. Constitution.<sup>87</sup>

The United States explained its reservation by stating that “it was necessary to limit U.S. undertakings under this article primarily because the meaning of the term ‘degrading treatment’ is at best vague and ambiguous.”<sup>88</sup>

The language of CAT, particularly Article 16, may appear to create more recourse and penalties for torture than it does for CID.<sup>89</sup> However, the U.N. Committee Against Torture’s position is that CAT applies equally to torture and CID, stating that “the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.”<sup>90</sup>

Article 2 of CAT imposes broad-ranging affirmative obligations to prevent torture, requiring states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction.”<sup>91</sup> In particular, states must criminalize all acts of torture, including attempted torture, complicity in acts of torture, and participation in acts of torture.<sup>92</sup>

CAT requires nations to ban torture comprehensively, categorically and without exception:

No exceptional circumstance whatsoever, whether a state of war or a threat of war, political instability or any other public emergency, may be invoked as a justification of torture. ...

An order from a superior officer or a public authority may not be invoked as a justification of torture.<sup>93</sup>

The United States issued two relevant understandings with respect to the absolute ban against torture. First, the prohibited acts must have occurred against individuals within the “offender’s custody or physical control.”<sup>94</sup> Second, “acquiescence” by a public official to torture requires both awareness of the torture prior to its execution and failure to intervene.

The CAT requires a series of protections to prevent and to ensure full investigations of acts of torture/CID. Article 10 requires that all officials involved in arrests or detentions (including law enforcement and military personnel) be trained and educated about the prohibitions against torture/CID.<sup>95</sup> Article 11 requires states to systematically review rules, instructions, methods and practices pertaining to detainee/arrestee treatment “with a view to preventing any cases of torture.”<sup>96</sup>

Article 12 requires a state to conduct a “prompt and impartial investigation” by “competent authorities” whenever there is “reasonable ground to believe that an act of torture has been committed in any territories within its jurisdiction.”<sup>97</sup> Article 13 requires that persons who allege that they were subject to torture/CID have the right to complain and have complaints promptly and impartially examined by competent authorities. Article 14 requires that victims of torture have a legally enforceable right to redress and compensation. The duties to train, to review rules and to investigate apply to CID as well as to torture.<sup>98</sup>

The CAT provides that evidence acquired by torture is inadmissible except as evidence against an alleged torturer:

Each state shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence *in any proceedings*, except against a person accused of torture as evidence the statement was made.<sup>99</sup>

The exclusion of torture-acquired evidence applies to all proceedings without exception.<sup>100</sup>

### **The Torture Statute**

The Torture Statute is the U.S. federal statute prohibiting acts of torture.<sup>101</sup> The statute was enacted in 1994 by Congress in order to comply with CAT’s requirement to enact enabling legislation. The statute defines torture as an act committed

- by a person acting under the color of law;
- specifically intended to inflict severe physical or mental pain or suffering upon another person;
- within his custody or physical control.<sup>102</sup>

Conspiracy to commit torture also violates the statute.<sup>103</sup> The coverage of nongovernmental officials is left ambiguous by the language of the Act, which requires that torture be done “under color of state law.” What is clear is that purely private abusive conduct is not covered.

The Torture Statute covers acts committed outside the United States; acts committed within the United States are prohibited by other federal and state laws.<sup>104</sup> U.S. courts have jurisdiction over all U.S. nationals and any foreign nationals who are present in the United States.<sup>105</sup> The jurisdiction over foreign nationals, often referred to as “universal jurisdiction,” complies with CAT’s requirement that states prosecute or extradite perpetrators of torture found in their territory regardless of nationality.<sup>106</sup>

The Torture Statute imposes fines and/or imprisonment of “not more than 20 years” for torture or conspiracy to torture. If torture or conspiracy to torture results in death, however, the penalty may include death, life imprisonment, or imprisonment of “any term of years.”<sup>107</sup>

### **The War Crimes Act**

The War Crimes Act (WCA), was passed by Congress in 1996 and criminalizes certain violations of the law of armed conflict.<sup>108</sup> The act makes it a crime under U.S. law to violate the

Geneva Conventions and other international laws of war ratified by the United States.<sup>109</sup> The WCA applies to all U.S. nationals and members of the U.S. Armed Forces.<sup>110</sup>

The WCA, as originally enacted, created two categories of crimes: (1) “grave breaches” of the Geneva Convention in international armed conflicts;<sup>111</sup> and (2) any violations of Common Article 3 in other conflicts.<sup>112</sup>

### **Other Statements of U.S. Legal Intent**

Two additional international law instruments reflect U.S. commitment to the bans on torture and CID: the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Though the UDHR is not legally binding, it is significant as it contains the basic principles upon which many subsequent human rights treaties are based. The United States was a leader in drafting and implementing the UDHR.

The UDHR of December 1948 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>113</sup> Additionally, the Declaration has a series of articles that collectively bar wrongful detention.<sup>114</sup>

The ICCPR, which prohibits torture, CID and arbitrary detention, was drafted to clarify and enforce the UDHR.<sup>115</sup> Though the ICCPR was ratified by the Senate with numerous reservations and understandings, it has nearly unanimous support around the world and, as such, constitutes binding international law.<sup>116</sup> The Senate observed that the ICCPR protects “basic democratic values and freedoms.”<sup>117</sup> Many of the rights contained within the ICCPR are already recognized and enforced by the federal and state constitutions.<sup>118</sup>

## **The Initial Legal Response of the Federal Government after September 11**

Three days after September 11, President George W. Bush declared a national emergency pursuant to the National Emergencies Act (50 U.S.C. §§ 1601 *et seq.*).<sup>119</sup> On September 18, 2001, the one-week anniversary of the attacks, Congress enacted the Authorization for Use of Military Force (AUMF).<sup>120</sup> The statute empowered the president to use “all necessary and appropriate force against those nations, organizations, or persons” involved in the terrorist attacks of September 11, 2001.<sup>121</sup>

President Bush signed a still-classified presidential finding the day prior, on September 17, authorizing the CIA to kill or capture suspected terrorists.<sup>122</sup> The CIA’s chief legal officer at the time, John Rizzo, who helped draft the September 17 presidential authorization, said of it: “I had never in my experience been part of or ever seen a presidential authorization as far-reaching and as aggressive in scope. It was simply extraordinary.”<sup>123</sup>

The September 17 authorization had moved much faster than a typical covert-action finding.<sup>124</sup> Generally, after the CIA’s lawyers drafted a proposed finding, it was reviewed by “the Lawyers’ Group,” which was chaired by the National Security Council’s legal counsel and included lawyers from DOS, DOD, DOJ, and the CIA.<sup>125</sup> After the legal review, the proposed findings were reviewed further by cabinet-level national-security policymakers, where, among others, the vice president would weigh in and then it would move to the president’s desk. But in this

instance, the CIA had gained incredible new powers with very little debate — none of it public. Two weeks after the attacks, DOJ's Office of Legal Counsel issued the first of its known opinions in the post-September 11 legal landscape.

## **The Early Expansion of Executive Authority**

### ***The Office of Legal Counsel***

The Office of Legal Counsel (OLC) is responsible for issuing opinions that instruct government officials by providing interpretations of existing law.<sup>126</sup> The opinions by OLC do not constitute binding U.S. law. However, OLC considers its opinions binding on the executive branch, subject to the supervision provided by the attorney general, under the ultimate authority of the president.<sup>127</sup> The office is led by an assistant attorney general.<sup>128</sup> A number of deputy assistant attorneys general and attorney advisors, numbering approximately two dozen at any one time, serve under the assistant attorney general.<sup>129</sup>

On September 11, 2001, Jay S. Bybee was awaiting confirmation as the next assistant attorney general in charge of OLC to replace Randolph D. Moss, who had been appointed by President Bill Clinton to the position.<sup>130</sup> The confirmation of Bybee by the Senate came on October 23, 2001.<sup>131</sup> At that time, a deputy assistant attorney general was already working in the office. That lawyer, John Yoo, had been hired specifically to supervise OLC's work on foreign affairs and national security.<sup>132</sup>

Prior to arriving at OLC, Yoo was a law professor at the University of California at Berkeley and had authored a number of scholarly articles on the Constitution's separation of powers.<sup>133</sup> In his scholarly work, Yoo repeatedly maintained that the president possessed a great deal of unilateral constitutional authority in the execution of war. Yoo, even in these early articles, in his own words, expressed “a more pro-Executive” view of presidential power than many of his peers in academia.<sup>134</sup>

### ***The “War Council”***

An impromptu group of influential lawyers within the Bush administration met periodically to consider legal issues that arose in the immediate wake of September 11. The group included David Addington, legal counsel to Vice President Dick Cheney; Alberto Gonzales, White House counsel; Timothy Flanigan, deputy White House counsel; William “Jim” Haynes II, DOD general counsel; and Yoo. These five self-selected lawyers called themselves the “War Council.”<sup>135</sup> None of them had significant experience in law enforcement, military service or counterterrorism.

OLC memoranda bind the executive branch, but individuals outside OLC, individuals in the War Council in particular, were influential in crafting OLC's advice. As Yoo set to work crafting controversial memoranda on the interrogation of detainees during the spring and summer of 2002, he was “under pretty significant pressure to come up with an answer that would justify [the program],” John Bellinger III, legal adviser to the National Security Council (NSC) later observed.<sup>136</sup> In an interview with *The Washington Times* on December 18, 2008, Vice President Cheney commented on the dialogue back and forth between OLC and senior White House officials:

Was it torture? I don't believe it was torture. ... We spent a great deal of time and effort getting legal advice, legal opinion out of the [Justice Department's] office of legal counsel.<sup>137</sup>

And, in a February 14, 2010, interview with ABC News, Cheney said:

The reason I've been outspoken is because there were some things being said, especially after we left office, about prosecuting CIA personnel that had carried out our counterterrorism policy or disbarring lawyers in the Justice Department who had — had helped us put those policies together, and I was deeply offended by that, and I thought it was important that some senior person in the administration stand up and defend those people who'd done what we asked them to do.<sup>138</sup>

At the time OLC was crafting controversial detainee interrogation memoranda, Yoo stated in a July 2002 email to an OLC colleague that comments from Gonzales and others would be incorporated into OLC's work product.<sup>139</sup> Gonzales speculated that Addington had a significant hand in an OLC memo that was addressed to him on August 1, 2002, as it contained significant discussion of the plenary authority of the commander in chief — about which Addington held strong views.<sup>140</sup> The precise role the War Council or others outside OLC had on OLC and its work product remains unclear. Addington denied a role in the authorship of OLC memoranda but, in his testimony before the House Judiciary Committee in 2008, said:

Now, there is one thing worth pointing out in there in defense of Mr. Yoo, who, as any good attorney would, has, I presume, not felt free to explain and defend himself on the point. I can do this in my capacity essentially as the client on this opinion [addressed to Alberto Gonzales, dated August 1, 2002]. ...

In defense of Mr. Yoo, I would simply like to point out that is what his client asked him to do. So it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on.<sup>141</sup>

### ***The OLC's Examination of Executive Authority to Take Action Post-September 11***

In a memo to Associate Attorney General David Kris, dated September 25, 2001 — two weeks after September 11 — Yoo wrote that the Foreign Intelligence Surveillance Act (FISA), the U.S. law outlining the procedures and requirements for intelligence collection by the government, could be amended unilaterally by the executive without violating the Constitution,<sup>142</sup> even though under the Constitution, only Congress could lawfully amend a statute. The memo asserted that constitutional standards had “shifted” in the aftermath of September 11. While analyzing the constitutionality of the proposed FISA change, Yoo wrote:

It is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks.<sup>143</sup>

A month later, OLC issued a memo that further demonstrated its view that September 11 had changed the application of constitutional considerations in matters of national security and foreign affairs.<sup>144</sup> This later memo, co-authored by Yoo and Special Counsel Robert J. Delahunty, advised:

- The president had ample authority to deploy military force against terrorist

threats within the United States. The AUMF had recognized that the president may deploy military force domestically to prevent and deter similar terrorist attacks.<sup>145</sup>

- The Posse Comitatus Act, 18 U.S.C. § 1385, which prohibits the use of the Armed Forces for domestic law-enforcement purposes, does not limit the ability of the president to utilize the military domestically against international and foreign terrorists operating within the United States.<sup>146</sup>
- The Fourth Amendment does not apply to domestic military operations against terrorists. “In our view, however well suited the warrant and probable cause requirements may be as applied to criminal investigations or to other law enforcement activities, they are unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy.”<sup>147</sup>
- The First Amendment protections of freedom of the press and freedom of speech may also be subordinated to the overriding need to wage war successfully.<sup>148</sup>

In a memo to the deputy counsel of the president dated September 25, 2001, Yoo laid out an expansive view of presidential authority to conduct military operations.<sup>149</sup> The memo argued that:

- The AUMF passed by Congress on September 14, 2001, and the War Powers Resolution (WPR) of 1973 (50 U.S.C. §§ 1541–48) did not grant power to the president but were acknowledgments of the president’s inherent executive power.<sup>150</sup>
- “The President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, *whether or not they can be linked to the specific terrorist incidents of September 11.*”<sup>151</sup>
- “[The Constitution’s] enumeration of the Treaty and Appointments Clauses only dilutes the unitary nature of the executive branch in regard to the exercise of those powers.”<sup>152</sup>
- “The Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people whether at home or overseas.”<sup>153</sup>
- “Neither [the WPR nor the AUMF] can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.”<sup>154</sup>

A November 5, 2001 memo, again co-authored by Yoo and Delahunty, advised the senior associate counsel to the president and NSC legal adviser that the client, the president of the United States, had the authority to unilaterally suspend articles of the Anti-Ballistic Missile Treaty, to which the United States is a party.<sup>155</sup> The memo’s authors concluded that “amending” the treaty would require Senate advice and consent, whereas wholesale suspension of articles included in the treaty did not.<sup>156</sup>

## **The First Detainee Legal Considerations**

Several weeks passed after September 11 before OLC first considered the issue of detainees. The invasion of Afghanistan by the U.S. military began on October 7, 2001. Ten days later, General Tommy Franks, the commander of U.S. forces in Afghanistan, ordered his troops to apply the requirements of the Geneva Conventions to all detainees in the theater of operations.<sup>157</sup>

### ***Establishing Military Commissions***

The first known OLC opinion pertaining to detainees is dated November 6, 2001.<sup>158</sup> The memo advised that individuals captured in connection with the September 11 attacks could be subject to a trial before a military court.<sup>159</sup> The memo found the authority for doing so in 10 U.S.C. § 821 (2000) and, moreover, within the president's inherent commander in chief powers, provided that the laws of war were in effect.<sup>160</sup> And, the memo asserted, there existed ample evidence and ample bases to find that the laws of war were in effect.<sup>161</sup> Furthermore, it stated, even if Congress had not authorized the creation of military commissions pursuant to § 821, the president nevertheless had the authority to convene them by view of his plenary constitutional authority.<sup>162</sup> One week later, the president authorized the secretary of defense to establish military commissions.<sup>163</sup> On perhaps a related note, Yoo is believed to have issued a still-classified memo to the DOD general counsel on possible criminal charges against John Walker Lindh, the so-called "American Taliban," on or about December 21, 2001.<sup>164</sup>

### ***Detainee Rights to Habeas Review***

Proposals were under consideration in late 2001 to detain alleged Al Qaeda and Taliban members at Guantánamo Bay, Cuba. OLC was asked to consider whether federal courts would entertain a writ of *habeas corpus* filed on behalf of alien detainees at Guantánamo.<sup>165</sup> The memo's authors acknowledged that, were a federal court to take jurisdiction, it could review the constitutionality, the detention, and use of military commissions.<sup>166</sup> The late-December 2001 memo concluded:

[T]he great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo]. Nonetheless, we cannot say with absolute certainty that any such petition would be dismissed for lack of jurisdiction. A detainee could make a non-frivolous argument that jurisdiction does exist. . . . While we believe that the correct answer is that federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States, there remains some litigation risk that a district court might reach the opposite result.<sup>167</sup>

On this point the Supreme Court would later explicitly reject OLC's position.<sup>168</sup>

### **Application of the Geneva Conventions to Al Qaeda and Taliban**

When evaluating the legal analysis that led to OLC's advice on the application of the Geneva Conventions to Al Qaeda and Taliban detainees, it is important to note that the first memo, and several subsequent memos produced by OLC on this matter, are believed to still be classified.<sup>169</sup> Currently pending Freedom of Information Act (FOIA) litigation indicates that an OLC memo

may exist, dated November 21, 2001, written by John Yoo to White House Counsel Alberto Gonzales.<sup>170</sup> The substance of the memo is believed to address the War Crimes Act, Hague Convention, Geneva Conventions, the federal criminal code and detainee treatment.<sup>171</sup>

The question of the application of the Geneva Conventions to detainees is noteworthy as it produced disagreement within the federal government on the topic of detainee treatment for the first time post-September 11.<sup>172</sup> The disagreement extended both to the adequacy of OLC's legal advice and the policy it suggested. The first known OLC opinion on the topic was a draft memo dated January 9, 2002, from Yoo and Delahunty to DOD's Jim Haynes.<sup>173</sup> A subsequent, virtually identical, version of the memo came from Bybee addressed to Haynes and Gonzales on January 22, 2002.<sup>174</sup> The memo concluded that the treaties to which the United States was a party did not protect members of Al Qaeda or the Taliban. The legal rationale differed slightly for Al Qaeda and Taliban members: Al Qaeda members were not entitled to the protections of the Conventions since Al Qaeda was neither a state actor nor a signatory to any treaty. For Taliban members, Afghanistan's status as a failed state and the Taliban's failure to establish a government provided the legal grounds to find that members of the Taliban militia were also not entitled to the POW status described in the Conventions. The Taliban "was more akin to a non-governmental organization that used military force" and thus "its members would be on the same legal footing as Al Qaeda."<sup>175</sup>

The memo explicitly took no position whether, as a matter of policy, the U.S. military should adhere to the standards of conduct outlined in the treaties.<sup>176</sup> The memo went so far as to state even if the treaty *were* applicable, OLC found the president had the plenary constitutional power to suspend treaty obligations toward Afghanistan until the war's end.<sup>177</sup> The memo went on to assert that customary international law had no binding effect on either the president or the military, as "[international law] is not federal law, as recognized by the Constitution."<sup>178</sup>

William H. Taft IV, the legal adviser to the State Department, having read OLC's guidance on the application of the Geneva Conventions, sent Yoo a memo with notes on January 11.<sup>179</sup> Taft's memo was highly critical of OLC's legal analysis.

- "Both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed."<sup>180</sup>
- "The draft memorandum badly confuses the distinction between states and government in the operation of the law of treaties. Its conclusion that 'failed states' cease to be parties to treaties they have joined is without support."<sup>181</sup>
- "Its argument that Afghanistan became a 'failed state' and thus was no longer bound by treaties to which it had been a party is contrary to the official position of the United States, the United Nations and all other states that have considered the issue."<sup>182</sup>
- "In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions. I have no doubt we can do so here, where a relative handful of persons is involved."<sup>183</sup>



- “Only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva Conventions in our conduct of military operations over the past fifty years. Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete.”<sup>184</sup>

Taft's draft comments proceeded as a wholesale repudiation of Yoo's premise: (1) that Afghanistan ever ceased to be a party to the Geneva Conventions; (2) that the president had the ability to suspend articles of the Geneva Conventions or the Conventions in their entirety; and (3) disputing the position that customary international law had no legally binding effect on the United States.<sup>185</sup>

After Taft's complaints, several still-classified memos were then believed to have been exchanged between the parties involved in advising on this issue:

- On January 11, 2002, Bybee is believed to have authored a memo to Gonzales on the authority of DOJ (including OLC and the attorney general) and DOS to interpret treaties and international law.<sup>186</sup>
- The same day, January 11, 2002, Yoo authored a memo to Gonzales discussing the Geneva Conventions.<sup>187</sup>
- Three days later, Yoo sent a memo to Taft on the prosecution of Al Qaeda members under the War Crimes Act.<sup>188</sup>
- Two days after Bybee's January 22 memo, Yoo is believed to have sent Gonzales a memo on the topics of the Geneva Conventions and POWs.<sup>189</sup>
- That same day, January 24, 2002, Yoo also sent a memo to the office of the deputy attorney general discussing the application of international law.<sup>190</sup>

On January 18, 2002, White House Counsel Alberto Gonzales advised the president that GCIII did not apply to Al Qaeda or the Taliban and the president concurred.<sup>191</sup> The next day, Secretary of Defense Donald Rumsfeld rescinded the order that the Geneva Conventions were to be applied to detainees in the field, which had originally been issued by General Tommy Franks on October 17.<sup>192</sup> Secretary of State Colin Powell requested the president reconsider his decision and find instead that GCIII did apply or, in the alternative, that a military board, on a case-by-case basis, should determine whether Al Qaeda and Taliban fighters were prisoners of war under GCIII.<sup>193</sup>

Gonzales drafted a memo for the president on the matter and sent it to Powell for comment.<sup>194</sup> This draft memo advised that the positives of concluding GCIII didn't apply preserved “flexibility” and “substantially reduce[d] the threat of domestic criminal prosecutions under the WCA.”<sup>195</sup> The memo provided arguments in support of the secretary of state's contrary position but, Gonzales wrote, he found those arguments unpersuasive.<sup>196</sup> In support of Powell's position, the memo states,

“A determination that [GCIII] does not apply to Al Qaeda and the Taliban

could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries.”<sup>197</sup>

In his written comments the following day to Gonzales’s draft memo, Powell expressed concern that “the draft does not squarely present to the president the options that are available to him.”<sup>198</sup> Powell believed the president should determine GCIII applied because a failure to do so would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.”<sup>199</sup>

Attorney General John Ashcroft weighed in on the matter, sending a letter to President Bush dated February 1, 2002.<sup>200</sup> By that time, Ashcroft wrote it was his understanding that “the [president’s] decision that al Qaeda and Taliban detainees are not prisoners of war remains firm. However, reconsideration is being given to whether [GCIII] applies to the conflict in Afghanistan.”<sup>201</sup> He advised “a determination that [GCIII] does not apply, will provide the United States with the highest level of legal certainty available under American law.”<sup>202</sup> Moreover, he added, opting out of Geneva “would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention or interrogation of detainees.”<sup>203</sup>

As the debate seemed to have shifted during the exchange of the several memos, Taft, in a doomed effort to return the debate to its earlier stage, sent a memo to Gonzales the following day:<sup>204</sup>

The paper should make clear that the issue for decision by the President is whether the Geneva Conventions apply to the conflict in Afghanistan in which U.S. armed forces are engaged. ... The structure of the [current] paper suggesting a distinction between our conflict with Al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions.<sup>205</sup>

The debate finally concluded when, on February 7, 2002, the president signed a memo in which he determined none of the provisions of the Geneva Conventions would apply to members of Al Qaeda.<sup>206</sup> Additionally, the president determined that Common Article 3 would not apply to either Al Qaeda or Taliban detainees.<sup>207</sup> Furthermore, the president determined Taliban detainees were unlawful combatants and did not qualify as POWs under Article 4 of GCIII.<sup>208</sup> Finally, the president did determine that the Geneva Conventions would apply to the present conflict with the Taliban but he reserved the right to unilaterally suspend the Geneva Conventions between the United States and Afghanistan at a later time.<sup>209</sup>

On February 7, in response to the president’s decision, OLC issued a memo to Gonzales concluding that the president had reasonable factual grounds to determine that no members of the Taliban were entitled to prisoner of war status under GCIII Article 4 and that there existed no reason to convene a tribunal under GCIII Article 5 to determine the status of Taliban detainees.<sup>210</sup> The categorical determination that all detainees were not POWs, absent an Article 5 hearing, effectively rendered GCIII moot. Notably, throughout and on all sides of the debate amongst the small group of individuals involved, no consideration was given to the application of GCIV to Afghan civilians. All captured Afghans were assumed to be either Al Qaeda or

Taliban members. From known records, it apparently did not occur to any of the participants in the debate that Afghan civilians, unaffiliated with either organization, could be picked up and detained. Absent guidance on lawful detainee treatment under existing U.S. and international law, OLC would soon set out on the task of fashioning new legal parameters.

## Detainee Interrogation Policy is Established in the Absence of the Geneva Conventions

Once the federal government determined the Geneva Conventions would not apply to detainees, it found it necessary to generate its own detainee policy. A comprehensive policy would not be crafted in advance; rather, memorandum by memorandum, issues involving detainees were addressed piecemeal as they arose. OLC addressed a wide range of policy questions, even going so far as to wade into the minutiae of specific interrogation tactics.

### Legal Status and Legal Rights Afforded to Detainees

In a February 26, 2002, memo, Bybee advised that the Self-Incrimination Clause of the Fifth Amendment was not applicable in the context of a trial by military commissions.<sup>211</sup> While broadly addressing legal constraints applicable to all interrogations, the memo also focused on the case of John Walker Lindh, an American citizen captured while serving with the Taliban.<sup>212</sup>

Finally, we note that even if the Government did in fact violate Rule 4.2 by having military lawyers interrogate represented persons (including Mr. Walker) without consent of counsel, it would not follow that the evidence obtained in that questioning would be inadmissible at trial.<sup>213</sup>

A March 5, 2002, still-classified memo from OLC addressed the availability of *habeas corpus* relief to detainees.<sup>214</sup> Additionally, a March 28, 2002, memo from Yoo to Taft on an unknown topic remains classified.<sup>215</sup> When Sen. Patrick Leahy proposed a bill, the Swift Justice Authorization Act, which would vest in the president the authority to detain certain individuals involved in terrorist acts and establish military commissions, OLC saw the bill as an unconstitutional interference in the president's exercise of his commander in chief authority.<sup>216</sup> The OLC memo, written April 8, 2002, pushed back against the legislation. Congress "cannot constitutionally restrict the President's authority to detain enemy combatants or to establish military commissions."<sup>217</sup> The memo is consistent with the reasoning found in OLC's October 2001 memo, which, by contrast, approvingly viewed the AUMF as appropriate congressional action. The AUMF, the October 2001 memo found, had merely *acknowledged* the president's inherent constitutional authority.<sup>218</sup> The April 8 memo, written by Patrick Philbin, a deputy assistant attorney general with OLC, adopted similar logic:

If [the Swift Justice Authorization Act] merely reaffirmed the President's existing authority, it would likely do no harm. As drafted, however, the proposed legislation attempts to impose substantive limits on the President's authority that ... are unconstitutional.<sup>219</sup>

The case of John Walker Lindh was not the only instance when OLC considered how the United States could legally treat its own citizens involved in terrorist activities. The issue arose again

when Jose Padilla was captured by federal officials on May 8, 2002.<sup>220</sup> In federal court in August of 2007, despite his pleas, Padilla, an American citizen, was found guilty of providing material support to terrorists. At the time of his arrest at Chicago O'Hare International Airport in May of 2002, a material-witness warrant had been issued for him in connection with an on-going grand jury investigation of the September 11 terrorist attacks.<sup>221</sup> On May 22, 2002, Padilla's lawyer moved to vacate the warrant and submitted a motion to that effect on June 7, 2002.<sup>222</sup> A court conference on the motion was scheduled four days later on June 11. The conference would never take place. Instead, on June 9, the government notified the court the president had issued an order designating Padilla an enemy combatant and had directed the secretary of defense to take him into custody.<sup>223</sup>

The day before the president's order, on June 8, 2002, Bybee, in an OLC opinion addressed to Attorney General Ashcroft, determined that Padilla was "properly considered an enemy combatant and could be turned over to military authorities for detention as an unlawful enemy combatant."<sup>224</sup> The memo examined past Supreme Court jurisprudence, *Ex Parte Quirin*,<sup>225</sup> where the court had found military-commission jurisdiction existed for the defendant, and *Ex Parte Milligan*,<sup>226</sup> where the court found military-commission authority did not exist. Bybee concluded the instant case of Jose Padilla was "far closer to the scenario presented in *Quirin* than *Milligan*."<sup>227</sup> The memo further concluded that the Posse Comitatus Act, which prevents the use of the military for law enforcement purposes in the United States, "present[ed] no statutory bar to the transfer of Padilla to the Department of Defense."<sup>228</sup>

In briefings that followed to the Senate Judiciary Committee and Senate Select Committee on Intelligence, concerns were raised as to whether Padilla's transfer to the Defense Department had violated 18 U.S.C. § 4001.<sup>229</sup> That section provides, in part:

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b) (1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General. ...

Yoo's June 27, 2002, memorandum, which found the detention of enemy belligerents did not violate 18 U.S.C. § 4001(a), regardless of the belligerent's status as a U.S. citizen, echoed a familiar theme.

[T]he President's authority to detain enemy combatants, including U.S. citizens, is based on his constitutional authority as Commander in Chief. We conclude that section 4001(a) does not, and constitutionally could not, interfere with that authority."<sup>230</sup>

Yoo's memo found that plenary executive authority to detain U.S. citizens as enemy combatants "arises out of the President's constitutional status as commander in chief."<sup>231</sup> In support of this finding Yoo noted:

- Congress specifically authorized the president to use force against enemy combatants pursuant to the AUMF.<sup>232</sup>

- “[M]ilitary detention of enemy combatants serves a particular goal, one that is wholly distinct from that of detention of civilians for ordinary law enforcement purposes. The purpose of law enforcement detention is punitive. ... The purpose of military detention, by contrast, is exclusively preventive.”<sup>233</sup>
- “Nothing in section 4001 indicates that its provisions were meant to reach the President’s authority, as Commander in Chief, to detain enemy combatants. To the contrary, section 4001 addresses the Attorney General’s authority with respect to the federal civilian prison system. ... As a structural matter, the placement of section 4001(a) in the United States Code signifies it was not intended to govern the detention of enemy combatants by U.S. Armed Forces. Title 18 of the United States Code covers ‘Crime and Criminal Procedure.’ Statutes concerning military and national security, by contrast, are generally found in Title 10 (‘Armed Forces’) and in Title 50 (‘War and National Defense’).”<sup>234</sup>
- “The fact that a detainee is an American citizen, thus, does not affect the President’s constitutional authority as Commander in Chief to detain him, once it has been determined he is an enemy combatant.”<sup>235</sup>

OLC was “compelled” to conclude that Section 4001 did not interfere with what it found was the president’s plenary authority, as “statutes are not to be construed in a manner that presents constitutional difficulties so long as a reasonable alternative construction is available.”<sup>236</sup>

## Rendition

The rendition policy of the United States over the past two decades is treated in greater detail in Chapter 5 of this report. Here we address only a March 13, 2002, OLC memorandum by Bybee that would appear to underpin the so-called “extraordinary rendition” policy of the United States during the early 2000s. The question presented in the memo was whether the president had plenary constitutional authority to transfer individuals who were captured and held “outside” the United States to another country.<sup>237</sup> In this 34-page memo, OLC concluded that the commander in chief had plenary authority under the Constitution to transfer any prisoners captured during hostilities. The memo acknowledged that GCIII and CAT both regulated the transfer of enemy prisoners, but it found GCIII did not apply because of the president’s earlier determination in February that Al Qaeda and Taliban prisoners were not legally entitled to POW status within the meaning of the conventions.<sup>238</sup> Moreover, CAT “poses no obstacle to transfer” as “the treaty does not apply extraterritorially.”<sup>239</sup>

The memo limited its conclusions to those “outside” the United States as individuals within the United States “may be subject to a more complicated set of rules established by both treaty and statute.”<sup>240</sup> “We need not address” those in custody in United States territory, as Al Qaeda and Taliban prisoners were, the memo’s author found, detained *outside* of United States territory at Guantánamo Bay or in Afghanistan.<sup>241</sup> As with other determinations by OLC, the Supreme Court would later rule that Guantánamo Bay was within the jurisdiction of the U.S. courts.

## Interrogation Techniques

As controversial as OLC's legal advice may have been on many topics in the aftermath of September 11, none was more controversial than the advice it gave on the use of certain interrogation techniques for detainees. It has been reported that sometime in May 2002, attorneys from the CIA's Office of General Counsel met with Attorney General John Ashcroft, National Security Adviser Condoleezza Rice, Deputy National Security Adviser Stephen Hadley, Legal Adviser to the National Security Council John Bellinger III, and White House counsel Alberto Gonzales, and discussed interrogation methods.<sup>242</sup> The CIA had not, prior to September 11, been authorized to detain or interrogate individuals and, in fact, lacked institutional experience and expertise in doing so.<sup>243</sup>

In those meetings that discussed detainee interrogations, in the spring of 2002, an operations manual is said to have been distributed.<sup>244</sup> The operations manual, used to train American military members to withstand torture in the military's Survival, Evasion, Resistance and Escape (SERE) program, was prepared by the DOD's Joint Personnel Recovery Agency (JPRA).<sup>245</sup> OLC members also attended these meetings. Bellinger and Rice told the Senate Armed Services Committee in 2008 they either did not see or did not recall seeing the JPRA manual in these meetings.<sup>246</sup> The operations manual, dated May 7, 2002, was found in OLC's files, but it could not be determined when or how the manual came into OLC's possession.<sup>247</sup> The operations manual contained seven of the 10 interrogation techniques that OLC would approve for use on detainees at Guantánamo Bay in an August 1, 2002, memo to the CIA general counsel authored by Yoo and signed by Bybee.<sup>248</sup> Yoo recalled a conversation with Bellinger in which Bellinger told him that access to the interrogation program was extremely limited and that the Department of State should not be informed.<sup>249</sup> Unlike OLC's memo on the application of the Geneva Conventions to members of Al Qaeda and the Taliban, which had been circulated to DOS, this work would not be so circulated. A log sheet from OLC's records designated "John Rizzo Central Intelligence Agency" a client on a pending matter on April 11, 2002.<sup>250</sup>

Yoo wrote a letter to John Rizzo at the CIA on July 13, 2002.<sup>251</sup> The letter was written "in response to your inquiry at our meeting today" and discussed the legal elements incident to the crime of torture.<sup>252</sup> The letter focused on the definitions of "severe pain or suffering" within the Torture Statute (18 U.S.C. § 2340(2)).

Moreover, to establish that an individual has acted with the specific intent to inflict severe pain or suffering, an individual must act with specific intent, i.e., with the express purpose of causing prolonged mental harm in order for the use of any of the predicate acts to constitute torture. Specific intent can be negated by a showing of good faith. . . . If, for example, efforts were made to determine what long term impact, if any, specific conduct would have and it was learned that the conduct would not result in prolonged mental harm, any actions undertaken relying on that advice would have [been] undertaken in good faith. Due diligence to meet this standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience.<sup>253</sup>

The letter concludes, "As you know, our office is in the course of finalizing a more detailed memorandum opinion analyzing section 2340. We look forward to working with you as we finish that project."<sup>254</sup> Yoo recalled providing regular briefings about the pending memo to

Attorney General Ashcroft and Ashcroft's counselor, Adam Ciongoli.<sup>255</sup> Yoo also recalled mentioning to Ashcroft at the time that the CIA had requested advance assurances that CIA officers would not be prosecuted for the use of "enhanced interrogation techniques" (EITs).<sup>256</sup> Ashcroft was sympathetic to the CIA's request and asked Yoo if such an "advance pardon" was possible.<sup>257</sup> Yoo informed Ashcroft it was not, and that Michael Chertoff, assistant attorney general at the criminal division, had rejected the CIA's request for such an "advance pardon."<sup>258</sup> Chertoff, later confirmed as the Secretary of Homeland Security in 2005, suggested in his testimony at his Senate confirmation hearing that his only part had been to warn the CIA it had "better be careful" as it was dealing in an area where there was potential criminality.<sup>259</sup>

As interrogation policy continued to take shape, Yoo sent a still-classified memo to Gonzales on July 22, addressing the applicability of CAT.<sup>260</sup> A July 24, 2002, fax was addressed to Yoo from an unknown source at the CIA and contained a six-page psychological assessment of detainee Abu Zubaydah.<sup>261</sup> It is clear, based on a subsequent OLC memo, that the fax must have come from the CIA.<sup>262</sup> Abu Zubaydah, as discussed elsewhere in this report, would later be subjected to EITs. The faxed psychological assessment posited, "He denies and there is no evidence in his reported history of thought disorder or enduring mood or mental health problems."<sup>263</sup> Also, the

subject is familiar and probably well versed regarding al-Qa'ida's detentions and resistance training materials. Thus one would expect that subject would draw upon this fund of knowledge as he attempts to cope with his own detention.<sup>264</sup>

The guidance Yoo had promised arrived on August 1, 2002, when OLC provided a letter and a memo to Gonzales at the White House, as well as a memo to Rizzo at the CIA. The White House had dictated the pace of the OLC legal analysis, demanding that one opinion be signed no later than the close of business on August 1, 2002.<sup>265</sup> Yoo, with the assistance of a still-classified OLC line attorney, had completed the first draft of the memo to Gonzales on April 30, 2002, followed by drafts on May 17, June 26, and July 8, 2002.<sup>266</sup> Yoo later said he did not feel pressure to complete the memoranda quickly.<sup>267</sup> Bybee later said "The memos were well underway, and we did have some — we did have some pressure at the very end."<sup>268</sup> The July 8 draft was the first draft circulated outside of OLC for comment.<sup>269</sup> In emails to the unnamed OLC line attorney, Yoo referred to the memo to Gonzales as "the bad things" opinion. On Friday morning July 12, 2002, Yoo emailed, "Let's plan on going over [to the White House] at 3:30 to see some other folks about the bad things opinion."<sup>270</sup> Yoo was uncertain who, other than either Addington or Flanigan, attended the July 12, 2002, White House meeting.<sup>271</sup> Of the attorney general, Bybee later recalled:

We advised the Attorney General. He was generally aware that the memo was being prepared. I advised him of the substance of our advice; and the Attorney General, the one comment that has stuck with me that I remember was the Attorney General said something to the effect that he was sorry that this was necessary.<sup>272</sup>

The 50-page memo to Gonzales, signed by Bybee, examined, generally, behavior under the Torture Statute to address which actions would be torture under the law and which would not.<sup>273</sup> The memo began by examining the text and meaning of the Torture Statute. It is from this memo that OLC derived its definition of torture. The memo was concerned with CAT only insofar as it was implemented by the Torture Statute. It concluded that:

- Acts intended to inflict severe pain or suffering, whether mental or physical, must be of an extreme nature to rise to the level of torture under the law.
- Certain acts may be cruel, inhuman or degrading, but will not produce pain and suffering of the requisite intensity to fall within the Torture Statute's proscription against torture.
- Pain, be it physical or mental, must be "severe" to meet the definition of torture.
- Congress's use of the phrase "severe pain" elsewhere in the U.S. Code sheds light on its meaning; the phrase "severe pain" appears in statutes defining an emergency medical condition for the purpose of providing health benefits.
- Although the health care statutes address a substantially different subject from the Torture Statute, they are nonetheless helpful for understanding what constitutes severe physical pain. The health care statutes treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function.
- Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death.
- For purely mental pain or suffering to amount to torture under the Torture Statute, it must result in significant psychological harm of significant duration lasting for months or even years.
- CAT only requires general intent, but the specific-intent language found in the legislative history of the United States' ratification reservation means a perpetrator must have specific intent to cause "severe" pain.
- In determining what actions reach the threshold of torture in the criminal context, courts are likely to take a totality-of-the-circumstances approach to determine whether the Torture Statute has been violated.
- The Torture Statute may be unconstitutional if applied to interrogations of detainees undertaken pursuant to the president's constitutional commander in chief power to conduct a military campaign.
- Under the current circumstances in the War on Terror, even if an interrogation method crossed the line drawn by the Torture Statute, a defendant might be able to utilize certain justification defenses, the defense of necessity or self-defense, to eliminate criminal liability.

The July 8 draft and earlier drafts of the memo had not discussed the president's constitutional power as commander in chief to conduct a military campaign nor had they addressed possible defenses to violations of the torture statute.<sup>274</sup> Those sections were added only after a July



16, 2002, meeting Yoo had at the White House.<sup>275</sup> The OLC line attorney who assisted Yoo in drafting those two additional sections did not believe they had been added in response to any request from the White House, NSC or CIA.<sup>276</sup> Similarly, Yoo was “pretty sure” those sections were added because he, Bybee and Philbin “thought there was a missing element to the opinion.”<sup>277</sup> Bybee and Philbin did not know or did not recall why the two sections had been added.<sup>278</sup> When Philbin inquired about the two sections and was critical of their inclusion in the August 1, 2002, memo to Gonzales, Yoo had told him, “They want it in there.”<sup>279</sup> Philbin hadn’t inquired further about who Yoo meant when he referred to “they.”<sup>280</sup> In his testimony before the House Judiciary Committee in June 2008, David Addington recalled that he told Yoo, in July 2002, “Good, I’m glad you’re addressing these issues” when he learned Yoo planned to include in the memo possible defenses to the Torture Statute and discussion of the plenary authority of the president.<sup>281</sup>

Earlier drafts of the August 1, 2002, memo to Gonzales had been addressed to John Rizzo at the CIA but, as Rizzo would later state, the CIA did not want an unclassified memo as it would have confirmed the existence of a classified program.<sup>282</sup> The recipient of the memo was changed to Gonzales.

A six-page letter to Gonzales dated August 1, 2002, accompanied the memo and supplemented it, addressing the legality of interrogation methods under international law.<sup>283</sup> This six-page letter was authored by Yoo and frequently refers to Bybee’s longer, 50-page memo addressed to Gonzales. Specifically, the letter provided an opinion on whether methods, found not to have violated the Torture Statute, could either (a) violate the United States’ obligations under CAT or (b) create the basis for prosecution by the International Criminal Court (ICC).<sup>284</sup> Yoo advised that interrogation methods that comply with the Torture Statute would not violate international obligations under CAT because of the specific understandings attached by the United States to the instrument of ratification.<sup>285</sup> Additionally, actions taken as part of an interrogation of an Al Qaeda member did not fall within the ICC’s jurisdiction.<sup>286</sup> Yoo’s letter cautioned

We cannot guarantee, however, that the ICC would decline to investigate and prosecute interrogations of al Qaeda members. ... We cannot predict the political actions of international institutions.<sup>287</sup>

The August 1 memo and supplemental letter to Gonzales did not address the application of specific interrogation methods to a detainee. Those were discussed in a separate OLC memo, also dated August 1, 2002, addressed to Rizzo.<sup>288</sup> The Rizzo memo, in three parts, directly addressed the proposed interrogation of Abu Zubaydah. On July 24, 2002, Yoo had telephoned Rizzo and told him that six enhanced interrogation techniques were approved for use on Abu Zubaydah: attention grasp, walling, facial hold, facial slap, cramped confinement and wall standing.<sup>289</sup> As for other techniques, Yoo told Rizzo that DOJ was waiting for more data from the CIA.<sup>290</sup> At some point thereafter, Rizzo remembered Yoo asking how important a specific, still-classified interrogation technique was to the CIA, because it would “take longer” to complete the memorandum if it were included.<sup>291</sup> The legal analysis contained in the memo to Rizzo is identical to the legal analysis in the Gonzales memo of the same date. It is extremely informative to see the analysis applied in a practical model.

The initial de-classified release of the memo to Rizzo was heavily redacted. It began “You have asked for this Office’s views on whether certain proposed conduct would violate the prohibition

against torture. ... This letter memorializes our previous oral advice given on July 24, 2002 and July 26, 2002.”<sup>292</sup> It continued: “Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply.”<sup>293</sup>

- The memo stressed that Abu Zubaydah appeared to have vital intelligence, that terrorist “chatter” existed at a level equal to that prior to September 11, and that Abu Zubaydah had become accustomed to traditional interrogation techniques.
- As part of an “increased pressure phase” Abu Zubaydah would have contact only with an interrogation specialist and a training psychologist, versed in the military’s SERE program. The phase would likely last no more than a few days but could last up to 30 days.
- The interrogation during this phase would utilize 10 techniques including (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard.<sup>294</sup>
- In the second part of the memorandum, OLC reviewed the context in which the procedures would be applied, discussing, at length, Abu Zubaydah’s psychological assessment.<sup>295</sup> It stressed that these techniques were used on military members during their SERE training and no substantiated reports of long-term mental harm have followed. The memo also highlighted that interrogators have consulted experts to ensure no long-term harm would result from these interrogation methods.
- The memo to Rizzo determined no specific intent to cause severe pain or suffering appeared to be present in the application of these methods. It reiterated that an individual must have the specific intent to cause prolonged harm or suffering as required under the statute.<sup>296</sup>

In the August 1, 2002, memoranda from Bybee to Rizzo, by stating “if these facts were to change, this advice would not necessarily apply,” OLC had placed itself as a necessary involved party in all future interrogations involving enhanced interrogation techniques. In April 2003, in response to a review of the CIA’s detention and interrogation program by the CIA inspector general, OLC attorneys worked with attorneys from the CIA’s Counter Terrorism Center to draft a list of “bullet points” summarizing OLC’s guidance to the CIA.<sup>297</sup> That document, however, was unsigned, undated, and not drafted on OLC stationary. OLC later disavowed the bullet points after Yoo no longer worked at OLC.<sup>298</sup> Apart from the April 2003 bullet points, any continuing legal advice after August 1, 2002, from OLC on the conduct of interrogations remained classified until late 2003 — with one notable exception.

That notable exception came on March 14, 2003, when Yoo wrote an 81-page memo to Haynes.<sup>299</sup> It was born out of the significant disagreement [discussed in greater detail in Chapter 1] amongst several Pentagon lawyers that arose once the August 2002 OLC advice became known. Military attorneys (JAGs) and several federal civilian attorneys believed OLC’s

legal guidance was inadequate. A “working group” was established in January 2003 at the Pentagon to examine the domestic and international laws that applied to detainee policy. Yoo’s March 14 memo addressed precisely that subject.

Yoo’s advice to Haynes on the domestic and international law applicable to the interrogation of detainees by military members mirrored the advice provided in Bybee’s August 1 memo to Gonzales. Yoo advised:

- The Fifth and Eighth Amendments did not extend to enemy combatants held abroad, nor did generally applicable criminal laws apply to the interrogation of alien unlawful combatants held abroad. Any law that purported to do so would conflict with the president’s plenary authority as commander in chief.
- CAT’s requirement that signatories undertake to prevent “cruel, inhuman, or degrading treatment or punishment” extends only to conduct that is “cruel and unusual” under the Eighth Amendment or otherwise shocks the conscience” under the Due Process Clauses of the Fifth and 14th Amendments.
- Customary international law supplies no additional standards to the interrogation of detainees, and in any event, customary international law is not federal law and could be overridden by the president.
- Even if criminal prohibitions applied, the defenses of necessity or self-defense could provide justifications for any criminal liability.<sup>300</sup>

Despite disagreements between OLC and attorneys at the Pentagon, on April 16, 2003, the state of flux surrounding the federal government’s detainee interrogation policy ended when Rumsfeld authorized 24 of 35 previously unapproved interrogation techniques for Guantánamo detainees. In July 2003, the CIA’s general counsel, likely relying on the bullet points, briefed “senior Administration officials” on the expanded use of EITs, and, at that time, according to the CIA’s inspector general, the attorney general is said to have affirmed that the CIA’s proposed conduct remained well within the advice provided in OLC’s August 1, 2002, opinion.<sup>301</sup>

## Evolution of Legal Advice Governing Detainee Treatment

The legal advice pertaining to detainees changed as both OLC’s personnel changed and as OLC reacted to events such as Supreme Court rulings.

### Jack Goldsmith III Replaces Jay Bybee

In late May 2003, Yoo resigned from OLC and returned to his teaching position at Berkeley.<sup>302</sup> Bybee had already departed OLC on March 28, 2003, after his confirmation as a judge on the U.S. Court of Appeals for the Ninth Circuit.<sup>303</sup> Gonzales had wanted Yoo to take over from Bybee.<sup>304</sup> Ashcroft reportedly objected to Yoo’s appointment because he believed Yoo was too close to the White House and wanted his counselor, Adam Ciongoli, to take the job instead.<sup>305</sup> Gonzales, alternatively, was opposed to Ciongoli’s appointment because he felt Ciongoli was

too close to Ashcroft.<sup>306</sup> Bybee's replacement, Jack Goldsmith III, was eventually suggested as a compromise candidate.<sup>307</sup> Goldsmith had been working for Haynes at the DOD's Office of General Counsel since September 2002, and he began his tenure leading OLC on October 6, 2003.<sup>308</sup>

In late October 2003, a few weeks into his new position, Goldsmith is believed to have received a still-classified memo on the Geneva Conventions from an unidentified individual within OLC.<sup>309</sup> In mid-November 2003, Goldsmith and Robert Delahunty are believed to have sent a still-classified memo to the DOD on the application of the Geneva Conventions. Goldsmith asked Patrick Philbin to bring him copies of any OLC opinions that might be problematic, and Philbin gave Goldsmith copies of OLC's August 1, 2002, memoranda sometime in December 2003.<sup>310</sup> In his book *The Terror Presidency*, Goldsmith wrote that by December 2003 he had determined that some of OLC's legal opinions would need to be withdrawn and replaced.<sup>311</sup> Goldsmith called Haynes to inform him that the Defense Department should not rely on Yoo's March 2003 memo.<sup>312</sup> When Haynes asked what was wrong with the opinion, Goldsmith responded, "There are many potential problems with it."<sup>313</sup>

On March 2, 2004 the CIA's Office of General Counsel sent a fax to Goldsmith asking OLC to reaffirm the guidance provided in the two August 1 memos, the August 1 letter from Yoo, and the still-classified June 2003 memo.<sup>314</sup> The fax stated:

We rely on the applicable law and OLC guidance to assess the lawfulness of detention and interrogation techniques. ...

in addition to the sitting and kneeling stress positions discussed earlier with OLC, the Agency has added to its list of approved interrogation techniques two standing stress positions involving the detainee leaning against a wall. We also would like to share with you our views on three additional interrogation techniques ... and two uses of water not involving the waterboard.<sup>315</sup>

One of the uses of water described in the fax was "pouring, flicking, or tossing (*i.e.*, water PFT)," where up to one pint of potable water would be used to startle, humiliate and cause insult.<sup>316</sup> The other technique was called "water dousing," where a detainee, dressed or undressed, would be restrained by shackles and/or interrogators while potable water was poured on the detainee from a container or garden hose.<sup>317</sup>

March 2004 undoubtedly had to have been a particularly stressful time at OLC. Ashcroft was unexpectedly hospitalized and in poor health. In Ashcroft's absence, Deputy Attorney General James Comey had become the acting attorney general. On March 11, 2004, a still-classified intelligence program, believed to be a National Security Agency (NSA) program, was set to expire.<sup>318</sup> Comey and Ashcroft, the week before the March 11 deadline, and prior to Ashcroft's illness, had discussed and agreed that certain aspects of the secret intelligence program could not be certified lawful by DOJ, as required to renew the program.<sup>319</sup> Comey had so informed the White House. On the evening of March 10, 2004, Gonzales and White House Chief of Staff Andrew Card went to visit Ashcroft at his hospital room. When the two men arrived, Comey, Goldsmith and Philbin were already in the room.<sup>320</sup> Comey dramatically testified to the Senate Judiciary Committee that he had run up the stairs of the hospital when he arrived to Ashcroft's

**“The IG found the CIA had ‘failed to provide adequate staffing, guidance and support to those involved with the detention and interrogation of detainees.’”**

bedside in the intensive care unit, worried that, if the White House staff arrived there first, they might ask Ashcroft, in his compromised medical state, to overrule him on the classified program.<sup>321</sup> Gonzales did ask Ashcroft to authorize the secret program and was rebuffed by Ashcroft.<sup>322</sup>

Goldsmith sent a series of still-classified memos: one on March 11 to Gonzales clarifying OLC advice on classified foreign intelligence activities and one to Comey on classified foreign intelligence activities dated March 12.<sup>323</sup> On Saturday March 13, Goldsmith phoned Comey at home and asked to meet with him that same day.<sup>324</sup> Philbin and Goldsmith discussed with Comey problems that existed in the Yoo memo.<sup>325</sup> Goldsmith felt the memo's discussion of presidential powers was incorrect, that there were problems with the memo's discussion of possible defenses, and that the memo had arrived at an unduly high threshold for the application of the term "severe pain."<sup>326</sup> A still-classified memo from Goldsmith to Comey on OLC views regarding legal issues concerning classified foreign intelligence activities (followed on March 15).<sup>327</sup> Comey, in turn, sent to Gonzales a still-classified memo containing legal recommendations regarding classified foreign intelligence activities.<sup>328</sup>

On March 18, 2004, Goldsmith authored a memo on the application of GCIV to the conflict in Iraq.<sup>329</sup> Notably, in contrast with OLC's advice in late 2001, this memo considered and concluded that the Convention *did* apply to the United States' occupation of Iraq. Both the United States and Iraq had ratified GCIV.<sup>330</sup> U.S. nationals, foreign nationals of a state not bound by GCIV, and nationals of a co-belligerent state were *not* "protected persons" within the meaning of GCIV, the memo argued. However, it found, Iraqi nationals and permanent residents of Iraq *would be* protected.<sup>331</sup> Thus, Al Qaeda operatives — those who were Iraqi nationals or permanent residents — would be protected, the memo reasoned. It is a contrast from earlier OLC memos, not only in its finding that an existing international convention affected the options on U.S. action, but also because nowhere in the memo was the president's plenary authority as commander in chief discussed. "They're going to be really mad," Philbin told Goldsmith. "They're not going to understand our decision. They've never been told 'no.'" <sup>332</sup> Members of the War Council were, indeed, not pleased. "Jack, I don't see how terrorists who violate the laws of war can get the protections of the laws of war," Gonzales told Goldsmith.<sup>333</sup> Of Addington, Goldsmith observed

If Gonzales seemed puzzled and slightly worried, David Addington was just plain mad. "The President has already decided that terrorists do not receive Geneva Convention protections," he barked. "You cannot question his decision."<sup>334</sup>

The next day Goldsmith followed up with a draft memo on the permissibility of transferring persons to and from Iraq.<sup>335</sup> GCIV prohibited "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory ... regardless of motive."<sup>336</sup> The memo advised that the United States may "remove 'protected persons' who are illegal aliens from Iraq pursuant to local immigration law."<sup>337</sup> Additionally, the temporary relocation of "protected persons" who have not been accused of an offense to another country, for a brief but not indefinite period, to facilitate interrogation, was deemed permissible.<sup>338</sup>

Two still-classified documents were later exchanged. Goldsmith sent a memo to the deputy assistant attorney general on March 22, 2004, confirming oral advice provided by OLC concerning classified foreign intelligence activities.<sup>339</sup> Eight days later, the deputy assistant attorney general briefed and summarized OLC's conclusions regarding a terrorist surveillance program for the attorney general in a still-classified document.<sup>340</sup>

It is worth noting that, in April 2004, the Abu Ghraib scandal became public knowledge and Goldsmith reportedly went to work on a replacement draft for the August 1, 2002, Gonzales memo assisted by then-Principal Deputy Assistant Attorney General Steven Bradbury, who would later become OLC's acting assistant attorney general.<sup>341</sup> On May 6, 2004, Goldsmith sent a still-classified document to the attorney general consisting of a legal review of classified foreign intelligence activities.<sup>342</sup>

In May 2004, the CIA inspector general (IG) released a report critical of the CIA's interrogation program. The report focused on the period after September 11 up through October 2003.<sup>343</sup> Its conclusions were startling. The IG found the CIA had "failed to provide adequate staffing, guidance and support to those involved with the detention and interrogation of detainees. ... Unauthorized, improvised, inhumane and undocumented detention and interrogation techniques were used."<sup>344</sup> CIA officials had "neither sought nor been provided a written statement of policy or a formal signed update of the DOJ legal opinion, including such important determinations as the meaning and applicability of Article 16 of [CAT]."<sup>345</sup> The inspector general discovered CIA officers at different levels were concerned that they would be vulnerable to legal action in the United States or abroad in the future.<sup>346</sup>

Although the current detention and interrogation Program has been subject to DOJ legal review and Administration political approval, it diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups.<sup>347</sup>

Goldsmith sent a letter to the IG in late May and asked to review the description of OLC's advice contained in the report and provide comment before the report would be sent to Congress.<sup>348</sup> He sent Scott Muller at the CIA Office of General Counsel (OGC) a letter two days later advising the CIA to suspend the use of the waterboard technique "until we have had a more thorough opportunity to review the Report and the factual assertions in it" and ensure, with respect to the other nine enhanced interrogation techniques, that they be used in accordance with the OLC's August 2002 memo.<sup>349</sup> Goldsmith talked with Yoo by telephone on June 9, 2004, about the bullet points OLC had helped craft in the spring of 2003.<sup>350</sup> Yoo told Goldsmith that the bullet points did not constitute the official views of OLC.<sup>351</sup> The following day, Goldsmith wrote to Muller that OLC would not reaffirm the bullet points, which "did not and do not represent an opinion or a statement of the views of this Office."<sup>352</sup> Four days later, Muller responded to Goldsmith that the bullet points had been jointly prepared by OLC and the CIA OGC, that OLC knew they would be provided to the CIA IG for the purposes of the IG's report, and that the bullet points had been used in a briefing slide at a July 2003 meeting attended by the vice president, the national security advisor, the attorney general, the director of the CIA, Patrick Philbin, and others.<sup>353</sup> The following day, the CIA OGC informed OLC that, because the offices had different views about the legal advice OLC had previously provided, the CIA would not be a joint signatory in a letter to the CIA IG.<sup>354</sup> OLC's comments and requested changes to the CIA IG report would later be submitted separately as an attachment to the report.

On June 8, 2004, *The Washington Post* reported that a secret August 2002 DOJ memo had authorized torture.<sup>355</sup> Five days later, the August 1, 2002, memo to Gonzales was posted to the *Post's* website.<sup>356</sup> Shortly after the leak, Goldsmith was asked by the White House to affirm the advice contained in the memo, which Goldsmith concluded he could not do.<sup>357</sup> He consulted with Comey and Philbin, who agreed with his decision and, on June 15, 2004, Goldsmith informed the attorney general and David Ayres, John Ashcroft's chief of staff, of his decision to withdraw the August 1, 2002, memorandum, and the following day offered his letter of resignation.<sup>358</sup> Goldsmith wrote of this time:

For a week I struggled with what to do. In the end I withdrew the August 2002 opinion even though I had not yet been able to prepare a replacement. I simply could not defend the opinion. ...

Ashcroft was, in context, extraordinarily magnanimous and, as always, supportive. But I sensed for the first time that he might be questioning my judgment, and I wondered when I left his office whether he would agree with my decision or exercise his prerogative to overrule me.<sup>359</sup>

The decision to withdraw the Bybee August 1 memorandum to Gonzales was formally announced that same month by Comey, who then directed OLC to prepare a replacement memorandum.<sup>360</sup> The replacement memo for the Bybee August 1 memo to Gonzales, written by Goldsmith's replacement, Daniel Levin, would be provided at the end of the year, on December 30, 2004.<sup>361</sup>

Less than two weeks after Goldsmith submitted his resignation, the Supreme Court ruled that detainees at Guantánamo Bay were indeed within the jurisdiction of the U.S. courts, which could review whether a detainee was wrongfully detained.<sup>362</sup> On July 16, Goldsmith sent to Ashcroft a still-classified memo on the implications of the recent Supreme Court decision for certain foreign-intelligence activities.<sup>363</sup> Ashcroft sent a letter dated July 22, 2004, to the acting CIA director that the interrogation of an unidentified detainee, outside territory subject to U.S. jurisdiction, would not violate the law if it utilized nine interrogation techniques (other than the waterboard) described in Bybee's August 1 memorandum.<sup>364</sup> After Goldsmith's disavowal of the bullet points, the CIA appeared to have decided to seek written approval whenever it intended to use enhanced interrogation techniques.<sup>365</sup>

### **Acting Assistant Attorney General Daniel Levin**

With the departure of Jack Goldsmith III, two acting assistant attorneys general filled the role for the remainder of the Bush presidency. Daniel Levin first served as acting assistant attorney general, from June 2004 until February 2005.<sup>366</sup> He had been chief of staff to the director of the FBI from 2001 to 2002.<sup>367</sup>

Shortly after assuming the post, on July 22, 2004, Levin worked on the preparation of a replacement memo. Levin stated that when he first read the August 1, 2002, memo to Gonzales he remembered "having the same reaction I think everybody who reads it has — 'this is insane, who wrote this?'"<sup>368</sup> He wrote to Scott Muller at the CIA requesting assistance in OLC's assessment of "whether a certain detainee in the war on terrorism may be subjected to the 'waterboard interrogation technique'" consistent with the Torture Statute.<sup>369</sup> The letter cites the

IG's concerns that the technique in practice did not match the technique upon which OLC's prior opinion had been based.<sup>370</sup> Levin's letter asked:

It would greatly assist us if you could address the details of the technique, including whether the technique on which we would now opine differs in any respect from the one considered in our earlier memorandum. If there are differences but you believe those differences should not alter our conclusion that the technique is lawful under the statute, we would appreciate receiving an explanation of your view, including any medical or other factual support on which you rely. Finally, we would be grateful if you could provide information about the facts and circumstances of this detainee, including his medical and psychological condition, of the sort, provided with respect to the detainee discussed in our earlier opinion.<sup>371</sup>

The CIA responded with a still-classified letter dated July 30, 2004.<sup>372</sup> A second, nonclassified fax, was submitted to Levin on August 5, 2004, with specific details about the water used in a waterboard session.<sup>373</sup> The next day Levin sent a letter to the CIA confirming OLC's advice:

[A]lthough it is a close and difficult question, the use of the waterboard technique in the contemplated interrogation of [redacted] outside territory subject to United States jurisdiction would not violate any United States statute, including [the Torture Statute], nor would it violate the United States Constitution or any treaty obligation of the United States.<sup>374</sup>

A number of still-classified letters from the CIA flowed to Levin that described CIA interrogation techniques, presumably for OLC's review.<sup>375</sup> Levin took up each interrogation request in turn. On August 26, 2004, he wrote that dietary manipulation, nudity, water dousing and abdominal slaps were lawful with certain conditions.<sup>376</sup> On September 6, 2004, Levin wrote that attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary manipulation, nudity, water dousing, and abdominal slap were lawful with certain conditions.<sup>377</sup> The conditions necessary were that the techniques conform to all representations previously made to OLC, that no medical or psychological contraindications existed to any of the medical and psychological assessments provided to OLC, and that medical officers would be present.<sup>378</sup> An almost identical letter to the September 6 letter, so similar that it may apply to the same detainee, was written by Levin to the CIA on September 20.<sup>379</sup>

Sometime in September 2004, Levin sent a memo to the attorney general and the deputy attorney general on the "Status of Interrogation Advice."<sup>380</sup> When discussing the Bybee August 1, 2002, memo to Gonzales, Levin stated, "It contains discussion of a variety of matters that are not necessary to resolving any issues raised to date."<sup>381</sup> Additionally, when discussing the March 14, 2003, memo to Haynes, Levin wrote "[the memo to Haynes] contains extensive discussion of the torture statute and other matters that is not necessary to resolve any issue."<sup>382</sup> Levin added that the lawfulness of the tactics themselves "was *reaffirmed* ... in a July 7, 2004 letter from Jack Goldsmith to Scott Muller [referring to approval of both CIA and DOD techniques] and also in a July 17, 2004 fax by Jack."<sup>383</sup>

While working on the replacement memo, Levin was reportedly so concerned about the



controversial technique of waterboarding that he went to a military base near Washington and underwent the procedure himself.<sup>384</sup>

### **Bybee's August 1, 2002, Memorandum to Gonzales is Replaced**

The first draft of a replacement memo was produced by OLC in mid-May 2004, and at least 14 additional drafts followed.<sup>385</sup> Two days before the beginning of 2005, in the midst of the winter holiday season, Levin released a memorandum,<sup>386</sup> superseding the Bybee August 1 memo to Gonzales in its entirety, that

- stated that the discussion in the August 1 memo concerning the president's commander in chief plenary power and the potential defenses to liability was — and remains — unnecessary;<sup>387</sup>
- modified the August 1 memo's analysis of the legal standards applicable under the Torture Statute (*e.g.*, under some circumstances “severe physical suffering” may constitute torture even if it does not involve “severe physical pain”);<sup>388</sup>
- found that the only relevant definition of “torture” is the definition contained in CAT;<sup>389</sup>
- acknowledged that “drawing distinctions among gradations of pain ... is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain” and relied on several judicial interpretations of the Torture Victims Protection Act;<sup>390</sup>
- concluded that “[w]hile we have identified various disagreements with the August 2002 Memorandum, *we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.*”<sup>391</sup>

Thus, as with the Bybee memo to Gonzales, this memo did not get into specifics in regard to any one detainee's interrogation. Moreover, in its significant footnote, it stated *none* of OLC's conclusions as to the treatment of detainees would have been any different under the new standards now set forth in Levin's memorandum. Officials at the White House had insisted that footnote be included in the memo.<sup>392</sup> Of Levin's memo, Goldsmith wrote: “[N]o approved interrogation technique would be affected by this more careful and nuanced analysis. The opinion [the Bybee memo] that had done such enormous harm was completely unnecessary to the tasks at hand.”<sup>393</sup>

Prior to Levin's departure, OLC was consulted in still-classified documents about the individual interrogation of detainees.<sup>394</sup> On February 4, 2005, as he was leaving, Levin sent a still-classified memo to Haynes on the topic of interrogation policy that, perhaps, is a replacement for the March 2003 memo Yoo had authored for Haynes.<sup>395</sup> Levin said the CIA never pressured him as he examined the issue of detainee interrogation; however, the White House had “pressed” him on this issue.<sup>396</sup> “I mean, a part of their job is to push, you know, and push as far as you can. Hopefully not push in a ridiculous way, but they want to make sure you're not leaving

any executive power on the table.”<sup>397</sup> Levin left OLC to take over Bellinger’s job as the legal adviser to the NSC. Levin had not initially been interested in the job, but Gonzales, White House Counsel Harriet Miers, and the new National Security Advisor Stephen Hadley had encouraged him to take the position.<sup>398</sup> Deputy Assistant Attorney General Comey later said that senior levels of the Justice Department understood that Levin had been denied appointment as the permanent head of OLC because he had not “delivered” to the White House its desired memoranda on interrogation.<sup>399</sup>

**“Of waterboarding, in 2007 McCain said ... ‘It is not a complicated procedure. It is torture.’”**

Levin arrived at his new position and found he had “nothing to do.”<sup>400</sup> After about a month, Levin asked for permission to leave his new position and returned to private practice.<sup>401</sup> The behavior toward Levin was not, according to Philbin, an isolated incident. Addington approached Philbin in November 2004 and told him he had violated his oath to uphold, protect and defend the Constitution by participating in the withdrawal of Yoo’s NSA opinion and the withdrawal of the August 1 memo to Gonzales.<sup>402</sup> Addington told Philbin that he would prevent Philbin from receiving any advancement to another job in the government and suggested Philbin resign immediately and return to private practice.<sup>403</sup> In the summer of 2005, Solicitor General Paul Clement chose Philbin to be the principal deputy solicitor general; Gonzales agreed, and the proposal was sent to the White House for approval. According to Philbin, Addington objected strenuously to the appointment and the vice president called Gonzales personally to ask Gonzales to reconsider the proposal.<sup>404</sup> When told by Gonzales that he would not receive the job to preserve good relations with the White House, Philbin told Gonzales that he should have defended him, to which Gonzales told Philbin that, if he felt that way, he should resign.<sup>405</sup> Philbin resigned and returned to private practice.<sup>406</sup>

### **Acting Assistant Attorney General Steven G. Bradbury**

Levin had replaced the August 1 memo to Gonzales before his departure, and had been working on a “techniques” memo but had been unable to complete it.<sup>407</sup> Comey was concerned. In an internal DOJ email on April 27, 2005, Comey, who had already submitted his resignation by this time and would leave DOJ in August, wrote:

The Attorney General explained that he was under great pressure from the Vice President to complete both [replacement] memos, and that the President had even raised it last week, apparently at the Vice President’s request and the Attorney General had promised they would be ready early this week.<sup>408</sup>

Comey was worried Bradbury “was getting similar pressure. ... Parenthetically, I have previously expressed my worry that having Steve as ‘Acting’ — and wanting the job — would make him susceptible to just this kind of pressure.”<sup>409</sup> Later, Comey said no one was ever specific about end results from OLC but one would have to “be an idiot not to know what was wanted.”<sup>410</sup> Bradbury stated he never felt nor received any pressure from the White House counsel’s office, the vice president’s office, the CIA, the NSC, or the attorney general as to the outcome of his opinions concerning the legality of the CIA’s interrogation program.<sup>411</sup> Moreover, Bradbury’s nomination as assistant attorney general had already been approved by the president in April 2005, prior to his completion of the replacement memos. However, it was not forwarded to the Senate until June 23, 2005.<sup>412</sup>

On May 10, 2005, Bradbury authored two memoranda to Rizzo at the CIA. The first, a 46-

page memo, looked at whether certain specified interrogation techniques designed for use on high-value Al Qaeda detainees complied with the Torture Statute.<sup>413</sup> This memo

- utilized the legal analysis in Levin's December 2004 memo and applied the CIA's request to that analysis;<sup>414</sup>
- assumed that, prior to interrogation, each detainee is evaluated by medical and psychological professionals from the CIA's Office of Medical Services to ensure that he is not likely to endure any severe physical or mental pain or suffering;<sup>415</sup> and that medical and psychological personnel are on-scene;<sup>416</sup>
- discussed in detail the following techniques: dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap (insult slap), abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation, and waterboarding;<sup>417</sup>
- found that, subject to the understandings, limitations, and safeguards discussed, including ongoing medical and psychological monitoring and team intervention as necessary, each of the techniques, considered individually, would not violate the Torture Statute,<sup>418</sup> but that the issues raised by sleep deprivation and the waterboard require great caution in their use;<sup>419</sup>
- determined that, in sharp contrast to those practices universally condemned as torture over the centuries, the techniques considered here were carefully evaluated to avoid causing severe pain or suffering to the detainees.<sup>420</sup>

The second memo to Rizzo from Bradbury, a 20-page memo, addressed the same techniques in combination to assess their legality pursuant to the Torture Statute without reference to a particular detainee.<sup>421</sup>

- [A]ny physical pain resulting from the use of these techniques, even in combination, cannot reasonably be expected to meet the level of "severe physical pain" contemplated by the statute.<sup>422</sup>
- Moreover, although it presents a closer question ... we conclude that the combined use of these techniques also cannot reasonably be expected to cause severe physical suffering.<sup>423</sup>
- The authorized use of these techniques in combination "would not reasonably be expected to cause prolonged mental harm and could not reasonably be considered specifically intended to cause severe mental pain or suffering."<sup>424</sup>
- The waterboard may be used simultaneously with two other techniques: sleep deprivation and dietary manipulation. The remaining techniques cannot be employed during the actual waterboard session, but "may be used at a point in time close to the waterboard, including same day."<sup>425</sup>
- [OLC] stress[es] that these possible questions about the combined use of

these techniques ... are difficult ones and they serve to reinforce the need for close and ongoing monitoring by medical and psychological personnel and by all members of the interrogation team and active intervention if necessary.<sup>426</sup>

**“OPR concluded that Yoo ‘had committed intentional professional misconduct when he violated his duty to exercise independent legal judgment...’”**

Later the same month, on May 30, 2005, Bradbury sent a memo to Rizzo on whether the CIA’s interrogation techniques were consistent with U.S. obligations under Article 16 of CAT, which forbids cruel, inhuman or degrading treatment that did not amount to torture.<sup>427</sup> Article 16, Bradbury’s memo posited, was limited to conduct within “territory under [U.S.] jurisdiction.”<sup>428</sup> Territory of the United States “includes, at most, territory over which the United States exercises at least de facto authority as the government.”<sup>429</sup> Thus, the memo concludes,

the CIA interrogation program is not conducted in the United States ... and does not implicate Article 16. We also conclude that the CIA Interrogation program, subject to its careful screening, limits and medical monitoring, *would not violate the substantive standards applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program.* Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though ... the question is unlikely to be subject to judicial inquiry.<sup>430</sup>

Philip Zelikow, the counselor of the Department of State at the time in 2005, had been working at DOS to persuade the rest of the government to join in developing an option that would abandon technical defenses and embrace the definitions of Common Article 3.<sup>431</sup> Of Bradbury’s May 30, 2005, opinion, Zelikow testified to the Senate Judiciary Committee in 2009:

The OLC had guarded against the contingency of a substantive “CID” review in its May 30, 2005 opinion. OLC had held that, even if the standard did apply, the full CIA program — including waterboarding — complied with [the standard]. This OLC view also meant, in effect, that the McCain amendment was a nullity,<sup>432</sup> it would not prohibit the very program and procedures Senator McCain and his supporters thought they had targeted.<sup>433</sup>

Sen. Lindsey Graham, one of the co-sponsors of the Detainee Treatment Act in 2005 along with Sen. McCain, said of the legal memoranda that approved waterboarding, “the [legal] guidance that was provided during this period of time, I think, will go down in history as some of the most irresponsible and shortsighted legal analysis ever provided to our Nation’s military and intelligence communities.”<sup>434</sup> In an interview with Task Force staff, Graham said: “They were tortured legal reasoning. ... They were trying their best to create legal lanes that, I think, were (1) dubious, and (2) long term, damaging.”<sup>435</sup> Of waterboarding, in 2007 McCain said: “All I can say is that it was used in the Spanish Inquisition, it was used in Pol Pot’s genocide in Cambodia, and there are reports that it is being used against Buddhist monks today. ... It is not a complicated procedure. It is torture.”<sup>436</sup>

In mid-February 2006, Zelikow wrote a memo challenging OLC’s interpretation of the constitutional law contained in the May 2005 memo.<sup>437</sup> Zelikow later heard his memo was thought to be “not appropriate” for further discussion and that copies of his memo were

collected and destroyed.<sup>438</sup> At least one copy survived, however, and was located in the State Department's files in 2009.<sup>439</sup> On June 29, 2006, the Supreme Court released its decision in *Hamdan v. Rumsfeld*, finding that Common Article 3 applied to the government's treatment of detainees.<sup>440</sup> According to Bradbury, OLC (along with DOS and DOD) had a central role in analyzing the legal issues and legislative options of the Military Commissions Act of 2006, which was a response to the *Hamdan* decision.<sup>441</sup>

Notably, after *Hamdan*, there was an absence of response by OLC to the Supreme Court's holding in the case. One reason may have been that President Bush was deciding on a course of action at the time. Zelikow testified:

Internal debate continued into July [2006], culminating in several decisions by President Bush. Accepting positions that Secretary Rice had urged again and again, the President set the goal of closing the Guantánamo facility, decided to bring all the high-value detainees out of the "black sites" and move them toward trial, sought legislation from the Congress that would address these developments (which became the Military Commissions Act) and defended the need for some continuing CIA program that would comply with relevant law. President Bush announced these decisions on September 6.<sup>442</sup>

The next known memorandum on the topic of detainee treatment from OLC is dated July 20, 2007. For this opinion, Bradbury solicited input from the attorney general's office, the deputy attorney general's office, the criminal division, the national security division as well as DOS, the NSC and the CIA.<sup>443</sup> Bellinger, now legal adviser to Secretary of State Rice, raised multiple objections to the memo in an 11-page letter.<sup>444</sup> Bradbury responded to Bellinger in a 16-page letter dated February 16, 2007, and reproached Bellinger for taking positions that were inconsistent with his previous support of the CIA program, when he had been the NSC legal adviser.<sup>445</sup> Bradbury addressed Bellinger's comments on the memo in detail and rejected almost all of them.<sup>446</sup>

The July 20 memo began "the last eighteen months have witnessed significant changes in the legal framework applicable to the armed conflict with al Qaeda."<sup>447</sup> After this "significant change," the CIA was now "expecting to" detain further high-value detainees, subsequent to the president's announcement of September 6, 2006.<sup>448</sup> The CIA sought approval of six "enhanced interrogation techniques" for these high-value detainees.<sup>449</sup> OLC advised that the techniques would not violate, and were consistent with, (a) the War Crimes Act, as amended by the Military Commissions Act of 2006, (b) the Detainee Treatment Act of 2005, and (c) the requirements of Common Article 3.<sup>450</sup> In order that its determination would be conclusive under U.S. law, the memo continued, the president could exercise his authority to issue an executive order adopting OLC's interpretation of Common Article 3.<sup>451</sup>

We understand that the President intends to exercise this authority. We have reviewed his proposed executive order: the executive order is wholly consistent with the interpretation of Common Article 3 provided herein, and the six proposed interrogation techniques comply with each of the executive order's terms.<sup>452</sup>

The six techniques included in the July 20, 2007, memo were: dietary manipulation, extended sleep deprivation, the facial hold, the attention grasp, the abdominal slap, and the insult (or facial slap).<sup>453</sup> Later, Bradbury would, three different times — on August 23, November 6, and November

7, 2007 — advise the CIA that an additional period of authorization for its interrogation, the precise nature of which remains classified, would comply with all applicable legal standards.<sup>454</sup>

### Closing OLC Chapter of the Bush Presidency

On June 12, 2008, the Supreme Court repudiated OLC's earlier detainee policies yet again when it ruled, in *Boumediene v. Bush*, that detainees had a right to challenge their captivity in *habeas corpus* proceedings in federal court.<sup>455</sup>

Bradbury authored a memo on October 6, 2008, that “advise[d] caution” before relying “in any respect on the Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001) as a precedent.”<sup>456</sup> The memo continues:

It is important to understand the context of the 10/23/01 Memorandum. It was the product of an extraordinary — indeed, we hope, a unique — period in the history of the Nation; the immediate aftermath of the attacks of 9/11. Perhaps reflective of this context, the 10/23/01 Memorandum did not address specific and concrete policy proposals; rather it addressed in general terms the broad contours of hypothetical scenarios involving possible domestic military contingencies that senior policy makers feared might become a reality in the uncertain wake of the catastrophic terrorist attacks of 9/11.<sup>457</sup>

A follow-up memo from Bradbury on January 15, 2009, casts an even broader net of retraction. The January 15 memo, Bradbury's last at OLC, issued five days before the inauguration of President Barack Obama, confirmed “that certain propositions issued by the Office of Legal Counsel in 2001–2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office.”<sup>458</sup> Again, “caution should be exercised before relying in other respects on the remaining opinions identified below.”<sup>459</sup> Those opinions upon which, Bradbury advised, should not be relied included:

- Bybee's March 13, 2002, memo to Haynes on the president's power to transfer captured terrorists to the control and custody of foreign nations ;
- Philbin's April 8, 2002, memo to Bryant regarding the Swift Justice Authorization Act;
- Yoo's June 27, 2002, memo on the applicability of military detention to a U.S. citizen;
- Bybee's August 1, 2002, memo to Gonzales on the Torture Statute;
- Yoo's March 14, 2003, memo to Haynes on the interrogation of detainees by the military;
- Yoo's February 8, 2002, memo to Haynes on the interpretation of the Foreign Intelligence Surveillance Act;

- Yoo and Delahunty's November 15, 2001, memo to Bellinger on the authority of the president to suspend certain provisions of the ABM Treaty;
- Bybee's January 22, 2002, memo to Gonzales and Haynes on the application of treaties and laws to Al Qaeda and Taliban prisoners;
- Yoo's September 25, 2001, memo to David S. Kris regarding the Foreign Intelligence Surveillance Act.

On January 22, 2009, President Obama issued an executive order that no member of the executive branch rely on any interpretation of the law governing detainee interrogations issued by the Department of Justice between September 11, 2001, and January 20, 2009.<sup>460</sup>

## Why the OLC Opinions Must Be Rejected

On July 29, 2009, DOJ's Office of Professional Responsibility (OPR) released a 289-page report documenting its 5½-year investigation into OLC relating to the CIA's "enhanced interrogation technique" program.<sup>461</sup> Based on the results of its investigation, OPR concluded that Yoo "had committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."<sup>462</sup> It also concluded Jay Bybee "had committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."<sup>463</sup> Notably, the report

did not attempt to determine and did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result. Thus the fact that other OLC attorneys subsequently concluded that the CIA's use of EITs was lawful was not relevant to our analysis.<sup>464</sup>

Moreover, the report "did not find that the other Department officials involved in this matter committed professional misconduct."<sup>465</sup> On January 5, 2010, Associate Attorney General David Margolis wrote a memo to the attorney general in which he did not adopt OPR's findings of misconduct for Bybee and Yoo and did not authorize OPR to refer its findings to the state-bar disciplinary authorities in the jurisdictions where the two men were licensed.<sup>466</sup> In reaching his decision, Margolis stated:

This decision should not be viewed as an endorsement of the legal work that underlies those memoranda. However, OPR's own analytical framework defines "professional misconduct" such that a finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct. I am unpersuaded that OPR has identified such a standard.<sup>467</sup>

There are many criticisms of OLC's practices and conduct during this period. Alberto Mora and Philip Zelikow, who aired their concerns at the time, remain highly critical of OLC's advice and the attendant policies that followed.<sup>468</sup> The noted historian Arthur Schlesinger, on the policies authorized by OLC, said, "No position taken has done more damage to the American reputation in the world — ever."<sup>469</sup>

The 1952 seminal decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>470</sup> in which the Supreme Court found the president's authority to act was limited to authority specifically enumerated under Article II of the Constitution or to statutory authority granted by Congress, wasn't even discussed in Bybee's now infamous August 1, 2002, memo to Gonzales. Nor, critics say, had the memo discussed the DOJ's 1984 prosecution of a Texas sheriff and his deputies for "water torture."<sup>471</sup> Nor had the memo discussed war crimes prosecutions of Japanese soldiers who had waterboarded American aviators during World War II. Nor had the memo, in its discussion of the invocation of necessity or self-defense, discussed a Supreme Court decision from just a year prior in which the Court indicated a necessity defense was only available when Congress had explicitly said such a defense was available.<sup>472</sup> Yoo and Bybee's conclusion that the president's commander in chief authority trumped all else during wartime set a dangerous precedent. Their reliance upon the health-care statute, in defining severe pain, was extremely poor legal scholarship. The OPR report described much of the criticism of Bybee and Yoo's work:<sup>473</sup>

Harold [Hongju] Koh, then Dean of Yale Law School, characterized the memorandum as "blatantly wrong" and added: "[i]t's just erroneous legal analysis." Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, Financial Times, June 10, 2004. A past chairman of the international human rights committee of the New York City Bar Association, Scott Horton, stated that "the government lawyers involved in preparing the documents could and should face professional sanctions." *Id.* Cass Sunstein, a law professor at the University of Chicago, said: "It's egregiously bad. It's very low level, it's very weak, embarrassingly weak, just short of reckless." Adam Liptak, *Legal Scholars Criticize Memos on Torture*, New York Times, June 24, 2004 at A14. In the same article, Martin Flaherty, an expert in international human rights law at Fordham University, commented, "The scholarship is very clever and original but also extreme, one-sided and poorly supported by the legal authority relied on." *Id.* ...

Similar criticism was raised by a group of more than 100 lawyers, law school professors and retired judges, who called for a thorough investigation of how the Bybee Memo and other, related OLC memoranda came to be written. Fran Davies, *Probe Urged Over Torture Memos*, Miami Herald, August 5, 2004 at 6A; Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, Washington Post, August 5, 2004 at A4. A few lawyers defended the Bybee Memo. In a Wall Street Journal op-ed piece, two legal scholars argued that the Bybee Memo appropriately conducted a dispassionate, lawyerly analysis of the law and properly ignored moral and policy considerations. Eric Posner and Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, Wall Street Journal, July 6, 2004 at A22.<sup>474</sup>

Others have argued that Bybee and Yoo share an unfair portion of the criticism. Even those OLC lawyers who believed that using tough tactics was a serious mistake had agreed that the methods themselves were legal.<sup>475</sup> OLC attorneys did not retract Bybee and Yoo's infamous August 1, 2002, "Torture Memo" until after it had been leaked to the public in 2004, but then did so almost immediately, suggesting the attorneys in the office knew they could not defend in public that which had been signed-off on in secret. Once Yoo and Bybee had said "yes," none of their successors at OLC were willing to say that they had been wrong in saying yes. At most, the criticism from their successors at OLC, and from many others in and outside the Justice Department, was that Yoo and Bybee had written more than was needed and/or



engaged in *dicta* — not that they had approved illegal interrogation tactics. Under Daniel Levin's analysis, if the use of the waterboard and other "enhanced" techniques didn't violate any U.S. statute or the Constitution, there existed no barrier to using the CIA's interrogation practices on our own domestic criminal suspects. Under Steven Bradbury's analysis, the CIA's techniques could be used by a foreign enemy against U.S. troops in the future as the uses of the techniques were consistent with Common Article 3. In his article *The Sacrificial Yoo*, David Cole wrote:

Yoo and Bybee are in some sense easy targets. Their memos were the first to be written, and they employed less polished rhetoric and less nuanced argument than the memos that followed years later, written by authors who had the benefit of hindsight and were aware of the public condemnation that the initial memo had occasioned.<sup>476</sup> ...

And by focusing on Yoo's methods, rather than his result, the OLC failed to confront the real failing. It was not only in Yoo's work, but also in that of those who, following him, authorized the CIA to engage in torture and cruel, inhuman and degrading treatment.<sup>477</sup>

Noted constitutional scholar Bruce Ackerman has gone further than many critics and suggested that the memoranda of Bybee, Yoo, and their successors at OLC in the Bush administration are symptomatic of a larger problem in how OLC operates today, one that is present irrespective of whether a Democrat or Republican occupies the White House.<sup>478</sup> Ackerman, a Yale Law School professor, believes OLC as an institution relies too heavily on the individual ethics and personalities of those who occupy its offices to ward off legal abuses. OLC lawyers are expected to push back against a White House even though, Ackerman points out, institutional and perhaps personal incentives are in place for OLC to provide amenable answers. So long as the status quo remains, Ackerman fears, so too does the possibility OLC would, in the future, tell a White House not what it needs to hear from its lawyers, but what it wants to hear. He suggests an independent body should be created to advise the president as to the legal limits of his or her executive power, one that would operate at arms-length from the White House.<sup>479</sup>

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Bybee and Yoo, and those at OLC who came after them, made the same, initial, signature mistake from which everything flowed. They promulgated a fundamental and egregious misunderstanding of the Geneva Conventions. The Geneva Conventions, duly ratified in accordance with the U.S. Constitution, were the latest codification of laws of war that dated back centuries. They laid out civilized rules of treatment for all categories of people caught up in armed conflicts — not just "lawful combatants." The Geneva Conventions openly contemplated and addressed what could be done to nonuniformed "unlawful" combatants. Such persons could be interrogated.<sup>480</sup> They could, after a trial, even be executed.<sup>481</sup> But they could not be physically or psychologically tortured or subject to cruel, inhuman or degrading treatment. They had to be treated "with humanity."<sup>482</sup> Torture and degrading treatment were clearly prohibited not only by the Geneva Conventions and the Convention Against Torture, two bodies of international law, but they were illegal under the War Crimes Act and the Torture Statute — domestic law — as well.

The humane treatment of prisoners is deeply ingrained in the fabric of the United States' history and its military. During the Revolutionary War, the British Army had viewed American soldiers as "unlawful" combatants by reason that all of them were viewed as having committed treason. The British brutalized and killed American prisoners: American soldiers were refused the ability to surrender, starving prisoners were mistreated in the hulks of prison ships in New York harbor, and the homes and property of suspected American sympathizers were plundered and destroyed.<sup>483</sup> By contrast, American leaders, Benjamin Franklin and Thomas Jefferson among them, resolved that the war would be conducted by the revolutionaries with a respect for human rights consistent with the values of their society and the principles of their cause, true to the expanding humanitarian ideals of the American Revolution.<sup>484</sup> As leaders in this cause, John Adams gave words to the policy and George Washington put the policy into practice.<sup>485</sup> In a letter to his wife Abigail, Adams wrote:

I who am always made miserable by the Misery of every sensible being, am obliged to hear continual accounts of the barbarities, the cruel Murders in cold blood, even the most tormenting ways of starving and freezing committed by our Enemies. ... These accounts harrow me beyond Description. ...

I know of no policy, God is my witness, but this — Piety, Humanity and Honesty are the best Policy. Blasphemy, Cruelty and Villainy have prevailed and may again. But they won't prevail against America, in this Contest, because I find the more of them are employed, the less they succeed.<sup>486</sup>

Washington ordered his troops to treat British captives humanely:

[L]et them have no reason to complain of us copying the brutal manner of the British Army. ... While we are contending for our own liberty we should be very cautious of violating the rights of conscience in others, ever considering that God alone is the judge of the hearts of men, and to Him only in this case, are they answerable.<sup>487</sup>

America's superior treatment of its prisoners boosted the morale of Washington's troops and was seen as hard evidence of the ideals for which the American revolutionaries were fighting. A few Americans managed to escape British captivity and the stories of their cruel treatment at the hands of the British Army helped rally and fortify the opinions of many Americans against the British.

During the U.S. Civil War, the United States continued to lead the way when Frances Lieber drafted the first, modern, comprehensive code for the laws of war. The "Lieber Code" established the idea that criminals were not the same as soldiers and, therefore, soldiers must not be detained in punishing conditions. Starvation, torture, intentional suffering and "other barbarity" were all outlawed. Lieber's code was adopted at two important international diplomatic conferences at The Hague in 1899 and in 1907, which would put American egalitarianism at the core of future international humanitarian law.<sup>488</sup>

Seen in this light, the Geneva Conventions and the Convention Against Torture, which the United States championed, are not limits on American hegemony; rather, they reflect the ideals that have coursed through the country's history since its founding. Not only are these

ideals interwoven into those two international treaties, as well as the Torture Statute and the War Crimes Act, they are at the origins of the nation's founding document, the Constitution.

Rather than counseling the president and other senior officials on ways in which the applicable law could be avoided, OLC and its attorneys could have, and should have, in a time of great fear and panic, reinforced the country's commitment to the rule of law and helped put a stop to clearly illegal practices. Had they done so, they would have done their country an immeasurable service. The effect of their failure to do so continues to reverberate and is felt to this day.

# Rendition and the “Black Sites”

*Between 2001 and 2006, the skies over Europe, Asia, Africa and the Middle East were crisscrossed by hundreds of flights whose exact purpose was a closely held secret. Sometimes the planes were able to use airports near major capitals, while on other occasions the mission required the pilots to land at out-of-the-way airstrips.*

*The planes were being used by the CIA to shuttle human cargo across the continents, and the shadowy air traffic was the operational side of the U.S. government’s anti-terrorist program that came to be known as “extraordinary rendition.”*

*After the September 11, 2001, terrorist attacks, the Bush administration resolved to use every available means to protect the United States from further attack. The extraordinary rendition program, used previously by President Bill Clinton, quickly became an important tool in that effort. In the years since, numerous investigations and inquiries have found evidence of illegal acts in the form of arbitrary detention and abuse resulting from the program. These, in turn, have led to strained relations between the United States and several friendly countries that assisted the CIA with the program.*

*The program was conceived and operated on the assumption that it would remain secret. But that proved a vain expectation which should have been apparent to the government officials who conceived and ran it. It involved hundreds of operatives and the cooperation of many foreign governments and their officials, a poor formula for something intended to remain out of public view forever. Moreover, the prisoners transported to secret prisons for interrogations known as “black sites” would someday emerge. Many were released, and others faced charges, providing them a public platform from which to issue statements about the rendition program and their treatment.*

*The extraordinary rendition program required secrecy for two principal reasons: First, it allowed the CIA to operate outside of legal constrictions; controversial interrogation techniques were approved for use by the CIA on a limited number of “high-value detainees,” and records show that the CIA had flight data falsified to limit the ability of outside actors, including rights groups, to track the movement of detainees. Second, the CIA operated the “black sites” — the secret prisons abroad — typically on the basis of agreements between CIA officials and their counterparts, intelligence officials in the host countries. The decision to bypass regular diplomatic channels, which would involve the wider political leadership of each country, was designed to keep the existence of the secret prisons entirely out of domestic politics,*

*bilateral relations, and the media. However, the CIA's effort to keep hundreds of flights, prisons in numerous countries, and the mistreatment of detainees secret failed in the end, leaving the participating countries to cope with questions about the international legal violations that occurred. Allies such as Poland and Lithuania continue to face significant legal and political problems stemming from their participation. There have been numerous reports released and lawsuits filed against governments in Europe, in some cases prompting official government investigations into complicity with the rendition program that clash with the pact of secrecy relied upon by the CIA and the U.S. government.*

*The investigation of extraordinary rendition by the Task Force uncovered many new details regarding the black sites in Poland and Lithuania, countries that were visited by Task Force staff. In Poland, an official investigation has been hampered by the U.S. government's refusal to share information, even as Polish prosecutors issued indictments against top Polish officials for their role in facilitating the black site there. The secrecy imposed by the CIA also resulted in political attempts to derail the investigation entirely. Polish prosecutors have, at various times, been caught in the difficult position of handling information classified by the United States and Poland. The prosecutors also had to judge to what extent they could share such information with counsel for detainees who were held in Poland, who have a legal right to access such information. The Lithuanian prosecutors faced many of the same problems, although unlike the Poles, they based their investigation on a parliamentary report asserting that black sites did exist in Lithuania. The Lithuanian prosecutors suspended their investigation in early 2011 without a public rationale; although they acknowledged the existence of the sites, they initially claimed to Task Force staff that they had "proven" that no detainees had been held there. They later amended their position to say that they simply did not have evidence of detainees being held in the black sites — although human rights groups have insisted that such evidence exists. The Lithuanian prosecutors also provided Task Force staff with new details about the suspected black sites, even describing the "cell-like structures." Other Lithuanian officials gave the Task Force full accounts of how noted intelligence officials came to exceed their authority by concluding agreements on their own with the CIA to host the black sites. These officials also described the many legislative and political changes that have been made in Lithuania to ensure that such acts are not repeated. Former senior CIA officials — including the former head of covert operations in Europe, Tyler Drumheller, and the former chief of analysis at the counterterrorist center, Paul Pillar — also gave Task Force staff a broader understanding of the CIA's internal operations and deliberations.*

*Because the United States has declined to hold an official inquiry of its own, the Task Force's meetings and interviews abroad were essential to gaining a greater understanding of the founding and operation of the black sites. However, the Task Force staff found that the investigations abroad and elsewhere have been frustrated in part due to the United States' refusal to respond to information requests regarding renditions, and in part because of the limited or nonparticipation of government officials with knowledge of the agreements. As a result, allied governments have been caught in the difficult position of being held accountable both by their citizens and by international organizations, while also being discouraged from making any public disclosures through direct and indirect warnings from the United States.*

## A Brief History of the Rendition Program

While it is difficult to pinpoint precisely when the United States first began using rendition as an anti-terror technique, the Task Force concludes that it was “well in place” by the late 1980s or early 1990s.<sup>1</sup> But the nature of the program changed significantly over time.

In 1989, William Webster, former CIA and FBI head, stated in an interview that the United States had created the term “rendition” to describe the act of capturing and bringing back to the United States a terror suspect.<sup>2</sup> In 1992, President George H.W. Bush issued National Security Directive 77 (NSD-77), whose title and contents remain classified, but NSD-77 was referenced by President Clinton in President Decision Directive 39 in 1995, which stated that

[r]eturn of terrorist suspects from overseas by force may be effected without the cooperation of the host government, consistent with the procedures outlined in National Security Directive-77, which shall remain in effect.<sup>3</sup>

This technique was used to bring Ramzi Yousef, perpetrator of the 1993 World Trade Center bombings, from Pakistan to the United States in 1995, where he stood trial.

Michael Scheuer, head of the CIA’s bin Laden Unit from 1996 to 1999, summarized why extraordinary rendition was embraced, saying that the United States knew the whereabouts of many dangerous militants, but did not want them in the United States. The solution was to send them to a third country where they could be held secretly.<sup>4</sup> In 1995, the Clinton administration approved a new agreement with Cairo to send abducted Islamic militants to Egyptian custody.<sup>5</sup> It was well-known that the mukhabarat — the Egyptian secret police — used torture methods on prisoners and committed extrajudicial killings; that was clearly asserted in the Department of State (DOS) human rights report on Egypt from 1995.<sup>6</sup> Among the individuals rendered by the CIA to Egypt during the Clinton administration were Talaat Fouad Qassem, who was arrested in Croatia in September 1995, and Shawki Salama Attiya, arrested in Albania in 1998.<sup>7</sup> Both men (along with four of Attiya’s cohorts) were transferred by CIA officials to Cairo.<sup>8</sup> Qassem “disappeared” after his return to Egypt, and is suspected to have been executed.<sup>9</sup> Attiya alleged that upon return to Egypt, he was tortured by being suspended by various limbs, made to stand in knee-deep filthy water, and given electric shocks to his genitals — a technique later also alleged by Ahmed Agiza and Muhammed Alzery upon their renditions to Egypt in 2001.<sup>10</sup>

Edward Walker, the former ambassador to Egypt who knew about the program, has said that the human rights reports were correct, that the “Chinese walls” at the embassy only came together at the ambassadorial level and that the DOS diplomats working on human rights reports might have been “upset” if they knew what was going on.<sup>11</sup> The negotiations, in Egypt’s case, were conducted between top CIA officials and the longtime chief of Egyptian intelligence, Omar Suleiman.<sup>12</sup> Walker described Suleiman as one who understood the negative aspects of torture, but was “not squeamish” about using it for intelligence gathering.<sup>13</sup> Suleiman remained chief of Egyptian intelligence and oversaw post-September 11 renditions to Egypt until January 2011, when he briefly held the position of vice president before Hosni Mubarak’s overthrow in February 2011.<sup>14</sup>

The rendition program was expanded under Clinton to include Syria, Jordan and Morocco, which also used torture in their treatment of prisoners, and numerous reports state that these

four countries have, to date, received the most U.S.-sponsored renditions.<sup>15</sup> A former FBI official said about the program that from the beginning, the CIA “loved that these guys would just disappear off the books, and never be heard of again. ... [T]hey were proud of it.”<sup>16</sup> It is important to note, however, that Michael Scheuer testified before Congress in 2007 that interrogation was specifically not the objective in rendering these individuals under the Clinton administration, in part because of the possibility that torture would be used and the evidence would be unreliable. The purpose of the program at that time, according to Scheuer, was to “take these men off the street” and seize any documents or other information on their persons, and the individuals would then be returned to countries in which there was some type of outstanding legal process for them.<sup>17</sup> This was confirmed to Task Force staff by former CIA deputy director Paul Pillar, who says that renditions before September 11 had “nothing to do with interrogation.”<sup>18</sup> Former FBI interrogator Ali Soufan also stated to Task Force staff that early renditions were always to the suspects’ countries of origin, “or [where they were] wanted” on criminal charges.<sup>19</sup> According to Richard Clarke, former director of the Central Intelligence Agency, “President Clinton approved every ‘snatch’ that he was asked to review.”<sup>20</sup> In 2004, George Tenet testified before Congress there had been more than 70 renditions prior to September 11, 2001.<sup>21</sup> Some of those renditions were to U.S. custody, however.

## Expansion of the Program Post–September 11

After September 11, President George W. Bush authorized a huge range of covert operations, including the creation of joint operations centers in other states to capture terrorists abroad, render and interrogate them.<sup>22</sup> These operations included the re-conceptualized rendition program. Through the newly expanded network, members of the “Rendition Group” at the CIA’s counterterrorism center were authorized to capture suspects all over the world.<sup>23</sup> According to CIA officers:

Members of the Rendition Group follow a simple but standard procedure: Dressed head to toe in black, including masks, they blindfold and cut the clothes off their new captives, then administer an enema and sleeping drugs. They outfit detainees in a diaper and jumpsuit for what can be a day-long trip. Their destinations: either a detention facility operated by cooperative countries in the Middle East and Central Asia, including Afghanistan, or one of the CIA’s own covert prisons — referred to in classified documents as “black sites.”<sup>24</sup>

CIA flights could transfer suspected terrorists from numerous different countries to either the custody of third countries such as Egypt and Syria, or to secret CIA facilities within third countries, to remain within CIA custody throughout. The latter locations became known as “black sites” [see below]. The two methods were not necessarily mutually exclusive; there are several examples of suspects who were apparently rendered to black sites as well as third country facilities.<sup>25</sup> Further, the case-by-case approval given by the president to previous rendition operations was replaced after September 11 by a grant of blanket authority to the CIA for the detention and transfer of suspects.<sup>26</sup> Although the president and top administration officials continued to receive frequent briefings from the CIA, this broad authority may have contributed to renditions and lengthy detention based on patchy intelligence or mistaken identities. As former CIA official Tyler Drumheller stated in an interview with Task Force staff:

“There was a tendency — [whether] CIA, State Department, Pentagon — to run immediately to the White House. Everyone wanted to be the first person to reach the President, and once you tell the President something, especially President Bush, it’s very hard to go back and say ‘you know, we hadn’t quite checked it out enough’ ... and they often didn’t.”<sup>27</sup>

**“The European Parliament issued a report in 2007 after an investigation, which estimated that the CIA had flown as many as 1,245 extraordinary rendition flights between September 2001 and February 2007.”**

Due to the secrecy of the program, it is difficult to accurately estimate how many individuals were subject to extraordinary rendition post-September 11. The European Parliament issued a report in 2007, culminating an investigation, which estimated that the CIA had flown as many as 1,245 extraordinary rendition flights between September 2001 and February 2007, including flights to countries where suspects are known to be subject to torture.<sup>28</sup> The high figure may comport with the allegation that suspects were often flown to multiple sites over a short period of time in order to “disorient” them.<sup>29</sup> This number of actual rendition flights is disputed, however, by former CIA Director Michael Hayden, who said that many of those flights carried equipment, documents and people not associated with the rendition program.<sup>30</sup> Hayden also stated in 2007 that “apart from that 100 that we’ve detained [at CIA facilities], the number of renditions is actually even a smaller number, mid-range two figures,” placing the actual number of CIA detainees at around 150, including suspects known to have been sent to Afghanistan, Guantánamo Bay, or U.S. custody elsewhere.<sup>31</sup> This figure would appear to comport with the statement in the May 30, 2005, memorandum from Steven Bradbury, former head of DOJ’s Office of Legal Counsel (OLC), to John Rizzo, former counsel for the CIA, that up to that point, there had been 94 detainees in CIA custody.<sup>32</sup> There are allegations of abuse in both Afghanistan and Guantánamo Bay in connection with previously rendered detainees, particularly between 2002 and 2006. The number of extraordinary renditions to foreign custody in third countries was estimated at 53, in a 2008 report by the New America Foundation.<sup>33</sup> The report said, “[a]ll individuals for whom the rendition destination is known were sent to countries that have been criticized by the State Department’s annual Country Reports on Human Rights Practices, which document ‘torture or other cruel, inhuman or degrading treatment or punishment.’ ”<sup>34</sup>

In interviews with *The Washington Post*, unnamed U.S. officials involved with the rendition program confirmed that the purpose of transfers to countries that torture was explicitly to utilize those methods: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”<sup>35</sup> The temptation, according to another official, is “to have these folks in other hands because they have different standards.”<sup>36</sup> A large number of current and former detainees have alleged torture arising from their renditions to foreign custody.<sup>37</sup> Drumheller explained to Task Force staff that in his view, “It’s wrong and misguided to send people to places like Egypt, thinking you’re going to get a great truth — you don’t. And no military commander would ever go into combat based on this [evidence], because they know they can’t verify it.”<sup>38</sup>

A striking confirmation of the extraordinary rendition program was provided in February 2011, by Karl Rove, who acknowledged in an interview that detainees had been rendered to Egypt and other countries during the Bush administration, saying that “we take steps to make sure that they are not treated inhumanely.”<sup>39</sup> The State Department had noted in its 2002 human rights report that imprisonment in Egypt frequently involved prisoners being stripped, blindfolded,



suspended from the ceiling or door frame; beaten with whips, fists, metal rods; subjected to electric shocks; and doused with cold water.<sup>40</sup>

Even apart from the numerous allegations by detainees of torture after rendition, there are acknowledgements by U.S. government officials that use of methods eschewed by the United States to obtain information was the primary goal of the renditions. Omar Suleiman's personal relationship with the United States was cited by DOS as "probably the most successful element of the [U.S.-Egypt] relationship."<sup>41</sup> On one reported occasion, when the CIA "asked for a DNA sample from a relative of Al Qaeda leader Ayman Al-Zawahiri, Suleiman offered the man's whole arm instead."<sup>42</sup> When asked in 2007 whether individuals were likely to be tortured if sent to Egypt, former CIA official Bob Baer replied, "Oh, absolutely, no doubt at all. ... If you never want to hear from them again, send them to Egypt. That is pretty much the rule."<sup>43</sup> Former FBI agent Ali Soufan, who interrogated a number of "high value detainees" (HVDs) around the world, noted to Task Force staff that "[i]t's an assumption that when you take [detainees] to countries like this, you're taking them to be interrogated by someone else — you believe that someone else can get information that you cannot get."<sup>44</sup>

According to reports, when President Obama and Vice President Biden (who had years of foreign-policy experience) were briefed on the CIA's practice of sending suspects to "friendly intelligence services in places like Egypt and Jordan," Biden scoffed, "Come on ... you turn these people over to other countries so they can be tortured."<sup>45</sup> CIA Director Michael Hayden protested this statement, since the CIA retains "moral and legal responsibility" for everyone subjected to rendition, and the Bush administration had repeatedly emphasized their position that rendition was not for the express purpose of torture.<sup>46</sup> As journalist James Mann put it, "Biden was speaking in plain English, Hayden in the CIA's standard legalistic formulations."<sup>47</sup>

In a report based on 2007 interviews with the 14 HVDs at Guantánamo Bay about their time in CIA custody, the International Committee of the Red Cross (ICRC) described the transfer process:

Throughout their detention, the fourteen were moved from one place to another and were allegedly kept in several different places of detention, probably in different countries. ... The transfer procedure was fairly standardized in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. ... The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. ... The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. ... The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper. ... On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort. ..."<sup>48</sup> Additionally, "the detainees were kept in continuous solitary confinement and incommunicado detention."<sup>49</sup>

In 2010, it was reported that certain HVDs who had arrived at Guantánamo Bay in 2003 had been secretly removed and transferred to black sites abroad specifically to avoid the Supreme Court’s ruling granting them access to lawyers and *habeas corpus* hearings.<sup>50</sup> Flight data published by the European Parliament seemed to confirm that detainees including Abu Zubaydah, Abd al-Rahim al-Nashiri, Ramzi bin al Shibh and Mustafa Ahmed al Hawsawi, arrived in Guantánamo Bay on September 23, 2003, and were kept at a CIA facility there named “Strawberry Fields.”<sup>51</sup> However, the Supreme Court had begun to consider whether Guantánamo detainees should have access to U.S. courts, and the administration was reportedly afraid that such access would be granted by the Court the following summer.<sup>52</sup> According to al-Nashiri’s lawyer, Nancy Hollander, “[t]here was obviously a fear that everything that had been done to them might come out.”<sup>53</sup> In anticipation of the Court’s ruling of June 2004, the four detainees were moved from Guantánamo Bay on March 27 on a flight that landed in Rabat, Morocco.<sup>54</sup>

## Diplomatic Assurances

The Bush administration’s principal defense to accusations that extraordinary rendition included detainee abuse was the system of requiring “diplomatic assurances,” by which the detaining third countries guarantee (despite known practices), that they will not abuse the specific individuals being transferred.<sup>55</sup> The recently discovered files of Moussa Koussa, Muammar el-Gaddafi’s former intelligence chief and minister of foreign affairs, illustrate this tactic. One letter from the CIA to Koussa discusses the rendition of el-Gaddafi opposition figure Sami Al Saadi from Hong Kong to Libya, and notes that if the CIA were to underwrite the cost of a private charter flight for the rendition, “we must have assurances ... that [Al Saadi] and his family will be treated humanely and that his human rights will be respected.”<sup>56</sup>

Former CIA director Porter Goss testified before Congress that while “[w]e have a responsibility of trying to ensure that [detainees] are properly treated, and we try and do the best we can to guarantee that ... once they’re out of our control, there’s only so much we can do.”<sup>57</sup> Alberto Gonzales, when asked about torture in the rendition program during his confirmation hearings for the post of attorney general in January 2005, “chuckled and noted that the administration ‘can’t fully control’ what other nations do.”<sup>58</sup>

The implications of this ambiguity became apparent when the details of Maher Arar’s rendition came to light. Arar, a Canadian citizen of Syrian descent, was detained in New York during a layover at John F. Kennedy Airport while on his way back to Canada from a family vacation in Tunisia in September 2002. After several weeks of detention, Arar was deported to Syria via Jordan despite telling U.S. officials he would be tortured in Syria. He was imprisoned and tortured for nearly a year in Syria before being released and returned to Canada. Arar claimed that while in Syria, he was imprisoned in an unlit “grave” that was three feet wide, six feet deep and seven feet high, with a metal door.<sup>59</sup> He further described the cell as having a small opening in the ceiling with bars and that occasionally cats would urinate through the opening into the cell.<sup>60</sup> Arar claimed to have been beaten with fists and a two-inch thick electric cable, and threatened with being hung upside-down, given electric shocks, and placed in a “spine-breaking chair.”<sup>61</sup> To minimize the torture, Arar stated that he falsely confessed to having trained with terrorists in Afghanistan, where he has never actually been.<sup>62</sup> Arar also attested to having been regularly placed in a room where he could hear the screams of other detainees who were being tortured.<sup>63</sup> Arar believes that he did not see the sun for six months

and lost approximately 40 pounds while detained.<sup>64</sup> Arar's rendition to Syria occurred only three months after John Bolton, the U.S. ambassador to the U.N., labeled Syria as part of the "Axis of Evil" — states "that sponsor terror and pursue weapons of mass destruction."<sup>65</sup>

Former congressman William Delahunt (D-MA) discussed the general practice of obtaining such assurances, and explained at a 2008 congressional hearing that

[the assurances provided regarding Arar] were ambiguous as to the source and the authority of the person within Syria providing them. And it appeared that no one checked to determine the sufficiency of these assurances. So to sum it up, there was nothing particularly assuring about these assurances. And yet we sent Mr. Arar to Syria on the basis of those assurances. ... [T]he Arar case demonstrates the dangerous practice of relying on these diplomatic assurances.<sup>66</sup>

Clark Kent Ervin, the former inspector general for the Department of Homeland Security (DHS), gave a harsher assessment in congressional testimony about the Arar case. According to Ervin, "[T]here is no question but that given everything we know, the intention here was to render him to Syria, as opposed to Canada, because of the certainty that he would be tortured in Syria and he would not be in Canada."<sup>67</sup> Ervin said he thought there should be a criminal inquiry into whether U.S. officials had violated 18 U.S.C. § 2340(a), which prohibits conspiracy to torture. No inquiry has ever occurred.

Drumheller, who was the former head of CIA covert operations in Europe from 2001 to 2005, confirmed that diplomatic assurances regarding a detainee's treatment were not taken seriously. "You can say we asked them not to do it. ... [But] [i]f you know that this is how this country has treated people in the past, you have to be honest that that is going to be a part of it."<sup>68</sup> He later told Task Force staff that with regard Egypt, Morocco, and other countries where torture is routine, "[y]ou can't really use [diplomatic assurances]."<sup>69</sup>

The current administration tacitly admitted the legal problems with diplomatic assurances in 2009, when DOS spokesman Ian Kelly stated that the State Department would be responsible for implementing a "monitoring mechanism" to augment diplomatic assurances and "make sure, after the prisoner is transferred, that he or she is not being abused."<sup>70</sup> Speaking at a press briefing, Kelly said that a process for ensuring that U.S. consular officers could visit detainees transferred to third countries was essential, along with the extra safeguard of speaking with them "in confidence" in case of bugged cells.<sup>71</sup> The introduction of such a monitoring system would strengthen the value of diplomatic assurances, although clearly it would provide no remedies for the abuses that occurred under diplomatic assurances for years after September 11, 2001.

## Applicable Law

The two major potential legal violations associated with rendition are (1) arbitrary detention, and (2) torture or cruel, inhuman, or degrading treatment (CID). Arbitrary detention is a violation of the International Covenant on Civil and Political Rights, to which the United States is a party.<sup>72</sup> In many cases, rendition also led to the practice of enforced disappearances. The prohibition on enforced disappearance violates international humanitarian law in both international and noninternational armed conflicts, according to the Geneva Conventions.<sup>73</sup> The International Convention for the Protection of All Persons Against Enforced

Disappearances, to which the United States is not a party but which codifies binding customary international law, states that “[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity.”<sup>74</sup> The United States regularly condemns other countries for engaging in enforced disappearance in DOS’s annual human rights reports.

Regarding torture and CID, the Convention Against Torture (CAT) specifically provides in Article 3 that no state “shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This principle, referred to by international lawyers as the principle of “nonrefoulement,” is also considered to be customary international law, which is binding upon all states.<sup>75</sup> The United States has said that in determining whether there are “substantial grounds,” it would use the “more likely than not” standard, meaning that the decision would hinge on whether it was “more likely than not” that an individual would be subjected to torture if sent to another state.<sup>76</sup> This is the standard that U.S. immigration courts rely on to make determinations regarding whether it is permissible under CAT to expel asylum-seekers to their native countries or to other states. The State Department conducts thorough human rights analyses each year, determining whether states use torture/CID, and at least some of the states in which torture/CID is in widespread practice, by our own account, are states to which we’ve rendered detainees.<sup>77</sup>

The United States has maintained that while as a matter of policy it does not send anyone to areas where they would be mistreated or tortured, it does not have a legal obligations to prevent refoulement.<sup>78</sup> Former Bush administration officials argued that for the purpose of rendition, the CAT’s prohibition on refoulement does not apply extraterritorially to the transfer of detainees (in U.S. custody) from locations outside the United States to a third country.<sup>79</sup> The U.N. special rapporteur on torture, Juan Mendez, specifically rejects this interpretation of the prohibition on nonrefoulement, stating that it “violates the object and purpose of the Convention Against Torture, making it illegal.”<sup>80</sup>

The CAT also prohibits the actual commission of torture or CID, which is alleged to have been perpetrated by CIA officials in the black sites. Those countries that allegedly hosted such prisons, as well as countries that assisted the United States with the extraordinary rendition program, have been censured by institutions including the European Parliament, the Council of Europe, and the United Nations.<sup>81</sup> A number of these allies and former allies have conducted internal investigations, as mentioned, and several have cases pending against them before the European Court of Human Rights.<sup>82</sup>

On March 19, 2004, Jack Goldsmith, then head of the Office of Legal Counsel at the Department of Justice (DOJ), drafted a confidential memo allowing the CIA to transfer detainees out of Iraq for interrogation.<sup>83</sup> Although the memo limited the duration of the transfer to a “brief but not indefinite period,” the memo also allowed permanent removal of detainees determined to be “illegal aliens” under “local immigration law.”<sup>84</sup> Although the memo was reportedly never finalized or signed, a substantially similar March 18, 2004, memo concluded that “Al Qaeda operatives captured in occupied Iraq lack ‘protected person’ status” under the Geneva Conventions.<sup>85</sup> It is unclear whether the March 19 memo was ever explicitly used to justify detainee transfers out of Iraq by the CIA [see discussion below on black sites in Iraq], although at least one intelligence official has stated that “the memo was a green light” for such transfers, and the military transferred at least two detainees from Iraq to Afghanistan: Amanatullah Ali, and Yunus Rahmatullah.<sup>86</sup> Additionally, a Swiss intelligence cable published

by Swiss newspaper *SonntagsBlick* in 2006 reported that Egyptian officials had proof that there were 23 Iraqi and Afghan detainees being held for interrogation at a CIA facility in Romania [see “Romania” section below].<sup>87</sup> The transfer of Iraqi citizens or Al Qaeda detainees captured in connection with the armed conflict in Iraq would be prohibited by Article 49 of the Fourth Geneva Convention, which provides that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>88</sup> Further, Goldsmith’s March 19 draft memo acknowledges that “violations of Article 49 may constitute ‘grave breaches’ of the Convention, art. 147, and therefore ‘war crimes’ under federal criminal law, 18 U.S.C. § 2441.”<sup>89</sup>

## International Cooperation

A long roster of allies was necessary to operate the rendition program.<sup>90</sup> In addition to Egypt, Syria, Morocco and Jordan, countries including the U.K.,<sup>91</sup> Canada,<sup>92</sup> Italy,<sup>93</sup> Germany,<sup>94</sup> and Sweden<sup>95</sup> have acknowledged collaboration with the rendition program.<sup>96</sup> Their assistance ranged from capturing suspects and turning them over to U.S. custody, and assisting in interrogations and abuse, to allowing stopovers of known CIA flights carrying detainees. In February 2013, the Open Society Justice Initiative released a report detailing the involvement of 54 countries with the extraordinary rendition program.<sup>97</sup>

Examples of the many roles played by allies are evident in well-documented individual stories; these include Maher Arar (mentioned above), Binyam Mohammed, Khaled El-Masri, Ibn al-Shaykh al-Libi, Abu Omar, Ahmed Agiza, and Muhammed Alzery. Their stories have been verified by numerous sources, including other governments, and in part even by the U.S. government. The details of their allegations are below.

- In 2007, the Canadian government undertook a full inquiry into the CIA’s rendition of Maher Arar from JFK Airport in New York to Syria. The commission of inquiry determined that Canadian government officials had known that Arar was in danger of rendition by the United States along with torture, and Arar was formally cleared of any terrorism charges. The commission also found that Canada had provided the United States with false information leading to Arar’s rendition, stating that “[t]here is no evidence to indicate that Mr. Arar ... committed any offence or that his activities were a threat to the security of Canada.”<sup>98</sup> Finally, the commission concluded that 17 of the techniques used against Arar in Syria constituted torture.<sup>99</sup> The Canadian government paid Arar \$9.8 million in damages, along with a formal apology.<sup>100</sup>
- Abdel Hakim Belhadj and Sami Al Saadi, both Libyan nationals, were arrested in Bangkok and Hong Kong (respectively) and rendered to Libya along with members of their families. [For further details and Task Force interviews with Belhadj and Al Saadi, see Libya case study in Chapter 8]. Belhadj has filed legal proceedings (currently pending) in the United Kingdom against the government, U.K. security forces, an MI6 official, and former Foreign Secretary Jack Straw for the administration and approval of his rendition and alleged torture.<sup>101</sup>
- Binyam Mohammed, an Ethiopian national and U.K. resident, was arrested at Karachi Airport in Pakistan on suspicion of being an Al Qaeda operative who had attended

weapons training camps.<sup>102</sup> While imprisoned in Pakistan, Mohammed was interrogated by an American who identified himself as an FBI agent, and asked repeatedly about his links to Al Qaeda.<sup>103</sup> Mohammed was held in Pakistan for a period of time, where he claims to have been beaten by Pakistani authorities with a “thick wooden stick” while he was chained in his cell, fed only every other day, given limited access to toilet facilities, and subjected to mock executions.<sup>104</sup> Mohammed was also interrogated by at least one MI5 officer while in Pakistan, who alluded to his forthcoming rendition.<sup>105</sup> Documents published by the U.K. Foreign Office in 2010 show that “MI5 was aware that Mohamed was being continuously deprived of sleep, threatened with rendition and subjected to previous interrogations that were causing him ‘significant mental stress and suffering.’”<sup>106</sup> In July 2002, Mohammed was rendered by the CIA to Morocco, where he was further interrogated by U.S. officials.<sup>107</sup> Mohammed also claims that Moroccan prison officials beat him, subjected him to sleep deprivation, and cut his chest and penis repeatedly with a scalpel.<sup>108</sup> Mohammed has said that “[a]bout once a week ... I would be taken for interrogation, where they would tell me what to say. They said if you say this story as we read it, you will just go to court as a witness and all this torture will stop. I eventually repeated what was read out to me.”<sup>109</sup> Telegrams from MI5 to the CIA in November 2002 confirm MI5’s participation in Mohammed’s interrogation; the telegrams provided numerous questions for interrogators to put to Mohammed, along with large files of information and photos to be shown during interrogation.<sup>110</sup> When Mohammed was eventually transferred to Afghanistan in January 2004, a female military police officer (MP) took photos of his injuries.<sup>111</sup> However, Mohammed was held in the “Dark Prison” near Kabul, where he was allegedly beaten further, starved and deprived of sleep before being sent to Bagram.<sup>112</sup> Mohammed was transferred to Guantánamo Bay in September 2004.<sup>113</sup> The U.S. government charged Mohammed with terrorism-related offenses, which were later dropped before he was released in 2009.<sup>114</sup>

**“In addition to Egypt, Syria, Morocco and Jordan, countries including the U.K., Canada, Italy, Germany, and Sweden have acknowledged collaboration with the rendition program.”**

- Khaled El-Masri, a German citizen, was captured in Macedonia in December 2003 because his name was identical to a known Al Qaeda member. He was interrogated by Macedonian officials (who thought his German passport was a forgery), then transferred to U.S. custody in January 2004 and rendered to Afghanistan. El-Masri was sent to the “Salt Pit” prison [see “Afghanistan,” below], where he was interrogated and claims to have been repeatedly tortured by U.S. officials via beatings, sodomy, and malnourishment. In March 2004, the CIA discovered that El-Masri’s passport was genuine, but debated about how to release him while El-Masri staged a hunger strike to protest his imprisonment. CIA Director George Tenet discovered El-Masri’s wrongful imprisonment in April 2004, and El-Masri was released on May 28, 2004, after two orders were issued by then–National Security Advisor Condoleezza Rice. El-Masri was flown to Albania and abandoned on a rural road without funds. He was eventually picked up by Albanian authorities and reunited with his family, who had moved to Lebanon in the interim period. El-Masri has filed numerous suits against the U.S. government, and several European countries (Germany and Spain among them) have launched inquiries and/or warrants for the arrests of the CIA agents involved in the rendition. In an interview with Task Force staff, former CIA official Drumheller reiterated that Germany had been concerned since 2001 about the U.S. rendition program: “They knew we had this capability, from the 90s, and [the Germans] were worried about

the FBI (rather than the CIA) coming into Germany and arresting people on German soil,” a concern that was neatly sidestepped by El-Masri’s arrest in Macedonia.<sup>115</sup> Actions on El-Masri’s behalf in Macedonia and before the European Court of Human Rights have been pending for years, after a lawsuit in the U.S. Court of Appeals for the Fourth Circuit was dismissed when the U.S. government invoked the state-secrets privilege. Angela Merkel, the German chancellor, has stated publicly that Condoleezza Rice acknowledged to the German government that El-Masri’s rendition was a mistake, and that he should not have been held or rendered at all.<sup>116</sup> While the State Department and the CIA reportedly “quibbled” over whether to issue an apology for El-Masri’s rendition and detention, no such statement has ever been made by the U.S. government.<sup>117</sup> El-Masri’s lawyer, Manfred Gnjidic, testified in a court declaration that El-Masri had provided hair samples for radioactive isotope analysis to the Munich prosecutor’s office to assist in their inquiry, and the results showed that El-Masri had spent time in a South Asian country during the time in question and had been “deprived of food for an extended period.”<sup>118</sup>

- Ibn al-Shaykh al-Libi, a Libyan citizen, has been described as a member of the Libyan Islamic Fighting Group and also as a member of Al Qaeda, although the evidence currently suggests that he was not a member of either group. Al-Libi was one of the leaders of the Al Qaeda-linked Khalden training camp in Afghanistan. He was detained in December 2001 and rendered to Egypt. Once there, al-Libi was tortured, including being put into a small box for 17 hours, struck on his chest, and badly beaten.<sup>119</sup> He subsequently made a false confession stating that Saddam Hussein had provided Al Qaeda operatives with information about the use of biological and chemical weapons.<sup>120</sup> This “confession” was then used as part of the justification for the invasion of Iraq by the United States in March 2003, despite the fact that the information had been debunked by the U.S. Defense Intelligence Agency a full year earlier: “[I]t is ... likely this individual is intentionally misleading the debriefers. Ibn al-Shaykh has been undergoing debriefs for several weeks and may be describing scenarios to the debriefers he knows will retain their interest. Saddam’s regime is intensely secular and is wary of Islamic revolutionary movements.”<sup>121</sup> In an interview with Task Force staff, Colonel Lawrence Wilkerson confirmed that senior Bush administration officials had eagerly used al-Libi’s confession, with Colin Powell only later finding out that the confession was elicited through torture.<sup>122</sup> [See Chapter 7 for more on efficacy of torture.] al-Libi was subsequently forcibly disappeared, possibly rendered to Mauritania, Poland, Morocco, Jordan, and back to Afghanistan before finally being returned to Libya (probably sometime in 2006).<sup>123</sup> He died in Abu Salim Prison in 2009 under disputed circumstances: while the el-Gaddafi government stated that he committed suicide, U.S. officials, as well as rights group, were skeptical.<sup>124</sup> Two weeks before his death, al-Libi was visited at Abu Salim by workers from Human Rights Watch, who claim that al-Libi told them that he had been tortured in U.S. custody.<sup>125</sup> Following the Libyan revolution, an inquiry was begun by the new government into the circumstances of al-Libi’s death.<sup>126</sup> According to Human Rights Watch, who visited al-Libi’s family in Tripoli, photographs have emerged of al-Libi in his cell when he was allegedly found dead by guards.<sup>127</sup> The photographs show a severely bruised al-Libi with his head resting in the loop of a sheet tied around a wall in his cell, with his feet flat on the ground and knees bent.<sup>128</sup> al-Libi’s family is reportedly consulting forensic specialists to learn if the photographs depict an individual who has committed suicide.<sup>129</sup>
- Abu Omar, an Egyptian cleric abducted from Italy in February 2003 by CIA agents (who believed that he was plotting a bomb attack against American school children) and

rendered to Egypt, where he was interrogated and tortured for 14 months (seven months in the custody of the Egyptian General Intelligence Service, and seven months at the State Security Investigation Service’s (SSI) national headquarters) before being released without charge in February 2007.<sup>130</sup> Italian police later identified the CIA agents involved in the rendition, and they were tried and convicted *in absentia* for their roles in the operation in 2009. The convictions were upheld by Italy’s highest criminal court on September 19, 2012.<sup>131</sup> [See “Legal and Political Consequences of the Rendition Program,” below.]

- Muhammed Alzery and Ahmed Agiza, Egyptian nationals, were rendered from Sweden to Egypt in December 2001, where they were imprisoned. Both men have said that almost immediately upon arrival in Egypt, they were tortured with “excruciatingly painful” electrical charges attached to their genitals, and Alzery claimed that he was forced to lie on “an electrified bed frame.”<sup>132</sup> Alzery was released in October 2003, and Agiza in August 2011. The cases of Alzery and Agiza were widely publicized after a Swedish television network aired a documentary on their deportations in 2004.<sup>133</sup> Both the U.N. Committee Against Torture and the Human Rights Committee found that Sweden had violated obligations under the CAT and the International Covenant on Civil and Political Rights in deporting Agiza and Alzery.<sup>134</sup> In 2008, Alzery and Agiza were awarded 3 million kroner (roughly \$450,000) each in settlements from the Swedish Ministry of Justice for the wrongful treatment they received in Sweden and the subsequent torture in Egypt.<sup>135</sup>

## Public Recognition of the Extraordinary Rendition Program

Both Secretary of State Condoleezza Rice and President George W. Bush confirmed the use of rendition in 2005 and 2006 speeches, respectively, with Rice stating that “[r]endition is a vital tool in combating transnational terrorism.”<sup>136</sup> The House Committee on Foreign Affairs held a hearing in 2007 on extraordinary rendition, during which much of the detail about the length and breadth of the rendition program was publicly stated for the first time. Congressman Bill Delahunt, chairman of the Subcommittee on International Organizations, Human Rights, and Oversight, said during the hearing, “These renditions not only appear to violate our obligations under the U.N. Convention Against Torture and other international treaties, but they have undermined our very commitment to fundamental American values.”

Further information came to light in two reports issued by the Council of Europe in 2006 and 2007, and one released by the European Parliament in 2007. The 2006 Council of Europe report, presented by Swiss senator Dick Marty, followed a months-long investigation triggered by media reports in November 2005 about the existence of CIA secret prisons in Europe [see “Black Sites,” below]. This report stated that it was clear that arbitrary and unlawful arrests and renditions had been carried out in Europe.<sup>137</sup> Moreover, the renditions “were made possible either by seriously negligent monitoring or by the more or less active participation of one or more government departments of Council of Europe member states.”<sup>138</sup> The 2007 Council of Europe report benefited from greater investigation, and concluded that the existence of CIA detention centers in Poland and Romania was considered “factually established.”<sup>139</sup> This second report also noted that other European states may have hosted secret detention facilities for the HVDs, and criticized national governments’ invocations of “state secrets” to avoid cooperation with judicial or parliamentary proceedings.<sup>140</sup>



Also released in 2007, the European Parliament report analyzed a large amount of flight data and commented that data on detainee transfers seemed to match with media reports about detainees held in Poland.<sup>141</sup> The European Parliament report, like the Council of Europe reports, characterized extraordinary rendition as “an illegal instrument used by the U.S.A. in the fight against terrorism” and condemned both the cooperation of European states with the program and the lack of cooperation from European Parliament members in the inquiry.<sup>142</sup> Jozef Pinior, member of the European Parliament investigative committee and now a Polish senator, said in an interview with Task Force staff, “We spent nearly two years on the investigation, and invited to Brussels, people who knew something about these sites in the different European states.”<sup>143</sup> Although the Polish government did not cooperate at the time, Pinior described “secret hearings” during the European Parliament investigation in Warsaw with Polish intelligence officials whose identities he could not disclose. “After these hearings, I could say that [a black site] was created in Poland, and the site contained prisoners from Afghanistan.”<sup>144</sup>

A 2010 report by the U.N. Human Rights Council on secret detention discussed use of the black sites at length, including publicizing a finding that use of the black sites “clearly fell within [the definition of] arbitrary detention.”<sup>145</sup> The U.N. report also listed known evidence for the various rendition sites.<sup>146</sup>

In 2011, Reprieve, a British human rights organization, discovered a legal dispute over unpaid bills between two small aviation companies in upstate New York.<sup>147</sup> Court documents revealed the details of numerous CIA rendition flights between 2002 and 2005.<sup>148</sup> Lawyers for both companies, Richmor Aviation and Sportsflight (which hired planes from Richmor and then allegedly breached payment contracts), acknowledged the nature of the flights. One attorney stated, “Richmor Aviation entered into a contract with Sportsflight to provide rendition flights for detainees. ... I saw the various invoices from Richmor that were submitted to Sportsflight [and] it was amazing to me that no one from the United States government ever said boo to me about any of this.”<sup>149</sup> Indeed, *Richmor v. Sportsflight Aviation* is the only known rendition-related case in which the U.S. government has failed to invoke the “state secrets” privilege, in what was an apparent oversight.<sup>150</sup> Flight logs and transcripts of court proceedings were also included among the documents in the public record. One such transcript noted Richmor’s president, Mahlon Richards, testifying that passengers were “government personnel and their invitees,” and confirming that his planes flew “terrorists” and “bad guys.”<sup>151</sup> The Richmor documents confirmed many of the conclusions set forth by the Council of Europe and the European Parliament regarding the movement of specific detainees and the countries involved in the rendition program.

Finally, in February 2012, the European Parliament’s Civil Liberties Committee launched an effort to follow-up on the 2007 report, with a hearing on March 27 at which members of various human rights organizations investigating rendition spoke about new evidence for the European black sites.<sup>152</sup> The purpose of the initiative was to penetrate the “law of silence among governments” on the topic, according to committee member Hélène Flautre.<sup>153</sup> Committee members visited Lithuania in April 2012. The report, released in September 2012, focused on renditions to Lithuania, Poland and Romania, and found that no EU member state has fulfilled its legal obligation to hold an open and effective investigation into collaboration with the CIA rendition program.<sup>154</sup>

## The Black Sites

President Bush publicly acknowledged for the first time, in September 2006, that certain suspected terrorists had been held outside the United States, although he refused to divulge the locations of their detention or any details of the prisoners’ confinement.<sup>155</sup> CIA use of secret prisons abroad, however, had actually begun in early 2002, and by the time of Bush’s speech, reports indicate that the “black sites” had been closed. According to unnamed sources, initially the CIA considered keeping detainees on ships in international waters, but “discarded” the idea. (The capture of Ahmed Warsame in 2010 raises the question of whether the idea was entirely discarded, though he was likely detained by Joint Special Operations Command forces rather than the CIA).<sup>156</sup>

After 2001, the United States established detention facilities for CIA captives from Afghanistan and elsewhere. Congress approved an expenditure of “tens of millions of dollars” to establish CIA secret prisons including the Salt Pit, outside Kabul, but further facilities were deemed necessary.<sup>157</sup> From the available information, it is apparent that the CIA used a secret facility in Thailand for several months beginning in March/April 2002, to interrogate Zayn Al-Abedin Muhammed Al-Husayn (more commonly known as Abu Zubaydah), Abd al-Rahim al-Nashiri, and possibly Ramzi bin al Shibh.<sup>158</sup> A similar facility was established in Poland in 2002, and approximately \$100 million for the costs was “tucked inside the classified annex of the first supplemental Afghanistan appropriation.”<sup>159</sup> It is not clear whether this figure was to fund operations at all of the black sites, including the Salt Pit and the Dark Prison in Afghanistan and the facilities in Thailand, Poland, Lithuania and Romania, or whether further funds were necessary as the facilities were opened and closed in turn. It is generally understood that the Thai facility was closed in 2003, soon after the Polish facility was opened. A Romanian facility was used from about 2003 to 2006, and a facility was also used in Lithuania between 2005 and 2006.<sup>160</sup> Credible reports also alleged the existence of secret detention facilities in Kosovo and Eastern Africa, as well as additional unsubstantiated reports involving sites in Ukraine, Bulgaria and Macedonia.<sup>161</sup>

Former CIA official Drumheller objected to the proposition of CIA secret prisons. “People say that you can’t equate this with the Soviets, [but] of course you can. ... When you have an intelligence service [that] gets caught up in detentions and interrogation, then you’re moving towards having a secret police, and that’s really what you don’t want to have. The [FBI] and the military have a long tradition of training — they have career interrogators, that’s what they do. And so the idea that you can take a bunch of CIA guys and you give them some training, and say ok, now you’re going to be an interrogator; under any circumstances ... it’s a mistake.”<sup>162</sup>

### Afghanistan

The CIA has used sites in Afghanistan for interrogation and detention of terror suspects since the U.S. invasion in the fall of 2001. The three well-known secret prisons were called “The Hangar,” the Dark Prison, and the Salt Pit, although it cannot be definitively established that the Dark Prison and the Salt Pit were separate facilities.<sup>163</sup> The Hangar is understood to be located on Bagram Air Base, where the U.S. military also held detainees from the battlefield. The CIA facility was reported as a “prison within a prison,” where the Red Cross had no access to CIA detainees.<sup>164</sup> Former detainee Mohamed Bashmilah described the Hangar as having “makeshift cages” in which prisoners were kept, and being forced to listen to loud

music, including American rap and Arab folk songs, 24 hours a day.<sup>165</sup> Another former detainee recalled that they were held in barbed-wire cages measuring six feet by 10 feet, and furnished with a mattress and a bucket for a toilet.<sup>166</sup> Although it is difficult to ascertain which detainees were held at the CIA facility at Bagram, it is known that Ibn al-Shaykh al-Libi, Binyam Mohammed, and Omar al-Faruq were among them.<sup>167</sup> Omar al-Faruq escaped from the Hangar in July 2005 with three other detainees, and was eventually killed by British forces in Iraq in 2006.<sup>168</sup>

In the Dark Prison near Kabul Airport, there were “no lights, heat, or decoration,” with detainees being held in constant pitch blackness and cold temperatures.<sup>169</sup> Similar in description to the Hangar, the cells were roughly five by nine feet, contained a bucket to be used as a toilet, and loud rock music was played continuously.<sup>170</sup> Detainees were subjected to sleep deprivation for days at a time and reported being “chained to walls, deprived of food and drinking water.”<sup>171</sup>

According to former detainee Binyam Mohammed, he was chained up to the point where “My legs had swollen. My wrists and hands had gone numb. ... There was loud music, [Eminem’s] Slim Shady and Dr. Dre for 20 days. ... [Then] they changed the sounds to horrible ghost laughter and Halloween sounds. [At one point, I was] chained to the rails for a fortnight.”<sup>172</sup> Similarly, both Khalid al-Sharif and Mohammed Shoroeiya described the cells and interrogation rooms where they were held as “in total darkness,” with “loud, Western music blaring constantly.”<sup>173</sup> Al-Sharif and Shoroeiya also stated that their cells contained buckets to be used as toilets.<sup>174</sup> Majid al-Maghrebi, another Libyan national allegedly held at the Dark Prison, commented that “[i]t was so dark I couldn’t find the bucket to use as a toilet. I banged my head against the wall.”<sup>175</sup> The Libyan detainees detailed how they were chained to their cell walls for the first few months of their detention; sometimes by one or both hands, and several long periods with both hands and feet bound to a metal ring in the wall. Al-Sharif recalled a two-week period when he was shackled by all fours to the wall, and released only for 30 minutes each day to eat one meal and use the bucket.<sup>176</sup> Al-Maghrebi said that when he called for a doctor due to severe illness, the “doctor” removed his clothes, “shackled him to the wall naked, and took away his blankets” for the night.<sup>177</sup>

The claims of former detainees regarding the Dark Prison have been consistent, both regarding their treatment and noting that while the guards were Afghans, the interrogators and supervisors were American and did not wear military uniforms.<sup>178</sup> Most of the former detainees were able to identify that they were being held in Afghanistan due to various factors including the shapes of the buildings, the soil, and the Dari-speaking guards.<sup>179</sup> Aside from frequent beatings, shaving of body hair, lack of food, and being shackled in stress positions, former detainees described three different “torture instruments” at the Dark Prison: the waterboard (although neither al-Sharif nor Shoroeiya knew the term “waterboard” [see Chapter 8]), a small box, and a wooden wall.<sup>180</sup> The small box was described by Shoroeiya as being roughly one square meter; when he was squeezed into it on one occasion, the box was locked and he was prodded with “long thin objects” through holes in the box.<sup>181</sup> The wooden wall had a foam-covered ring that would be placed around detainees’ necks, presumably to hold them in place as they were subsequently beaten against the wall.<sup>182</sup> Detailed death threats were also used on detainees, according to al-Sharif.<sup>183</sup>

Detainees held in the Dark Prison between 2002 and 2004 included Binyam Mohammed, Bisher al-Rawi, Jamil el-Banna, Hassan bin Attash, Laid Saidi, Abdul Salam Ali al-Hila,

Khalid al-Sharif (currently commander of the Libyan National Guard; see “Legal and Political Consequences of Rendition,” below), and Mohammed Shoroeyia.<sup>184</sup>

The use of cold temperatures played a large role in the third known Afghan black site — the Salt Pit.<sup>185</sup> The Salt Pit was reportedly a former brick factory located northeast of Kabul Airport.<sup>186</sup> In November 2002, an Afghan militant named Gul Rahman was brought to the prison, where he died in CIA custody a few hours later from hypothermia.<sup>187</sup>

Other detainees reported similar treatment: “I was left naked, sleeping on the barren concrete,” and hung up naked for “hours on end,” said Ghairat Baheer, who was held at the same time as Rahman.<sup>188</sup> El-Masri claimed that his cell at the Salt Pit was “cold and dirty,” and that he was brutally beaten and told that by an interrogator that “[y]ou are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know.”<sup>189</sup>

It is unclear when each of the Afghan black sites was closed, but officials insist that they have not been used subsequent to President Obama’s 2009 executive order shutting all CIA detention facilities.<sup>190</sup>

## Iraq

In 2004, an investigation by Major General George Fay concluded: “The CIA conducted unilateral and joint interrogation operations at Abu Ghraib ... [which] contributed to a loss of accountability and abuse at Abu Ghraib. No memorandum of understanding existed on the subject interrogation operations between the CIA and CJTF-7 [Combined Joint Task Force 7], and local CIA officers convinced military leaders that they should be allowed to operate outside the established local rules and procedures.”<sup>191</sup>

In 2005, however, it was reported that the CIA had signed a memorandum of understanding (MOU) with military intelligence officials at Abu Ghraib prison in Iraq, authorizing the CIA to “hide certain detainees at the facility without officially registering them.”<sup>192</sup> According to Colonel Thomas Pappas, a military intelligence officer at Abu Ghraib, the CIA requested in September 2003 that “the military intelligence officials ‘continue to make cells available for their detainees and that they not have to go through the normal inprocessing procedures.’”<sup>193</sup>

The most notable CIA detainee in Iraq was Manadel al-Jamadi, an Iraqi national who died during interrogation in 2003.<sup>194</sup> Al-Jamadi was brought to Abu Ghraib in military custody, after allegedly being beaten and doused with cold water by Navy SEALs and CIA personnel at Baghdad Airport, although he was “walking fine” upon arrival.<sup>195</sup> He was never “checked into” the prison via any booking process; he was “basically a ‘ghost prisoner,’” according to a government investigator.<sup>196</sup> Al-Jamadi was shackled in “strappado” fashion, with hands tied behind his back and shackled up to a window behind him while being interrogated by CIA officer Mark Swanner.<sup>197</sup> Less than an hour later, al-Jamadi was dead, bleeding profusely and with severe bruising to his face.<sup>198</sup> Several Navy SEALs received administrative punishment for al-Jamadi’s abuse (and that of other prisoners). However, Swanner never faced charges, and Walter Diaz, an MP on duty at the time who deduced that al-Jamadi was dead, claims that the CIA covered up their own involvement: “They tried to blame the SEALs. The CIA had a big

role in this.”<sup>199</sup> After al-Jamadi’s death, the CIA reportedly issued a memo ordering agents to stop all interrogations, although the scope of the order is not known.<sup>200</sup>

In 2011, Attorney General Eric Holder assigned federal prosecutor John Durham to lead a new inquiry into whether the deaths of al-Jamadi in Iraq and Gul Rahman in Afghanistan may have constituted war crimes.<sup>201</sup> The inquiry followed a lengthy “preliminary review” by the Justice Department into the CIA’s rendition, detention, and interrogation program, ordered by Holder to determine whether “any unauthorized interrogation techniques were used by CIA interrogators” outside “the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”<sup>202</sup> Although Swanner was part of the investigation, the investigation ended in August 2012 without charges being filed.<sup>203</sup> DOJ’s inquiry was seemingly the last possibility of any criminal charges being filed in the United States as a result of CIA abuse.<sup>204</sup>

The CIA’s role in Iraq is discussed in greater detail in Chapter 3.

## Thailand

The southern provinces of Thailand have been plagued by separatist violence from Muslim insurgents for more than a hundred years.<sup>205</sup> The 1902 annexation of Pattani, inhabited largely by Malay Muslims, and subsequent human rights violations sparked tensions between the Muslim minorities in the south and the Buddhist majority in the remainder of the country.<sup>206</sup> These tensions were exacerbated after 2001 with the implementation of Thaksin Sinawatra’s suppressive policies towards the Muslim South, which triggered violent riots.<sup>207</sup> Although scholars generally agree that the Muslim insurgency remains a local movement, they note that Thai militants “increasingly use the language of jihadi extremism.”<sup>208</sup>

The Thai struggle with Muslim insurgents, combined with the positive, long-standing relationship between the CIA and Thai intelligence counterparts built during the Vietnam War and its aftermath, may account for the decision to establish the first black site for high value detainees in that country.<sup>209</sup> As recounted to the Council of Europe investigators by one CIA official, “In Thailand, it was a case of ‘you stick with what you know.’ ”<sup>210</sup> This is similar to the reasons for the initial rendition collaboration with Egypt.

It is difficult to identify the precise location of the CIA site in Thailand, due to conflicting details gleaned from former detainees and individuals involved in the renditions. The first individual rendered to Thailand was Abu Zubaydah, who was arrested in Pakistan on March 28, 2002.<sup>211</sup> FBI interrogator Ali Soufan, who questioned Abu Zubaydah, stated that he arrived at an overseas location to participate in the detention on March 30 (he does not name the country) and took an additional flight from the international airport to reach the detention facility, which he describes as a “very primitive place” with a snake problem.<sup>212</sup> The 2007 Council of Europe report noted that the exact location of the black site was publicly alleged to be in Udon Thani in northeast Thailand, “near to the Udon Royal Thai Air Force Base”<sup>213</sup> and possibly connected to the Voice of America relay station in that area.<sup>214</sup> This could well be the facility to which Soufan was referring, and in which Abu Zubaydah was held. Shot three times in the thigh, groin and stomach during the arrest raid in Pakistan and critically injured, Abu Zubaydah was attended in Thailand by a Johns Hopkins trauma surgeon who was specially flown to the Thai hospital where the CIA temporarily moved him from the detention facility on or around March 30.<sup>215</sup> According to a source with knowledge of the flight, 19 individuals,

including medical personnel, landed at the military side of Don Mueang International Airport on March 31, 2002.<sup>216</sup> Media coverage on videotapes that were destroyed by the CIA also indicates that Abd al-Rahim al-Nashiri (alleged mastermind of the USS Cole bombing who was arrested in Dubai in November 2002), was held in Thailand briefly between detention at the Salt Pit in Afghanistan and the black site in Poland.<sup>217</sup> He was held in the same facility as Abu Zubaydah, where their interrogations were recorded on video.<sup>218</sup> Incidentally, both CIA Director Michael Hayden and CIA officer Jose Rodriguez stated that the videotapes were destroyed in November 2005 — the same month that Dana Priest of *The Washington Post* wrote a comprehensive story about the CIA holding detainees in prisons abroad.<sup>219</sup>

Evidence exists for another detention site in Thailand for CIA detainees: Libyan national Abdel Hakim Belhadj claims that in 2004, he and his wife were arrested at Don Mueang Airport and held for several days in a prison “within minutes of” the airport.<sup>220</sup> Additionally, while Abu Zubaydah was transferred to Thailand “within three days” of his arrest, the videotapes made by the CIA (in part to document his treatment in case he died in custody<sup>221</sup>) did not begin until April 13.<sup>222</sup> It has been reported that Belhadj and Abu Zubaydah could have been held in a Thai facility near or on the military side of the Bangkok airport.<sup>223</sup> However, the three-day delay before Abu Zubaydah’s CIA tapes begin could also be ascribed to his hospital stay. There have also been reports of a prison nicknamed “Cat’s Eye,” but is unclear whether this name refers to a facility near Bangkok or to the alleged facility in Udon Thani.<sup>224</sup>

In June and August 2003, alleged Al Qaeda operatives Mohammed Farik Amin (“Zubair”), Bashir bin Lep (“Lillie”), and Riduan Isamuddin (“Hambali”) were arrested in joint U.S.-Thai operations. Thai authorities confirmed that after their arrests, the three men were “interrogated at a secret location” by “allied countries.”<sup>225</sup> According to their Guantánamo files, the three men did not arrive at Guantánamo Bay until September 2006.<sup>226</sup> They have been classified among the 14 HVDs, several of whom were rendered to multiple black sites, and it is therefore possible that they were briefly held at the Thai black site before being rendered elsewhere.<sup>227</sup>

In terms of treatment at the Thai black site(s), the since-destroyed CIA videos show the waterboarding “and other forms of coercion”<sup>228</sup> of al-Nashiri and Abu Zubaydah, and were described by former CIA officer Jose Rodriguez as “ugly visuals.”<sup>229</sup> The videos were also reported to show Abu Zubaydah “vomiting and screaming.”<sup>230</sup> After being medically treated by the CIA to keep him alive for interrogation, Abu Zubaydah was subjected to several, if not all, of the techniques authorized by the August 1, 2002, memo from DOJ’s Office of Legal Counsel.<sup>231</sup> This included being “slapped, grabbed, made to stand long hours in a cold cell,”<sup>232</sup> along with water dousing, similar to the treatment of Gul Rahman in Afghanistan: “spraying him with extremely cold water from a hose while he was naked and shackled by chains attached to a ceiling in his cell.”<sup>233</sup> Abu Zubaydah was also waterboarded 83 times in August 2002, and it is likely that this occurred in Thailand.<sup>234</sup> Abu Zubaydah owed this treatment to the fact that “Bush administration officials kept insisting that Abu Zubaydah was a member of Al-Qaeda, and they inflated his importance, not only publicly but in classified memos. ... None of this was true, nor should it ever have been believed,” according to former FBI interrogator Ali Soufan.<sup>235</sup> “He wasn’t even an Al Qaeda member,” Soufan added in an interview with Task Force staff.<sup>236</sup> Even prior to the OLC memo, the CIA subjected Abu Zubaydah to techniques including loud music blasted in his cell, forced nudity, sleep deprivation — over the objections of Soufan and other FBI interrogators present.<sup>237</sup> Rodriguez ordered the destruction of

the videos in 2005, saying that he wanted to protect the interrogators on the video.<sup>238</sup> That revelation triggered a DOJ investigation that resulted in no charges, despite the potential of the tapes as evidence in the forthcoming military commission proceedings.<sup>239</sup>

The facility where al-Nashiri and Abu Zubaydah's interrogations were taped was reportedly closed in 2003, after Thai officials took issue with "published reports reveal[ing] the existence of the site in June 2003."<sup>240</sup>

## Poland

In December 2002, al-Nashiri and Abu Zubaydah were transferred from Thailand to a new facility in Poland, just days after that facility was opened.<sup>241</sup> Unlike the uncertainty over the location of the Thai facility, the Polish facility is widely reported to have been located in Stare Kiejkuty (in northeastern Poland), on the grounds of a Polish intelligence training center.<sup>242</sup> According to the Council of Europe, "[t]he secret detention facilities in Europe were run directly and exclusively by the CIA," while local personnel had "no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter."<sup>243</sup>

According to a 2007 Council of Europe report, one incentive for Poland's participation in the rendition program was U.S. support of Poland's inclusion in the "lucrative" NATO Integrated Air Defense System, which pulled Poland further away from "communist remnants."<sup>244</sup> However, there are reasons for believing that Poland's acquiescence to the establishment of the black site went deeper than monetary compensation. A CIA official told the Council of Europe that "we have an extraordinary relationship with Poland. My experience is that if the Poles can help us they will. Whether it's intelligence, or economics, or politics or diplomacy — they are our allies."<sup>245</sup> A source close to the Polish investigation into its collaboration with the rendition program told Task Force staff that Poland's willingness to cooperate with Washington in providing a black site was centered on its great desire to be close allies with the United States, following the collapse of the Soviet Union: "The problem is that Poland always looked to the United States as a beacon of what was right, what was aspirational, what is ethically correct. To us, when we heard about the Russians, torturing and kidnapping and killing ... we thought, the United States is our model."<sup>246</sup>

In 2002, then-Prime Minister Leszek Miller reportedly authorized Polish intelligence officials to assist the CIA in establishing the new detention facility.<sup>247</sup> Such assistance included "purely logistical duties such as securing the outer perimeter," and allowing American "special purpose" planes to land on Polish territory.<sup>248</sup> Pinior, a former member of the European Parliament (MEP), also maintains that during the European Parliament investigation, he found out about a document signed by Miller, regarding the treatment of any corpses within the CIA facility.<sup>249</sup> The document was not signed by U.S. officials, allegedly to hide "traces of evidence" of the agreement.<sup>250</sup> "To my knowledge, it was a document signed by the Prime Minister [Miller] with instructions for the construction of a CIA site on Polish territory, and there is a paragraph in the instructions which described the situation for what is to be done in situations involving corpses."<sup>251</sup> If Pinior's recollection is accurate, the only plausible explanation is the CIA's anticipation of detainee deaths in custody.

According to 2007 Council of Europe report: "[T]he CIA determined that the bilateral arrangements for operation of its HVD programme had to *remain absolutely outside of the*

*mechanisms of civilian oversight.* For this reason the CIA’s chosen partner intelligence agency in Poland was the Military Information Services (Wojskowe Służby Informacyjne), whose officials are part of the Polish Armed Forces and enjoy ‘military status’ in defence agreements under the NATO framework.”<sup>252</sup> From 2002 until possibly 2005, between eight and 12 HVDs were allegedly held in Poland, including al-Nashiri, Khalid Sheikh Mohammed (KSM), Abu Zubaydah, Ramzi bin al Shibh, Walid bin Attash, Abu Yasir Al-Jazairi, and Ahmed Khalfan Ghailani.<sup>253</sup> A 2009 FOIA release of flight data from the Polish Air Navigation Services Agency shows CIA-operated planes arriving at Szymany Airport (near Stare Kiejkuty) in 2003 from Afghanistan and Morocco that correspond with the movements of several of these detainees.<sup>254</sup> Notably, the flight data shows that four of these flights arrived at Szymany despite having flight plans for Warsaw, and two more were allowed landing at Szymany without *any* flight plans.<sup>255</sup> The data further illustrates how Jeppesen International Trip Planning (which planned the rendition flights in conjunction with the CIA) requested, and was granted by Poland Civil Air, the dummy landing permits for Warsaw, which would later be cited in the flight plans.<sup>256</sup> Each of the flights was operated by Stevens Express Leasing Inc., described as a CIA “shell company” (existing only on paper) by the European Parliament and media outlets.<sup>257</sup>

**“Although KSM was told by interrogators that he would not be allowed to die, he ‘would be brought to the verge of death and back again.’”**

The Polish flight data, in conjunction with previously discovered rendition flight data, illustrates aspects of Polish cooperation with the CIA. Direct involvement by the Department of State (DOS) has never been proven regarding the rendition program, and former DOS legal advisor Harold Hongju Koh stated in an interview with Task Force staff that many renditions during the Bush administration “took place without State Department awareness.”<sup>258</sup> However, the Richmor documents include DOS authorization letters sent to flight crews prior to each flight, from an official named Terry Hogan.<sup>259</sup> The letters described the flights as “global support for U.S. embassies worldwide.”<sup>260</sup> No current or former DOS official by that name has ever been located, and the letters are reported to have been forged.<sup>261</sup>

In describing an Eastern European CIA facility that was likely the Polish black site, Jane Mayer relies on accounts from former CIA officials: “The newer prison . . . was far more high-tech than the prisons in Afghanistan, and more intensely focused on psychological torment. The cells had hydraulic doors and air-conditioning. Multiple cameras in each cell provided video surveillance of the detainees. In some ways, the circumstances were better: The detainees were given bottled water.”<sup>262</sup>

The bottled water allowed KSM an attempt at identifying one of his prisons. In his 2007 interviews with the International Committee of the Red Cross (ICRC) at Guantánamo Bay, KSM reported that “on one occasion a water bottle was brought to me without the label removed. It had email address ending in ‘.pl.’ ”<sup>263</sup> However, KSM’s other descriptions of the facility differ somewhat from Mayer’s — specifically, he described an “old style” central heating system common to former communist countries, along with cells of roughly three meters by four meters with wooden walls.<sup>264</sup> If KSM’s account is correct, the CIA may have had reason to plan for the possibility of corpses. Although KSM was told by interrogators that he would not be allowed to die, he “would be brought to the verge of death and back again.”<sup>265</sup> KSM was famously waterboarded 183 times, according to the CIA Inspector General report.<sup>266</sup> Based on the publicly-reported chronology of his detention, this most likely occurred in Poland. KSM told the Red Cross,



“I would be strapped to a special bed, which could be rotated to a vertical position. A cloth would be placed over my face. Cold water from a bottle that had been kept in a fridge was then poured onto the cloth by one of the guards so that I could not breathe. ... Injuries to my ankles and wrists also occurred during the waterboarding as I struggled in the panic of not being able to breathe.”<sup>267</sup>

KSM also described frequent beatings, stress positions, and being doused with cold water from a hose in his cell.<sup>268</sup> He closed his ICRC interview by asserting:

During the harshest part of my interrogation, I gave a lot of false information in order to satisfy what I thought the interrogators wanted to hear in order to make the ill-treatment stop. I later told the interrogators that their methods were stupid and counterproductive. I'm sure the false information ... wasted a lot of their time and led to several false red-alerts being placed in the U.S.<sup>269</sup>

The CIA IG report identifies several other episodes of detainee mistreatment, which most likely occurred in Poland. Around the end of December 2002 (after al-Nashiri had been transferred to Poland), a CIA debriefer used an unloaded handgun to “frighten Al-Nashiri into disclosing information.”<sup>270</sup> On what was probably the same day, the same debriefer “entered the detainee’s cell and revved [a power drill] while the detainee stood naked and hooded.”<sup>271</sup> In another incident, the debriefer threatened to produce al-Nashiri’s mother and family members, reportedly so that al-Nashiri would “infer, for psychological reasons ... [that his interrogation could include] sexually abusing female relatives” in front of him.<sup>272</sup> CIA officials say that both the debriefer and the CIA official in charge of the prison were disciplined for these incidents.<sup>273</sup> Al-Nashiri also told the ICRC that he was “threatened with sodomy” and the arrest and rape of his family.<sup>274</sup> On at least one occasion, al-Nashiri was forced into a “strappado” position, being “lifted off the floor by his arms while his arms were bound behind his back with a belt.”<sup>275</sup> According to court papers, Abu Zubaydah and Walid bin Attash also reported further mistreatment in Poland.<sup>276</sup> A source close to the Polish investigation told Task Force staff that “there is a scenario that I can accept, that [a detainee] was tortured by CIA people only in a closed room, and the Poles were outside and they did not know — but what the Poles did know is that he was held illegally.”<sup>277</sup> In September 2010, the Open Society Justice Initiative filed an application before the European Court of Human Rights to open a suit against Poland for the mistreatment of al-Nashiri while in Polish territory.<sup>278</sup> Legal action for mistreatment has also been taken in Poland on behalf of Abu Zubaydah.<sup>279</sup>

The Polish government conducted an internal investigation when news reports surfaced naming Poland as a potential CIA black site, and concluded in November 2005 that there was no evidence of secret detention facilities in Poland.<sup>280</sup> During Foreign Minister Stefan Meller’s visit to Washington in 2005, the Polish Ministry of Foreign Affairs asked to keep “in close contact” to coordinate their public stance on Poland’s involvement in the rendition program.<sup>281</sup> Although Prime Minister Miller and former President Aleksander Kwasniewski were kept apprised of the CIA facility, Miller continuously denied the existence of the prison, saying that “democratic countries have a whole range of other instruments which can be used very effectively in situations when they are under threat.”<sup>282</sup>

But things changed in March 2008 when the new Prime Minister Donald Tusk issued an order to the appellate prosecutor’s office in Warsaw, launching an official inquiry into the

role of the Polish authorities in the rendition program. The investigation was unprecedented, given that the United States has resisted all attempts, domestic or international, to officially investigate the black sites, either in the form of detainee lawsuits or official inquiries.<sup>283</sup>

The Polish investigation is aimed at identifying whether public officials abused their powers by allowing the establishment of an extraterritorial zone under the control of a foreign state’s jurisdiction.<sup>284</sup> The prosecutor’s investigation, which is still pending, proceeded for four years largely in secret except for the granting of “victim status” to al-Nashiri and Abu Zubaydah, upon their application.<sup>285</sup> The granting of victim status gave credence to al-Nashiri and Abu Zubaydah’s claims of mistreatment on Polish territory, following the review of the evidence in their applications by Jerzy Mierzewski, the first prosecutor heading the investigation, and then Waldemar Tyl, the second prosecutor.<sup>286</sup> Receiving victim status also allowed lawyers for Abu Zubaydah and al-Nashiri full access to the public and classified portions of the Polish prosecutor’s investigative files.<sup>287</sup> The sudden removal of Mierzewski as prosecutor in May 2011 was reported to be connected to the publication of a memo in which several Polish experts in international law provided Mierzewski with opinions on various questions of law raised by the investigation. Sample questions and answers included:

**“The granting of victim status gave credence to al-Nashiri and Abu Zubaydah’s claims of mistreatment on Polish territory.”**

*Question:* Whether there are any provisions of public international law that allow exclusion of an existing detention centre for persons suspected of terrorist activities from jurisdiction of the State in which such a centre has been set up, and if so, which of those provisions are binding on the Republic of Poland.

*Answer:* *There are no such provisions. Setting up of such a centre would violate the constitution and it would be a crime against the sovereignty of the Republic of Poland.*

*Question:* In light of public international law, what influence does the fact of being detained [i.e. caught] outside a territory that is occupied, taken or that is a place of military activities has on the status of a person suspected of terrorist activities?

*Answer:* *Such detention may be qualified as unlawful kidnapping.*

*Question:* Whether regulations issued by the U.S. authorities concerning persons found to conduct terrorist activities and their practical application conform with the public humanitarian international law provisions ratified by Poland?

*Answer:* *No. Those regulations are often in contradiction with international law and human rights.*<sup>288</sup>

Sources close to the Polish investigation, however, told Task Force staff that Mierzewski was removed after he refused to follow orders on the running of the investigation from a superior at the appellate prosecutor’s office, in what would constitute an illegal intervention.<sup>289</sup> Whatever the reason for Mierzewski’s removal, access to the investigative files for the victims’ lawyers was severely restricted by the new prosecutor, Waldemar Tyl, and human rights groups active in Poland suspected that former Prime Minister Miller, once again gaining power in Poland, used his influence to slow the investigation.<sup>290</sup> Although the current prosecutors insisted to Task Force staff that “it is not legal to refuse defense lawyers access

to evidence of the case,” they later qualified that requests for access by the lawyers would be “postponed for further review” if the requests “obstructed secret procedures.”<sup>291</sup> It was not explained how this qualification was consistent with the “full access” to which lawyers are legally entitled.

In a broad interview with Task Force staff, Polish prosecutors Waldemar Tyl, Dariusz Korneluk and Szymon Liszewski stated that they believed that the investigation would be completed sometime in 2012.<sup>292</sup> However, they noted that their attempts to request information from the United States for the investigation, pursuant to the Polish-U.S. Mutual Legal Assistance Treaty, had caused delays: “The first request was rejected [by DOJ in October 2010], and the reason given was the safety of the state. As far as the second one is concerned we are still waiting for a response.”<sup>293</sup> The prosecutors said to Task Force staff that the refusal of the United States to provide any assistance to their inquiry made their task “difficult,” as dispositive information about the passengers on CIA planes would likely only be available from the United States.<sup>294</sup>

Despite this challenge, it was announced on February 11, 2012, that the investigation had been transferred from the appellate prosecutor’s office in Warsaw to the appellate prosecutor’s office in Krakow.<sup>295</sup> An indictment filed against Zbigniew Siemiatkowski (former head of Polish intelligence) became public on March 27, 2012, and although the file had been transferred to Krakow soon after the indictment was filed, detainee lawyers were able to meet with the new prosecutors shortly afterwards.<sup>296</sup> According to Siemiatkowski, the indictment included allegations of violating international law by “unlawfully depriving prisoners of their liberty” and allowing corporal punishment in connection with the site at Stare Kiejkuty.<sup>297</sup> Charges were reportedly being considered against Siemiatkowski’s deputy, Colonel Andrzej Derlatka, and former Prime Minister Leszek Miller, and in May 2012 former President Kwasniewski commented that “[o]f course, everything went on behind my back” despite records of conversations showing that he and Miller were well informed about the site.<sup>298</sup> In response to a question about U.S.-Polish relations following the indictment, Prime Minister Donald Tusk said, “Poland is the political victim of the indiscretion of some members of the U.S. administration a few years ago. ... [We will] no longer be a country where politicians — even if they are working arm-in-arm with the world’s greatest superpower — could make some deal somewhere under the table and then it would never see daylight.” In February 2013, however, a major Polish newspaper announced that the charges against Siemiatkowski would be dropped by the Krakow prosecutors, despite charges reportedly having been drawn up against him. At the time, prosecutors declined to comment.<sup>299</sup>

## Romania

The existence of a black site in Romania was reported in November 2005 by Human Rights Watch, at the same time of the revelation of the site in Poland.<sup>300</sup> After two years of investigation, the 2007 Council of Europe report announced that there was sufficient “evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania.”<sup>301</sup> Multiple sets of flight data, including those contained in the Richmor documents, show the landing of CIA-contracted flights in Bucharest.<sup>302</sup> Additionally, documents issued by Poland’s Border Guard Office in July 2010 show at least one flight from Szymany airport to Romania on September 22, 2003, carrying five passengers upon departure after the plane had arrived at Szymany without passengers.<sup>303</sup>

In response to the release of the flight data, the Romanian government acknowledged that planes leased by the CIA landed in Bucharest, but denied that the planes transferred detainees or that Romania hosted a black site.<sup>304</sup> A 2006 inquiry by the Romanian senate found that the allegations regarding a black site in Bucharest were “unfounded,” although no other information regarding the inquiry was made public.<sup>305</sup> Indeed, Romanian authorities indicated to Swiss senator Marty during the Council of Europe investigation that “CIA activities [in Romania] now fall unambiguously under the secrecy regime instituted under the NATO Security Policy.”<sup>306</sup> Marty also noted that “[a]s in several other Eastern European countries who adopted more stringent secrecy policies as part of their NATO accession, Romania’s legislation on classified information was expedited through Parliament and criticised by civil society for being unbalanced.”<sup>307</sup> Beyond abbreviated statements and provision of select flight data to the Council of Europe and the media, Romania’s official position on the black site has remained a “sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources.”<sup>308</sup> This position stands in contrast to the official investigations undertaken by prosecutors in Poland and Lithuania, and is much more similar to the position taken by the United States on the subject.

According to the Council of Europe report, a select group of Romanian officials (including, President Ion Iliescu, Minister of National Defense Ioan Talpes, and Head of Military Intelligence Sergiu Tudor Medar) were involved in the CIA collaboration, thereby “short-circuit[ing] the classic mechanisms of democratic accountability.”<sup>309</sup> The collaboration was “withheld” from Romania’s Supreme Council of National Defense and civilian intelligence agencies, as well as “senior figures in the Army.”<sup>310</sup> The Council of Europe also noted that according to sources, the majority of detainees brought to Romania were extracted “from the theater of conflict,” referring to transfers from Afghanistan and Iraq.<sup>311</sup> This allegation is supported by the 2007 Swiss intelligence cable stating Egyptian counterparts had unequivocally confirmed that there were 23 Iraqi and Afghan detainees being held for interrogation at a CIA facility in Mihail Kogalniceanu Air Base.<sup>312</sup>

By the latter account, it is likely that detainees were interrogated at Mihail Kogalniceanu in addition to a separate detention facility. In 2009, *The New York Times* published an account of former CIA agent Kyle “Dusty” Foggo’s role in the building of three black sites, including “a renovated building on a busy street in Bucharest, Romania.”<sup>313</sup> The paper quoted sources saying that the sites “were designed to appear identical,” and Foggo relied on contractors to provide “toilets, plumbing equipment, stereos, video games, bedding, night vision goggles, earplugs and wrap-around sunglasses” to equip the sites.<sup>314</sup>

In December 2011, a joint investigation by the Associated Press and German media outlet ARD Panorama claimed to have located the black site in Bucharest.<sup>315</sup> Former intelligence officials reportedly “described the location of the prison and identified pictures of the building,” which was used as the headquarters of ORNISS — the National Registry Office for Classified Information, where secret Romanian, NATO and EU information is stored.<sup>316</sup> The building itself is on a residential street in Bucharest, where CIA officials shuttled detainees in vans after arrival in Bucharest.<sup>317</sup> The report asserted that the prison, code-named “Bright Light,” opened in the fall of 2003, after the Polish facility was closed, and that “[t]he basement consisted of six prefabricated cells, each with a clock and arrow pointing to Mecca. ... The cells were on springs, keeping them slightly off balance and causing disorientation among some detainees.”<sup>318</sup> Former officials further confirmed that in the first month of detention, detainees “endured sleep deprivation and were doused with water,

slapped or forced to stand in painful positions.”<sup>319</sup> The Romanian government dismissed the AP report, and all details contained therein, as “pure speculation.”<sup>320</sup>

The identities of detainees held in Romania have not been confirmed, but they are reported to have included Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al Shibh, Abd al-Rahim al-Nashiri and Abu Faraj al-Libi.<sup>321</sup> Disappointingly, the European Parliament Civil Liberties, Justice, and Home Affairs Committee’s current renewal of its 2007 investigation has not encouraged Romania toward limited information disclosure or more thorough internal inquiries. Tasked with debating the text of the new European Parliament report in July 2012, Romanian MEPs proposed numerous amendments to the report, including the proposed deletion of a call for Romania to undertake an independent inquiry.<sup>322</sup> The Romanian MEPs also criticized the report for a lack of judicial evidence, despite the fact that they have steadfastly refused to undertake any judicial process by which such evidence could be uncovered.<sup>323</sup>

Thomas Hammarberg, the Council of Europe’s commissioner for human rights, submitted a confidential memorandum to the prosecutor-general of Romania in March 2012 (made public in December 2012) that detailed his findings regarding the Romanian black site.<sup>324</sup> In his memo, Hammarberg named the September 22, 2003, flight from Poland as the first rendition that opened the Romanian black site.<sup>325</sup> He also provided details on the practice of filing “dummy” flight plans as “part of a system of cover-up frequently used in relation to CIA flights,” saying that the CIA’s contractor, Jeppesen International Trip Planning, had deliberately avoided listing Bucharest as an express destination.<sup>326</sup> Hammarberg expressed his concern that the HVDs held in Romania were likely subjected to “enhanced interrogation techniques” that might “have ramifications for compliance with the [European Convention on Human Rights], including the use of blindfolding or hooding, forced shaving of hair, indefinite periods of incommunicado solitary confinement, continuous white noise, continuous illumination using powerful light bulbs, and continuous use of leg shackles (in some instances for 24 hours a day).”<sup>327</sup> He concluded that

sufficient evidence has now been amassed to allow us to consider the existence of a CIA Black Site in Romania as a proven fact, and to affirm that serious human rights abuses took place there. ... In order to fulfil Romania’s positive obligations under the European Convention on Human Rights, I believe it is now imperative that the Romanian authorities conduct a prosecutorial investigation capable of leading to the identification and punishment of those responsible, whoever they might be.<sup>328</sup>

In August 2012, the Open Society Justice Initiative filed an application on behalf of al-Nashiri before the European Court of Human Rights (ECHR), collecting flight data on renditions to and from Romania from the Richmor documents and Eurocontrol (the European Organisation for the Safety of Air Navigation).<sup>329</sup> If the application is accepted (a similar application against Poland was accepted by the ECHR in June 2012), Romania may be compelled to produce further information about Bright Light and the detainees held there.

## **Lithuania**

In 2009, it was reported for the first time by ABC News that Lithuania had provided at least one secret prison (disguised as a riding school) for the CIA to detain and interrogate up to eight HVDs.<sup>330</sup> The report included details regarding flights from Afghanistan to Vilnius, and stated that Lithuania was likely the last black site to be opened in Eastern Europe, after the

closure of the Polish site in late 2003 or early 2004.<sup>331</sup> The Lithuanian Parliament (Seimas) immediately undertook an investigation into the allegations, which was closely followed by the U.S. government.<sup>332</sup> Correspondence from the U.S. embassy in Lithuania, from 2010, commented that “many thought” the investigation was “ill-advised.”<sup>333</sup> Additionally, after President Dalia Grybauskaitė called “for more accountability” on the secret prisons, the U.S. embassy commented that “[s]he did not seem to be aware of how this could affect relations with the U.S.”<sup>334</sup>

Headed by Arvydas Anusauskas, chairman of the Committee on National Security and Defense (CNSD), the CNSD held a number of hearings at which 55 former and current officials with potential knowledge of the CIA program were interviewed.<sup>335</sup> Former director general of the state security department, Meļys Laurinkus and his deputy Dainius Dabašinskas, admitted to knowledge of the program.<sup>336</sup> Additionally, Laurinkus discussed the receipt of the proposal from the United States, and recounted his consultation with then-President Rolandas Paksas on the matter.<sup>337</sup> All other former officials, including Paksas, denied any knowledge of the CIA program.<sup>338</sup>

Even without the cooperation of most government officials, the conclusions of the CNSD were startling. On the question of whether CIA detainees were subject to transportation and confinement in Lithuania, the CNSD found that it was impossible to establish whether detainees were brought into Lithuania; however, “conditions for such transportation did exist.”<sup>339</sup> The CNSD highlighted several CIA-related flights to Lithuania that had not been reported to the Council of Europe in their inquiry, including three flights for which no customs inspections were carried out.<sup>340</sup> In fact, the state border guard security was prevented from making inspections by the State Security Department (SSD) — it was found “that oral arrangements had been made [by the SSD] with representatives of the airport and aviation security.”<sup>341</sup> ABC News also reported that the CIA submitted false flight plans to European aviation authorities, similar to the practice in Poland. “Planes flying into and out of Lithuania, for example, were ordered to submit paperwork that said they would be landing in nearby countries, despite actually landing in Vilnius. ... Finland and Poland were used most frequently as false destinations.”<sup>342</sup>

Jonas Markevicius, President Grybauskaitė’s special advisor on national security, confirmed to Task Force staff that after the reports of the secret facilities surfaced, the president had been concerned “about the ability of special services to manipulate gaps in the law.”<sup>343</sup> These concerns were validated, he said, when the CNSD found that “flights had avoided border guard inspectors.”<sup>344</sup> At the time, “there was no procedure of scrutinizing SSD actions,” and Markevicius insisted that there would have been “no way to authorize the action, [which] was illegal from the beginning.”<sup>345</sup> This lack of formal review over the SSD decision to cooperate with the CIA also concerned Anusauskas, who told Task Force staff: “There were gaps and problems in intelligence control ... and high level accountability. The previous intelligence laws allowed agencies to act independently, and information provided to the political authorities was simply not sufficient.”<sup>346</sup> Meanwhile, embassy correspondence showed the United States’ continued alarm at Grybauskaitė’s forthright public comments on her suspicions that detention facilities existed:

Rather than help quiet a story that does not reflect favorably on Lithuania, her comments instead have suggested that there may be a kernel of truth to the allegation, and have reignited a parliamentary investigation that in the end likely will result in another inconclusive finding. ... The president’s comments are all the more puzzling given her concerns about Russian influence in the Lithuanian media, as the story tends to cast doubt on the strength of the U.S.-Lithuanian relationship.<sup>347</sup>

Grybauskaitė's comments may have been particularly troubling to U.S. officials, given that CIA officials spoke highly of their Lithuanian counterparts. "We didn't have to [offer any incentives to be allowed to establish a facility.] ... They were happy to have our ear."<sup>348</sup> Lithuania had also joined NATO in April 2004, along with Romania.<sup>349</sup>

The CNSD was similarly candid about the existence of secret CIA detention sites in Lithuania, establishing that "the SSD had received a request from the partners to equip facilities in Lithuania suitable for holding detainees, and that "in the course of the project, facilities suitable for holding detainees were equipped, taking account of the requests and conditions set out by the partners."<sup>350</sup> The CIA detention program in Lithuania began with use of a facility named "Project No. 1" in or near Vilnius in 2002.<sup>351</sup> The CNSD also outlined the launch of a second facility in Antaviliai, named "Project No. 2," and situated in a former riding school.<sup>352</sup> Although the CNSD could find no evidence in their final report that any detainees were actually held in either facility, Project No. 2 has received the most scrutiny, and much more is known about its provenance.

According to the former owner of the riding school, he responded to an ad looking for land, which had been posted on the Internet by the U.S. embassy in Vilnius.<sup>353</sup> The land was actually bought by Elite LLC, an apparent CIA shell company, on March 5, 2004.<sup>354</sup> Elite was incorporated on July 9, 2003.<sup>355</sup> Its initial member was Star Group Finance and Holdings, Inc. (Panama) and its initial registered agent was the Federal Research Corporation of Washington, D.C. Elite LLC had vested power of attorney in a purported Lithuanian national by the name of Valdas Vitkauskas.<sup>356</sup> However, according to Lithuanian reporter Egle Digryte, journalists attempting to look for Vitkauskas found that he had no Social Security number and had paid no taxes as of 2006.<sup>357</sup> Moreover, the address listed for him was a student dormitory where the exasperated guard told Digryte that "no one by that name" had ever lived there, and that she "wasn't the first" to look for him there.

After the purchase of the riding school by Elite Corp for two million litas (roughly \$700,000), the former owner said that he continued to "work with the Americans" for about a year on changing the electricity to make it U.S.-compatible.<sup>358</sup> This comports with the ABC News report, which describes the renovated facility as being composed of

" 'prefabricated pods' to house prisoners, each separated from the other by five or six feet. Each pod included a shower, a bed and a toilet. Separate cells were constructed for interrogations. ... All the electrical outlets in the renovated structure were 110 volts, meaning they were designed for American appliances." <sup>359</sup>

According to the CNSD, the layout and operation of the facility "allowed for the performance of actions by officers of the partners [CIA] without the control of the SSD and use of the infrastructure at their discretion."<sup>360</sup>

The final question addressed by the CNSD was whether the Lithuanian state institutions considered the activities of the CIA relating to secret detention on Lithuanian territory.<sup>361</sup> The CNSD found that "Mėčys Laurinkus, [Lithuanian military commander] Arvydas Pocius, [and] Dainius Dabašinskas, had knowledge of Project No. 2 at the time of launching and running thereof."<sup>362</sup> However, there was no evidence that Paksas or President Valdas Adamkus were informed about the specific operations at Project No. 2.<sup>363</sup>

The CNSD concluded their report with the proposal to refer the question of charges (misuse

of office or abuse of power) against Laurinkus, Pocius, and Dabašinskas to the prosecutor general’s office, along with recommendations to strengthen oversight of the SSD.<sup>364</sup> According to Lithuanian officials, those recommendations have been fully implemented. Anusauskas provided details of reforms including “procedures whereby intelligence needs are formulated by the political power, rather than the SSD;” the creation of an “Intelligence Coordination Group” under presidential authority; and a new draft law on intelligence to improve parliamentary control over the SSD.<sup>365</sup> However, Anusauskas admitted that the “classification of information led to the conclusion of ‘no evidence’ that detainees had been held in Lithuania.”<sup>366</sup> Similar to the Polish inquiry, Anusauskas confirmed that the CNSD “had asked the USG for information through diplomatic channels, but received an answer of ‘no comment.’ ”<sup>367</sup>

The release of the CNSD report caused a political flurry in Lithuania. Laurinkus, who was then serving as ambassador to Georgia, was recalled by President Grybauskaite.<sup>368</sup> Foreign Minister Vygaudas Usackas resigned in January 2010 after Grybauskaite publicly declared her mistrust of him.<sup>369</sup> While Grybauskaite stated that the CNSD report supported her suspicions that detention facilities had existed in Lithuania, Usackas contradicted this interpretation, emphasizing that “conclusions of the commission show that they haven’t found any facts which would prove that Lithuanian territory was used for any kind of detention contrary to international obligations.”<sup>370</sup> Usackas was ambassador to the United States from 2001 to 2006, when the alleged negotiations and operations of the sites in Lithuania took place. However, he asserted that “[t]he facts announced by [news reports] came from a time when I was not foreign minister. I had no clue about it.”<sup>371</sup>

Following the referral from the CNSD, the prosecutor general’s office opened a criminal inquiry in January 2010, regarding whether SSD officials had colluded with the CIA in the rendition program.<sup>372</sup> Irmantas Mikelionis, of the Organized Crime and Corruption Investigation Unit of the prosecutor general’s office, stated that compared to the CNSD investigation, prosecutors had “access to [a] larger amount of documents and materials, they interviewed many individuals with access to classified information, and so they could reach a more objective decision.”<sup>373</sup> During the prosecutor general’s investigation, the European Committee for the Prevention of Torture (CPT), a treaty-monitoring body, requested and was granted access to the two purported detention sites.<sup>374</sup> The CPT report confirms many of the details provided by ABC News and the Seimas Report, including that Project No. 1 “consisted of a small, single-storey, detached building located in a residential area in the centre of Vilnius,” while Project No. 2 was located 20 kilometers outside of Vilnius.<sup>375</sup>

Despite the CPT’s findings, as well as the 2010 publication of the U.N. Report on Secret Detentions (which also found that Lithuania had participated in the CIA rendition program), the prosecutor general’s office concluded its inquiry in January 2011, citing a lack of information. This was explained in 2012 remarks by President Grybauskaite, who said that

“the legal investigation, no doubt, stalled due to the fact that we did not receive additional information from the United States. ... What concerns prosecutors and other investigators [is that] we had no access to full information due to the other country’s refusal to provide it.”<sup>376</sup>



In the hope that the investigation would be reopened, further information was provided to the prosecutor general's office in September 2011, by NGOs Amnesty International and Reprieve. The Amnesty International report outlined new flight data for CIA flights landing in Vilnius and further evidence linking Abu Zubaydah to the Vilnius detention site. In particular, the organizations presented flight data showing that Abu Zubaydah was rendered from Morocco to Lithuania on a Boeing 737 in February 2005 — evidence that had been previously unavailable.<sup>377</sup> The prosecutor general spent several weeks considering the possibility of reopening the investigation, but ultimately declined to do so, initially offering no public explanation for the decision.

Deputy Prosecutor General Darius Raulušaitis attempted to explain the refusal in an interview with Task Force staff, stating that by the date of Abu Zubaydah's alleged flight to Lithuania in February 2005, "there were no conditions to keep individuals in the facility — they had been removed."<sup>378</sup> This assertion is at odds with statements by CIA officials and flight data showing CIA-related flights into Lithuania from 2004 until at least March 2006.<sup>379</sup> He added that the "conditions" were "not particularly meant for detention — it was not necessarily a jail." Mikelionis agreed, saying that the facility "could just as well have been meant to hold valuables."<sup>380</sup> Citing state secrets, neither Raulušaitis nor Mikelionis could provide any further details on the investigation, including the number of individuals interviewed, the number of documents examined, and the completion of any forensic tests.

Both Mikelionis and Raulušaitis did, however, insist strongly to Task Force staff that following their "exhaustive" investigation, they came to the "categorical conclusion that no persons have been secretly detained in the Republic of Lithuania."<sup>381</sup> When asked how such a conclusion could be proven, Raulušaitis stated that after "all necessary procedural inquiries ... the officers made a categorical conclusion that no person who'd been secretly transported had been detained in the secret sites indicated in the CNSD report, nor in any other possible sites."<sup>382</sup> The prosecutors refined this statement in a later clarification, saying, "It is more accurate to say: there is no evidence that any persons were secretly detained in Lithuania." However, they once again made the "categorical" assertion to representatives of the European Parliament's Civil Liberties Committee in April 2012, that they had proven that "no detainees have been detained in the facilities of Projects No. 1 or No. 2 in Lithuania."<sup>383</sup>

The divergent voices within the Lithuanian government — from Grybauskaitė to Anusauskas and Raulušaitis — on the subject of alleged CIA sites have kept the debate in the headlines. In its 2012 report, the European Parliament's Civil Liberties Committee found that "the layout of [Project No. 2] and installations inside appears to be compatible with the detention of prisoners," and called for "the Lithuanian authorities to honour their commitment to reopen the criminal investigation into Lithuania's involvement in the CIA programme if new information should come to light, in view of new evidence provided by the Eurocontrol [flight] data."<sup>384</sup> In addition, the filing of an application against Lithuania before the European Court of Human Rights by lawyers for Abu Zubaydah may yield the disclosure of further evidence or new detainee names associated with the two detention sites.<sup>385</sup>

## **Morocco**

Flight records and reports from CIA officials have indicated that a prison near Rabat, Morocco, was used as a proxy detention site for detainees including Ramzi bin al Shibh, Binyam Mohammed, and Abou Elkassim Britel.<sup>386</sup> Both Mohammed and Britel appear to have been

brutally tortured in Moroccan custody. Britel, an Italian citizen of Moroccan origin, was captured in Pakistan in March 2002, and rendered by the CIA to Morocco two months later.<sup>387</sup> Britel was imprisoned in Morocco until February 2003, when he was briefly released.<sup>388</sup> During his imprisonment, Britel claims to have been repeatedly beaten as well as subjected to a Moroccan interrogation technique known as "bottle torture," whereby a bottle is forced into the anus of a prisoner.<sup>389</sup> Britel was released without charge in February 2003, but was re-arrested in May 2003 while he was traveling back to Italy, on suspicion of involvement in the recent Casablanca bombings.<sup>390</sup> Britel claims that he was once again held in inhumane conditions and forced to sign a confession that he had not read. After a trial that failed to comport with international fair-trial standards, Britel was sentenced to 15 years in prison, which was reduced to nine years after appeal.<sup>391</sup> In 2006, a six-year long Italian criminal investigation into Britel (which was influential in the Moroccan charges) was dismissed for a lack of any evidence of criminal or terrorist activity by Britel.<sup>392</sup> Britel was finally released from Morocco in April 2011, and returned to Italy.<sup>393</sup> While imprisoned, he was a plaintiff in the lawsuit filed by several detainees against aviation company Jeppesen Dataplan, which organized his flight to Morocco in 2002.<sup>394</sup>

Bin al Shibh and Mohammed were also held in Morocco between 2002 and 2003.<sup>395</sup> It has been reported that the CIA began building its own prison in Morocco, similar to the black sites, in 2003, but it is unclear whether the prison was completed or if detainees were held there.<sup>396</sup>

## Kosovo

In 2005, allegations surfaced in Europe that the United States was using a NATO military base in Kosovo (Camp Bondsteel) for secret detentions related to the "War on Terror."<sup>397</sup> Alvaro Gil-Robles, the human rights commissioner for the Council of Europe, visited Camp Bondsteel in September 2002. He described the prisoners' situation as similar to Guantánamo Bay: "Each prisoner hut was surrounded with barbed wire, and guards were patrolling between them. Around all of this was a high wall with watchtowers."<sup>398</sup> At the time, the camp was under the control of NATO Kosovo Force (KFOR) troops, and Gil-Robles described the prisoners as "Kosovo Albanians or Serbs, and there were four or five North Africans. Some of them wore beards and read the Koran."<sup>399</sup>

These details were partially supported by the periodic review of the Kosovo criminal justice system by the Organization for Security and Cooperation in Europe (OSCE) covering March 2002 through April 2003.<sup>400</sup> The report states that the OSCE was concerned with arrests made by KFOR in September 2002 and again in March 2003 and noted that some of the detentions breached international human rights standards. The OSCE was "particularly concerned about the treatment of five Algerian nationals, three of whom were detained for more than 30 days."<sup>401</sup> When the OSCE interviewed the five Algerian detainees, they were informed "that the line of interrogation had little to do with security issues in Kosovo and was more related to their possible connections to Islamic activists in Bosnia-Herzegovina, Algeria, or the Al Qaeda terrorist network. If true, this could be contrary to KFOR's own Directive 42, which states that "the fact that a person may have information of intelligence value by itself is not a basis for detention."<sup>402</sup> The fact that the OSCE had some degree of access to the detainees, however, suggests that they were not necessarily being held by the CIA at the time.<sup>403</sup>

In 2005 and 2006, the Council of Europe's Committee on the Prevention of Torture submitted seven requests for information to NATO on the detentions at Camp Bondsteel, but failed

to receive any response.<sup>404</sup> Before the 2006 and 2007 Council of Europe reports on secret detention were released, the Council's secretary-general, Terry Davis, threatened to "go public" about the secret detentions at Camp Bondsteel if NATO failed to cooperate with the investigation.<sup>405</sup> The 2006 report described Kosovo as a "black hole" for the investigation, and stated that "[the lack of cooperation] is frankly intolerable, considering that the international intervention in this region was meant to restore order and lawfulness."<sup>406</sup> The report also cited the 2005 Swiss intelligence cable intercepted from Egyptian intelligence, which appeared to confirm that there was a secret interrogation center in Kosovo, in addition to Mauritania, Ukraine, Macedonia and Bulgaria.<sup>407</sup> There is no further information about the latter three sites. Ibn al-Shaykh al-Libi, Abdullah Mohammed Omar al-Tawaty and Saleh Hadiyah Abu Abdallah Di'iki (also Libyan nationals) were reportedly held in Mauritania, with Di'iki being initially arrested in Mauritania and allegedly interrogated by both Mauritanian and American officials before being transferred to Morocco and Afghanistan.<sup>408</sup>

## Djibouti

Limited information exists about the use of Djibouti, on the Horn of Africa, by the CIA, but it has been reported that Camp Lemonnier, the U.S. naval base, was used for interrogations of several detainees, including Mohammed al-Asad, Suleiman Abdallah [see "Somalia," below], Gouled Hussein Dourad, Mohammed Ali Issa, and Abdulmalik Mohammed.<sup>409</sup> Al-Asad is the only known detainee to have identified Djibouti as the site of one of his prisons.<sup>410</sup> After his arrest in Tanzania in 2003, al-Asad claims that he was flown to Djibouti and placed in a small cell in a prison with a photograph of Djibouti President Ismail Omar Guelleh on a wall.<sup>411</sup> Al-Asad stated that a guard also told him that he was being held in Djibouti, and al-Asad's father was given the same information by Tanzanian authorities.<sup>412</sup> During their investigation, U.N. officials received information "proving that [al-Asad] had been transferred by Tanzanian officials by plane to Djibouti on 27 December 2003."<sup>413</sup>

During his detention in Djibouti, al-Asad claims to have been interrogated by a white English-speaking woman identifying herself as American.<sup>414</sup> Al-Asad said he was held for two weeks in the prison, without being given a change of clothes, before being taken to an airport where his clothes were torn off and he was assaulted by a team of "black-clad men masked with balaclavas" — a description that applies to the CIA "Rendition Group."<sup>415</sup>

Flight records from the Richmor legal documents show numerous CIA-contracted flights to Djibouti from Egypt, Afghanistan and Cyprus in 2003 and 2004.<sup>416</sup> In 2005, General John Abizaid (then commander of U.S. Central Command), commented before the Senate Armed Services Committee that "Djibouti has given extraordinary support for U.S. military basing, training, and counter-terrorism operations."<sup>417</sup>

In January 2013, it was reported that three European men (two from Sweden and one from the UK) with Somali backgrounds had been arrested in August 2012 while traveling through Djibouti.<sup>418</sup> Accused of supporting extremist group Al Shabab, the men were first interrogated by U.S. agents in Djibouti for several months before being secretly indicted by a federal grand jury and flown to the United States to stand trial.<sup>419</sup> They appeared in a New York courtroom for the first time on December 21, 2012.<sup>420</sup> This case bears greater resemblance to traditional renditions conducted pre-September 11, in which suspects captured overseas (with or without cooperation from the host government) were transferred to the United States to stand trial.

Although due process concerns remain, there are no reported allegations of mistreatment of the three men aside from extended secret detention.<sup>421</sup>

## Somalia

In July 2011, after an extensive investigation on the ground in Mogadishu, Jeremy Scahill of *The Nation* published new information about alleged CIA counterterrorism operations in Somalia. These operations including a training center for Somali intelligence agents and operatives at Mogadishu’s international airport, composed of “more than a dozen buildings behind large protective walls and secured by guard towers ... [containing] eight large metal hangars” with CIA aircraft.<sup>422</sup> The training center is said to have been completed in spring 2011.<sup>423</sup> According to Somali counterterrorism officials and other operatives interviewed by Scahill, the CIA also presently uses a secret prison in the Somali National Security Agency headquarters to hold terror suspects and those with ties to Al Shabab.<sup>424</sup> Similar to the closed black sites, the prison is staffed by Somali guards, but CIA officials pay the salaries of the officials and “directly interrogate” detainees, who include individuals rendered from Kenya to Mogadishu by the CIA.<sup>425</sup> The prison

consists of a long corridor lined with filthy small cells infested with bedbugs and mosquitoes. One said that when he arrived in February, he saw two white men wearing military boots, combat trousers, gray tucked-in shirts and black sunglasses. The former prisoners described the cells as windowless and the air thick, moist and disgusting. Prisoners, they said, are not allowed outside. Many have developed rashes and scratch themselves incessantly. Some have been detained for a year or more. According to one former prisoner, inmates who had been there for long periods would pace around constantly, while others leaned against walls rocking.<sup>426</sup>

The existence of both sites was confirmed by a U.S. official, who stated that “[i]t makes complete sense to have a strong counterterrorism partnership” with the Somali government.<sup>427</sup> One of the alleged inmates of the prison was Ahmed Abdullahi Hassan, a Kenyan citizen suspected of involvement with Al Qaeda in East Africa, who was captured in Nairobi in 2009 and “disappeared” for nearly two years.<sup>428</sup> The Kenyan government denied any knowledge of his whereabouts.<sup>429</sup> In 2011, a man who had been released from the Mogadishu prison described being imprisoned with Hassan, who told him that he had been tied up and flown to Mogadishu (which he recognized by the smell of the sea), and interrogated by Somalis and “white men” constantly after his arrival.<sup>430</sup> Hassan’s lawyers in Kenya (hired by his family after his disappearance) plan to file a *habeas* petition in order to compel the production of information about Hassan’s whereabouts and reasons for detention.<sup>431</sup> According to Scahill, a U.S. official denied that Hassan had been rendered by the CIA, but acknowledged that the U.S. was involved in his capture and detention, implying that the Mogadishu prison is being used as a proxy detention site rather than a traditional black site.

In June 2012, a report by investigator Clara Gutteridge detailed how a Tanzanian national, Suleiman Abdallah, had been captured in Mogadishu in 2003 by a warlord and transferred to American custody, after which he was rendered through Kenya and Djibouti. Abdallah was imprisoned for five years at U.S. prisons in Afghanistan, including the Dark Prison and Bagram. The reasons for his detention were not clear; one report by a Kenyan minister claimed that Abdallah was being extradited to the United States for charges related to the 1998 embassy

**“Somali warlords would send captured locals to the CIA for cash payments.”**

bombings in Kenya and Tanzania, but he never arrived in the United States. Gutteridge described how Abdallah was essentially “disappeared”; his name “appeared in the margins of a confession barred by a Kenyan court in 2005 for having been obtained through torture.”<sup>432</sup> Abdallah was released from Bagram in 2008 without explanation for either his detention or his release.<sup>433</sup> However, one possible explanation, as Gutteridge explains, was the bounty system (similar to that in Afghanistan) that developed in Somalia in 2002, whereby Somali warlords would send captured locals to the CIA for cash payments.<sup>434</sup> Both Abdallah and Hassan’s stories appear to confirm that CIA operations in Somalia include both proxy detention and rendition.

## Legal and Political Consequences of the Rendition Program

The extraordinary rendition program has triggered a number of lawsuits in the United States and abroad, along with investigations and official inquiries that continue more than six years after the black sites were allegedly closed.

- Former detainees Khaled El-Masri and Maher Arar filed lawsuits in U.S. district court against, respectively, George Tenet (former director of the CIA) and John Ashcroft (former attorney general), alleging violations of U.S. and international laws in connection with their renditions and torture. Both cases were eventually dismissed by judges after the U.S. government argued that adjudicating the cases would compromise state secrets.<sup>435</sup> However, Arar received an apology by Democratic and Republican members of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties for his treatment and the fact that he was barred from entering the United States to testify before the committee in person.<sup>436</sup>
- Former detainees Binyam Mohammed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Bashmilah, and Bisher al-Rawi filed a lawsuit in 2007 in U.S. district court against Jeppesen Dataplan, a Boeing subsidiary, alleging knowing participation in the CIA detainee transfers to potential torture and cruel, inhuman or degrading treatment.<sup>437</sup> In earlier media reports, a Jeppesen employee recalled that “Bob Overby, the managing director of Jeppesen International Trip Planning, said, “We do all of the extraordinary rendition flights — you know, the torture flights. Let’s face it, some of these flights end up that way.”<sup>438</sup> The lawsuit was eventually dismissed after the U.S. government intervened and asserted the state-secrets privilege.<sup>439</sup>
- Lawyers for El-Masri also filed an application against the United States in 2009 before the Inter-American Court of Human Rights alleging violations of the American Declaration of the Rights and Duties of Man, including kidnapping and torture. The United States never responded to the application.<sup>440</sup>
- In 2009, after a three-year trial, an Italian court convicted 23 U.S. citizens (22 alleged CIA agents and one U.S. Air Force officer) for their roles in the rendition and subsequent torture of Abu Omar.<sup>441</sup> The agents, who were all tried *in absentia*, included former CIA Milan chief Robert Lady, despite attempts by at least one defendant to halt the prosecution via invocation of diplomatic immunity.<sup>442</sup> Lady was sentenced to seven years in prison, while the remaining agents were sentenced to five years each.<sup>443</sup> All 23 individuals are now considered fugitives under Italian law.<sup>444</sup> To pay the €1.5 million (approximately \$2

million) in damages awards to Abu Omar, Lady’s property in Italy was seized. In February 2013, a Milan appeals court vacated acquittals (previously based on diplomatic immunity) for three U.S. citizens in the same case, including the former CIA station chief in Rome, Jeffrey Castelli, and instead convicted them *in absentia*. Castelli was sentenced to seven years, and the other two officials were sentenced to six years each. On February 12, 2013, Italy’s former military intelligence chief Nicolas Pollari and his deputy, Marco Mancini, were both sentenced to 10 years and nine years in prison, respectively, for their roles in the Abu Omar rendition. Unlike the CIA officials convicted *in absentia*, Pollari and Mancini will serve their sentences in Italy if they lose the appeals process.<sup>445</sup>

- Four applications have been filed in the European Court of Human Rights (ECHR) on behalf of Khaled El-Masri (against Macedonia), Abu Zubaydah (against Lithuania), and al-Nashiri (against Poland and Romania), alleging violations of the European Convention on Human Rights, including the prohibition of torture/CID and the right to liberty and security of person.<sup>446</sup> El-Masri’s application was accepted by the ECHR, and arguments were heard on May 16, 2012. On December 13, 2012, the ECHR ruled in favor of El-Masri, finding that El-Masri was subjected to techniques amounting to torture by the CIA following his capture in Skopje, and that Macedonia bore responsibility for El-Masri’s rendition to Afghanistan and treatment over his entire period of detention in Macedonia and Afghanistan.<sup>447</sup> El-Masri was also awarded €60,000 (roughly \$80,000) in compensation, to be paid by the government of Macedonia. The ruling was viewed as an historic judgment, and U.N. special rapporteur on human rights and counter-terrorism, Ben Emmerson, described it as “a key milestone in the long struggle to secure accountability of public officials implicated in human rights violations committed by the Bush administration CIA in its policy of secret detention, rendition and torture.”<sup>448</sup>
- In 2010, the U.K. government came to a settlement worth “millions” of pounds in a lawsuit filed by a dozen former detainees, including Binyam Mohammed, Bisher al-Rawi, Jamil el-Banna, Richard Belmar, Omar Deghayes, and Martin Mubanga.<sup>449</sup> The suit alleged the complicity of MI-5 and MI-6 in interrogation and torture prior to the claimants’ detention at Guantánamo Bay.<sup>450</sup> In contrast to the U.S. lawsuits, the U.K. Court of Appeals ruled that the government could not assert state secrets or use secret evidence in its defense, ruling that “allegations of wrongdoing had to be heard in public.”<sup>451</sup> Additionally, the British Crown Prosecution Service is currently investigating whether MI-6 and its former head were involved in the rendition of Abdel Hakim Belhadj to Libya, and Belhadj has filed a lawsuit on the issue against former Foreign Secretary Jack Straw and MI-6.<sup>452</sup>
- On December 13, 2012, it was announced that the U.K. government had paid £2.2 million (approximately \$3.55 million) to Libyan national Sami Al Saadi [see Chapter 8, on Consequences] to settle his legal claims over MI-6’s involvement in his rendition to Libya and subsequent torture in 2004.<sup>453</sup> The U.K. government admitted no liability in the settlement, although Al Saadi commented that “I started this process believing that a British trial would get to the truth in my case. But today, with the government trying to push through secret courts, I feel that to proceed is not best for my family. I went through a secret trial once before, in Gaddafi’s Libya. In many ways, it was as bad as the torture. It is not an experience I care to repeat.” Also in December 2012, it was reported that Al Saadi had filed a lawsuit against the Hong Kong government for its involvement in his rendition. That case is currently pending.<sup>454</sup>

- An All-Party Parliamentary Group on Extraordinary Rendition (APPG), headed by Conservative MP Andrew Tyrie, has held hearings since 2006 on the U.K.'s involvement in the extraordinary rendition program. The APPG issued a report in 2011 titled "Account Rendered," which summarized their conclusions that "Britain was drawn into" the extraordinary rendition program and "mixed up in wrongdoing."<sup>455</sup> The APPG also continues to push for an official government inquiry, following the very brief existence of the Gibson Inquiry in 2011 whose credibility was questioned by NGOs, and which ultimately could not proceed at the same time as the government investigation into Belhadj's allegations.<sup>456</sup>
- The 2007 annual report of the U.K. House of Commons' Foreign Affairs Committee examined the torture and CID allegation in connection with the rendition program, as well as purported U.K. involvement in the program. The committee concluded that "the Government has a moral and legal obligation to ensure that flights that enter U.K. airspace or land at U.K. airports are not part of the 'rendition circuit,' " and that "given the clear differences in definition, the U.K. can no longer rely on U.S. assurances that it does not use torture."<sup>457</sup>
- In December 2009, lawyers for Mohammed al-Asad filed suit against Djibouti before the African Commission for Human and Peoples' Rights, alleging Djibouti's complicity in al-Asad's rendition and abuse.<sup>458</sup> The Commission has taken preliminary steps to accept the case, although it remains to be seen whether the case will progress. This suit is the first involving an African nation's role in the CIA rendition program.<sup>459</sup>

Reports have also shown the United States' increasing frustration and concern about investigations and lawsuits abroad, and a concerted effort by the U.S. government to halt such inquiries through political and diplomatic pressure.

- The most egregious example of a deliberate effort to impose secrecy is the German investigation into the rendition of Khaled El-Masri. A 2010 report by *Der Spiegel* details the negotiations between the U.S. State Department, the political leadership of Germany, and German prosecutors.<sup>460</sup> In one cable, Deputy U.S. Ambassador John Koenig wrote directly to Secretary of State Condoleezza Rice that he had asked Angela Merkel's office to "weigh carefully at every step of the way the implications for relations with the U.S.," following the issuance by the German prosecutor of arrest warrants for the 13 CIA agents involved in El-Masri's abduction.<sup>461</sup> According to another cable, Bavarian state officials called the U.S. embassy and emphasized that they had "no role" in the prosecutor's decision to issue the warrants.<sup>462</sup> U.S. officials were reportedly most concerned that the warrants would be enforced outside of Germany, and were reassured by both the German Ministry of Justice and the Foreign Ministry that the cases "would not be handled as routine," and would take into account any foreign policy consequences.<sup>463</sup> On that issue, Koenig helpfully "pointed out that [the United States'] intention was not to threaten Germany ... but reminded [Merkel's office] of the repercussions to U.S.-Italian bilateral relations in the wake of [the Italian arrest warrants issued the previous year]."<sup>464</sup> Ultimately, the pressure yielded results: Justice Minister Brigitte Zypries decided that because the United States would not recognize the validity of the arrest warrants, it was not worth the effort to pursue charges or extradition.<sup>465</sup>
- In 2005, Spanish police opened an investigation into rendition flight stopovers (including

the flight carrying Khaled El-Masri) in Mallorca, with the inquiry eventually being sent to Spain’s national court to determine the facts of the flights and whether CIA operatives used false identities without the permission of the Spanish government.<sup>466</sup> In 2010, the Spanish National Court’s Office of the Prosecutor requested arrest warrants for the 13 CIA agents involved in El-Masri’s rendition.<sup>467</sup> U.S. officials were reportedly alarmed when German and Spanish prosecutors began comparing information on the rendition flights, commenting that “[t]his co-ordination among independent investigators will complicate our efforts to manage this case at a discreet government-to-government level.”<sup>468</sup> Officials in the prosecutor’s office did, however, accede to U.S. concerns regarding the Spanish investigation: U.S. embassy officials noted, following a meeting with one of the prosecutors, that “[t]he prosecutors do not intend to request information on this case from the embassy or from the U.S. government in general.”<sup>469</sup> Additionally, U.S. officials expressed a concern that surfaced in State Department communications about many countries’ rendition allegations — that they simply did not know the facts. “Our ability to beat down this story is constrained by the fact that we do not ourselves know, factually, what might have transpired five or six years ago.”<sup>470</sup>

- In 2008, U.K. Foreign Secretary David Miliband announced that the British territory of Diego Garcia had been used for rendition flight stopovers by the United States.<sup>471</sup> Miliband’s predecessor, Jack Straw, and former U.K. Prime Minister Tony Blair had previously been informed by the U.S. government that no rendition flights had been conducted through U.K. airspace.<sup>472</sup> Bellinger explained the discrepancy by stating that even though several previous inquiries on the use of U.K. airspace and territory for renditions had been conducted, the new information resulted from the CIA conducting a “more comprehensive record search” after “continuing allegations” about the use of Diego Garcia — despite the incidents occurring six years prior.<sup>473</sup> Neither Bellinger nor Miliband provided any details about the detainees moved through Diego Garcia, including their previous and subsequent destinations.<sup>474</sup> Bellinger stated that there had been no legal obligation to inform the British government of the flights through Diego Garcia, but that there would be no future such flights without U.K. permission.<sup>475</sup> Andrew Tyrie, Conservative Party MP and head of the U.K.’s APPG, stated that “[t]his statement will leave the British public unwilling to trust other assurances we have received from the U.S.”<sup>476</sup> Despite the diplomatic tension, the U.S. State Department’s focus was on stifling wide reporting of the story. DOS officials in London noted with evident relief that “U.K. media covered the story but for the most part didn’t have it on the front pages.”<sup>477</sup> Unclassified DOS emails summarized the coverage of the Diego Garcia story, noting the benefit of competing headlines regarding fatal embassy burnings in Serbia.<sup>478</sup>
- In November 2009, U.S. District Court Judge Gladys Kessler in Washington, D.C., issued an opinion in the *habeas corpus* case of *Farhi Saeed Bin Mohammed v. Barack Obama*, which included a thorough assessment of the validity of Binyam Mohammed’s claims of torture.<sup>479</sup> Kessler found that “Binyam Mohamed’s trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans.”<sup>480</sup> Kessler concluded that there was “no question that throughout his ordeal Binyam Mohamed was being held at the behest of the [United States],” and that any



information he gave during his various interrogations was not “reliable evidence.”<sup>481</sup> In 2010, Kessler’s opinion was relied upon by the U.K. Court of Appeal in determining that classified information given by the CIA to the Foreign Ministry would be made public as part of Mohammed’s suit to force the British government to disclose knowledge of his treatment.<sup>482</sup> Prior to the Court of Appeals’ decision, the Foreign Ministry received a letter from John Bellinger, the DOS legal adviser, stating that “[w]e want to affirm in the clearest terms that a decision that the public disclosure of these documents or of the information contained therein is likely to result in serious damage to U.S. national security and could harm existing intelligence information-sharing between our two governments.”<sup>483</sup> The Court of Appeals found that the information amounted to evidence that Mohammed was indeed “subjected to torture.”<sup>484</sup> The Court of Appeals, however, determined that there was “overwhelming” public interest in the information with minimal risk to national security, and the judgment publicly castigated the Foreign Office and MI-5’s failure to respect human rights, lying to Parliament, and “culture of suppression.”<sup>485</sup> The White House heavily criticized the court’s decision, stating that “the court’s judgment will complicate the confidentiality of our intelligence-sharing relationship.”<sup>486</sup>

- Following the deportation of Ahmed Agiza and Muhammed Alzery, and subsequent torture in Egypt, the Swedish Ministry of Defense began requiring more details regarding U.S. flights and refueling stops in Sweden.<sup>487</sup> The U.S. embassy noted that the ministry’s questions “appear[ed] to be directed at finding out whether [the] flight was for renditions or prisoner transfers connected with the war on terror — a sensitivity [one Swedish official] mentioned ... explicitly.”<sup>488</sup> The embassy commented that it was unclear whether “Sweden wants to make the clearance process so difficult that we will seek other refueling venues.”<sup>489</sup> Sweden later awarded Alzery and Agiza 3 million kroner (approximately \$425,000) each in settlement for their treatment in Sweden and Egypt. Additionally, Agiza was granted residency in Sweden in 2012.<sup>490</sup>
- In 2007, the Irish Human Rights Commission (a government entity) issued a report entitled “Extraordinary Rendition: A Review of Ireland’s Human Rights Obligations,” which concluded that flights that were part of the CIA rendition circuits had landed at Shannon Airport without being subject to inspections or searches.<sup>491</sup> Following the report, the Irish government established a cabinet-level committee to review human rights policies and ensure that airport authorities had a mandate to search and inspect all aircraft transiting through Ireland.<sup>492</sup> A representative from the Irish Department of Foreign Affairs, however, explained to the U.S. embassy that the creation of the committee was merely to “assuage” the Green Party members of the governing coalition, and that the question of inspecting all aircraft was a “nonstarter.”<sup>493</sup> This view was confirmed in 2010 by reports that the committee had met only three times over two years, without any progress.<sup>494</sup> However, the Irish government did privately begin requesting further information from the United States about military flights through Shannon Airport, similar to the Swedish government, out of fear that renditions were being transited through Ireland.<sup>495</sup> The U.S. embassy noted the new “cumbersome notification requirements,” and commented on the possibility of pulling out of Shannon as a transit hub.<sup>496</sup>
- In 2007, the Swiss Federal Council authorized a criminal investigation into the alleged unlawful use of Swiss airspace by 13 CIA agents for the rendition of Abu Omar.<sup>497</sup> At the time, the U.S. embassy noted that Dick Marty (who spearheaded the Council of Europe reports) provided the impetus for the Swiss investigation, and that it was “difficult to say

what type of evidence the Swiss possess.”<sup>498</sup> The investigation was suspended in November 2007, although the suspension was not announced by the Swiss federal prosecutor’s office until January 2008.<sup>499</sup> No reason was given for the suspension, and a spokesperson for the prosecutor’s office stated that the office would “not provide any further information on this case until the circumstances allow.”<sup>500</sup>

- In 2011, Finland’s Ministry of Foreign Affairs asked the United States for clarification regarding an alleged rendition flight that landed in Helsinki, which was reportedly one of many between 2004 and 2006.<sup>501</sup> Media reports of rendition flights through Finland resulted in Finland delaying ratification of the U.S.-E.U. Mutual Legal Assistance Treaty for two years, from 2005 until 2007, with Finnish ministers expressing concern that United States rendition violated Finnish constitutional law.<sup>502</sup> There has been no reported response from the U.S. to Finland’s request for information regarding the flight.



In 2009, President Obama’s Interrogation and Transfer Policy Task Force announced that transfers “in which the United States moves or facilitates the movement of a person from one country to another or from U.S. custody to the custody of another country” would continue, but with stricter oversight of diplomatic assurances.<sup>503</sup> The decision was immediately criticized by rights groups, and Amrit Singh of the Open Society Justice Initiative pointed out those diplomatic assurances, even with American or consular visits, had been “completely ineffective in preventing torture.”<sup>504</sup> This conclusion was illustrated by the Canadian government’s investigation into the Maher Arar rendition; a Canadian consular official visited Arar several times, but Arar was forced by Syrian officials to speak in Arabic with a translator, and was often cut off in his responses to the official’s questions.<sup>505</sup> The Arar Inquiry found that Arar was not in a position to be able to speak freely about his treatment in Syria with the consular official.<sup>506</sup>

In accordance with the statement by President Obama’s Task Force, there is evidence that a number of renditions and instances of proxy detention have taken place since 2009, most notably in the 2011 and 2012 reports regarding detentions in and renditions from Mogadishu. Harold Hongju Koh, the former DOS legal advisor, seemed to dispute this in an interview with Task Force staff, saying that during his time in the administration, the CIA had not conducted any unlawful renditions.<sup>50</sup>



# The Role of Medical Professionals in Detention and Interrogation Operations

*More than a year after Camp Delta at Guantánamo opened, officials enthusiastically presented to the public a simple narrative about the interaction of medical personnel and the detainees held there. Officials said that the medical personnel were providing the detainees with an especially high level of medical care. The modern clinic inside the barbed wire enclosure was proudly exhibited to visiting journalists and members of Congress.*

*The detainees were getting medical treatment far superior to any they had ever received or could hope to receive in their home countries like Afghanistan or Yemen. Officials said that many detainees were scrawny when they arrived but were now gaining weight — metrics were shown to visitors — and their health was attended to with what the superintendent of the hospital described in 2003 as care equivalent to that which the U.S. provides for its own soldiers. “They never had it so good,” said Captain Albert Shimkus, the detention center’s chief medical officer at the time.<sup>1</sup>*

*Military doctors performed minor surgery on some prisoners; others were prescribed heart medicines, or statins to control cholesterol. The message was that, yes, these people were in prison but there was a silver lining for them in their doleful situation: they were getting benefits they never would have received but for their imprisonment at Guantánamo — first-rate medical attention and a planned nutrition regimen.*

*But there was an entirely different universe of professional medical involvement in the detainees’ lives that was hidden from wider view: the use of psychologists, psychiatrists and other physicians, and other medical and mental health personnel, to help assist and guide interrogations that were often brutal.*

*The involvement of medical personnel was ostensibly to make the process more efficient (psychologists could provide guidance to interrogators as to how best obtain information) and safe (medical personnel could monitor the conditions of subjects and, theoretically, intervene if necessary to prevent excessive harm or death). But the other major advantage in enlisting doctors to the interrogation program was that they appeared to provide a sort of ethical approbation for what would occur. The participation of doctors — professional healers — would certify that the activities were not inhumane.*

*The Office of Legal Counsel relied very heavily on this role of medical personnel to support its much-criticized findings that “enhanced” techniques did not amount to torture or cruel, inhuman or degrading treatment.*

*It was perhaps for those very reasons — utilizing medical participation to signify humaneness and approval*

— that once the participation of doctors in the interrogation program became known publicly, controversies erupted in the professional associations that regard themselves as guardians of the identities and collective ethics of their members.

*The New York Times* reported on November 30, 2004, that psychiatrists and psychologists were important and direct participants in the interrogation regime at Guantánamo. The article put into public consciousness for the first time the term “biscuits,” a nickname for Behavioral Science Consultation Teams (BSCTs). These biscuit teams included behavioral psychologists, who provided guidance for interrogators as to how to best obtain information from detainees. The psychologists did not, as a rule, interact directly with the subjects of interrogations, but observed what was happening, usually through one-way glass and made recommendations to the interrogators. Sometimes, the newspaper reported, the psychologists made their recommendations based on information found in detainees’ medical files.

After the article’s publication, the professional associations for psychiatrists and psychologists were faced with urgent questions about the proper and ethical role of their members in such situations. The American Psychiatric Association, a medical association consisting of physicians who are specialists in mental health, quickly achieved a consensus. That group decided, with little dissent, that its members could not ethically participate in any way in the interrogations. It was a different situation for the community of psychologists, many of whom considered themselves behavioral scientists and thought it thoroughly appropriate to provide their expert guidance to legitimate authorities, like police and the military. Those psychologists argued that they were not treating the detainees and thus did not owe any professional duty to them; they said their clients were, in fact, the authorities who sought their help. The controversy produced significant battles within the psychologists’ group and many questions remain unresolved.

The use of medical personnel in questionable activities also exposed another vexing issue, that of dual loyalties for medical personnel in the military. Military doctors are obligated to abide by the codes of their profession while also simultaneously required as soldiers to obey their commanders.

Medical professionals — specifically, psychologists — had an even more central role in the CIA’s interrogation program. Two CIA contract psychologists convinced senior policymakers of the appropriateness of using a military program previously used to train U.S. soldiers during the Cold War to resist interrogation as a model for a regime to break down detainees taken in the new war. The selection of the Survival, Evasion, Resistance and Escape program would come to be recognized as a singularly misguided approach.

Like attorneys, medical personnel were crucial to official authorization for brutal interrogation techniques by the CIA. Unlike lawyers, they were sometimes physically present while the techniques were administered, and in a few cases may have taken part directly.

*[In examining the role of health care professionals in detainee treatment, it is important to clarify some definitions at the outset. This chapter uses the terms “clinicians,” “doctors,” and “medical personnel” broadly, to include not only physicians (including psychiatrists, i.e., medical doctors who specialize in providing mental health treatment) but also psychologists (mental health clinicians who have Ph.D.s, not M.D.s, and are not licensed as physicians), physicians’ assistants, nurses and all other medical and mental health professionals.]*

# Doctors' and Psychologists' Role in Treatment of Prisoners in CIA Custody

## Learned Helplessness

Many of the techniques used against Al Qaeda suspects in CIA custody originated in the military's "Survival, Evasion, Resistance and Escape" (SERE) program, a training program designed to enable U.S. Armed Services personnel to endure abusive treatment and evade revealing truthful information while in enemy hands. The methods applied during SERE training, inspired by practices used by communist enemies of the U.S. during the Cold War, include physical slaps, prolonged hooding, stress positions, close confinement in small spaces, slamming into walls, forced nudity, extended isolation, sleep deprivation and waterboarding. According to former chief U.S. Navy SERE trainer Malcolm Nance, the SERE techniques are "dramatic and highly kinetic coercive interrogation methods" patterned after techniques employed by "brutal authoritarian enemies," such as "the Nazis, the Japanese, North Korea, Iraq, the Soviet Union, the Khmer Rouge and the North Vietnamese."<sup>2</sup> Lieutenant Colonel Daniel Baumgartner, former chief of staff for the agency that administers SERE training, has testified that "I'm not going to torture students," but affirmed that "[w]e are simulating an enemy that is not complying with the Geneva Conventions."<sup>3</sup>

SERE training is carefully regulated, both for students' safety, and to ensure that the training increases rather than decreases their confidence in their ability to resist. Dr. Jerald Ogrisseg, former SERE psychologist for the U.S. Air Force Survival School, explained in congressional testimony in 2008 that SERE's purpose was to "enhance student decision-making, resistance, confidence, resiliency, and stress inoculation, and not to break the will of the students and teach them helplessness." An instruction manual for SERE trainers similarly states that "maximum effort will be made to ensure that the students do not develop a sense of 'learned helplessness,' " because "learned helplessness ... will render the student less prepared for captivity than prior to the training."<sup>4</sup>

"Learned helplessness" is a phenomenon first described by psychologist Dr. Martin Seligman, based on experiments he performed on animals in the 1960s. Seligman found that when dogs were given electric shocks while confined in harnesses that they could not escape, most later failed to escape shocks when the harnesses were removed.<sup>5</sup> Similar behaviors occur in other animals. For example, one study found that rats placed in a water tank with no exit would attempt to swim for 60 hours before succumbing to exhaustion and drowning. If rats were squeezed in a researcher's hand until they stopped struggling before being placed in the tank, however, they drowned after an average of 30 minutes.<sup>6</sup> Such experiments could not be ethically repeated on human subjects, but Seligman believed that clinical depression was linked to learned helplessness.<sup>7</sup>

Two psychologists with the SERE program, James Mitchell and Bruce Jessen, were heavily influenced by Seligman's findings about "learned helplessness." Mitchell retired from the Air Force SERE school in May 2001, and began working as a consultant.<sup>8</sup> In December 2001, the CIA asked him to review the "Manchester Manual," an Al Qaeda manual seized in the United Kingdom that advised terrorists on resistance to interrogation.<sup>9</sup> Also in December 2001, a small group of psychologists that included Mitchell and a CIA operational psychologist named Kirk Hubbard met with Martin Seligman at Seligman's home in suburban Philadelphia. Hubbard

had some role in the CIA's decision to hire Mitchell and Jessen; in his words, "I didn't make the decision to hire [Mitchell and Jessen]. ... I just introduced them as potential assets" to the agency.<sup>10</sup>

Seligman has told reporters that the meeting at his house with Mitchell and Hubbard "did not touch on interrogation or torture or captured prisoners or possible coercive techniques — even remotely," and that he was "grieved and horrified" that his research may have been used to inflict harm. But Seligman did remember that Mitchell had complimented his work on "learned helplessness."<sup>11</sup>

In the months that followed, Mitchell and Jessen drafted a proposal to use SERE techniques against captured members of Al Qaeda.<sup>12</sup> The purpose, though, was the opposite of that of the SERE program: to induce, rather than inoculate against, learned helplessness in order to force detainees into a state of compliance.

In an interview with Task Force staff, Steven Kleinman, a retired Air Force colonel and former interrogator who knew Mitchell professionally before September 11, said that Mitchell's paradigm for interrogation was heavily based on "Martin Seligman's concept of learned helplessness."<sup>13</sup> Mitchell and Jessen, through their counsel, both declined interview requests from Task Force staff. In the past, Mitchell has disputed that learned helplessness research was the basis for the CIA "enhanced interrogation program,"<sup>14</sup> but the CIA's own documents suggest otherwise.

A December 2004 description of the program the CIA sent to the Office of Legal Counsel (OLC) explained that "[t]he goal of interrogation is to create a sense of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner." In order to create this sense of helplessness, "it is important to demonstrate to the [detainee] that he has no control over basic human needs."<sup>15</sup>

CIA officials have confirmed to the press that the techniques were designed to induce learned helplessness. According to former CIA counsel John Rizzo, "the techniques themselves were not intended [or] designed to make [detainees] talk while actually being subjected to those techniques. ... I'm a lawyer, not a psychologist, but as I also understand, there's a theory called learned helplessness."<sup>16</sup> Similarly, Jose Rodriguez, head of the CIA's counterterrorism center from 2002 to 2005, has said, "this program was not about hurting anybody. This program was about instilling a sense of hopelessness and despair on the terrorist," and hopelessness led detainees to "compliance."<sup>17</sup>

But according to the Istanbul Protocol, the United Nations' guide for doctors and lawyers documenting and investigating allegations of prisoner mistreatment, reducing detainees to a state of helplessness and despair is itself one of the central harms of torture:

One of the central aims of torture is to reduce an individual to a position of extreme helplessness and distress that can lead to a deterioration of cognitive, emotional, and behavioral functions.<sup>18</sup>

### **The Interrogation of Abu Zubaydah**

On March 28, 2002, Abu Zubaydah was captured in a gunfight in Faisalabad, Pakistan. He was believed at the time to be the highest level Al Qaeda suspect in U.S. custody. He was transported to a secret CIA site, most likely in Thailand. There, FBI interrogators Ali Soufan and Stephen

Gaudin began interviewing Abu Zubaydah while doctors worked to stabilize his condition. Soon after, according to Soufan, a CIA team including contractor James Mitchell began directing the interrogation, and using “enhanced” techniques such as nudity and sleep deprivation. When Soufan argued that his questioning had gained valuable intelligence and expressed skepticism about the new techniques, Mitchell reportedly replied, “This is science.”<sup>19</sup>

Soufan has written that when the “enhanced” techniques failed to yield the desired results, Mitchell began using longer periods of sleep deprivation. At that point, Soufan said, although Mitchell was operating with headquarters’ approval, a CIA operational psychologist left the interrogation for fear of losing his license. Reporters have identified that psychologist as R. Scott Shumate.<sup>20</sup>

Not long after that, Soufan saw a “confinement box” that “looked like a coffin,” in which Mitchell was seeking authorization to place Abu Zubaydah.<sup>21</sup> Soufan concluded that “the interrogation was stepping over the line from borderline torture. Way over the line.” Soufan left the interrogation, with the approval of his FBI superiors, Assistant Director Pat D’Amuro and FBI Director Robert Mueller.<sup>22</sup>

CIA officials, particularly former Counterterrorism Center Director Jose Rodriguez, have disputed Soufan’s account. Most of the disputes concern whether the FBI agents using traditional interrogation techniques or CIA interrogators using “enhanced” methods had more success in obtaining intelligence from Abu Zubaydah — an issue discussed elsewhere. Rodriguez also asserted that Soufan<sup>23</sup> overestimated the contract psychologist’s role, and “seemed to blame our contractor for everything,” even threatening the contractor with violence at one point. Rodriguez wrote that “[a]t the time the contractor was just an advisor. He was not in charge of the interrogation.” Rodriguez, however, does not dispute that the contract psychologist was advising FBI agents as well as CIA interrogators from the beginning, and Soufan does not dispute that Mitchell had CIA headquarters’ authorization for his actions.<sup>24</sup>

According to Rodriguez, after Soufan and the FBI left, he met with the contract psychologist and CIA personnel involved in the interrogation and asked the psychologist how long it would take for more aggressive techniques to be effective:

“Thirty days” was his estimate. I thought about it overnight and the next morning asked the contractor if he would be willing to take charge of creating and implementing such a program. He said he would be willing to take the assignment but could not do it himself. ... I agreed that the contractor should bring in someone from the outside to help him work with Agency officers in crafting a program we hoped would save lives.<sup>25</sup>

The program had approval from the highest levels of the U.S. government, as former President George W. Bush wrote in his memoirs:

CIA experts drew up a list of interrogation techniques that differed from those Zubaydah had successfully resisted. George [Tenet] assured me all interrogations would be performed by experienced intelligence professionals who had undergone extensive training. Medical personnel would be on-site to guarantee that the detainee was not physically or mentally harmed.



At my direction, Department of Justice and CIA lawyers conducted a careful legal review. They concluded that the enhanced interrogation program complied with the Constitution and all applicable laws, including those that ban torture.<sup>26</sup>

The techniques that President Bush approved and that the OLC deemed legal, in a classified opinion signed by OLC head Jay Bybee (hereinafter “classified Bybee memo”), included not only waterboarding, but: (1) sleep deprivation for up to 11 consecutive days; (2) “cramped confinement” in small, darkened boxes; (3) the placement of an insect inside a confinement box, which the suspect could be told was a stinging insect but was in fact “a harmless insect such as a caterpillar”; (4) “wall standing” and other stress positions; (5) physical assaults including grabbing a suspect’s collar, grabbing his face, slapping his face or abdomen, and slamming him into a specially constructed plywood wall.<sup>27</sup>

In approving these techniques, OLC relied heavily on the SERE psychologists’ representations. It cited SERE psychologists’ assurances that the “enhanced” techniques would not cause prolonged mental harm, stating:

Through your consultation with various individuals responsible for [SERE] training, you have learned that these techniques have been used as elements in a course of conduct without any reported incident of prolonged mental harm. ...

You have informed us that your on-site psychologists, who have extensive experience with the use of the waterboard in Navy training, have not encountered any significant long-term mental health consequences from its use. Your on-site psychologists have also indicated that JPRA [Joint Personnel Recovery Agency] has likewise not reported any long-term mental health consequences of the waterboard.<sup>28</sup>

These “on-site” psychologists were likely James Mitchell and Bruce Jessen, who joined Mitchell at the Abu Zubaydah interrogation in July or August 2002.<sup>29</sup>

OLC also relied on the CIA’s representations that “a medical expert with SERE experience will be present throughout this phase, and the procedures will be stopped if deemed medically necessary to prevent severe medical or physical harm” to Abu Zubaydah.<sup>30</sup>

Finally, OLC cited a psychological assessment of Abu Zubaydah that a psychologist sent to John Yoo on July 24, 2002.<sup>31</sup> The assessment states that it is based in part on “direct interviews” with Abu Zubaydah, and is thus widely assumed to have been written by James Mitchell. It states that Abu Zubaydah is “[a]lleged to have written al Qaeda’s manual on resistance techniques,” was “[i]nvolved in every major Al Qaeda terrorist operation,” and was a planner of the September 11 attacks.<sup>32</sup> It also states that he is personally resilient, skilled at resisting interrogation, and has no history or symptoms of mental illness.<sup>33</sup>

Ali Soufan has written that the psychological profile’s claims about of Abu Zubaydah’s role in September 11, and other Al Qaeda operations, were known at the time to be false:

To this day, I don’t understand how anyone could write such a profile. Not only did we know this to be false before we captured Abu Zubaydah, but it was patently false from information obtained after we captured him. ... It

seems they just put down on paper whatever they could to show that Abu Zubaydah was “twelve feet tall.”<sup>34</sup>

The government has never charged Abu Zubaydah with war crimes, and has stated in Abu Zubaydah’s *habeas* case that it “has not contended that [he] had any personal involvement in planning or executing” the 1998 embassy attacks or September 11, nor that he “was a member of al-Qaida or otherwise formally affiliated with al-Qaida.”<sup>35</sup> The unclassified portions of the psychological profile also make no mention of a head injury that Abu Zubaydah suffered in 1992, which led to serious memory loss and possible psychological consequences.<sup>36</sup>

The psychologists’ assurance about the safety of SERE techniques has also been questioned, including within the CIA. The CIA inspector general (IG) reported in May 7, 2004, that according to the head of the CIA’s Office of Medical Services (OMS), “OMS was neither consulted nor involved in the initial analysis” of the interrogation techniques.<sup>37</sup> OMS took issue with the Office of Technical Services and contract psychologists’ conclusions about the techniques, particularly waterboarding:

OMS contends that the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.<sup>38</sup>

In an interview with Task Force staff, former CIA General Counsel John Rizzo said that other agency personnel “swear they consulted with the Office of Medical Services,” though he lacked first-hand knowledge of the consultations. Rizzo said that medical personnel, in addition to psychologists, monitored Abu Zubaydah’s interrogation:

[I]n terms of overseeing the program, there were always medical people. I know there were psychologists and physicians’ assistants. I believe doctors would go through periodically but I can’t say that MD’s were there constantly.

Rizzo said that because Abu Zubaydah had been wounded during capture and “was the first one” subjected to the techniques, “people wanted to be extraordinarily careful” and “I believe there were medical doctors from OMS on site.”<sup>39</sup>

Dr. Kirk Hubbard wrote in an email to Task Force staff that

I don’t think OMS was involved in the initial analysis of the enhanced interrogation techniques, but ... an OMS medical doctor observed at least some of the interrogations of [Abu Zubaydah].<sup>40</sup>

The report of the CIA Office of Inspector General (CIA OIG report) stated that investigators had viewed the videotapes of Abu Zubaydah’s waterboarding. In contrast to the OLC’s statement that waterboarding “will not be used with substantial repetition,”<sup>41</sup> “OIG identified 83 waterboard applications, most of which lasted less than 10 seconds.”<sup>42</sup> There were other differences as well:

**“There was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.”**

OIG's review of the videotapes revealed that the waterboard technique employed at [redacted] was different from the technique as described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE School and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator [redacted] continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose.<sup>43</sup>

In 2008, the Senate Armed Services Committee found that the divergence between SERE school and actual CIA practices on detainees were not restricted to waterboarding, or to any particular technique. SERE schools use "strict controls" to reduce the threat of harm to students, including

medical and psychological training for students, intervention by trained psychologists during training, and code words to ensure that students can stop the application of a technique at any time should the need arise. Those same controls are not present in real world interrogations.<sup>44</sup>

In 2009, the Department of Justice's (DOJ) Office of Professional Responsibility (OPR) criticized the OLC memo for relying "almost exclusively on the fact that 'the proposed interrogation methods have been used and continue to be used in SERE training' without 'any negative long-term mental health consequences.'" They found this reliance unwarranted "[i]n light of the fact that the express goal of the CIA interrogation program was to induce a state of 'learned helplessness.'" <sup>45</sup>

In addition to their role in developing the program and advocating for the use of coercive techniques, Mitchell and Jessen may have directly participated in interrogations. The CIA OIG report describes the individuals who waterboarded Abu Zubaydah and Abd al-Rahim al-Nashiri as "SERE psychologist/interrogators" or "psychologist/interrogators." The DOJ OPR report similarly states that "psychologist/interrogators administered all of the interrogation sessions involving EITs [enhanced interrogation techniques]" for Abu Zubaydah, and administered the waterboard to al-Nashiri on two occasions.<sup>46</sup> The Associated Press, which cited anonymous U.S. intelligence officials, has also reported that Mitchell and Jessen personally waterboarded Abu Zubaydah and Abd al-Rahim al-Nashiri.<sup>47</sup>

This is not to say that Mitchell and Jessen were acting without headquarters' guidance or oversight. Both the OIG report and the DOJ OPR report state that CIA headquarters closely monitored Abu Zubaydah's and al-Nashiri's interrogations, including videotapes of the sessions. Based on the CIA's response to Freedom of Information Act requests, Abu Zubaydah's interrogators included "medical update" and "behavioral comments" in daily cables to CIA headquarters describing the interrogation in August 2002.<sup>48</sup>

Hubbard wrote in an email to Task Force staff that

Drs. Mitchell and Jessen had no authority to establish policy or procedure, or make independent decisions regarding the interrogation program. The

conditions of their contract prohibited that. Everything they did was specifically approved by the CIA.<sup>49</sup>

Hubbard also wrote that, contrary to some accounts he had seen in the press, Mitchell and Jessen “were not promoting themselves; the CIA approached them.”<sup>50</sup>

*The Washington Post* has reported that Mitchell and Jessen concluded that Abu Zubaydah was fully “compliant,” and there was no need or use for further waterboarding sessions, before CIA headquarters did. According to the *Post’s* source, the CIA counterterrorist center sent back cables advocating for waterboarding to continue for another 30 days, and told Mitchell and Jessen that “you’ve lost your spine.” Mitchell and Jessen requested that the officials observe a waterboarding session at the site, after which they agreed that no further waterboarding was needed.<sup>51</sup> It is impossible to confirm the details of this incident without access to classified information, but the *Post’s* reporting is consistent with the public portions of the CIA OIG report.<sup>52</sup>

In a possible reference to the same incident, Abu Zubaydah later told the Red Cross that during the period when he was undergoing waterboarding, “I collapsed and lost consciousness on several occasions. Eventually the torture was stopped by the intervention of the doctor.” He stated, however, that the intervention came long after he suffered severe physical pain and prolonged mental stress. Abu Zubaydah described waterboarding as causing severe pain, repeated vomiting and hopelessness: “I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.”<sup>53</sup>

Abu Zubaydah made further allegations about continued physical and mental harm during his Combatant Status Review Tribunal (CSRT) hearing, though the details were not clear and most of his statements about treatment at the CIA facility were redacted.<sup>54</sup> His medical records, statements about his treatment in custody, and information about his current medical condition are also largely classified.

According to a filing by Abu Zubaydah’s counsel in Lithuania, requesting victim status in an inquiry into allegations of CIA prisons, while they cannot reveal “the details of his physical and psychological injuries because all information obtained from Abu Zubaydah is presumed classified under a U.S. court order,” publicly available records show that his prior head injuries

were exacerbated by his ill-treatment and by his extended isolation. As a consequence, he has permanent brain damage and physical impairment. He suffers blinding headaches, and has an excruciating sensitivity to sound. Between 2008 to 2011 alone, he experienced more than 300 seizures. At some point during his captivity, the CIA removed his left eye. His physical pain is compounded by his awareness that his mind is slipping away. He suffers partial amnesia, and has trouble remembering his family.<sup>55</sup>

Elsewhere, Abu Zubaydah’s counsel has alleged that he had been prescribed Haldol, a powerful antipsychotic.<sup>56</sup>

Photographs confirm that Abu Zubaydah is missing an eye, but all other medical records or evaluations that would confirm or refute these allegations remain classified.

## Refinements to the CIA Program by the Office of Medical Services

On January 28 2003, the CIA issued and George Tenet signed written guidelines regarding interrogation and conditions of confinement for detainees in CIA custody.<sup>57</sup> This was the first agency-wide written guidance on the program.

The Conditions of Confinement Guidelines are largely redacted. One of the few legible passages states that “[d]ue provision must be taken to protect the health and safety of CIA detainees, including basic levels of medical care.”<sup>58</sup>

The Interrogation Guidelines categorized isolation, sleep deprivation of 72 hours or less, reduced caloric intake, use of loud music or white noise, and the use of diapers “generally not to exceed 72 hours [redacted]” as “standard” interrogation techniques. “Enhanced techniques” included close confinement, stress positions, wall standing, harmless insects, walling, slapping or grabbing a detainee’s face or body, more prolonged periods of diapering and sleep deprivation, waterboarding, and “such other techniques as may be specifically approved” by headquarters.<sup>59</sup>

In order to approve a request for “enhanced” techniques, the director of the counterterrorism center had to certify that “appropriate medical and psychological personnel have concluded that the use of the Enhanced Technique(s) is not expected to produce ‘severe physical or mental pain or suffering.’”<sup>60</sup> The guidelines also required that “[a]ppropriate medical and psychological personnel” be available for consultation with or travel to the interrogation site for standard techniques, and physically present at the interrogation site for the application of enhanced techniques. Whether on-site or off-site, medical and psychological personnel were instructed to suspend the interrogation if they found that “significant and prolonged physical or mental injury, pain, or suffering is likely to result if the interrogation is not suspended.” If this occurred, the interrogation team would be required to “report the facts to Headquarters for management and legal review to determine whether the interrogation may be resumed.”<sup>61</sup>

The CIA’s OMS issued its first, draft guidelines on medical treatment of detainees in March 2003. That first draft has not been publicly released, but revised versions issued in September 2003, May 2004, and December 2004 are publicly available in redacted form.<sup>62</sup> There are subtle differences between the three versions.

The guidelines state that CIA captives

may be subjected to a wide range of legally sanctioned techniques, all of which are also used on U.S. military personnel in SERE training programs. These [techniques] are designed to psychologically “dislocate” the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist our efforts to obtain critical intelligence.<sup>63</sup>

The guidelines describe OMS’s obligation to detainees as “assessing and monitoring the health of all Agency detainees subject to ‘enhanced’ interrogation techniques” and “determining that the authorized administration of these techniques would not be expected to cause “serious or permanent harm.” A footnote points out that, according to the Department of Justice, mental harm is not considered serious unless it lasts “months or years,” and “in the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted.”<sup>64</sup>

The initial version of the OMS guidelines appears not to mention medical professionals' common obligation to "do no harm," rather than ensuring that harm inflicted is not "serious or permanent."<sup>65</sup> Later versions do acknowledge that "[a]ll medical officers remain under the professional obligation to do no harm," but this is immediately followed by several redacted lines of text and a conclusion that "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'"<sup>66</sup> — the OLC's standard, not the Hippocratic Oath's.

**"... the longest consecutive period a detainee was deprived of sleep was 180 hours."**

Throughout, the guidelines repeatedly call for medical professionals to monitor the severity of harm imposed by interrogators on detainees, rather than preventing any harm. For example, the 2003 guidelines state that "[d]etainees can safely be placed in uncomfortably cool environments for varying lengths of time, ranging from hours to days."<sup>67</sup> They provide several paragraphs of instructions (largely redacted) for monitoring temperatures to prevent hypothermia. Later versions include more specific instructions regarding "water dousing" — soaking detainees in cold water.<sup>68</sup>

The guidelines' requirements with regard to stress positions, shackling and sleep deprivation are heavily redacted. The 2003 guidelines say that shackling "in a non-stressful position requires only monitoring for the development of pressure sores with appropriate treatment and adjustment of the shackles as required," and that being shackled upright for up to 72 hours "can be approved if the hands are no higher than head level and weight is borne fully by the lower extremities."<sup>69</sup> The approval for "standard" sleep deprivation is also 72 continuous hours, with or without shackling, but this could apparently be repeated after only a short rest. Clinicians were instructed that examinations of detainees undergoing sleep deprivation "should include the current numbers of hours without sleep; and if only a brief rest preceded this period, the specifics of the previous deprivation also should be required."<sup>70</sup> Later versions of the guidelines restrict "standard" sleep deprivation and shackling to 48 hours.<sup>71</sup>

OMS's representations about the medical safety of the techniques and clinicians' role in monitoring detainees were essential to the OLC's 2005 re-affirmation of the legality of several CIA techniques. Three memos, signed in 2005 by the OLC's acting head, Steven Bradbury, again and again rely on OMS to ensure that detainees are not subjected to severe physical suffering or prolonged mental harm. One of the memos, for example, states with regard to sleep deprivation:

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two-to-three foot diameter of movement. The detainee's feet are shackled to a bolt in the floor. Due care is taken to ensure that the shackles are neither too loose nor too tight for physical safety. We understand from discussions with OMS that shackling does not result in any significant physical pain for the subject.<sup>72</sup>

Bradbury wrote that detainees were continually monitored by closed-circuit television to ensure that they would not fall asleep and dangle from their shackles, and monitored for edema, swelling in the lower legs:

OMS has advised us that this condition is not painful, and that the condition disappears quickly once the detainee is permitted to lie down. Medical personnel carefully monitor any detainee being subjected to standing sleep deprivation for edema or other physical and psychological conditions.<sup>73</sup>

Because several detainees did experience edema as a result of standing sleep deprivation, the CIA, in consultation with OMS, developed an alternative protocol for “horizontal sleep deprivation,” which involved shackling detainees’ arms and legs to the floor far enough away from their bodies that the limbs “cannot be used for balance or comfort” but not so far as to “force the limbs beyond natural extension or create tension on any joint.” The CIA assured OLC that this was “not significantly painful, according to the experience and professional judgment of OMS and other personnel.”<sup>74</sup>

While they were being shackled in a standing position for purposes of sleep deprivation, detainees were kept in diapers rather than being unshackled or allowed to use a bucket or latrine. The CIA told OLC in 2005 that releasing a detainee from shackles during sleep deprivation to urinate or defecate “would interfere with the effectiveness” of the sleep deprivation technique.<sup>75</sup> The May 2004 OMS guidelines list diapering “generally for periods not greater than 72 hours” as a standard measure, “prolonged diapering” as an enhanced measure, and states that only the medical limitation on diapering is “[e]vidence of loss of skin integrity due to contact with human waste materials.”<sup>76</sup> In 2005, however, the CIA assured OLC that diapers were regularly checked and changed if soiled, and detainees had not developed skin lesions.<sup>77</sup>

According to the Bradbury memos, the longest consecutive period a detainee was deprived of sleep was 180 hours.<sup>78</sup>

The OMS guidelines describe waterboarding as “by far the most traumatic of the enhanced interrogation techniques,” and the only one requiring the presence of a physician as opposed to a physician’s assistant. It discusses serious risks based on the CIA’s previous experience administering the waterboard:

[F]or reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness. An unresponsive subject should be righted immediately, and the interrogator should deliver a sub-xiphoid thrust to expel the water. If this fails to restore normal breathing, aggressive medical intervention is required. Any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard.<sup>79</sup>

Before this degree of harm is reached, however, OMS stated that “a series of several relatively rapid waterboard applications is medically acceptable. ... Several such sessions per 24 hours have been employed without apparent medical complication.” OMS recommended a careful medical assessment before more than 15 waterboard applications within a 24 hour period, and warned of “cumulative” effects after three to five consecutive days of intense waterboarding.<sup>80</sup>

The 2005 OLC memos contain more details about potential medical complications of waterboarding, and precautions taken to avoid them. These included: (1) feeding detainees

liquid diets beforehand to reduce the risk of vomiting, and (2) using saline solution instead of water to reduce the risk of pneumonia. The memo also states that equipment for emergency resuscitation and medical supplies for performing a tracheotomy are available for detainees subjected to waterboarding.<sup>81</sup>

Throughout the 2005 memos, Bradbury placed great reliance on OMS's assurances about the safety of the techniques and their role in monitoring interrogation and modifying techniques as needed. A May 10 memorandum on the legality of individual techniques under the Torture Statute cited a CIA assurance that medical and psychological personnel are continuously present and that "[d]aily physical and psychological evaluations are continued" during the entire period of use for "enhanced" techniques.<sup>82</sup>

OMS's participation was especially crucial to Bradbury's finding that waterboarding and sleep deprivation enforced by shackling did not violate the Torture Statute. Footnote 31 stated that OMS had assured OLC that "although the ability to predict is imperfect — they would object to the initial or continued use of any technique if their psychological assessment of the detainee suggested that the use of the technique might result in post traumatic stress disorder (PTSD), chronic depression, or other conditions that could constitute prolonged mental harm."<sup>83</sup> The memorandum concluded with a paragraph again emphasizing the crucial role of medical and psychological personnel, and OLC's assumption that in addition to monitoring interrogations and stopping or adjusting techniques when needed, "medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees."<sup>84</sup>

A second memo, on whether combined techniques would rise to the level of torture, states of medical professionals' evaluations of detainees and monitoring of interrogations that "these safeguards, which were critically important to our conclusions about individual techniques, are even more significant when techniques are combined." The same memo later states that OMS's role is "essential to our advice" that the CIA program does not violate the Torture Statute.<sup>85</sup> A third memo, regarding whether the CIA program constitutes cruel, inhuman or degrading treatment, places similar reliance on OMS.<sup>86</sup>

It is unclear whether the limits discussed in the OMS guidelines and the 2005 OLC memos were consistently applied in practice.<sup>87</sup> Steven Bradbury, the author of the memoranda, later told DOJ investigators that he had deferred to the CIA's representations regarding the precise implementation and effectiveness of the "enhanced" techniques, because "[i]t's not my role, really, to do a factual investigation."<sup>88</sup> The CIA IG's Office has conducted several reviews on the program since its initial 2004 report, but they are all fully classified.

## High-Value Detainee Accounts and Red Cross Findings on the CIA Interrogation Program

In 2006, 14 high-value detainees (HVDs) were transferred from CIA prisons to military custody at Guantánamo Bay, where they met with representatives of the International Committee of the Red Cross (ICRC) for the first time. The ICRC's account of their interviews has been published. The detainees' accounts of their treatment are highly consistent with one another, although they had limited if any ability to coordinate their statements. According to the ICRC, "the consistency of the detailed allegations provided separately by each of the 14 adds particular



weight” to the claims. The detainees’ accounts of interrogation techniques and the role of clinicians are broadly, though not entirely, consistent with the officially released documents on the CIA program. But the detainees’ characterizations of the level of pain and suffering resulting from their treatment are dramatically different from that of OMS.

Several of the detainees described “doctors” monitoring their condition, and in some cases instructing interrogators “to continue, to adjust, or to stop particular methods.”<sup>89</sup> The medical personnel did not identify themselves, and they may well have been physicians’ assistants or para-professionals as opposed to licensed physicians.

Khalid Sheikh Mohammed described during waterboarding sessions “a person he assumed to be a doctor” regularly checking a device attached to one of his fingers, which the ICRC concluded was likely a pulse oxymeter. Mohammed alleged “that on several occasions the suffocation method was stopped on the intervention of a health person who was present in the room.”<sup>90</sup> It is not clear whether this intervention was by a physician or by another medical person, such as a physician’s assistant.

According to the ICRC, waterboarding “caused considerable pain” for all three detainees who experienced it, and resulted in vomiting and incontinence in Abu Zubaydah’s case. Mohammed alleged that he suffered injuries to his wrists and ankles as a result of struggling against his restraints during waterboarding.<sup>91</sup>

Regarding shackling in a standing position, the ICRC reported that the technique was used “for periods ranging from two or three days continuously, and for up to two or three months intermittently,” always while naked. As a result, many detainees had suffered leg or ankle swelling. While the detainees were frequently checked by U.S. personnel, three alleged that they had fallen asleep in the position and were temporarily suspended from their shoulders, causing painful injuries. Walid bin Attash, who had an artificial leg, alleged that interrogators sometimes removed it to increase the stress and fatigue of being shackled to the ceiling. As a result, his good leg sometimes collapsed and his handcuffs cut into his wrists. Four detainees, including bin Attash, alleged that they had to remain standing in their own excrement because their diapers were not replaced. Four detainees also alleged that they were doused with cold water while shackled in a standing position, and “[s]everal thought this was in order to clean away the feces which had run down their legs when they defecated while held in the prolonged stress standing position.”<sup>92</sup>

Bin Attash reported that during a later period of forced standing, his lower leg was measured daily with a tape measure to check for swelling by someone he assumed was a doctor. Eventually, the doctor allowed him to sit, though he remained shackled in a way that was “very painful on my back.” Detainee Riduan Isamuddin (aka Hambali) also alleged that a doctor had eventually put an end to a period of forced standing, telling him, “I look after your body only because we need you for information.” Laid Saidi, a detainee held in a CIA-run prison in Afghanistan, told *The New York Times* that after his legs had become painfully swollen after an extended period of being shackled in a standing position, a doctor had treated him with an injection.<sup>93</sup>

Nine detainees alleged that they were beaten by interrogators, including being punched and kicked as well as being slapped and having their heads slammed into walls. One detainee alleged being beaten “to the extent that I was bleeding.” Abu Zubaydah alleged that he was slammed into a solid wall before being slammed against a wall that had been covered with plywood sheeting to absorb some of the impact.<sup>94</sup>

The ICRC wrote that the ethical obligations of doctors and other health professionals forbade

ruling on the permissibility, or not, of any form of physical or psychological ill-treatment. The physician, and any other health professionals, are expressly prohibited from using their scientific knowledge and skills to facilitate such practices in any way. ... [T]he participation of health personnel in such a process is contrary to international standards of medical ethics.<sup>95</sup>

The ICRC reported after an initial period that ranged from weeks to months, the detainees' treatment became less harsh and conditions began to improve.<sup>96</sup> There were limits to the improvements, though. Even when not undergoing sleep deprivation, detainees alleged that they were continuously kept handcuffed and/or shackled in their cell, for periods of up to 19 months. One detainee stated that his ankle shackles had to be cut off twice because they had rusted shut. Eleven of the detainees also alleged that they were kept naked for extended periods, ranging from weeks to months, often in cells that were excessively cold.<sup>97</sup>

Several detainees alleged during their CSRTs<sup>98</sup> that they suffered continued ill health, mental or physical, as a result of their treatment by the CIA, which they all termed "torture." Abu Zubaydah's allegations are noted above. Abd al-Rahim al-Nashiri stated, "Before I was arrested I used to be able to run about 10 kilometers. Now I cannot walk for more than 10 minutes. My nerves are swollen in my body."<sup>99</sup> Majid Khan stated that at Guantánamo, he has twice "chewed my artery" and been forced to wear an anti-suicide smock as a result.<sup>100</sup>

Again, the medical records that could verify these claims, or provide other evidence of the 14 HVDs' current medical conditions, are classified.<sup>101</sup> With the exception of the ICRC report, which was leaked to the press without authorization, and excerpts from the CSRTs, the HVDs' descriptions of their own treatment are also classified. Except for the CIA OIG report, almost all of the CIA documents that would corroborate or refute these claims are likewise classified.

As a result of the secrecy surrounding the program, the OMS personnel involved in medical and psychological evaluation of detainees and monitoring of interrogations have never been publicly identified or interviewed. It is unclear whether they are medical doctors or physicians' assistants, and whether they were government employees or contractors.<sup>102</sup>

What can be said is that the detainees' accounts in the ICRC report are far more consistent with medical literature on the effects of ill treatment on prisoners than the OMS guidelines are. According to two experts on the subject, Leonard Rubenstein of Physicians for Human Rights and retired Brigadier General Stephen Xenakis, M.D.

The OMS endorsement that these methods do not cause severe mental or physical pain or suffering is contrary to clinical experience and research. The OMS failed to take account of pertinent medical and nonmedical literature about the severe adverse effects of enhanced methods, including the cumulative effects on prisoners subjected to practices such as sensory deprivation, sleep deprivation, waterboarding, and isolation<sup>103</sup>

The CIA's representations about the medical effects of its program also disregarded an older body of literature about the effects of communist interrogation techniques on American

POWs. For example, a 1957 article by Albert Biderman about methods used to extracting false confessions from U.S. airmen during the Korean War describes “one form of torture experienced by a considerable number of Air Force prisoners of war” as follows:

The prisoners were required to stand, or sit at attention, for exceedingly long periods of time — in one extreme case, day and night for a week at a time with only brief respites. In a few cases, the standing was aggravated by extreme cold.<sup>104</sup>

Biderman wrote that POWs “who underwent long periods of standing and sitting ... report no other experience could be more excruciating.”<sup>105</sup>

*Communist Control Techniques*, a 1956 study on the effects of KGB and communist Chinese detention and interrogation commissioned by the CIA and authored by psychologists Harold Wolff and Lawrence Hinkle, reached similar conclusions about a regime of total isolation, cold temperatures, sleep deprivation and food deprivation:

The effects of isolation, anxiety, fatigue, lack of sleep, and chronic hunger produce disturbance of mood, attitudes, and behavior in nearly all prisoners. The living organism cannot entirely withstand such assaults. The Communists do not look upon these assaults as “torture.” Undoubtedly, they use the methods which they do in order to conform, in a typical legalistic manner to overt Communist principles which demand that “no force or torture be used in extracting information from prisoners.” But these methods do, of course, constitute torture and physical coercion. All of them lead to serious disturbances of many bodily processes.<sup>106</sup>

Wolff and Hinkle described the method of

requiring the prisoner to stand throughout the interrogation session or to maintain some other physical position which becomes painful. This, like other features of the KGB procedure, is a form of physical torture, in spite of the fact that the prisoners and KGB officers alike do not ordinarily perceive it as such. Any fixed position which is maintained over a long time ultimately produces excruciating pain.<sup>107</sup>

Wolff and Hinkle also discussed the risk of swelling and edema, which contrary to OMS guidance they describe as “intensely painful,” and state:

Men have been known to remain standing for periods as long as several days. Ultimately they develop a delirious state, characterized by disorientation, fear, delusions, and visual hallucinations. This psychosis is produced by a combination of circulatory impairment, lack of sleep, and uremia.<sup>108</sup>

As discussed further in Chapter 8, the ICRC report is also consistent with clinical evaluations and other former detainees’ reports on the harmful effects of “enhanced” interrogation in CIA or military custody.

## The Guantánamo BSCTs

Medical and mental health professionals also had a key role in the use of brutal interrogation techniques by the Department of Defense (DOD), particularly at Guantánamo Bay. At Guantánamo, Behavioral Science Consultant Teams (BSCTs), composed of psychologists, psychiatrists and mental health technicians (who were apparently not psychiatrists or psychologists), had a central role. The BSCTs signed memos requesting authorization to use SERE techniques against Guantánamo detainees, monitored interrogations, and advised interrogators about techniques. They and other members of the interrogation team had access to detainees' medical records, and detainees have repeatedly alleged that their medical care depended on cooperation with interrogators.

The BSCTs, unlike the SERE psychologists affiliated with the CIA program, did not seek to become involved with interrogation. In June 2002, psychiatrist Major Paul Burney, psychologist Major John Leso, and a psychiatric technician, whose name and rank have never been made public, deployed to Guantánamo Bay. Leso and Burney thought their mission would be to treat U.S. servicemembers. Instead, Burney later told the Senate Armed Services Committee, they

were hijacked and immediately in processed into Joint Task Force 170, the military intelligence command on the island. It turns out we were assigned to the interrogation element. ... Nobody really knew what we were supposed to do for the unit.<sup>109</sup>

Burney stated that he and Leso had never received any training on interrogation, nor was there a standard operating procedure in place for the BSCT clinicians when they arrived.<sup>110</sup> There had been another, very different BSCT working at Guantánamo before Leso's and Burney's. It was affiliated with the DOD's Criminal Investigation Task Force, a group of military criminal investigators charged with determining which detainees would be prosecuted. A member of that team, Navy Criminal Investigative Service (NCIS) psychologist Michael Gelles, explained that he and his fellow BSCT members reviewed files, watched interrogations and provided advice about specific detainees, but "[p]sychologists don't go in. ... [T]here was no reason for psychologists to be in the room."<sup>111</sup> Gelles said that he had over a decade of experience doing similar consultation for law enforcement interrogations, including the investigation into the USS Cole bombing; "[t]hat's what I did for a living." His colleagues were similarly experienced, and were focused on obtaining information that would be legally admissible in court.<sup>112</sup>

Gelles said Major General Michael Dunlavey, the commander of Guantánamo's interrogation group, wanted his team based at Guantánamo full time. When Gelles told Dunlavey this was not possible, Dunlavey's response, Gelles said, was " 'Fine. Then I'll get my own.' And then he went out and asked the army to give him some psychiatrists and psychologists ... and he built a behavioral science team."<sup>113</sup> Gelles said that the new BSCT team lacked appropriate training for the assignment they were given.<sup>114</sup>

Dunlavey has disputed this account. In 2007, he told the Senate Armed Services Committee that he was in the hospital for much of the month of June, and did not know who created the BSCT.<sup>115</sup>

On August 6, 2002, the U.S. Southern Command issued a new confidentiality policy for health care providers at Guantánamo, which stated that communications between detainees and doctors, psychiatrists, psychologists and therapists “are not confidential and are not subject to the assertion of privileges by or on behalf of detainees.” Rather, medical and mental health personnel were instructed to “convey any information concerning ... a military or national security mission” obtained during treatment of detainees to “non-medical military or other United States personnel with an apparent need to know the information.” This exchange of information could occur either at the initiative of medical personnel or interrogators.<sup>116</sup> Gelles confirmed that interrogation personnel had access to medical records both in Afghanistan and Guantánamo in 2002, though the NCIS did not use them for fear that it would render detainees’ statements inadmissible in court.<sup>117</sup> Standard operating procedures for the BSCTs from the fall of 2002 indicate that the BSCTs were assigned to act as the liaison between interrogators and medical staff, and “[d]escribe the implications of medical diagnoses and treatment for the interrogation process.”<sup>118</sup>

In September 2002, the three BSC T members and four interrogators received training in SERE techniques at Fort Bragg, N.C. According to the trainees, the trainers discussed both physical and psychological pressures used in SERE school that could be used on detainees, including “disrupt[ion of] prisoner sleep cycles,” “invasion of personal space by a female,” solitary confinement, walling, hitting in a way that avoided injury, the use of military dogs to enhance exploitation, hooding, and exploitation of fears.<sup>119</sup> According to Burney, the instructors stressed

time and time again that psychological investigations have proven that harsh interrogations do not work. At best it will get you information that a prisoner thinks you want to hear to make the interrogation stop, but that information is strongly likely to be false.<sup>120</sup>

The instructors and the chief psychologist for the Army’s Special Operations Command, Lieutenant Colonel Louie “Morgan” Banks, told investigators that they did not remember discussion of physical pressures, and Banks later wrote to Burney and Leso with a “strong recommendation ... that you do not use physical pressures.”<sup>121</sup> It is less clear what Banks’ and Joint Personnel Recovery Agency’s (JPRA) position was on psychological pressures such as isolation and sleep deprivation.

On October 2, 2002, the BSC T wrote a memo requesting authorization to use additional interrogation techniques. “Category II techniques” included stress positions; the use of isolation for up to 30 days (longer periods could be authorized by the chain of command); deprivation of food for 12 hours; handcuffing; hooding; and consecutive 20-hour interrogations once a week. “Category III” techniques included daily 20-hour interrogations; isolation without access to medical professionals or the ICRC; removal of clothing; exposure to cold or cold water; and “the use of scenarios designed to convince the detainee he might experience a painful or fatal outcome.”<sup>122</sup>

The October 2 BSC T memo also made recommendations about harsher conditions in the cell blocks, stating that “all aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible.” It proposed that detainees who were not cooperating with interrogators receive only four hours of sleep a day; be deprived of sheets, blankets, mattresses, washcloths; and that interrogators control access to their Korans.<sup>123</sup>

Even as it requested authorization to use these techniques, the October 2 memo recommended against their use. This was partially on grounds of efficacy and the danger of false confessions, but the BSCTs also warned:

The interrogation tools outlined above could affect the short term and/or long term physical and/or mental health of the detainee. Physical and/or emotional harm from the above techniques may emerge months or even years after their use. It is impossible to determine if a particular strategy will cause irreversible harm if employed.<sup>124</sup>

**“Al Qahtani was interrogated for approximately 20 hours a day for seven weeks ...”**

Burney told the Senate Armed Services Committee that he and his colleagues requested authorization to use the techniques despite this warning because there was “a lot of pressure to use more coercive techniques,” and any memo that did not request them “wasn’t going to go very far.”<sup>125</sup> The BSCTs’ warning about the dangers of the techniques was removed when their proposal for coercive techniques was transmitted up the chain of command.<sup>126</sup>

Also on October 2, Burney and Leso participated in a meeting with interrogation personnel, legal advisor Diane Beaver, and CIA attorney Jonathan Fredman. According to Beaver’s minutes, the BSCTs discussed Mohammed al Qahtani’s response to “certain types of deprivation and psychological stressors.”<sup>127</sup>

Al Qahtani, detainee number 63, was suspected of being the intended 20th hijacker in the September 11 attacks. In October 2002, he was interrogated with military dogs present, deprived of sleep, and placed in stress positions, all while in isolation.<sup>128</sup> When this failed to yield intelligence, Joint Task Force 170 (JTF-170) halted the interrogation and began developing a new “Special Interrogation Plan.” Al Qahtani remained in isolation, however, and according to an FBI agent by the end of November he was “evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end).”<sup>129</sup>

A publicly released interrogation log, dated from November 23, 2002, to January 11, 2003, shows that his treatment only became harsher.<sup>130</sup> Al Qahtani was interrogated for approximately 20 hours a day for seven weeks; subjected to strip searches, including some in the presence of female interrogators; forced to wear women’s underwear; led around on a leash; made to bark like a dog; and subjected to cold temperatures. Al Qahtani was also forcibly injected with large quantities of IV fluid and forced to urinate on himself, and given repeated enemas. (According to the log, this was due to al Qahtani’s refusal of fluid and constipation, but interrogators also used the prospect of being given IV fluid and enemas as a threat.) On December 7, 2002, al Qahtani’s heartbeat slowed to 35 beats per minute, and he had to be taken to the hospital for a CT scan of his brain and ultrasound of a swollen leg to check for blood clots.<sup>131</sup> On December 13, al Qahtani’s pulse again slowed to 38 beats per minute, but when it rose to 42 beats per minute a doctor determined that no medical intervention was necessary.<sup>132</sup> His interrogation log also showed rapid fluctuations in weight, possibly due to forcible hydration.<sup>133</sup> The log makes multiple references to swelling of the hands and feet, and to al Qahtani needing bandages due to chafing from hand and leg cuffs.<sup>134</sup> The log also describes al Qahtani’s psychological condition deteriorating. There are frequent references to al Qahtani crying,<sup>135</sup> and some entries suggest possible hallucinations.<sup>136</sup>

The log makes several references to the presence of a BSCT, and two to “Maj. L” — likely Major John Leso. It states that at one point when al Qahtani began crying, “[t]he BSCT observed that the detainee was only trying to run an approach on the control and gain sympathy,” and at another point the BSCT member suggests putting him in a swivel chair to ensure he does not fall asleep.<sup>137</sup>

According to a January 2005 sworn statement from a member of the BSCT team with the rank of major (likely Burney or Leso), “through all of the interrogation with AL QATANEE, at least one of the members of the BSCT was always present and witnessed his interrogation. Cumulatively this logged hundreds of hours of observations.”<sup>138</sup> The BSCT stated that the interrogation techniques used had been approved by commanders, and that both General Michael Dunlavey and General Geoffrey Miller believed that “coercive methods would be the best method of collecting information if given enough time. One of Gen. Miller’s favorite quotes was, ‘We’ve got more teeth than they have ass.’ ”<sup>139</sup>

Asked whether he felt that detainees were abused while he was at Guantánamo, the BSCT member replied,

That is a hard question to answer. I do believe it is possible for some detainees to have some kind of long-term or unintended difficulties because of the interrogation practices, but I did not see detainees being subjected to pointless cruelty.<sup>140</sup>

Gelles and two of his colleagues at NCIS, Mark Fallon and David Brant, disagreed. They showed Navy General Counsel Alberto Mora extracts of the al Qahtani interrogation log as well as memos approving harsh techniques. Mora’s reaction was, as he later described it, “dismay,”<sup>141</sup> as discussed in greater detail in Chapter 1.

Colonel Larry James, who succeeded Leso as a BSCT psychologist at Guantánamo, has written that Leso’s role in interrogations took a personal toll on him. According to James, when he arrived to relieve Leso in January 2003, he found that Leso was “traumatized” and “devastated” because:

He witnessed many harsh and inhumane interrogation tactics, such as sexual humiliation, stress positions, detainees being stripped naked, and the use of K-9 dogs to terrorize detainees. He had no command authority, meaning he felt as though he had no legal right to tell anyone what to do or not do.<sup>142</sup>

Nevertheless, James believed that Leso “was successful in cutting back on some of the abusive practices.”<sup>143</sup>

By his own account, James was able to do more by the time he left Guantánamo than May, teaching interrogators the effectiveness of lawful, rapport-building techniques and restricting their access to medical files. According to James, a Navy nurse explained to him that it was

perfectly legal for any interrogator, regardless of rank, educational background, or age, to have legal open access to any detainee’s medical record. What I discovered was that on any given day, FBI, CIA, Army, Navy, and contract interrogators would go to the hospital and demand to see detainees’ records immediately.<sup>144</sup>

If the doctors hesitated, James wrote, interrogation personnel would “help themselves” to the records anyway. James said that he declared “that the hospital and all doctors and nurses were completely off-limits to anyone from the intel community” except the BSCTs. The BSCTs maintained access to this information, he said, “to eliminate the possibility that any ill or fragile detainee would be harmed as a result of some abusive interrogation technique.”<sup>145</sup> James derided as “complete bullshit” ICRC and press reports that BSCTs were using medical records “in effect, to tell interrogators exactly where to poke the prisoner with a sharp stick.”<sup>146</sup> But the ICRC’s reports, well-documented cases such as the Jawad interrogation discussed below, and many other prisoners accounts suggest otherwise.

**“If the doctors hesitated, James wrote, interrogation personnel would ‘help themselves’ to the records anyway.”**

It is plausible that conditions at Guantánamo improved on James’s watch. Gelles noted improvements as well, though he attributed them primarily to Mora’s intervention. Gelles said that in the short run the DOD decided not to go forward with the most coercive techniques being considered and “toned down” the next harshest category. In the long run, they realized that coercion “didn’t work.”<sup>147</sup>

There are credible reports, though, that neither abusive techniques nor BSCTs’ role in coercive interrogations ended. In July 2003, Major General Miller submitted a request for approval for a “Special Interrogation Plan” for Mohamedou Ould Slahi, which was approved by Secretary Rumsfeld on August 13.<sup>148</sup> Interrogators apparently began implementing the plan before securing formal approval. They subjected Slahi to isolation, sleep deprivation, uncomfortable temperatures and darkness, threatened him with disappearance “down a very dark hole,” and threatened to bring his mother to Guantánamo.<sup>149</sup>

The Senate Armed Services Committee uncovered documents suggesting that interrogators eventually became concerned about Slahi’s mental state. On October 17, an interrogator emailed Lieutenant Colonel Diane Zierhoffer, a BSCT psychologist, that Slahi “told me he is ‘hearing voices’ now. ... He is worried as he knows this is not normal. ... [I]s this something that happens to people who have little external stimulus such as daylight, human interaction etc???? Seems a little creepy.”<sup>150</sup> Zierhoffer responded that this was plausible: “[S]ensory deprivation can cause hallucinations, usually visual rather than auditory, but you never know...”<sup>151</sup> It is unclear what action she took, if any, in response to the report that Slahi was hallucinating. A Guantánamo prosecutor, Lieutenant Colonel Stuart Couch, eventually refused to prosecute Slahi because he concluded that his statements to interrogators were tainted by torture and coercion.<sup>152</sup>

Zierhoffer was later accused of encouraging interrogators to exploit a juvenile detainee, Mohammed Jawad, through a program of isolation and sleep deprivation. According to Jawad’s military commission–appointed defense counsel David Frakt, a document obtained during the proceeding

revealed the involvement of a BSCT psychologist in the interrogations of Jawad and strongly suggested that she had been directly responsible for some of the abuses that he experienced and that led to his suicide attempt in December 2003. I attempted to call this Army psychologist as a witness, but the prosecution informed me that the officer had invoked her right against self-incrimination and refused to testify.<sup>153</sup>



News reports identify Zierhoffer as the psychologist in question.<sup>154</sup> Jawad was eventually acquitted and released, in part due to the military commission's finding that his incriminating statements were the product of coercion.

Several Guantánamo detainees have alleged that doctors or psychologists administered psychotropic drugs for purposes of interrogation. A DOD inspector general's report on these allegations, released in response to a Freedom of Information Act request filed by Task Force staff, and others found that detainees had not been administered drugs for interrogation purposes. However, the same report found that detainees who were diagnosed with schizophrenia and psychosis received involuntary injections of Haldol and other powerful antipsychotics, and were interrogated while experiencing the effects of this treatment.<sup>155</sup> This raises questions about the reliability of those detainees' statements under interrogation.

The ICRC reported after a January 2003 visit to Guantánamo that the "cumulative effects of isolation, repeated interrogation," overly harsh detention conditions and harassment were a "major cause of deterioration of mental health" of detainees. By June 2004, the regime had become "more refined and repressive," and had been applied for so long, with the clear purpose of gaining intelligence, that the ICRC characterized it as "tantamount to torture." Detainees showed four times the rate of psychological distress as U.S. personnel. They did not trust doctors or mental health clinicians because they correctly believed that they would not keep their communications confidential, and sometimes there were health personnel present in interrogations. The ICRC reported that files were "literally open to interrogators," in "flagrant violation of medical ethics."<sup>156</sup>

According to the ICRC, most detainees were locked up 24 hours a day, and a quarter were in solitary confinement. A new unit called Camp 5, consisting of 112 isolation cells with solid walls of concrete, steel, and aluminum, was constructed in early 2004, and detainees were often kept there for extended periods. Other interrogation techniques included shackling in uncomfortable positions; altered or shortened sleep schedules; exposure to loud noise, music, and cold temperature; and some beatings.<sup>157</sup>

In 2005, Dr. Steven Sharfstein, president of the American Psychiatric Association visited Guantánamo after reading disturbing reports on mental health clinicians' role in interrogations. He met with some of the BSCTs and discussed their work. Sharfstein described them as "two young women, very nice. ... I don't think they were malevolent in any way," and "the issue wasn't so much abuse when I was down there." Nonetheless, what he heard about their role made him uncomfortable, because they were clearly "part of the interrogation team" rather than clinicians. As he understood it, by that time the BSCTs were "not in the room, but in real time communication with the interrogators" whom they advised.<sup>158</sup>

## **BSCTs in Iraq and Afghanistan**

Much less is known about health and mental health professionals' role in interrogation in Iraq and Afghanistan, but it is clear that in some cases BSCTs were used, and that interrogators had broad access to medical records.

Colonel James recounted conversations with the chief Army SERE psychologist, Colonel

Morgan Banks, shortly after the Abu Ghraib scandal became public, in which Banks told him that part of the problem was “[w]e don’t have a biscuit psychologist at that place,”<sup>159</sup> and assigned James to deploy there. But while there may have been no BSCT at Abu Ghraib when the scandal broke, there had been a psychiatrist assisting with interrogations for part of the period when the abuse photographs were taken.

From August 31 to September 9, 2003, Guantánamo commander Major General Geoffrey Miller led a team of interrogation personnel to assess intelligence gathering in Iraq. One of Miller’s findings was that interrogators in Iraq should have access to a BSCT.<sup>160</sup> On November 15, 2003, Major Scott Uithol, a psychiatrist, reported to Abu Ghraib to fill that role.<sup>161</sup> He served with the 205th Military Intelligence Brigade for the next month. When he arrived, “I didn’t know what a Biscuit was,” he later told Dr. M. Gregg Bloche.<sup>162</sup>

Another source has described a psychiatrist having a role in interrogation at Abu Ghraib. Colonel Thomas Pappas, the commander of the 205th Military Intelligence Brigade, said that a doctor and psychiatrist would evaluate detainees’ written interrogation plans and “have the final say as to what is implemented.” According to Pappas, the psychiatrist would also sometimes go in with interrogators to evaluate detainees “and provide feedback as to whether they were being medically and physically taken care of.”<sup>163</sup>

JPra instructor Terrence Russell, who advised Special Forces troops at Camp Nama about SERE techniques in September 2003, has described a discussion about the use of “physical pressures” in interrogation with the “TF-20 SERE psychologist.”<sup>164</sup> A criminal investigative file from May 2004 contains an allegation from an interrogator who reported abuses by Special Forces task forces at Camp Nama, near the Baghdad airport. The interrogator said he “felt the actions were inhumane even though every harsh interrogation was approved by ... the medical personnel prior to its execution.”<sup>165</sup>

A 2005 DOD investigation by the inspector general of the Navy, Admiral Albert T. Church, reported that,

[a]nalogous to the BSCT in Guantánamo Bay, the Army has a number of psychologists in operational positions (in both Afghanistan and Iraq), mostly within Special Operations, where they provide direct support to military operations. They do not function as mental health providers, and one of their core missions is to support interrogations.<sup>166</sup>

Church found, based on interviews with clinicians in both Iraq and Afghanistan, that interrogators sometimes had easy access to medical information. In several cases, medical information and reports from interrogations were kept in a single file, which Church noted “makes it impossible to control or even monitor access to detainee medical information.”<sup>167</sup>

## Medical Personnel and Abuse Reporting

There have been allegations about medical personnel failing to report and document abuses in Iraq and Afghanistan.

A 2005 report by the U.S. Army surgeon general found that during the period when the most

intense abuses were committed against detainees at Guantánamo, Iraq and Afghanistan, from 2001 to 2004, there were no rules that specified health professionals' obligations to report abuse or any mechanisms to do so. Army policies requiring reporting were not issued until late 2004, and specific procedural directives for units were not available until late 2004 and early 2005.<sup>168</sup> Clinicians were not regularly informed or trained on the duty to report abuse until then, and only 37 percent of previously deployed medical personnel understood that they had a duty to report suspected cases of abuse.<sup>169</sup> In 2005, after receiving training, the number of medical personnel who said a detainee had alleged abuse to them quintupled, from 5 percent to 25 percent — despite widespread testimony that the worst abuses occurred before the Abu Ghraib scandal and the new guidance on reporting.<sup>170</sup>

The surgeon general's report was based on an investigation conducted between November 2004 and April 2005 involving interviews of military medical personnel, including physicians, nurses, and non-health professional personnel such as medics and technicians in various training settings and theaters of operation.

Of 60 medical personnel assigned to detention operations in Afghanistan who were interviewed for the surgeon general's report, only one claimed to have observed abuse or had an allegation of abuse reported to him or her.<sup>171</sup> At Guantánamo Bay, among the seven interviewed, no previously deployed and only two currently deployed medical personnel surveyed claimed to be aware of any abuse.<sup>172</sup> FBI agents assigned to Guantánamo in 2002, by contrast, repeatedly reported witnessing abuse and raised their concerns to the highest levels of the agency.<sup>173</sup> In some cases there seems to have been overt pressure on clinicians not to report suspected abuse. The surgeon general's report, for example, notes that one interviewee stated that

on two separate occasions, he was pressured by OGA personnel into filling out death certificates on Iraqi Detainees. Stated he was not given the opportunity to examine the dead. Causes of death were later found to be inaccurate.<sup>174</sup>

Despite these findings, the surgeon general's report concluded that medical personnel were “exceptionally vigilant in reporting actual or suspected detainee abuse.”<sup>175</sup>

Major General George Fay's August 2004 report into abuses at Abu Ghraib found evidence of two medics (not physicians) witnessing and failing to report abuse at Abu Ghraib in November and December 2003. Fay also found that, more generally, “medical personnel may have been aware of detainee abuse at Abu Ghraib and failed to report it,” but could not draw conclusions about the full scope of this problem because they had “requested, but not obtained” detainees' medical records. The Fay report noted that detainee medical records likely were not being maintained in accordance with Army regulations.<sup>176</sup> A number of criminal investigative files in other cases reviewed by Dr. Steven Miles contain evidence of medical signs of abuse going unreported or uninvestigated.<sup>177</sup>

Problematic record-keeping, and failure to report suspicions of abuse, extended to homicides. In several cases, prisoners were initially reported to have died of natural causes when their deaths actually resulted from abuse. The death of Iraqi Major General Abed Hamed Mowhoush is one example. An initial Pentagon press release about Mowhoush's death stated that “Mowhoush said he didn't feel well and subsequently lost consciousness. The soldier questioning him found no pulse, then conducted CPR and called for medical authorities. According to the on-site

surgeon, it appeared Mowhoush died of natural causes.”<sup>178</sup> A later autopsy, however, revealed that Mowhoush had died of asphyxia and chest compression after an interrogator stuffed him into a sleeping bag and sat on his chest. He had suffered “massive” bruising on his torso, arms, and legs (though not his head or face), and five broken ribs.<sup>179</sup>

Army pathologists found the death of Nagem Sadoon Hatab near Nasariya on June 5, 2003, to be a homicide caused by strangulation. However, the body was not properly refrigerated before or after the autopsy, and body parts were lost due to a “miscommunication” between the doctor who examined the body and her assistant. As a result, a military judge excluded the medical evidence of the cause of Hatab’s death, and efforts at prosecution collapsed.<sup>180</sup> The investigation of another suspicious case, Abdul Malik Kenami’s death in Mosul in December 9, 2003, was closed without any autopsy being performed at all.<sup>181</sup>

Vincent Iacopino of Physicians for Human Rights and retired Brigadier General Stephen Xenakis, M.D., reviewed the medical records of nine Guantánamo detainees who had alleged abuse. Xenakis and Iacopino found that all of the allegations were credible. In three cases, the detainees had physical injuries that were “consistent or highly consistent” with allegations of abuse, including bruises, lacerations, bone fractures, nerve damage, and sciatica, with “no mention of any cause for these injuries.” Eight of the nine detainees suffered psychological symptoms, including nightmares in five cases; suicidal ideation in four cases and suicide attempts in two; depression in two cases; dissociative states in two cases; and hallucinations in three cases. These symptoms were correlated in time with detainees’ allegations of abuse. However, “[t]he medical doctors and mental health personnel who treated the detainees at GTMO failed to inquire and/or document causes of the physical injuries and psychological symptoms they observed.”<sup>182</sup>

## Hunger Strikes

### Hunger Strikes and Force-feeding at Guantánamo

One of the most controversial aspects of medical personnel’s treatment of detainees has been their role in force-feeding prisoners on hunger strikes. Detainees at Guantánamo have used hunger strikes to protest their confinement since shortly after the camp opened, in February 2002. The first reported incidents of detainees being force-fed occurred in May 2002, after 60 or 70 days of hunger strikes.

The largest wave of hunger strikes began in the summer of 2005. The strike began on August 8, and by September 131 detainees were refusing food. An increasing number of them were fed involuntarily. In October 2005, prison officials told a delegation of visiting medical organizations that 25 prisoners were currently on a hunger strike, 22 of whom were being fed by nasogastric tube, most while in their cells and almost all of them acquiescing to the procedure.<sup>183</sup>

Detainees, through their lawyers, filed motions asking federal courts to stop the involuntary feeding, which they claimed was carried out in a punitive, brutal fashion. They alleged that doctors used excessively large feeding tubes that made inserting and extraction extremely painful, and causing bleeding, vomiting and loss of consciousness in some cases.<sup>184</sup>

Sami al-Hajj, a journalist who heads the Liberties and Human Rights Affairs section of Al Jazeera, was held for nearly seven years in Afghanistan and Guantánamo. At Guantánamo,

he undertook a 480-day hunger strike, during which he was force-fed by the military.<sup>185</sup> In an interview with Task Force staff, al-Hajj described his force-feedings as punitive exercises:

They're supposed to feed you [with] two cans, small cans ... but they feed us 24 cans and 24 bottle of water, continuous. And we [were] throwing up, it continues and we throwing up and it continues. This is one feeding; [it] would take 8 hours like that, you are in chair. Until your cell become full of [vomit]. And after that, when they come and [remove the feeding tube from the esophagus], they [would grab the tube and just walk away with it]. Then there was blood coming. And [the guard] takes it from you and he goes to another [detainee] directly and [inserts it] ... without cleaning.<sup>186</sup>

An October 19, 2005, declaration from Captain John Edmondson, then commander of Guantánamo's hospital, denied that force-feeding was intended to punish detainees. "Medical personnel do not insert or administer nasogastric tubes in a manner intentionally designed to inflict pain or harm on the detainee," Edmondson said, but

whenever nasogastric tubes are used, there may be occasional minor bleeding and nausea as a result. ... Occasional sores may occur in the throat, but those sores have not been severe and have been treated. The sores have not kept the patients from talking or otherwise functioning within the camp or the detention hospital. In all of the procedures done in order to feed patients enterally during the hunger strike, only one patient has passed out, and that was due to hyperventilation.<sup>187</sup>

Edmondson emphasized that once the feeding tube was inserted, "the detainee himself controls the flow of nutrition so that any discomfort is minimized," and that detainees were generally able to move around their cells during a feeding. He noted that feeding schedules had also been changed to accommodate detainees' fast during Ramadan.<sup>188</sup>

On November 10, 2005, Captain Stephen Hooker succeeded Edmondson as the officer in charge of the medical staff at Guantánamo, and determined that detainees were being given too much control over their feeding. In a sworn declaration, Hooker alleged that

[t]here were several small violent group demonstrations in the Detention Hospital by the hunger strikers. ... The doctors, nurses, and medics, were commonly verbally and physically assaulted, including being spit upon and having urine thrown on them. The prior Officer-in-Charge of the Detention Hospital was spit upon and had urine thrown on him. Two nurses were punched in the face.<sup>189</sup>

Hooker stated that despite being fed involuntarily, detainees were increasingly malnourished, because they were "sabotaging the feeding efforts" by negotiating for less formula or deliberately vomiting after a feeding.<sup>190</sup> By December 15, 19 of 29 hunger strikers being force-fed "had become significantly malnourished (less than 75% of their Ideal Body Weight) and were at great risk for serious complications."<sup>191</sup>

In December of 2005, a forensic psychiatrist and three consultants from the Federal Bureau of Prisons (BOP) visited Guantánamo and made recommendations for changing the hunger strike

protocol. According to Hooker, they all recommended the use of a “restraint chair” for enteral feedings.<sup>192</sup> The restraint chair was manufactured by a small company in Iowa, ERC Inc., which shipped five chairs to Guantánamo in early December and 20 more on January 10, 2006. The company’s website advertises the chairs as a useful tool for safe confinement or transportation of a “combative or self-destructive person. . . . It’s like a padded cell on wheels.”<sup>193</sup> The chair completely immobilizes a person strapped into it, using a lap belt and straps that immobilize the head as well as wrist and ankle restraints.

**“Saudis Ahmed Zuhair and Abdul Rahman Shalabi, were force-fed daily for close to four years.”**

Dr. Emily Keram, who did a medical evaluation of hunger striker Ahmed Zuhair in 2009, recounted his allegations:

When the restraint chairs were first introduced Mr. Zuhair was kept in the restraint chair for two hours after feeding ended. His requests to use the bathroom were refused. He soiled himself with urine and feces. Guards started putting diapers on Mr. Zuhair, refusing to allow him to do this himself. Some detainees ended their hunger strike. Mr. Zuhair was once kept in a restraint chair for six hours, exceeding the two hour maximum time limit recommended for the detainee’s safety. . . . Mr. Zuhair expressed his conviction that the restraint chairs were introduced as a means of punishing hunger striking detainees and forcing them to end their hunger strikes.<sup>194</sup>

By the end of December 2005, only four or five detainees (including Zuhair) were still on hunger strike.

The military has maintained, in a series of sworn declarations by Guantánamo commanders and medical officers, that the use of the restraint chair for force-feeding is not a form of punishment of, or retaliation against, detainees. Rather, its use was modeled after procedures used in U.S. federal prisons that visiting officials from the BOP had recommended that Guantánamo adopt. Force-feeding was only used “when medically necessary,” and detainees are kept in restraint chairs for “approximately 120 minutes or less,” twice a day.<sup>195</sup> In a declaration filed on May 13, 2006, Major General Jay Hood acknowledged that detainees had soiled themselves in restraint chairs, but portrayed this as an attempt at manipulation:

Since we began using the restraint chair system, over 700 meals have been fed to 29 detainees. In all of those feedings, records establish that only four detainees have urinated or defecated for a total of 20 occasions. Once these few detainees found that the tactic of soiling the chair would not work to delay their feeding, the incidents ceased.<sup>196</sup>

Although most detainees ended their hunger strikes when the restraint chairs were introduced in 2005, a few did not. At times, the number of hunger strikers being fed in restraint chairs rose to several dozen. Two detainees, Saudis Ahmed Zuhair and Abdul Rahman Shalabi, were force-fed daily for close to four years. After suffering serious medical complications from their prolonged fast and the force-feeding, both were evaluated by outside doctors in 2009. Zuhair and Shalabi both stated that while not as brutal as when it was first introduced, the feeding chair made them feel “like an animal,” and caused physical pain and hemorrhoids due to pressure on the tailbone.<sup>197</sup> Both expressed a very strong preference for being tube-fed in a hospital bed,

even in restraints. The evaluating psychiatrist, Dr. Emily Keram, found that Zuhair was suffering from some symptoms of anxiety, depression, and post-traumatic stress disorder (PTSD) that were worsened by the restraint chair, though these did not rise to the level of full blown PTSD or major depression.<sup>198</sup> She found that Shalabi suffered from full-blown PTSD, triggered in part by the restraint chair.<sup>199</sup> She recommended that both be fed in hospital beds.<sup>200</sup>

Keram observed Zuhair's force-feeding in the restraint chair in January 2009. She stated that medical staff complied with the guidelines for using the restraint chair. She also interviewed medical staff and guards, who did not express a hostile or punitive attitude toward the hunger strikers; one told her: "It's their decision. It's like smoking." Keram noted, though, that "[r]estraint chairs were used for all detainees' enteral feedings, regardless of their disciplinary history, unless there was a medical contraindication. ... There was no behavioral reward system by which a detainee could work his way up to another venue." The guards and the deputy commander of the detention group at Guantánamo told her that they did not know why compliant detainees could not be fed in hospital beds.<sup>201</sup>

The rationale given in a 2007 declaration by Captain Ronald Sollock was that even when a detainee was compliant,

there is simply no way to tell if or when he will become uncompliant and violent again and threaten the safety and welfare of the Detention Hospital medical staff. Accordingly, the use of the restraint chair is required.<sup>202</sup>

Many medical ethicists view any form of force-feeding as unethical. The World Medical Association's 1975 Declaration of Tokyo, strongly endorsed by the American Medical Association (AMA), states that "[w]here a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially."<sup>203</sup> The same organization's Declaration of Malta, adopted in 1991 and revised in 2006, contains more extensive and detailed policies on force-feeding. The Declaration of Malta notes that physicians must ensure that prisoners are competent and their refusal of nourishment is voluntary, and does not result from peer pressure, but concludes that "forcible feeding is never ethically acceptable." Regarding end-of-life issues, the Declaration of Malta states: "Consideration needs to be given to any advance instructions made by the hunger striker. Advance refusals of treatment demand respect if they reflect the voluntary wish of the individual when competent. ... It is ethical to allow a determined hunger striker to die in dignity rather than submit that person to repeated interventions against his or her will."<sup>204</sup>

Despite this, the BOP has adopted a policy of involuntarily feeding prisoners in some circumstances, which is codified in the Code of Federal Regulations and has been upheld by U.S. courts. Federal prisons are known to use restraint chairs for inmates who are physically dangerous to themselves, other inmates, or guards, but at most federal prisons, the chairs are apparently not used for forced feeding.

Based on those facts, and the government's affirmation that the use of the restraint chair for enteral feeding was modeled after procedures in federal prisons, Judge Gladys Kessler of the U.S. District Court for the District of Columbia upheld the force-feeding procedure in 2009.<sup>205</sup> A 2009 DOD review of conditions of confinement at Guantánamo, ordered by the Obama

administration, similarly found that the use of restraint chairs for force-feeding was “lawful and humane” in part because the process “is similar to that used by the US Bureau of Prisons, and has been upheld in US federal courts.”<sup>206</sup>

But at least some federal prisons handle hunger strikes very differently, and far less coercively, than at Guantánamo. In 2007, federal prisoner Sami al-Arian went on a water-only hunger strike for 60 days. Near the end of the strike, his family reported that his weight dropped from 202 pounds to 149 pounds, he was unable to walk, and trembled constantly. He was transferred to a medical prison, but was not force-fed, though BOP spokesmen publicly said officials considered doing so.<sup>207</sup> In contrast, based on court documents and press reports about the Guantánamo hunger strikes, detainees have been force-fed in a matter of days or weeks after they start refusing meals — long before their lives were in serious danger.

The written federal guidelines for force-feeding make no mention of restraints, and include several safeguards that are not in place in Guantánamo. Prison guidelines require the warden to notify a sentencing judge of involuntary feeding, with an explanation of the background of and reasons for involuntary feeding, as well as videotaping of force-feeding. BOP requires that “treatment is to be given in accordance with accepted medical practice.”<sup>208</sup> Accepted medical practice requires an individualized assessment of the patient’s situation that appears to be absent at Guantánamo. It also requires individualized counseling of the detainee, but based on medical records Guantánamo that “counseling” is frequently limited to a boilerplate warning about the dangers of hunger strike.

The BOP’s written policy on the use of restraints also conflicts with the restraint-chair protocol at Guantánamo. In federal prisons, restraints can be used “to gain control of an inmate who appears to be dangerous because the inmate is assaulting another individual, destroying government property, attempting suicide, inflicting injury upon himself or herself, or displaying signs of imminent violence.”<sup>209</sup> The use of four-point restraints must be authorized by the prison warden if he finds that they are the “only means available to obtain and maintain control over an inmate,” and he cannot delegate this decision. In general, restraints are to be used “only when other effective means of control have failed or are impractical,” and are to be removed when an inmate exhibits self-control.<sup>210</sup> The regulations make no provision to routine or categorical use in cases, regardless of an individual inmate’s behavior, or the use of restraints in force-feeding. There is no generalized written policy on the use of the restraint chair, but according to the United States’ 2005 report to the Committee Against Torture, “[BOP’s] use of restraint chairs is intended only for short-term use, such as transporting an inmate on or off of an airplane.”<sup>211</sup>

At least one federal prison has used restraint chairs for force-feeding: ADX Florence, the highest security federal prison in the United States. Press reports frequently refer to the Florence “Supermax” as “the Alcatraz of the Rockies,” and describe it as the most secure prison in the world.<sup>212</sup> Inmates are sent there if they cannot be safely housed at other maximum security prisons. Many have been convicted of terrorist attacks, mass-murders, or murders of guards or other inmates at other prisons.

One former warden at Florence, Robert Hood, told CBS News that he had authorized over “350, maybe 400” involuntary feedings of inmates, and CBS found records of 900 involuntary feedings in the prison’s H-wing, which houses convicted terrorists. (As Hood told CBS, the



number of individual prisoners force-fed is likely much lower, because “you could have one person, three meals a day for, you know, two months. That adds up.”<sup>213</sup> According to Laura Rovner, a clinical law professor who represents several ADX inmates, use of the restraint chair to force-feed inmates is “a pretty widespread practice” at the Florence Supermax. The government has redacted descriptions of the process in court documents, so details of the procedure are unknown. Rovner said that two safeguards that do exist are requirements to notify a prisoner’s sentencing judge, and to videotape the force-feeding process.<sup>214</sup>

It is unclear when the use of restraint chair began in Florence. An August 2006 OLC memo by Steven Bradbury refers to a recent “coordinated hunger strike among several convicted al Qaeda terrorists” held at ADX Florence, in which terrorists “developed a sophisticated method to resist compulsory feeding.”<sup>215</sup> The Bradbury memo does not give a specific date for that hunger strike, however.

Hunger strikes and force-feeding in the restraint chair continue to this day at Guantánamo, as confirmed by a February 14, 2012, visit to the base by Task Force staff. A PowerPoint displayed to visitors who tour Guantánamo lists hunger strikes as a means of detainees “continuing the fight.” According to veteran Guantánamo correspondent Carol Rosenberg of *The Miami Herald*, as of March 19, 2013 the military acknowledged there were 24 prisoners on hunger strike. Eight of them were being force-fed in restraint chairs.

### **Ideal Management of Hunger Strikes**

The involvement of physicians is essential for the management of hunger strikes. Their roles include: recognition and diagnosis of the hunger strike; assessment of the competence of the individual, whether the individual is suicidal, or whether there is pressure or coercion from other detainees involved; informing and advising the hunger striker regarding expected medical developments and outcomes and making decisions about management; treating and dealing with medical issues during the course of the fast; managing periods of refeeding after fasting; and dealing with medical crises and terminal, end-of-life situations. The physician should be involved as the hunger striker’s physician, in a trusted, physician-patient relationship with the individual’s medical interest held as paramount.

During the course of the hunger strike, serious medical situations may arise that call for feeding or the provision of nutrition by other means to prevent permanent injury or death. Such situations are most likely to occur at the end of a prolonged hunger strike. Total fasting with ingestion of water may go on for weeks and months without immediate risk of permanent injury or death, which usually occurs 55–85 days from the onset of fasting.<sup>216</sup>

At those times, in the context of continued determination of competence and absence of suicidal intent, physicians should advise the individual of the medical situation and the need for feeding or other forms of nutrition. The competent, nonsuicidal individual may elect to continue the fast or alter it by agreeing to some form of supplemental nutrition. If the physician determines that the striker is no longer competent, the physician, in the absence of advance directives to the contrary, may elect to proceed with feeding or nutrition. In such circumstances, the administration of nutrition or feeding without the consent of the individual is termed involuntary or force-feeding.

If hunger strikers are strong enough to physically resist forced feeding, it is unlikely that they are near death. Forced feeding is medically uncalled for in such situations.

Prolonged hunger strikes that proceed to the point of the likelihood of permanent injury or death pose challenging situations for all. The hunger striker may have maintained the commitment to fast understanding the possibility of death — a commitment that should be repeatedly examined and documented during the course of the hunger strike. Even though the individual may not, at the end, be competent or capable of reiterating that commitment, it may have been clearly expressed in an advance directive document declared at a previous time when the individual was competent and not suicidal. If no such directive exists, the physician is left to interpret the individual's wishes. At that point, acting on behalf of the best interest of the individual, the physician may elect to institute or recommend the administration of nutrition. If an advanced directive exists, the administration of nutrition would be contrary to the directive with medical and presumably ethical implications. Reportedly, in some cases physicians have elected to proceed with or recommend feeding. At such times, all such decisions should involve those responsible for the setting or institution. It is at this point also that the responsible institution, *e.g.*, a detention center, may elect to order feeding.

## Analysis of Ethical Obligations of Health Personnel Toward Detainees Undergoing Interrogation

### The Ethical Obligations of Medical Professionals Toward Detainees

Health care professionals — whether they are psychiatrists, other physicians, physicians' assistants, psychologists, or nurses — have certain obligations to people under their care. The most famous statement of these obligations is the approximately 2000-year-old Hippocratic Oath, which promises in part, “In every house where I come, I will enter only for the good of my patients.”

Most medical students recite some form of the oath before their graduation. Modern ethics codes reiterate the fundamental obligations to do good, and not harm, to patients; to respect patients' autonomy and not impose treatments without their consent; and to safeguard their confidences.<sup>217</sup> Psychologists and other health professionals share these obligations, though they do not formally recite the Hippocratic Oath.<sup>218</sup>

In keeping with these principles, doctors are forbidden from using their professional knowledge to help inflict torture or cruelty on anyone. The World Medical Association's (WMA) Declaration of Geneva is a physician's oath, adopted in the wake of revelations about atrocities by Nazi doctors, that promises “even under threat, I will not use my medical knowledge contrary to the laws of humanity.”<sup>219</sup> The WMA's Declaration of Tokyo, adopted in 1975, states that a doctor “shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife.” The Declaration of Tokyo further forbids doctors from being present when torture is inflicted or threatened, or providing any “premises, instruments, substances or knowledge to facilitate the practice of torture. ... A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible.”<sup>220</sup>

In 1982, the U.N. General Assembly adopted similar principles that applied to all health personnel, though with particular force to physicians, stating in part, “It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.”<sup>221</sup> The same document specifically forbids health personnel from participation in

any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.<sup>222</sup>

The American Psychological Association and American Psychiatric Association adopted a joint resolution supporting these principles in 1985.<sup>223</sup> The American College of Physicians similarly stated in its 1992 ethics manual, “Under no circumstances is it ethical for a physician to be used as an instrument of government to weaken the physical or mental resistance of a human being.” The AMA adopted the following policy in December 1999:

Torture refers to the deliberate, systematic, or wanton administration of cruel, inhumane, and degrading treatments or punishments during imprisonment or detainment. Physicians must oppose and must not participate in torture for any reason. Participation in torture includes, but is not limited to, providing or withholding any services, substances, or knowledge to facilitate the practice of torture. Physicians must not be present when torture is used or threatened. Physicians may treat prisoners or detainees if doing so is in their best interest, but physicians should not treat individuals to verify their health so that torture can begin or continue. Physicians who treat torture victims should not be persecuted. Physicians should help provide support for victims of torture and, whenever possible, strive to change situations in which torture is practiced or the potential for torture is great.

### **Separation of DOD and CIA Medical Personnel from Their Professional Ethical Obligations**

Soon after September 11, the military adopted a policy that key professional obligations, including the duty not to harm, do not apply in situations where the health professional has no clinical relationship with the patient. Current military guidelines claim that only medical personnel “*charged with the medical care of detainees* have a duty to protect detainees’ physical and mental health and provide appropriate treatment for disease”<sup>224</sup> (emphasis added). Health personnel who do not provide these clinical services, the military asserts, only have an obligation to obey the law as it applies to detainees. In 2004, David Tornberg, then the deputy assistant secretary of defense for health affairs, stated that when a doctor participates in interrogation, “he’s not functioning as a physician.”<sup>225</sup> In keeping with this position, the Defense Department changed key words in the U.N.’s standards of medical ethics in drafting its own standards for treatment of prisoners.<sup>226</sup> While the U.N. principles state that it is a contravention of medical ethics for a physician to have “any professional relationship” with prisoners other than to evaluate or seek to improve the individual’s health, the DOD replaced the key language with the

more limited phrase, “any patient-clinician relationship.”<sup>227</sup> As discussed further below, every professional medical association has rejected this distinction.

The DOD instruction governing medical support of detainee operations does not require health professionals who are not in a clinical relationship with detainees to preserve detainees’ well-being and avoid harm. Instead, it refers only to legal requirements: these health professionals have an obligation “to uphold the humane treatment of detainees and to ensure that no individual in the custody or under the physical control of the Department of Defense, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment, in accordance with and as defined in U.S. law.”<sup>228</sup> This simply restates a requirement to refrain from potentially criminal acts of cruelty that applies to all service members.

The Department of Defense does not require that licensed health professionals in its employ adhere to the ethical standards set by their professional associations, stating:

The DOD requires that all military professionals perform their duties in an ethical manner, consistent with their professional ethics although they are neither required to join nor adhere to the policies of any specific professional organization.<sup>229</sup>

Instead, the Army Medical Command and Office of the Surgeon General have made their own determinations about whether military health professionals’ conduct complies with their professional obligations. The Office of the Surgeon General has determined that acting as BSCTs is an “ethical practice consistent with medical and psychological ethics,”<sup>230</sup> and that,

[a]lthough physicians who provide medical care to detainees should not be involved in decisions whether or not to interrogate because such decisions are unrelated to medicine or the health interests of an individual, physicians who are not providing medical care to detainees may provide such information if warranted by compelling national security interests.<sup>231</sup>

DOD asserts that these policies are consistent with an AMA call for “balancing obligations to society against those to individuals.”<sup>232</sup> As discussed below, this is not accurate.

Far less is known about the CIA’s ethical guidance concerning the role of medical and mental health personnel in interrogation and detainee treatment, due to the level of secrecy that surrounds the program. The only available documentation of the CIA’s policies are the OMS guidelines discussed above, which outline a role for clinicians that clearly conflicts with their professional obligations. The alleged participation of “psychologists/interrogators” in *administering* brutal techniques like waterboarding is an even clearer conflict.

Doctors and psychologists serving in the field were forbidden from revealing what was happening, or discussing these issues with civilian practitioners. Even those disturbed by abusive interrogations could not discuss their objections outside the chain of command. As Gelles stated, “it was classified. ... There are laws about talking about classified information in unclassified arenas.”

Because of these restrictions, the medical and mental health professions had little awareness of widespread U.S. mistreatment of detainees before Abu Ghraib. There was even less knowledge

of the role of medical and mental health professionals in that treatment. The first reports of clinicians' complicity in abuse at Guantánamo were published in late 2004, and the military vehemently denied them. The corroborating evidence emerged over the course of several years. James Mitchell's and Bruce Jessen's role in designing the CIA interrogation program was not reported until 2007, and the official documents confirming clinicians' essential role in the CIA program were released still later.

### **Revisions to Professional Guidelines Regarding Participation in Abuse After September 11**

When clinicians' role in abusive interrogations did become public, the American College of Physicians, American Medical Association, and American Psychiatric Association reacted with dismay. All three associations rejected the government's argument that medical professionals advising interrogators were not acting as doctors and were exempt from their normal professional ethical standards. Instead, they further tightened their restrictions, to forbid members from participating in any interrogation.

In November 2005, the American College of Physicians wrote to the Department of Defense, rejecting the distinction DOD drew between doctors who "have a provider-patient treatment relationship" with detainees and those who do not, because "[t]his distinction leaves open the possibility for physician involvement in interrogations, which is inconsistent with ACP policy regarding the physician's role as healer and promoter of health and human rights."<sup>233</sup> In 2008, it revised its ethics manual to state more clearly that "[p]hysicians must not conduct, participate in, monitor, or be present at interrogations, or participate in developing or evaluating interrogation strategies or techniques."<sup>234</sup>

The American Psychiatric Association issued a formal resolution in 2006, declaring that physicians should not conduct, monitor or directly participate in the interrogation of prisoners or detainees, regardless of whether torture or abuse is occurring. The full resolution states:

1. The American Psychiatric Association reiterates its position that psychiatrists should not participate in, or otherwise assist or facilitate, the commission of torture of any person. Psychiatrists who become aware that torture has occurred, is occurring, or in a position has been planned must report it promptly to a person or persons to take corrective action.
2.
  - a) Every person in military or civilian detention, whether in the United States or elsewhere, is entitled to appropriate medical care under domestic and international humanitarian law.
  - b) Psychiatrists providing medical care to individual detainees owe their primary obligation to the well-being of their patients, including advocating for their patients, and should not participate or assist in any way, whether directly or indirectly, overtly or covertly, in the interrogation of their patients on behalf of military or civilian agencies or law enforcement authorities.
  - c) Psychiatrists should not disclose any part of the medical records of any patient, or information derived from the treatment relationship, to persons conducting interrogation of the detainee.

- d) This paragraph is not meant to preclude treating psychiatrists who become aware that the detainee may pose a significant threat of harm to him/herself or to others from ascertaining the nature and the seriousness of the threat or from notifying appropriate authorities of that threat, consistent with the obligations applicable to other treatment relationships.
3. No psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities, whether in the United States or elsewhere. Direct participation includes being present in the interrogation room, asking or suggesting questions, or advising authorities on the use of specific techniques of interrogation with particular detainees. However, psychiatrists may provide training to military or civilian investigative or law enforcement personnel on recognizing and responding to persons with mental illnesses, on the possible medical and psychological effects of particular techniques and conditions of interrogation, and on other areas within their professional expertise<sup>235</sup>

Dr. Sharfstein, former president of the American Psychiatric Association, said that psychiatrists found participating in interrogation “without the consent of individuals” in “highly coercive settings” to be incompatible with doctors’ Hippocratic commitment to do no harm, and “the trust that people need to put into us.” He said that while the controversy over Guantánamo was what prompted the resolution, the issue “when we thought about it ... clearly was beyond just the war on terror.”<sup>236</sup>

When the American Psychiatric Association adopted its position, Sharfstein noted that it was a position statement rather than an enforceable ethical rule, and assured military psychiatrists that they “wouldn’t get in trouble with the APA” for following orders that violated it.<sup>237</sup> Dr. M. Gregg Bloche, a law professor as well as a psychiatrist, has criticized this assurance as a way for the psychiatric association to appear to take a strong position while signaling to the military that they would look the other way if psychiatrists continued to participate.<sup>238</sup>

In response to these criticisms, Sharfstein said, “We’re a voluntary association. There is an ethics process” for complaints, but “the only sanction available” is to reprimand, sanction, or expel members from the association. In general, as soon as an investigation starts for any infraction, “they resign, and the only thing we can do is make public the fact that they resigned under investigation. ... We don’t have any police power like a licensing board.” He said that the American Psychiatric Association’s position was a philosophical position that would allow people in the military to say, when ordered to assist in interrogations, that it would be contrary to their professional ethical society’s instructions, but “[w]hether that’s effective or not, I don’t know.”<sup>239</sup>

A few months after the American Psychiatric Association’s resolution, the American Medical Association adopted a very similar position. The AMA stated that:

- (1) Physicians may perform physical and mental assessments of detainees to determine the need for and to provide medical care. When so doing, physicians must disclose to the detainee the extent to which others have access to information included in medical records. Treatment must never be conditional on a patient’s participation in an interrogation.

- (2) Physicians must neither conduct nor directly participate in an interrogation, because a role as physician-interrogator undermines the physician's role as healer and thereby erodes trust in the individual physician-interrogator and in the medical profession.
- (3) Physicians must not monitor interrogations with the intention of intervening in the process, because this constitutes direct participation in the interrogation.
- (4) Physicians may participate in developing effective interrogation strategies for general training purposes. These strategies must not threaten or cause physical injury or mental suffering and must be humane and respect the rights of individuals.
- (5) When physicians have reason to believe that interrogations are coercive, they must report their observations to the appropriate authorities. If authorities are aware of coercive interrogations but have not intervened, physicians are ethically obligated to report the offenses to independent authorities that have the power to investigate or adjudicate such allegations.

In 2008, the American College of Physicians adopted the following statement:

Physicians must not be party to and must speak out against torture or other abuses of human rights.

Participation by physicians in the execution of prisoners except to certify death is unethical.

Under no circumstances is it ethical for a physician to be used as an instrument of government to weaken the physical or mental resistance of a human being, nor should a physician participate in or tolerate cruel or unusual punishment or disciplinary activities beyond those permitted by the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Physicians must not conduct, participate in, monitor, or be present at interrogations, or participate in developing or evaluating interrogation strategies or techniques.

A physician who becomes aware of abusive or coercive practices has a duty to report those practices to the appropriate authorities and advocate for necessary medical care.

Exploiting, sharing, or using medical information from any source for interrogation purposes is unethical.

The World Medical Association revised its Tokyo Declaration to similar effect.<sup>240</sup>

In contrast to the medical association's ban on participation in interrogation, the American Psychological Association (APA) has taken the position that it can be ethical for psychologists to advise interrogators — a decision that many psychologists strongly oppose. In 2005, the APA's official Task Force on Psychological Ethics and National Security (PENS Task Force), while

reaffirming its opposition to any form of torture or cruel treatment, concluded that

it is consistent with the APA Ethics Code for psychologists to serve in consultative roles to interrogation and information-gathering processes for national security-related purposes. ... [P]sychologists are in a unique position to assist in ensuring that these processes are safe and ethical for all participants.<sup>241</sup>

The PENS Task Force declined to “render any judgment concerning events that may or may not have occurred in national security-related settings”<sup>242</sup> Most of its other prohibitions contained similar caveats. The PENS Task Force found that psychologists had an ethical responsibility to report abuse to authorities, but made no recommendations about what actions to take if authorities failed to adequately respond. The PENS Task Force also recommended that APA members “guard against the names of individual psychologists [suspected of abuse] being disseminated to the public.” Psychologists advising interrogators were forbidden from using “health care related information from an individual’s medical record to the detriment of the individual’s safety and well-being,” but could use such information for other purposes, because it might be “helpful or necessary to ensure that an interrogation process remains safe.” Psychologists were required to tell detainees that they were not acting as health professionals, and that the detainees should not expect confidentiality.<sup>243</sup>

The PENS report prohibits psychologists from engaging “in behaviors that violate the laws of the United States,” but notes that “such rules and regulations have been significantly developed and refined” in the course of recent operations. It does not prohibit psychologists from violating international law (except to the extent that the “refined” version of U.S. law incorporates it), a deliberate omission.

The PENS report’s conclusions, and the process preceded them, have led to years of bitter debate within the psychological profession and a number of resignations from the APA.

The PENS Task Force had nine voting members, whose identities and affiliations were kept confidential in advance of the report.<sup>244</sup> Six of the nine had some professional connection to the U.S. military or intelligence community.<sup>245</sup>

The three civilian members of the PENS Task Force have all expressed some degree of regret about their role in the group, although they had signed on to the original report. One member, Michael Wessells, resigned from the task force, and told reporter Amy Goodman that he regarded it as “predominantly a national security establishment operation” rather than a “representative dialogue” of psychologists.<sup>246</sup> Another, Jean Maria Arrigo, became so disillusioned with the report that she released her notes and the PENS email Listserv to the public despite a prior vote by task force members that the proceedings would be confidential.<sup>247</sup> She has been one of the leading voices calling for the report’s nullification.

Before the report was finalized, the civilian members of the PENS Task Force were not aware of psychologists’ central role in designing and implementing coercive interrogations. When Arrigo asked the group whether the APA should “exclude from membership psychologists who intentionally or negligently contribute to coercive interrogation,”<sup>248</sup> Larry James wrote in response:

it was psychologists who fixed the problems and not caused it. *This is a*



***factual statement!*** the fact of the matter is that since Jan 2003, where ever [sic] we have had psychologists no abuses have been reported.<sup>249</sup>

Morgan Banks reassured Arrigo, in response to a question about potential offensive use of SERE techniques, that the Army's SERE school makes clear that it is illegal for U.S. forces to apply the techniques. Michael Gelles warned in general terms about potential ethical pitfalls for psychologists, but could not discuss the specific abuses that had occurred. Gelles said that he was comfortable with the PENS report, and his position has always been that "psychologists should be involved, no two ways about it. They should just have the appropriate training and the appropriate experience with the appropriate controls in play."<sup>250</sup>

Stephen Soldz, a psychologist at the Boston Graduate School of Psychoanalysis, was one of the founders of the Coalition for an Ethical Psychology, which opposes any participation of psychologists in interrogation. Soldz said in an interview that he regards the PENS report as "a rigged committee and a rigged process," and the product of an undisclosed relationship between the APA and U.S. intelligence agencies.<sup>251</sup>

In 2007, in response to critics of the PENS report, the APA passed a resolution specifying techniques that it considered torturous or cruel, and adopting the standards of the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. In 2008, it amended the resolution to address concerns about potential loopholes. The text currently bans

mock executions; water-boarding or any other form of simulated drowning or suffocation; sexual humiliation; rape; cultural or religious humiliation; exploitation of fears, phobias or psychopathology; induced hypothermia; the use of psychotropic drugs or mind-altering substances; hooding; forced nakedness; stress positions; the use of dogs to threaten or intimidate; physical assault including slapping or shaking; exposure to extreme heat or cold; threats of harm or death; isolation; sensory deprivation and over-stimulation; sleep deprivation; or the threatened use of any of the above techniques to an individual or to members of an individual's family.<sup>252</sup>

Also in 2008, APA members approved a referendum resolving that psychologists cannot work

in settings where persons are held outside of, or in violation of, either International Law ... or the US Constitution (where appropriate), unless they are working directly for the persons being detained or for an independent third party working to protect human rights.<sup>253</sup>

Eight-thousand, seven hundred and ninety-two APA members voted for the referendum, while 6,157 voted against.

Soldz does not consider these steps sufficient, and is still working to get the PENS report nullified. He stated, "what intelligence people told us over and over that what matters is having [psychologists] people there. Once there, they're under command, and they'll do what they're told," and cannot be effectively monitored because "it's classified." Soldz noted that neither the APA nor any state licensing board has ever acted on an ethics

complaint against psychologists.<sup>254</sup>

### Complaints Against Individual Practitioners

In 2010, the APA wrote to the Texas State Board of Examiners of Psychologists regarding an ethics complaint filed against James Mitchell. The APA noted that Mitchell was not a member, but “[i]f any psychologist member of APA were proven to have committed the alleged acts as set forth in the Complaint before the Board, he or she would be expelled from the APA membership” and referred to his state’s licensing board with the “expectation that the individual’s state license to practice psychology would be revoked.”<sup>255</sup>

The Texas board dismissed the complaint against Mitchell after a hearing on February 10, 2011, at which Mitchell and his counsel were present. The board has not commented on the reasons for dismissal, saying it is legally forbidden from disclosing anything about a complaint that does not result in disciplinary action. Mitchell has told the press that the complaint against him was “riddled throughout with fabricated details, lies, distortions and inaccuracies,” but gave no specific details because he was “not free to discuss any work I may have done for the CIA.”<sup>256</sup>

Every other ethics complaint against a health professional in connection with post-September 11 abuses has likewise failed to result in disciplinary action, including complaints against John Leso in New York, Larry James in Louisiana and Ohio, Diane Zierhoffer in Alabama, and John Edmondson in California. The APA itself has not made any formal response to a complaint against Leso, which has now been pending for several years.

Michael Gelles, despite his differences with Leso, Mitchell, Jessen, and other advocates of “enhanced” techniques, fully supports the lack of any professional sanctions. Gelles said, “the fact that they’re still chasing these psychologists in these ridiculous court cases, whoever files those suits should be disciplined.” Gelles does support “the accounting of history,” but not “an accountability of individuals.”<sup>257</sup>

Others strongly disagree. The Texas complaint against James Mitchell noted that psychologists licensed in Texas are required to “report conduct by a licensee that appears to involve harm or the potential for harm to any individual, or a violation of Board rule, a state law or federal law.”<sup>258</sup> Stephen Xenakis, a psychiatrist and retired Army Brigadier General, and Leonard Rubenstein, the president of Physicians for Human Rights (PHR), have called the failure to publicly investigate or discipline any health professional for involvement in torture “an unconscionable disservice to the thousands of ethical doctors and psychologists in the country’s service.”<sup>259</sup> PHR has advocated on behalf of legislation in Massachusetts and New York that would make it easier to sanction health professionals who participate in unethical treatment of detainees.<sup>260</sup>



Whether or not the APA fully abandons the PENS report, there is a clear consensus within the medical and mental health professions that certifying that brutal interrogation techniques and conditions of confinement fall short of torture, or participating in interrogations like Abu Zubaydah’s or al Qahtani’s, are grave violations of professional ethics. Failing to report torture is equally unacceptable.

What is not clear is how to enforce these norms. Professional medical and psychological

associations do not have authority over licensure, nor do they have any authority over clinicians who are not members. They can investigate allegations against members, but remedies are limited — and the APA has declined to pursue such investigations. More importantly, state licensing boards have proved unable or unwilling to discipline the individual psychologists accused of abuses — likely because of the absence of clear rules and procedures that enable state boards to discipline doctors and psychologists for complicity in abuse, and the constraints of government secrecy. The identities of individual physicians, nurses or physicians' assistants who participated in the OMS's medical monitoring at CIA black sites have never been made public.

# True and False Confessions

## The Efficacy of Torture and Brutal Interrogations

*Central to the debate on the use of “enhanced” interrogation techniques is the question of whether those techniques are effective in gaining intelligence. If the techniques are the only way to get actionable intelligence that prevents terrorist attacks, their use presents a moral dilemma for some. On the other hand, if brutality does not produce useful intelligence — that is, it is not better at getting information than other methods — the debate is moot. This chapter focuses on the effectiveness of the CIA’s enhanced interrogation technique program. There are far fewer people who defend brutal interrogations by the military. Most of the military’s mistreatment of captives was not authorized in detail at high levels, and some was entirely unauthorized. Many military captives were either foot soldiers or were entirely innocent, and had no valuable intelligence to reveal. Many of the perpetrators of abuse in the military were young interrogators with limited training and experience, or were not interrogators at all.*

*The officials who authorized the CIA’s interrogation program have consistently maintained that it produced useful intelligence, led to the capture of terrorist suspects, disrupted terrorist attacks, and saved American lives. Vice President Dick Cheney, in a 2009 speech, stated that the enhanced interrogation of captives “prevented the violent death of thousands, if not hundreds of thousands, of innocent people.” President George W. Bush similarly stated in his memoirs that “[t]he CIA interrogation program saved lives,” and “helped break up plots to attack military and diplomatic facilities abroad, Heathrow Airport and Canary Wharf in London, and multiple targets in the United States.” John Brennan, President Obama’s recent nominee for CIA director, said, of the CIA’s program in a televised interview in 2007, “[t]here [has] been a lot of information that has come out from these interrogation procedures. . . . It has saved lives.” However, during his February 2013 confirmation hearing before the Senate Select Committee on Intelligence, Brennan said his initial review of the intelligence committee’s report “call[ed] into question a lot of the information that I was provided earlier on.”*

*The purported efficacy of the techniques was essential to their authorization as legal by the Justice Department’s Office of Legal Counsel during the second Bush administration. It analyzed the Fifth Amendment’s bar on executive-branch behavior that would “shock the conscience”; such behavior, the Justice Department reasoned, was clearly illegal. That memo, written by Assistant Attorney General Steven Bradbury, acknowledged “use of coercive interrogation techniques in other contexts — in different settings, for other purposes, or absent the CIA’s safeguards — might be thought to ‘shock the conscience.’” However, the memo assured, because these techniques were effective and were “limited to further a vital*

*government interest and designed to avoid unnecessary or serious harm, we conclude that it cannot be said to be constitutionally arbitrary.”*

*Others, including experienced interrogators and those with personal knowledge of the CIA program, are extremely skeptical of these claims. For example, President Obama's former National Director of Intelligence Admiral Dennis Blair is reported to have told colleagues in a private memo, “High value information came from interrogations in which those methods were used and provided a deeper understanding of the al Qa’ida organization that was attacking this country.” Blair amended his remarks in a written statement several days later and said:*

*The information gained from these techniques was valuable in some instances, but there is no way of knowing whether the same information could have been obtained through other means. ... The bottom line is these techniques have hurt our image around the world, the damage they have done to our interests far outweighed whatever benefit they gave us and they are not essential to our national security.<sup>1</sup>*

*Others who have seen the intelligence remain unimpressed. Critics with top secret security clearances who have seen the intelligence and remain skeptical include Robert Mueller, the director of the FBI.<sup>2</sup> In 2009 President Obama asked Michael Hayden, then the CIA director, to give a classified briefing on the program to three intelligence experts: Chuck Hagel, former Republican senator from Nebraska and, now, newly confirmed as secretary of defense; Jeffrey Smith, former general counsel to the CIA; and David Boren, a retired Democratic senator from Oklahoma.<sup>3</sup> Despite Hayden's efforts, the three men left the briefing very unconvinced.<sup>4</sup>*

*It is extremely difficult to evaluate the claims about efficacy given the amount of information about the CIA program that remains classified. Given their central role in Al Qaeda, it is certainly plausible that high-value detainees like Khalid Sheikh Mohammed gave up some useful intelligence after their brutal treatment.*

## Assertions of Useful Information Obtained Through Coercion

### The Death of Osama bin Laden

After Osama bin Laden was killed by U.S. forces in May 2011, defenders of the CIA program were quick to claim that enhanced interrogation was essential to the operation. Their claim has seeped into and been reinforced in popular culture. Most recently, in late 2012, the Kathryn Bigelow-directed Hollywood film, *Zero Dark Thirty*, portrayed enhanced interrogation as having led to valuable intelligence leading to bin Laden's capture.

The CIA located bin Laden through his most trusted courier, a man known within Al Qaeda by the *nom de guerre* Abu Ahmed al-Kuwaiti (or Sheikh Abu Ahmed) and to neighbors in Pakistan as Arshad Khan. According to journalist Peter Bergen, his real name was Ibrahim Saeed Ahmed.<sup>5</sup> The courier was fluent in both Pashto and Arabic, and was a trusted aide of Khalid Sheikh Mohammed and Abu Faraj al-Libi as well as bin Laden.

Days after the raid in Abbottabad, former Attorney General Michael Mukasey wrote an op-ed titled "The Waterboarding Trail to Bin Laden." The intelligence that led to the raid, Mukasey asserted,

began with a disclosure from Khalid Sheikh Mohammed (KSM), who broke like a dam under the pressure of harsh interrogation techniques that included waterboarding. He loosed a torrent of information — including eventually the nickname of a trusted courier of bin Laden.<sup>6</sup>

It later became apparent that this account was wrong. KSM hadn't revealed the courier's alias. According to an American official familiar with KSM's interrogation, KSM wasn't asked about al-Kuwaiti until the fall of 2003, months after his waterboarding had concluded.<sup>7</sup> KSM reportedly acknowledged having known al-Kuwaiti but told his interrogators al-Kuwaiti was "retired" and of little significance.<sup>8</sup> Supporters of enhanced interrogation nevertheless continued to claim that the program had led to bin Laden's death. A month after the raid, former CIA director Michael Hayden acknowledged that Mohammed had never revealed the courier's name, but wrote that "it is nearly impossible to imagine" how bin Laden could have been captured or killed without intelligence gained from the CIA program.<sup>9</sup> Hayden compared those who dispute the efficacy of the techniques to "9/11 'truthers' who, lacking any evidence whatsoever, claim that 9/11 was a Bush administration plot" or "the 'birthers' who, even in the face of clear contrary evidence, take as an article of faith that President Obama was not born in the United States."<sup>10</sup>

The first detainee to tell U.S. officials about al-Kuwaiti appears to have been Mohammed al Qahtani, whose military interrogation, including torture, at Guantánamo in November and December 2002 is discussed elsewhere [see Chapters 1 and 6]. According to a government intelligence assessment of al Qahtani, in 2003 al Qahtani told interrogators that he had received computer training in Pakistan from an operative named Ahmed al-Kuwaiti.<sup>11</sup> Al Qahtani said al-Kuwaiti had taken him to an Internet café in Karachi to show him how to use email.<sup>12</sup>

But according to Bergen, there was “no sense as of yet” that al-Kuwaiti was bin Laden’s trusted courier, and his “was just one of many hundreds of names and aliases of Al Qaeda members and associates that interrogators were learning in 2002 and 2003” from Guantánamo and elsewhere.<sup>13</sup> Some of this information was contradictory, or false. Mohamedou Ould Slahi, like al Qahtani identified as a high-value detainee and subjected to a brutal “special interrogation plan” at Guantánamo, told interrogators that Ahmed al-Kuwaiti was wounded fleeing Tora Bora and died in the arms of another Guantánamo captive.<sup>14</sup>

More important than al Qahtani’s information seems to have been the interrogation of Hassan Ghul, apprehended in Iraq on January 23, 2004.<sup>15</sup> The Associated Press first reported on Ghul’s role in identifying al-Kuwaiti, quoting an intelligence official who said that “Hassan Ghul was the linchpin.”<sup>16</sup> Ghul had told interrogators that al-Kuwaiti was close to Abu Faraj al-Libi, but both al-Libi and KSM vehemently denied his importance.

Former CIA Deputy Director for Operations Jose Rodriguez gave a similar account in his memoir defending CIA interrogations. Rodriguez does not identify Ghul by name, but does refer to an Al Qaeda operative captured in 2004 who was delivering information between Al Qaeda and Abu Musab al-Zarqawi’s network in Iraq:

We moved him to a black site and began the effort to find out what other information he might have that we could exploit. Initially, he played the role of a tough mujahideen and refused to cooperate. We then received permission to use some (but not all) of the EIT procedures on him. Before long he became compliant and started to provide some excellent information. ...

He told us that bin Ladin [*sic*] conducted business by using a trusted courier with whom he was in contact only sporadically. ... We pressed him on who this courier was and he said all he knew was a pseudonym: “Abu Ahmed al Kuwaiti.” This was a critical bit of information about the man who would eventually lead us to Bin Laden.<sup>17</sup>

Much remains unknown about the details of Ghul’s time as a CIA prisoner. Some officials familiar with the still-classified records of Ghul’s interrogation argue that the case that the information Ghul provided was as a result of “enhanced interrogation techniques” (EITs) is far from proven.<sup>18</sup> In May 2011 Sen. Dianne Feinstein told Reuters about a CIA detainee who “did provide useful and accurate intelligence.” But she added at the time: “This was acquired before the CIA used their enhanced interrogation techniques against the detainee.” Three U.S. officials told Reuters that Feinstein was referring to Ghul.<sup>19</sup>

Rodriguez acknowledged that Abu Faraj al-Libi and KSM refused to provide further information about the courier, but wrote that even their emphatic denials were valuable confirmation of his importance.<sup>20</sup> Armed with Ghul’s account of the courier’s significance, interrogators asked KSM again about al-Kuwaiti.<sup>21</sup> KSM stuck to his story that he had given months earlier.<sup>22</sup> After al-Libi was captured in May 2005 and turned over to the CIA, al-Libi denied knowing al-Kuwaiti and gave a different name for bin Laden’s courier, whom he called Maulawi Jan.<sup>23</sup> CIA analysts would never find such a person and eventually concluded that the name was al-Libi’s invention.<sup>24</sup> According to Rodriguez, an even-clearer signal came when Khalid Sheikh Mohammed attempted to send another detainee a warning to “tell them nothing about the courier.”<sup>25</sup>

Here we have a curious instance of Rodriguez arguing that after waterboarding and sleep deprivation had rendered KSM compliant, he attempted to deceive his interrogators. But Rodriguez argued that deceptiveness proved the usefulness of the technique. It's at least as plausible that KSM would have been equally motivated to *withhold* information about bin Laden, and instruct others to do the same, without being waterboarded 183 times. Rodriguez nevertheless maintains that the techniques were necessary because "without EITs [Al Qaeda] operatives would have little incentive to tell us anything."<sup>26</sup>

As discussed further below, however, there is considerable evidence of suspects giving intelligence to interrogators in the absence of coercion. Rodriguez himself has acknowledged that traditional interrogation can produce results "when you have all the time in the world," but argued that

We didn't have that luxury. We feared and anticipated a second wave of devastating attacks on the United States. You could not see a time bomb, but we could not miss the sound of one ticking.<sup>27</sup>

It was, of course, years after these interrogations that bin Laden was found. To the extent timing was a factor, many times in the years between 2003 and 2011 the trail for bin Laden went cold. Tommy Vietor, spokesman for the National Security Council, told *The New York Times*: "The bottom line is this: If we had some kind of smoking-gun intelligence from waterboarding in 2003, we would have taken out Osama bin Laden in 2003." Vietor continued, "It took years of collection and analysis from many different sources to develop the case that enabled us to identify this compound, and reach a judgment that bin Laden was likely to be living there."<sup>28</sup> When detainees provide false information so as to avoid mistreatment or the threat of mistreatment, resources are diverted to track down false information and torture becomes counterproductive. Former FBI agent and interrogation expert Joe Navarro told Task Force staff "You spend time on bad leads. [Bad leads] eat up time."<sup>29</sup>

Senators Dianne Feinstein and Carl Levin, chairs of the committees on Intelligence and Armed Services, have bluntly stated that Hayden's, Rodriguez's and Mukasey's assertions about the role of torture in the bin Laden raid are "wrong" and uncorroborated by CIA records. According to Feinstein and Levin, based on the Intelligence Committee's staff investigation of the CIA program, the original lead information on the bin Laden courier

had no connection to CIA detainees. The CIA had significant intelligence on the courier that was collected from a variety of classified sources. While the CIA's enhanced interrogation techniques were used against KSM and al-Libbi, the pair provided false and misleading information during their time in CIA custody.<sup>30</sup>

Feinstein and Levin stated that a third detainee, presumably Hassan Ghul, "did provide relevant information" about al-Kuwaiti, but "he did so the day before he was interrogated by the CIA using their coercive interrogation techniques." They also noted that "[d]etainees whom the CIA believed to have information on [bin Laden's] location provided no locational information, even after significant use of the CIA's coercive interrogation techniques."<sup>31</sup>

**"The bottom line is this: If we had some kind of smoking-gun intelligence from waterboarding in 2003, we would have taken out Osama bin Laden in 2003."**



## The Interrogation of Abu Zubaydah

Abu Zubaydah was the first detainee subjected to coercive interrogation by the CIA, at a “black site” in Thailand, and accounts of his interrogation are central to the dispute about the efficacy of brutal interrogations. Supporters and opponents of the CIA program — including FBI interrogators and CIA officials with firsthand knowledge — have given vastly different accounts of his interrogation and the intelligence it produced. These are differences that have legal as well as policy implications; the purported efficacy of the CIA’s techniques on Abu Zubaydah and other high-value detainees was essential to their re-authorization by the Justice Department’s Office of Legal Counsel (OLC) in 2005.

As we discussed in Chapter 4, the CIA sought review of its interrogation program by OLC at several points in the years after September 11. Initially, in 2002, OLC had told the CIA its proposed techniques were within the law. In 2004 OLC withdrew that advice to the CIA, and re-examined the lawfulness of the techniques that the CIA had already used. As part of OLC’s review process, the CIA provided Assistant Attorney General Steven Bradbury with information on the prior effectiveness of the enhanced interrogation program. Some of the CIA’s claims were clearly false. One CIA memo to OLC asserted:

Abu Zubaydah provided significant information on two operatives, Jose Padilla and Binyam Mohammed, who planned to build and detonate a “dirty bomb” in the Washington D.C. area. Zubaydah’s reporting led to the arrest of Padilla on his arrival in Chicago in May 2003.<sup>32</sup>

In fact, Padilla had been arrested in May of 2002, not May of 2003, and OLC had not signed off on the CIA program until August 2002.

Bradbury’s May 30, 2005, memo relied on this and several other inaccurate or contested CIA assertions about information gained from the use of enhanced techniques on Abu Zubaydah. Among the contested assertions were:

- “The CIA used the waterboard extensively in the interrogations of KSM and Zubaydah, but did so only after it became clear that standard interrogation techniques were not working.”<sup>33</sup>
- “Interrogations of Zubaydah — again, once enhanced techniques were employed — furnished detailed information regarding al Qaeda’s ‘organizational structure, key operatives, and modus operandi’ and identified KSM as the mastermind of the September 11 attacks. ... You have informed us that Zubaydah also ‘provided significant information on two operatives, [including] Jose Padilla[,] who planned to build and detonate a dirty bomb in the Washington DC area.’ ”<sup>34</sup>

Based on these and similar assertions, Bradbury concluded the high-value detainee program was not “conduct that would shock the contemporary conscience,” and thus would not violate the Constitution’s Fifth Amendment or Article 16 of the Convention Against Torture’s prohibition on cruel, inhuman or degrading treatment. Bradbury acknowledged that the “use of coercive interrogation techniques in other contexts — in different settings, for other purposes, or absent the CIA’s safeguards — might be thought to ‘shock the conscience.’ ” But he found that due to the strength of the government’s interest in protecting the nation, and the

CIA's belief that coercive interrogation "has been a key reason al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001," the program "cannot be said to be constitutionally arbitrary."

When Bradbury was later interviewed by the DOJ's Office of Professional Responsibility (OPR), he acknowledged having relied entirely on the CIA for its representations on the effectiveness of its program and did not question the information he was given. Bradbury told OPR "it's not my role, really, to do a factual investigation of that."<sup>35</sup> Former CIA Acting General Counsel John Rizzo, a defender of the CIA's enhanced interrogation program, told Task Force staff

I trusted the people that were conducting the program, not just the people, the interrogators, but the analysts that were taking the information, vetting it, preparing it into other reports. ...

I trusted, I knew the people who were doing this, I trusted their integrity, their judgment. When they conclude that the information they were getting is reliable and actionable, I agreed to accept it.<sup>36</sup>

Rizzo also told Task Force staff the controversy on the effectiveness of the techniques "has gotten very long legs" and he now supports declassifying as much information as possible about the CIA program in light of the Obama administration's decision to declassify the Bush administration's OLC memoranda on the subject.<sup>37</sup>

According to Ali Soufan, one of the FBI agents who first interrogated Abu Zubaydah at the black site in Thailand, the OLC memo and the CIA representations on which it relied were riddled with falsehoods. In an interview with Task Force staff, Soufan said that Abu Zubaydah "identified KSM as a mastermind" of September 11 before even the [CIA personnel and contractors] arrived" at the black site.<sup>38</sup> Jose Rodriguez acknowledged in his memoirs that Abu Zubaydah named KSM as "Mukhtar," the mastermind of September 11 "long before he was subjected to enhanced interrogation techniques."<sup>39</sup>

Abu Zubaydah's revelation about Jose Padilla came later. Soufan said it occurred after CIA contractors had begun using nudity and sleep deprivation on Abu Zubaydah, but long before waterboarding and the full range of enhanced techniques were approved. As Soufan noted, the actual date of Padilla's arrest appears to confirm this; Padilla was arrested in May 2002, and waterboarding was not approved until August 2002.

Jose Rodriguez suggests in his book that depriving Abu Zubaydah of sleep contributed to his identification of Jose Padilla. Soufan wrote in his memoir that the opposite was true. Abu Zubaydah stopped talking when CIA contractors began to use nudity and sleep deprivation. He said that Abu Zubaydah's refusal to talk was the only reason the CIA had authorized Soufan and his partner to interrogate Abu Zubaydah again.<sup>40</sup> Soufan said in an interview that the information Abu Zubaydah revealed during the early period of his interrogation was not restricted to KSM's alias and Padilla: "[I]t's not only Padilla, it's basically everything. Everything that we know about Abu Zubaydah came from when we arrested him until May."<sup>41</sup>

Many details of Soufan's account of the Abu Zubaydah interrogation were redacted from his book on national security grounds by the CIA's Publication Review Board — including, it seems,

every instance where Soufan used the pronouns “I” or “we,” and most of the descriptions of intelligence that Abu Zubaydah revealed to the FBI. Soufan told Task Force staff that he believed these redactions were unjustified by the need to protect national security: “They are declassifying documents that were found in bin Laden’s house, for heaven’s sake, you want to tell me that my notes on Abu Zubaydah’s interrogation now are so classified?” He noted that most of the operatives named are either “dead or in Gitmo,” and other information discussed was similarly dated. He said that if his notes showed that

I waterboarded the guy and he gave me the information, then it won’t be off-limits. Then they would probably put me on every TV station. ... [I]f I said I waterboarded him, they would be like absolutely, put it in, it’s unredacted, you can do whatever you want with it.<sup>42</sup>

Rodriguez’s book does contain some unredacted anecdotes about Soufan’s interrogation of Abu Zubaydah, as well as detailed assertions about the application of enhanced interrogation techniques to individual detainees, the techniques’ effects on detainees and their reactions to them, and detainees’ conditions of confinement. Rodriguez’s book also includes a number of purported quotations from Abu Zubaydah, Khalid Sheikh Mohammed, other CIA detainees, and their interrogators at the black sites, though their precise sourcing is unclear. Rodriguez wrote that Abu Zubaydah later told CIA interrogators that

he respected all of our team ... except for a Muslim FBI agent, who had offended him early on. The agent, it turned out, had tried to debate Islamic theory with AZ [Abu Zubaydah], who thought the agent had insufficient grounding in the facts. ...

At one point the Bureau guys decided to try to “recruit” AZ. In a meeting with the terrorist, the Arab-American agent told AZ, “Don’t pay attention to those CIA people ... you work with me,” and he gave him a candy bar. AZ was offended that the agent would think that he could be bought for a Snickers bar. The FBI man tried to use his Arab heritage as an opening to get AZ to talk, but it turned out to be counterproductive. “You are the worst kind of Arab,” AZ told him, “you are a traitor!”

Soufan said all of this was inaccurate. He said that while he had successfully interrogated other Al Qaeda operatives by discussing Islam with them, he did not do that with Abu Zubaydah because Abu Zubaydah seemed less religiously motivated than many other detainees. At times, Soufan said, “I felt that [I was] talking to a Che Guevara, from what I read about Che, rather than talking to an Islamic extremist.” He received long lectures from Abu Zubaydah about “how corporations are actually running the world, running America.” Regarding the claim about the candy bar, Soufan pointed out that when he first interrogated Abu Zubaydah he couldn’t have offered him a candy bar, “the guy was almost dying. We had a special diet planned for him, we couldn’t even give him water, for heaven’s sake, we used to put ice on his lips.”<sup>43</sup>

Rodriguez’s book said that the most valuable intelligence from Abu Zubaydah came after he was waterboarded, but is vague about the details of what was disclosed. The most specific example given is the assertion that Abu Zubaydah’s interrogation led to the capture of Ramzi bin al Shibh in Karachi on September 11, 2002. President George W. Bush made the same

claim in his 2006 speech acknowledging the CIA black sites, as does George Tenet in his memoirs. (The Tenet and Rodriguez memoirs share the same co-author credit, Bill Harlow, the former CIA spokesman.) They do not specify precisely what information Abu Zubaydah disclosed about bin al Shibh, however, and other sources have given different accounts of what led to the 2002 raid.

Ramzi bin al Shibh and Khalid Sheikh Mohammed gave a 48-hour interview to an Al Jazeera journalist, Yosri Fouda, in April 2002, in which they admitted their role in the September 11 attacks. According to Ron Suskind, Fouda's supervisors at Al Jazeera relayed the details of the encounter, including the approximate location in Karachi where the interview occurred, to the emir of Qatar in mid-June. The emir in turn told George Tenet. Ali Soufan, in his book, said that additional information came from the FBI's interrogation of a detainee named Ahmed al-Darbi at Bagram Air Field. He did not rule out the possibility that Abu Zubaydah had contributed some helpful intelligence, noting that Abu Zubaydah "gave us a lot of information based on phone numbers that we had" from detainees' "pocket litter," but he was extremely skeptical of the claim that Abu Zubaydah was the main source. In general, Soufan said, "it's a combination of information" that leads to a successful operation, not a "Hollywood type" scenario based on a single dramatic revelation.

The immediate catalyst for the bin al Shibh raid seems to have been a raid the day before on a different safe house run by Ahmed Ghulam Rabbani. According to a U.S. intelligence assessment of Rabbani at Guantánamo, Rabbani's driver cooperated and "provided information on other safe houses, which led on the following day" to the arrests of bin al Shibh, Hassan bin Attash, and other Al Qaeda members (as well as Rabbani's brother). Neither bin Attash's, bin al Shibh's, nor the Rabbanis' Guantánamo assessments mention Abu Zubaydah providing intelligence that contributed to their capture, but that does not prove his information played no role.

Some of the best evidence of exactly what happened during Abu Zubaydah's interrogation has been destroyed, on Jose Rodriguez's orders. The CIA made 92 videotapes of Abu Zubaydah's interrogation, including his waterboarding sessions. The tapes were reportedly quite graphic. John Rizzo told the BBC that a colleague who viewed them in Thailand said Abu Zubaydah "was reacting visibly in a very disturbing way" to waterboarding, which made the tapes "hard to watch." The BBC reported that they showed Abu Zubaydah "vomiting and screaming."<sup>44</sup>

Rodriguez was investigated for ordering the destruction of the videotapes, but after the statute of limitations expired the Department of Justice announced that it would not charge him with any crimes. As is generally the case, DOJ did not explain its reasons for declining prosecution. Rodriguez claimed to have been unaware the tapes should have been preserved at the time he ordered their destruction, a claim John Rizzo disputed in his interview with Task Force staff. "[W]e would talk about [destroying the tapes] at least once a week because he would keep raising it. ... I tried to play straight with him and at the last minute he goes around my back and does it anyway."<sup>45</sup> In his memoirs, Rodriguez argues that several CIA officials had reviewed the videotapes and concluded that they did not contain any information that was not memorialized in the daily cables from the black sites, and by ordering their destruction, "I was not depriving anyone of information about what was done or what was said. I was just getting rid of some ugly visuals that could put the lives of my people at risk." Rodriguez wrote that his primary motivation was the fear — accentuated by the Abu Ghraib

scandal — that if an image from the tapes leaked, terrorists “would use the photo to track down Agency officers and exact revenge on them or their families.” In a press interview after the release of his book, he said:

You really doubt that those tapes would not be out in the open now, that they would not be on YouTube? ... They would be out there, they would have been leaked, or somebody would have ordered their release.<sup>46</sup>

But the videotapes were far more closely held than the Abu Ghraib photographs, which low-ranking soldiers stored on their own cameras and used as computer screensavers. Only one copy of the tapes existed, at the CIA field location in Thailand. Many CIA documents describing the same events, which have not been destroyed and were distributed more widely than the videos, remain secret.

Soufan said that during the portion of Abu Zubaydah’s interrogation that he witnessed, the interrogators who were present during coercive techniques wore ski masks designed to obscure their identity.<sup>47</sup> In the declassified CIA documents regarding the decision to destroy the tapes, the danger to individual interrogators is not discussed. In one email sent to CIA Executive Director Dusty Foggo, a colleague concurs in Rodriguez’s view that

the heat from [destroying] it is nothing compared to what it would be if the tapes ever got into public domain — he said that out of context, they would make us look terrible; it would be “devastating” to us.<sup>48</sup>

There is other evidence of Abu Zubaydah’s interrogation, however. Soufan said he took detailed notes, and the Senate Intelligence Committee has access to them. They also have access to CIA cables and other contemporaneous documents regarding Abu Zubaydah’s interrogation. Without primary sources, and with eyewitnesses (including Abu Zubaydah himself) forbidden from disclosing the details of the interrogation, it is not possible to resolve fully the differences between Soufan’s and Rodriguez’s accounts.

Despite public controversy about the effectiveness of the CIA techniques against Abu Zubaydah and others, in a July 2007 memo by Steven Bradbury the effectiveness of the CIA’s EIT program was again front and center in OLC’s analysis of its legality.

For example, we understand that enhanced interrogation techniques proved particularly crucial in the interrogations of Khalid Shaykh Muhammad and Abu Zubaydah. Before the CIA used enhanced interrogations on Khalid Shaykh Muhammad, he resisted giving any information about future attacks, simply warning, “soon, you will know.” As the President informed the Nation in his September 6th address, once enhanced techniques were employed, Muhammad provided information revealing the “Second Wave,” a plot to crash a hijacked airliner into the Library Tower in Los Angeles — the tallest building on the West Coast. Information obtained from Muhammad led to the capture of many of the al Qaeda operatives planning the attack. Interrogations of Zubaydah — again, once enhanced techniques were employed — revealed two al Qaeda operatives already in the United States and planning to destroy a high rise apartment building and to detonate a radiological bomb in Washington, D.C. The techniques have revealed plots to blow up the Brooklyn Bridge and to

release mass biological agents in our Nation's largest cities.<sup>49</sup>

Bradbury is not the only individual who relied upon the intelligence community's representations as to the effectiveness of the program. President Bush, Michael Mukasey, Michael Hayden, John Yoo and others derived the information they had on the efficacy of the techniques from briefings, intelligence reports and other second-hand sources. Ali Soufan observed to our staff:

[M]ost of the people who actually fight tooth and nail for EITs are people who were appointed after the EIT program [had] been shelved. Mukasey, he was appointed as the Attorney General after the EIT program was shelved. Hayden, after the EIT program was shelved, not before. ...

It's so highly classified that they probably cannot even read it in their own offices, you know, they have to take them to a SCIF inside a SCIF inside a SCIF.<sup>50</sup> And then you read into a document, ["]Wow, yes, we saved hundreds of thousands of lives[."] But where? Give me the hundreds of thousands of lives.<sup>51</sup>

Former CIA General Counsel John Rizzo said that he thought some additional details about the CIA program could be disclosed without harm to national security: "The argument originally was don't declassify any of it. ... And now that this much has been opened up, yeah. ... I'd be for declassifying as much as possible."

### **The Library Tower Plot**

Opponents of a complete ban on torture have often cited a hypothetical "ticking bomb" scenario, in which a captured terrorist has information needed to prevent an imminent nuclear attack on an American city, which he will only reveal through torture.

Supreme Court Justice Antonin Scalia has cited the TV show "24," whose protagonist Jack Bauer frequently tortured suspects to defuse ticking bombs, as an example of why an absolute ban on torture is unrealistic. "Jack Bauer saved Los Angeles. ... He saved hundreds of thousands of lives," Justice Scalia said at a conference in Ottawa. "Are you going to convict Jack Bauer?"

The most often cited example of a "ticking time bomb" allegedly averted by the CIA high-value detainee program is a plot to crash planes into the highest skyscraper in Los Angeles, the 73-story Library Tower.<sup>52</sup> Marc Thiessen, a former Bush speechwriter and frequent defender of the CIA program, has written in reference to the Library Tower plot that "without enhanced interrogations, there could be a hole in the ground in Los Angeles to match the one in New York."<sup>53</sup> Deroy Murdock wrote in the *National Review* that America "should be proud of waterboarding," because without it "the Pacific Coast's highest skyscraper might have become a smoldering pile of steel beams."<sup>54</sup> The 2005 and 2007 Bradbury memos also repeatedly cite KSM's revelation of "a plot to crash a hijacked airliner into the Library Tower in Los Angeles" as an example of enhanced interrogations keeping the country safe.

President Bush first detailed the plot in a February 2006 speech, before the CIA detention and interrogation program was officially acknowledged:

[I]n October 2001, Khalid Shaykh Muhammad — the mastermind of the

September the 11th attacks — had already set in motion a plan to have terrorist operatives hijack an airplane using shoe bombs to breach the cockpit door, and fly the plane into the tallest building on the West Coast. We believe the intended target was [the Library]<sup>55</sup> Tower in Los Angeles, California.

Rather than use Arab hijackers as he had on September the 11th, Khalid Shaykh Muhammad sought out young men from Southeast Asia — whom he believed would not arouse as much suspicion. To help carry out this plan, he tapped a terrorist named Hambali, one of the leaders of an al Qaeda affiliated group in Southeast Asia called “J-I.” JI terrorists were responsible for a series of deadly attacks in Southeast Asia, and members of the group had trained with al Qaeda. Hambali recruited several key operatives who had been training in Afghanistan. Once the operatives were recruited, they met with Osama bin Laden, and then began preparations for the West Coast attack.<sup>56</sup>

In this speech, Bush did not give extensive details about how the plot was disrupted, but gave most of the credit to U.S. allies in Southeast Asia. He stated that the plan

was derailed in early 2002 when a Southeast Asian nation arrested a key al Qaeda operative. ... This critical intelligence helped other allies capture the ringleaders and other known operatives who had been recruited for this plot. The West Coast plot had been thwarted.<sup>57</sup>

Similarly, Frances Fragos Townsend, Homeland Security adviser to President Bush, stated at a news conference in February 2006 that “[t]he cell leader was arrested in February of 2002, and ... at that point, the other members of the cell believed that the West Coast plot [had] been canceled, was not going forward.”<sup>58</sup> Later on, though, Bush and other officials would repeatedly credit the CIA’s interrogation program with derailing the plot. In 2007, he stated that the CIA program “has produced critical intelligence that has helped us stop a number of attacks — including ... a plot to hijack a passenger plane and fly it into Library Tower in Los Angeles, California.”<sup>59</sup> In his memoirs, Bush stated that Khalid Sheikh Mohammed had

provided information that led to the capture of Hambali, the chief of al Qaeda’s most dangerous affiliate in Southeast Asia and the architect of the Bali terrorist attack that killed 202 people. He provided further details that led agent’s to Hambali’s brother, who had been grooming operatives to carry out another attack on the United States, possibly a West Coast version of 9/11 in which terrorists flew a hijacked plane into the Library Tower in Los Angeles.<sup>60</sup>

According to The Associated Press, the original pilot for the Library Tower plot, a Malaysian citizen named Zaini Zakaria, pulled out after seeing images from the September 11 attack. He cut off contact with the members of the cell before his arrest in December 2002. Zakaria reportedly told Malaysian security forces that he realized he “didn’t want that kind of jihad” and was not prepared to martyr himself.<sup>61</sup>

The cell leader, Masran bin Arshad, was arrested in February 2002 and was interrogated by Malaysian security forces. According to reports of U.S. intelligence assessments, Arshad revealed in 2002 that Khalid Sheikh Mohammed had selected him and three other Malaysians

to help plan an attack on “the tallest building in California.” Arshad named the other members of his cell as Mohammad Farik Amin (aka Zubair), Bashir bin Lep (aka Lillie), and Nik Abd-al Rahman bin Mustapha (aka Afifi). Arshad said that his cell was to provide support, while another group would be directly responsible for piloting the plane into the building. He told interrogators that the plan was put on hold after “shoe bomber” Richard Reid’s arrest exposed their potential methodology for hijacking. Other sources — including Zubair and bin Lep, who were eventually interrogated in CIA custody — said that it was bin Arshad’s arrest that derailed the plot.

Khalid Sheikh Mohammed was arrested well after bin Arshad had been detained and revealed his co-conspirators’ names and the plan to drive airplanes into the tallest building on the West Coast. Zubair and bin Lep, however, were arrested some months after KSM. Defenders of the CIA program have argued that the plot was not truly derailed until after they and their associates were arrested, and they were taken into custody as a result of Mohammed’s interrogation.

More specifically, according to Jose Rodriguez and to CIA documents, Khalid Sheikh Mohammed admitted to his interrogators that he had asked a detainee named Majid Khan to deliver \$50,000 to Riduan Isamuddin. Isamuddin, better known as Hambali, was the head of the Southeast Asian terror group Jemaah Islamiyah, the group responsible for the 2002 Bali bombings. Bin Lep, bin Arshad, Afifi and Zubair were also Jemaah Islamiyah operatives.

Majid Khan, a former resident of Baltimore, was captured at approximately the same time as KSM. He confirmed that he had couriered the money to Hambali. Khan said he had passed it on through a Malaysian named Zubair, and gave CIA interrogators Zubair’s phone number. This was extremely helpful for intercepting Jemaah Islamiyah’s communications as well as tracking Zubair, who was detained in June 2003. According to the CIA, Zubair led the CIA to bin Lep and Hambali, who were captured in Thailand in August of 2003.<sup>62</sup> The date on which Khan revealed Zubair’s phone number, and the interrogation methods used on him beforehand, are not publicly known. Khan later alleged that he was tortured in CIA custody. He told the International Committee of the Red Cross (ICRC) that he had been shackled naked in a standing position three consecutive days at a prison in Afghanistan. Most other details of his treatment remain classified.

The CIA and its former officials allege that Khalid Sheikh Mohammed next named Hambali’s brother, Rusman “Gun Gun” Gunawan, as a potential successor for the leadership of Jemaah Islamiyah. Gunawan was taken into custody and interrogated at a black site, and provided information about a group of Jemaah Islamiyah members in Karachi, known as the “Ghuraba cell.” According to CIA documents,

Hambali admitted that some members of the cell were eventually to be groomed for U.S. operations — at the behest of KSM — possibly as part of KSM’s plot to fly hijacked planes into the tallest building on the U.S. west coast.<sup>63</sup>

The CIA inspector general’s 2004 report similarly stated that Hambali “provided information that led to the arrest of previously unknown members of an Al Qa’ida cell in Karachi. They were designated as pilots for an aircraft attacks inside the United States.”<sup>64</sup> Later, the

**“... [i]t was only after 9/11 that the CIA began detaining and interrogating terrorism suspects. At that time, the CIA had literally no detention and interrogation experience.”**



report stated that detainees had revealed a plan to “hijack and fly an airplane into the tallest building in California in a west coast version of the World Trade Center attack.” However, the report did not find evidence that the West Coast attack or the others discussed in the report were imminent.<sup>65</sup>

FBI agent Ali Soufan’s account of the Jemaah Islamiyah arrests was largely redacted by the CIA’s publications review board, but the unredacted portions differ from the CIA’s version in three major respects. First, Soufan noted that Southeast Asian intelligence services were doing their own investigation into Jemaah Islamiyah, and these were crucial in breaking up Hambali’s network. Second, he argued that CIA officials had exaggerated the threat from the Ghuraba cell, all of whom were sent back to their own countries instead of being charged or interrogated by the United States. Third, he noted that the interrogation of various detainees about the money KSM provided to Jemaah Islamiyah did not prevent that money from being used in a successful suicide bombing in Jakarta in August 2003.

Soufan wrote that the CIA’s version of Hambali’s arrest was “[t]o put it charitably ... a loose interpretation of what happened.” He said that Indonesian authorities were doing their own investigation of Jemaah Islamiyah after the Bali nightclub bombings, and “by July 2003, more than eighty-three suspects were under arrest, and Hambali was on the run.” Soufan also said that the CIA had tried to “boost the importance of Gun Gun and the al-Ghuraba cell:”

Many of the students were trained in both religious studies and military and terrorist skills, and were being groomed to be the next generation of JI leaders. A few had traveled to Afghanistan for guerilla training and had met with Bin Laden in Kandahar. As it turned out, the cell had not yet committed any attacks and weren’t plotting anything; they were training and studying. In November the eighteen students were repatriated to their home countries.<sup>66</sup>

Soufan did not believe that the Ghuraba cell was involved in any attempt on the Library Tower, despite the CIA’s assertion that they would have “possibly,” or “eventually” participated in U.S. operations:

This “eventually” and “possibly” was the best analysts could conclude, despite 183 sessions of waterboarding. ... The reality is that the al-Ghuraba cell wasn’t involved, which is why the U.S. didn’t request the arrest of its members and they were sent to their home countries.<sup>67</sup>

Soufan said in an interview with Task Force staff that he thought the redactions were unjustified. The redacted information did not come from any information accessed through his FBI work or security clearance, but from his and a research assistant’s efforts to learn as much possible about the plot from open sources and conversations with Southeast Asian law enforcement.

Press reports confirm that the Ghuraba students were sent home rather than taken into custody by the United States. Many of them were released after their return. Others were held for several years, but none was ever charged in connection with any plot against the United States.<sup>68</sup>

According to Ken Conboy, a security consultant in Indonesia who has written several books about Jemaah Islamiyah and the Indonesian intelligence service, after 2001 Khalid Sheikh Mohammed

had lobbied unsuccessfully to have Ghuraba members deployed in suicide operations:

Thinking aloud, he fancifully contemplated using them in more airplane plots, possibly in the United States.

Hambali, who was in Karachi by that time, had other ideas. He had come to see al-Ghuraba as a sleeper cell of future Jemaah Islamiyah leaders, not cannon fodder to be wasted in some act of desperation by KSM. Fending off the advances by al-Qaeda, he successfully argued that they would not be operationally ready for at least another two years.<sup>69</sup>

Conboy wrote that before 2001, in addition to weekly lectures at a safe house in Karachi, Ghuraba members began receiving training at Al Qaeda camps in Afghanistan “during their university breaks.” Some of them met Osama bin Laden. When September 11 occurred, four members of the cell were in Kandahar. Rather than join the jihad in Afghanistan, though, they quickly returned to Karachi and they stayed there throughout 2002.

According to Conboy, the Ghuraba cell members did have an active plot when they were detained, but it did not involve crashing planes into skyscrapers. Rather, there was a plan to kidnap a Western oil executive in Karachi as revenge for Hambali’s capture. One attempt on September 8, 2003, had failed when the kidnappers got “a collective case of cold feet” and slept through the target’s arrival at the airport, but it was only the group’s arrest that ensured that no kidnapping occurred.

Thus, the available public record, limited as it is, simply does not support a claim that waterboarding prevented the Library Tower from being reduced to rubble. This is not to diminish the importance of the capture of Zubair, bin Lep, Hambali and their associates (though exactly what role CIA “enhanced interrogations” played in their capture remains ambiguous). Jemaah Islamiyah was a dangerous group, responsible for hundreds of civilian deaths — but it was most dangerous in Southeast Asia. If there were a ticking bomb that could have been defused by intelligence from Zubair, Khalid Sheikh Mohammed, and Majid Khan, it would have been in Jakarta, not Los Angeles. On August 5, 2003, a suicide bomber detonated a truck bomb outside of the lobby of the Jakarta Marriott Hotel, killing 11 people and wounding at least 81.

In February 2012, Majid Khan pleaded guilty to conspiracy and murder in violation of the laws of war in a military commission this year, in return for a reduced sentence in the future if he cooperated in providing testimony against other detainees in the CIA program. (Khan’s sentencing was postponed to ensure his cooperation at trial). One of the charges centered around the \$50,000 that Majid Khan had arranged to be transferred from KSM to Hambali through Zubair. According to Khan’s indictment, the money was used to finance the Marriott bombing.

Hambali and bin Lep were only captured after the Marriott bombing, and Khan has said he did not know any of the details of the operation or the Jemaah Islamiyah personnel involved. But according to Khan’s indictment and Zubair’s Guantánamo intelligence assessment, Zubair participated in the funds transfer and relayed a message from Hambali to Dr. bin Hussein Azahari, one of the lead co-conspirators in the Marriott bombing.<sup>70</sup> Ali Soufan argues plausibly that Khalid Sheikh Mohammed, as Al Qaeda’s military commander, must have also known

about the cell in Jakarta, as well as those responsible for train bombings in Madrid in 2004 and London in 2005.

It is impossible to be certain whether other interrogation methods would have stopped these attacks. But it is equally impossible to be certain that the information that captives revealed after being tortured could not have been obtained by any other means.

## The Danger of False Confessions

At the same time the CIA was adapting SERE techniques (Survival, Evasion, Resistance and Escape) for its interrogation program, the first season of the wildly popular TV show “24” was wrapping up on television. The first season’s finale aired May 21, 2002. The show was familiar to many at Guantánamo in 2002. “We saw it on cable,” Lieutenant Colonel Diane Beaver recalled. “People had already seen the first series. It was hugely popular. ... [Jack Bauer] gave people lots of ideas.”<sup>71</sup> Retired FBI interrogator Joe Navarro told Task Force staff

Keep in mind there are 17,000 different police departments across the country so there’s quite some variance, but the average law enforcement officer in the United States in their career receives between eight and fifteen hours of [suspect] interview training. What fills in the rest? People use words and techniques from popular culture and what’s trendy.”<sup>72</sup>

The SERE techniques that the CIA adapted for its interrogation program had their origins in Communist techniques used to extract false confessions. As former Air Force interrogator Steven Kleinman testified to the Senate Armed Services Committee:

Many of the methods used in SERE training are based on what was once known as the Communist Interrogation Model, a system designed to physically and psychologically debilitate a detainee as a means of gaining compliance. ... [T]hat model’s primary objective was to compel a prisoner to generate propaganda, not intelligence.<sup>73</sup>

After serving as an interrogator and intelligence officer in the Air Force, Kleinman worked as the director of intelligence for the Joint Personnel Recovery Agency’s SERE program at Fairchild Air Force Base near Spokane, Wash. From his work with SERE, he knew James Mitchell and Bruce Jessen, the contract psychologists who later designed the CIA program. (Mitchell and Jessen declined the Task Force’s interview request through their counsel).

Kleinman said that Mitchell and Jessen were not the only people associated with SERE who “couldn’t wait” to apply the techniques to the enemy. “I had the conversation with so many people,” he said. In his experience, SERE instructors tended to “see themselves as interrogators” because, although they were not interrogators, they were “really good at portraying an interrogator.”<sup>74</sup> One career SERE professional told Kleinman “One day after people are tired of getting attacked they won’t care how we got the information.”<sup>75</sup>

Bryce Lefever, a SERE psychologist who has defended Mitchell and Jessen, told Dr. Gregg Bloche that “[w]e all knew from experience that these techniques, these SERE training techniques, were pretty effective not only at training but ... at exposing vulnerabilities in our

own students.” Lefever said that SERE trainees were given specific “secrets” to keep from “interrogators” in the training exercise, and routinely failed: “It was kind of an astonishing thing. ... You could have truly brave American patriots, even in a training setting, talking rather freely about stuff they shouldn’t have been talking about.”<sup>76</sup> Former CIA Acting General Counsel John Rizzo told Task Force staff he “distinctly recalled [CIA officers from the Counterterrorism Center] tell me that they had some data to indicate that these techniques worked and produced reliable intelligence,” though he didn’t believe that efficacy data was related to the SERE program.<sup>77</sup>

Kleinman confirmed that SERE students often reveal information they are supposed to withhold, and so the SERE techniques *feel* like they are effective to both trainees and trainers. But, in Kleinman’s words, “training and the real world are not the same thing.” SERE instructors have no experience and receive no training in how to ensure that prisoners are telling the truth, instead of what they think interrogators want to hear. Instructors are not trained to avoid leading questions, which telegraph to a detainee the answer an interrogator wants. SERE instructors often know in advance the information they are trying to solicit and they have the option of calling a soldier’s unit to verify the information he reveals — something that is obviously impossible in a real interrogation.<sup>78</sup> Kleinman said that some SERE instructors likely believe they can tell based on behavioral cues whether someone is telling the truth, but scientific studies show that behavioral indicators of deception are faint and unreliable. In the controlled environment of SERE, there is also no need to worry about coercion undermining a source’s ability to accurately recall information — but this is a major concern in a real interrogation.

According to Bloche, the architects of the CIA program understood that inducing compliance was not enough if they wanted accurate intelligence, and that it was also important to “shape compliance” by rewarding truthful answers and punishing falsehood.<sup>79</sup> But how, exactly, they attempted to distinguish truthful and false information remains ambiguous. Bloche stated in an interview with Task Force staff that it is impossible to scientifically evaluate the efficacy of SERE techniques on captives. Even if the relevant evidence were not classified, the sample size is too small, and “to have the scientific answer, one would have to have the result of a randomized study.” Conducting such a study on prisoners would be “unimaginable,” because medical and psychological ethics forbid such brutal experiments on captives.<sup>80</sup>

It is unclear whether the architects of the CIA’s interrogation program accounted for, or were even aware of, what experienced interrogators saw as a central flaw in using torture. Torture disorients intelligence subjects and can affect memory. Stress, pain and a lack of sleep affect a subject’s ability to accurately recall and relate experiences and facts. Experienced interrogators weren’t the only ones aware of these efficacy limitations. According to Dr. Stephen Xenakis, a retired Army Brigadier General and psychiatrist “In the case of sleep deprivation, the evidence is clear psychological disorientation kicks in by 72 hours and by 96 [hours] there can be serious psychiatric episodes.”<sup>81</sup> As discussed further in the Medical and Consequences chapters (Chapters 6 and 8) of this report, abuse of detainees, at least in some instances, resulted in psychosis and eliminated any hope that useful intelligence could be gained from the subject. The belief that learned helplessness would compel detainees to disclose information was simply wrong, according to Xenakis:

Tactics that are intended to diminish consciousness and affect alertness may induce mood states like depression but are not helpful to elicit more information. ... Being in a helpless state is not the same as being in a state of

mind where you are going to disclose information. People don't, when they've given up all hope, suddenly decide to [disclose information].<sup>82</sup>

Prior medical studies had shown when mental or physical capacity had been reduced, so too had memory been reduced. Sleep deprivation of physicians led to disorientation and reduced awareness amongst the subjects in the study. Studies from the 1950s and 1960s that used hallucinogenic drugs to study memory produced false memories. As Xenakis explained to Task Force staff:

There is no professional literature that links the two. ... I've not been able to find any study of any kind that if you induce the circumstances [of the CIA EIT program] that you get information that you wouldn't get otherwise and when I look at the active ingredients of those techniques there is, respectively, research that shows you will not get good information.<sup>83</sup>

Jose Rodriguez wrote that whatever a detainee revealed, the CIA "would not accept it on blind faith but checked it out in many different ways," "checked and double-checked," and "double-checked the information six ways from Sunday":

The people who were asking the questions, and the people who were analyzing the answers, were among the leading experts on al-Qa'ida in the world. Often they knew the answers to questions before they were asked. ... As we got more and more al-Qa'ida leaders in custody, we were able to play one off against the other. We would ask a question, get a response, and then say, "Oh really? That's not what KSM said, he said X." We would ask factual questions, such as "Where did you travel to in 1999?" When the detainee said, "Nowhere," we would say, "No, actually you went to Tanganyika and stayed at the Hill Top Hotel." They quickly learned not to mislead us. Still, we never assumed that what a detainee was telling us was true. But after you caught them in a few lies, and the specter of renewed EITs (which they didn't know we were very unlikely to return to) arose in their minds, they generally gave you something close enough to the truth.<sup>84</sup>

According to the CIA inspector general, though, these safeguards were not foolproof. Particularly at the start of the program,

The Agency lacked adequate linguists or subject matter experts and had very little hard knowledge of what particular Al-Qa'ida leaders — who later became detainees — knew. This lack of information led analysts to speculate about what a detainee "should know," vice information the analyst could objectively demonstrate the detainee did know [six lines redacted]

[W]hen a detainee did not respond to a question posed to him, the assumption at Headquarters was that the detainee was holding back and knew more; consequently, Headquarters recommended resumption of EITs.<sup>85</sup>

Soufan said that he saw this play out during the interrogation of Abu Zubaydah: "Abu Zubaydah is not an al-Qaeda member. We knew that at the time, but the moment we arrested Abu Zubaydah, the President was saying he's the number three guy in al-Qaeda."<sup>86</sup> According to Soufan, this contradicted both the intelligence about Abu Zubaydah from the investigation of the

millennium plot, and documents captured with Abu Zubaydah. But CIA analysts “convinced themselves he’s number three” and that “[i]f he’s not admitting he’s number three, then he’s not cooperating. Well, 83 sessions [of waterboarding] and he admitted he’s number three.”

Abu Zubaydah alleged during his Guantánamo combatant status review tribunal that after being tortured,

I say, “yes, I was partner of BIN LADEN. I’m his number three in al Qaida and I’m his partner of RESSAM.” I say okay but leave me. So they write but they want what’s after, more information about more operations, so I can’t. They keep torturing me.<sup>87</sup>

Abu Zubaydah claimed that at some later point, “they told me sorry we discover that you are not number three, not a partner even not a fighter.”<sup>88</sup>

The risk that a suspect would make a false confession under torture seems to have been heightened in cases where the CIA rendered a subject to foreign custody. The most notorious example of this is the case of Ibn al-Sheikh al-Libi, a Libyan jihadist who led the Khalden training camp in Afghanistan. Al-Libi’s false claim about there being a link between Iraq and Al Qaeda on the development of chemical weapons has been cited as a primary source for the faulty prewar intelligence that the Bush administration repeated leading up to the war in Iraq. In an October 2002 speech in Cincinnati, President Bush stated Iraqis had trained members of Al Qaeda on the development and use of chemical and biological weapons.<sup>89</sup> Al-Libi, whose real name was Ali Abdel-Aziz al-Fakheri, was captured in December 2001 and questioned at Bagram by FBI agents Russell Fincher and George Crouch and New York City detective Marty Mahon. Jack Cloonan, an FBI agent in New York, advised the interrogators by telephone.

According to Soufan and several press accounts quoting FBI sources, al-Libi was cooperating, particularly with Fincher. He reportedly provided intelligence about Zacarias Moussaoui, Richard Reid, and several active plots, including a planned attack against the U.S. embassy in Yemen that was close to execution. The CIA, however, was convinced that he was withholding even more valuable information because he denied knowledge of any imminent attacks in the United States or links between Al Qaeda and Saddam Hussein. One CIA officer reportedly told al-Libi, “[y]ou’re going to Egypt,” and “[b]efore you get there, I am going to find your mother and fuck her.” Garrett Graff, a journalist who spoke to a number of FBI agents about al-Libi’s interrogation and other counterterrorism operations, reported that Fincher and Mahon witnessed this exchange:

Fincher, eyes wide, jumped off the picnic table, slammed into the CIA operative, and shoved him out the door with a “What the fuck are you doing?” Furious about the new plan, the Bagram FBI team, including the military and other intelligence agencies present (minus, though, the CIA) wrote a rare joint memo to Washington, still classified today, attesting to al-Libi’s forthright cooperation and urging the continuation of the FBI interrogation.<sup>90</sup>

But the FBI was overruled, and al-Libi was sent to Egypt. He made a number of confessions, and provided false information about ties between Iraq and Al Qaeda that Colin Powell would later cite in his presentation to the United Nations.<sup>91</sup> According to a Senate Intelligence Committee

**“I never encountered a single source in all my years of interrogating, that I felt I needed to do something to or with that I would be ashamed to tell my mother I did.”**

report sourced to CIA cables, when al-Libi returned to U.S. custody, he reported that

[REDACTED] After his transfer to a foreign government [REDACTED], al-Libi claimed that during his initial debriefings “he lied to the [foreign government service] [REDACTED] about future operations to avoid torture.” Al-Libi told the CIA that the foreign government service [REDACTED] explained to him that a “long list of methods could be used against him which were extreme” and that “he would confess because three thousand individuals had been in the chair before him and that each had confessed.”

[REDACTED] According to al-Libi, the foreign government service [REDACTED] “stated that the next topic was al-Qa’ida’s connections with Iraq. ... This was a subject about which he knew nothing and had difficulty even coming up with a story.” Al-Libi indicated that his interrogators did not like his responses and then “placed him in a small box approximately 50 cm x 50 cm.” He claimed he was held in the box for approximately 17 hours. When he was let out of the box, al-Libi claims that he was given a last opportunity to “tell the truth.” When al-Libi did not satisfy the interrogator, al-Libi claimed that “he was knocked over with an arm thrust across his chest and he fell on his back.” Al-Libi told CIA debriefers that he then “was punched for 15 minutes.”

(U) Al-Libi told debriefers that “after the beating,” he was again asked about the connection with Iraq and this time he came up with a story that three al-Qa’ida members went to Iraq to learn about nuclear weapons. Al-Libi said that he used the names of real individuals associated with al-Qa’ida so that he could remember the details of his fabricated story and make it more believable to the foreign intelligence service. Al-Libi noted that “this pleased his [foreign] interrogators, who directed that al-Libi be taken back to a big room, vice the 50 square centimeter box and given food.”

[REDACTED] According to al-Libi, several days after the Iraq nuclear discussion, the foreign intelligence service debriefers [REDACTED] brought up the topic of anthrax and biological weapons. Al-Libi stated that he “knew nothing about a biological program and did not even understand the term biological.” Al-Libi stated that “he could not come up with a story and was then beaten in a way that left no marks.” According to al-Libi, he continued “to be unable to come up with a lie about biological weapons” because he did not understand the term “biological weapons.”<sup>92</sup>

The United States later sent al-Libi to Libya, where he allegedly committed suicide in prison.

Several other renditions also produced faulty intelligence. In one notorious case, the United States rendered Canadian citizen Maher Arar to Syria, partly on the strength of confessions that two other Canadians, Ahmed el-Maati and Abdullah Almalki, made under torture in Syrian intelligence’s notorious Palestine branch. Arar in turn was tortured, and made a false confession.<sup>93</sup> Arar was later exonerated by a Canadian government investigation. El-Maati and Almalki were also eventually sent back to Canada, where they have not been charged with terrorism.

## Effective Interrogation Without Torture

Defenders of coercive interrogations often argue that, while flawed, it is the only technique that could plausibly work against fanatical terrorists. In his article “Psychologists and Interrogations: What’s Torture Got to Do with It?” Kirk Hubbard, a CIA psychologist who introduced Mitchell and Jessen to the agency, mocked the idea of interrogators gaining intelligence by building rapport or outsmarting Al Qaeda members:

Are we to think the terrorist has the following thoughts: “You know, nobody has ever been as nice to me as these people — I’m going to turn my back on my God and my life’s work and tell them what they want to know.” Alternatively, maybe the terrorist will think “What a clever way of asking that question. Now that they put it that way, I have no choice but to tell them what they need to know to disrupt my plans.” Unfortunately, it is difficult to envision scenarios where useful information will be forthcoming. ... For terrorists who do not care if they live or die and have no fear of prison, there is little or no incentive to work with interrogators.

But Hubbard was not an interrogator, nor were Mitchell and Jessen. Before September 11, the CIA generally did not conduct interrogations. Stuart Herrington, a decorated Army human intelligence officer and interrogator who gained invaluable intelligence over his 30-year career during the Vietnam, Panama, and the 1990 Gulf War, said in an interview with Task Force staff that the CIA had avoided interrogation since “they got burned” by South Vietnamese allies’ use of torture during the Vietnam War. According to Herrington, CIA colleagues used to call interrogation “the I word.”<sup>94</sup>

Retired FBI agent Joe Navarro has also written that “[i]t was only after 9/11 that the CIA began detaining and interrogating terrorism suspects. At that time, the CIA had literally no detention and interrogation experience.”<sup>95</sup> On September 11, 2001, Navarro was one of perhaps 20 interrogators in the United States qualified to conduct interrogations of senior Al Qaeda suspects. According to Navarro “the memo to [law enforcement and intelligence agencies] saying ‘give us your best interrogators’ never went out. It never went out because it doesn’t exist. It was never written.” According to Steven Kleinman, “the single point of failure” regarding the use of SERE techniques against detainees was that no one in a real position of authority had enough experience, in either HUMINT [human intelligence] generally or interrogation specifically, to understand that SERE techniques would not work in the real world.<sup>96</sup>

Ali Soufan said that some CIA officials did have useful experience and insight, but they were overridden. In his book, Soufan describes a veteran CIA polygrapher with interrogation training, “Frank,” as sharing his concerns about the Abu Zubaydah interrogation. Soufan said that “it annoys the heck out of me” when people portray the disputes over coercive techniques as “FBI versus CIA,” because it was CIA personnel whose objection to the program led to the critical inspector general’s report and the end to the most brutal techniques.<sup>97</sup> Soufan said that when he was deployed overseas, he needed to depend on the other Americans with him, regardless of what agency employed them: “I worked with these people, they protected my back, I protected their back. ... [W]e don’t care about any of these things, we’re all Uncle Sam.”<sup>98</sup>

Soufan, Kleinman, Navarro and Herrington all rejected the view that Islamic extremists will



not reveal useful information without brutality. “The Hanoi Hilton teaches us that if you brutalize prisoners you harden them in their resolve [against] you.” Herrington told Task Force staff in an interview that, despite his own personal feelings of revulsion about many of the detainees he interrogated,

[detainees] are human, they're very human. And if you don't acknowledge that right up front, that this is another human being, and your job is going to be to cultivate a relationship with him, man to man, captor to prisoner ... you don't have any business being there. Period.<sup>99</sup>

Moreover, Herrington pointed out, traditional interrogation techniques have worked on members of Al Qaeda and other extremist groups. “I never encountered a single source in all my years of interrogating, that I felt I needed to do something to or with that I would be ashamed to tell my mother I did.”<sup>100</sup> Similarly Navarro has said:

[A]s an interrogator, I need only three things, (1) a quiet room (2) I need to know what the rules are for where the interrogation is taking place because I don't intend to get into trouble and (3) I need time to build a rapport with the subject and become his only friend. If you give me those three things I'll get [the information]. I don't need to be rough. I get Christmas cards every year from guys I've sent to prison for life.”<sup>101</sup>

Besides his assertions about al-Libi and Abu Zubaydah, Soufan's memoirs describe useful FBI interrogations of a number of Al Qaeda figures. These included Abu Jandal, a former bin Laden bodyguard who identified a number of the September 11 hijackers as Al Qaeda members the week after the attacks; Mohammed al-Owhali, one of the men who participated in the 1998 bombing of the U.S. embassy in Nairobi; L'Houssaine Kherchtou, who was a key witness in the embassy bombing trials and later enrolled in the witness protection program; Jamal al-Badawi, who was involved in the USS Cole bombing; Fahd al-Quso, a Yemeni Al Qaeda member assigned to videotape the USS Cole attack; Ali al-Bahlul, an Al Qaeda propagandist detained in Guantánamo Bay; bin Laden's driver and bodyguard Salim Hamdan; and Ibrahim al-Qosi, another Guantánamo detainee.

In June 2008, 15 senior interrogators, interviewers and intelligence officials from the U.S. military, the FBI and the CIA — amongst them Kleinman, Herrington, Navarro and Cloonan — all met, developed and released principles upon which they agreed. All agreed that the most effective way to obtain timely, credible intelligence from suspected terrorists and others who threaten the United States was to use noncoercive, traditional, rapport-based interviewing approaches with detainees.<sup>102</sup> Moreover they found the use of torture and other inhumane and abusive treatment resulted in false and misleading intelligence, loss of critical intelligence, was unlawful, ineffective, counterproductive, and caused serious damage to the reputation and standing of the United States.<sup>103</sup>

As the debate on interrogation continues, the Obama administration has, if not changed, at least restructured the way it approaches the interrogation of high-value detainees. On January 22, 2009, President Obama issued Executive Order 13491, which required agents and employees of the United States to disregard the legal advice provided by the Bush administration's Justice Department and to interrogate in accordance with the Army Field

Manual. There are concerns amongst interrogation experts about revisions from 2006 that remain in the Army's Field Manual on Interrogation today. There exists in the manual, since 2006, the practice of an interrogation technique called "separation" which, in its current incarnation, human rights groups have argued, could inflict real, significant, physical and mental anguish on a detainee. Under Appendix M, with the permission of a combatant commander, a detainee could arguably be interrogated for 40 consecutive hours with four-hour rest periods book-ended. Moreover, while Appendix M explicitly prohibits sensory deprivation, it explicitly permits the use of goggles, blindfolds and earmuffs if the use of such items is deemed "expedient." Furthermore, Appendix M also takes off the table an invaluable interrogation approach — noncoercive separation — and puts it out of reach in situations where it could be employed humanely and effectively. Stuart Herrington gained invaluable military intelligence in the nation's conflicts in Vietnam, Panama and the first Gulf War. On the changes to the military's rules for interrogation, Herrington was frank with Task Force staff :

The truth of the matter is there are some rules of the road now that they put out there as a reaction to what happened [in the public aftermath of the reporting of torture by U.S. forces] that the two projects that I have described in such detail [in Panama and the first Gulf War], I couldn't do them today.<sup>104</sup>

The January 2009 executive order also created a task force, the Special Task Force on Interrogations and Transfer Policies, which was to be chaired by the attorney general and whose membership included the director of national intelligence, the secretary of defense, the secretary of state, the secretary of homeland security, the director of the CIA, and the chairman of the Joint Chiefs of Staff. On August 24, 2009 the Special Task Force recommended that the Obama administration establish a specialized interrogation group that would bring together officials from law enforcement, the military and the U.S. intelligence community on the conduct of interrogations. The High-Value Detainee Interrogation Group (HIG) was to channel the experience from these different branches of the government, develop a set of best interrogation practices, and disseminate them for training purposes. HIG was at the center of controversy in its first year of existence.

On December 25, 2009 Al Qaeda operative Umar Farouk Abdulmutallab, the "underwear bomber," attempted to detonate a bomb aboard a commercial aircraft bound for the United States. Abdulmutallab's plan failed and he was interrogated by the FBI in Detroit. Not only did HIG fail to participate in his interrogation, National Intelligence Director Dennis Blair admitted HIG was not even operational yet, four months after its creation. Controversially, FBI agents had briefly questioned Abdulmutallab and, it was reported, he had provided intelligence before he was read *Miranda* rights. Once he was read *Miranda* rights, Abdulmutallab asked for a lawyer and stopped talking. The White House was reportedly furious when it found out the HIG had not been officially formed in time to question Abdulmutallab despite a direct order from the president to do so in the fall of 2009.<sup>105</sup>

By the spring of 2010, HIG was operational and was involved in the interrogation of the man accused of the failed Times Square bombing plot. In May 2011, HIG was reported to be run by the FBI and headed by an FBI employee with two deputies — one from the CIA and one from the Defense Department.<sup>106</sup> The unit has three regional teams staffed by linguists, terrorism analysts and professional interrogators. The teams' duties include everything from questioning suspects to researching the best ways to get the most information from suspects. HIG's research

committee, a multidisciplinary committee, includes Mark Fallon, Matthew Waxman, David Danzig (from Human Rights First), law professors, forensic anthropologists, and others. The organization is soliciting, and has ongoing, a number of research projects related to evidence-based approaches to obtaining accurate and reliable intelligence.



The question of whether brutal interrogations are effective doesn't address the legal and moral considerations, which, for many, override any concern as to whether such practices are effective. In an internationally famous 1999 ruling, the Israeli Supreme Court unanimously found physically coercive tactics used by Israeli interrogators — including sleep deprivation, stress positions, and sensory deprivation — impermissible, irrespective of whether they were effective. In its ruling, written by the court's president, Aharon Barak, the court noted 121 people had been killed and 707 injured in bomb attacks within Israel in the previous 2.5 years.<sup>107</sup> The Israeli court referenced, in its decision, a European court's earlier determination that British interrogators had been guilty of using physically coercive tactics when questioning detainees suspected of terrorist activities in Northern Ireland. The Israeli court held:

The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's human dignity. It equally harms society's fabric. ...

This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that harsh reality. We are aware that this decision does [not] make it easier to deal with that reality. This is the destiny of a democracy — it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.<sup>108</sup>

# Effects and Consequences of U.S. Policies

*Detainee operations since 2001 have been lengthy and fraught with complications including the numerous prisoner abuse scandals in Iraq, Afghanistan, Guantánamo Bay, and those associated with the CIA's extraordinary rendition program. The detention program continues to evolve in response to internal and external criticisms.*

## Legal and Political Consequences of U.S. Detention Operations

### International Legal Consequences

U.S. and international human rights groups have launched campaigns to have President George W. Bush, along with key administration officials, arrested abroad. In 2011, Bush was forced to call off a planned trip to Switzerland amidst fears of large anti-torture demonstrations and threats from human rights organizations that had sent a dossier of detention-related information to Swiss prosecutors to trigger a criminal investigation.<sup>1</sup> “What we have in Switzerland is a Pinochet opportunity,” said a spokesman for the European Centre for Constitutional and Human Rights, who along with the U.S.-based Center for Constitution Rights and Amnesty International, supported Bush’s arrest in Switzerland.<sup>2</sup> “Bush will be pursued wherever he goes as a war criminal and torturer.”<sup>3</sup>

Rumsfeld has faced numerous threats of arrest in the years since the Abu Ghraib scandal. In 2005, Rumsfeld was threatened with arrest in Germany, where he was planning to attend a defense conference.<sup>4</sup> The charges of war crimes were filed by U.S. lawyers for Iraqi detainees at Abu Ghraib and stemmed from the torture and abuses that occurred there.<sup>5</sup> Rumsfeld eventually attended the conference after the German prosecutor dismissed the charges on the grounds that there was insufficient evidence to show that the United States was unable or unwilling to prosecute Rumsfeld.<sup>6</sup> (This argument has seemingly been eliminated by President Obama’s clear statement regarding prosecutions or inquiries). In 2007, another lawsuit alleging war crimes was filed in Germany against Rumsfeld and 13 other former Bush administration officials, along with a lawsuit in France against Rumsfeld alone.<sup>7</sup> Both lawsuits were dismissed on the grounds of immunity, but not before Rumsfeld was reportedly forced to flee a breakfast meeting in France when his staffers learned of the court filing.<sup>8</sup>

In 2009, the Center for Constitutional Rights also initiated two investigations at the National

Court of Spain: the first concerning the use of torture and other cruel, inhuman or degrading (CID) treatment or punishment at U.S. detention facilities, and the second a criminal complaint against the so-called “Bush Six” — David Addington, Jay Bybee, Doug Feith, Alberto Gonzales, William Haynes, and John Yoo.<sup>9</sup> The first investigation is ongoing, while the second was temporarily stayed following an April 2011 transfer of the case by the Spanish judge to the U.S. Department of Justice for continuation.<sup>10</sup> The second investigation was finally dismissed in February 2013 following a ruling by the Spanish court that there was sufficient legal recourse in the United States.<sup>11</sup> Human rights groups have also attempted to have charges brought against Bush and Cheney in Canada.<sup>12</sup>

In May 2012, Bush, Cheney, Rumsfeld, and five of the “Bush Six” (excepting Doug Feith) were, *in absentia*, convicted of war crimes in a specially convened tribunal in Malaysia.<sup>13</sup> Although the ruling was largely symbolic, the tribunal heard testimony from a number of witnesses and former detainees before issuing its verdict.<sup>14</sup>

Similar to the Italian convictions of 23 CIA officials for rendition and torture [see Chapter 5], the Malaysian verdict and the ongoing attempts to hold Bush administration officials legally accountable for torture and CID reflect the outrage in the international community over the excesses of U.S. detention operations since 2001. A spokesman for the Vatican pronounced the evidence of torture by U.S. forces “[a] more serious blow to the United States than Sept. 11. Except that the blow was not inflicted by terrorists but by Americans against themselves.”<sup>15</sup> British judge Lord Bingham (former Senior Law Lord in the House of Lords), severely criticized U.S. detention operations in Iraq and Guantánamo Bay, saying that “[p]articularly disturbing to proponents of the rule of law is the cynical lack of concern for international legality among some top officials in the Bush administration.”<sup>16</sup>

In addition to the lawsuits abroad against U.S. officials, lawsuits have been filed against foreign governments and officials for their roles in detention operations and particularly the extraordinary rendition program. On December 13, 2012, the European Court of Human Rights ruled in favor of former detainee Khaled El-Masri in his lawsuit against Macedonia for their responsibility for his torture and rendition by the CIA<sup>17</sup> [see Chapter 5 for further details]. There are currently three similar cases pending against rendition partners Poland, Lithuania, and Romania before the European Court of Human Rights, and one case ongoing against Djibouti before the African Commission of Human and Peoples’ Rights.<sup>18</sup>

In 2010, the United Kingdom issued a settlement in a case brought by 12 former detainees for the government’s complicity in their renditions and torture/abuse.<sup>19</sup> Additionally, the UK issued a £2.2 million (approximately \$3.5 million) settlement with Libyan national Sami Al Saadi over his allegations that MI-6 was involved in his rendition back to Muammar el-Gaddafi’s Libya.<sup>20</sup> Al Saadi was allegedly tortured while imprisoned in Libya.<sup>21</sup> There have been a number of inquiries by UK bodies into the rendition program to date, including one by the House of Commons’ Foreign Affairs Committee, and one by the All-Party Parliamentary Group, headed by Conservative MP Andrew Tyrie.<sup>22</sup> Prime Minister David Cameron has pledged that there will be an official government inquiry following the culmination of pending litigation by Libyan national Abdel Hakim Belhadj against former Foreign Secretary Jack Straw regarding his rendition to Libya by the CIA and MI-6 in 2004.<sup>23</sup> Further incentive for a UK inquiry can be found in Lord Peter Goldsmith’s (former British attorney-general) statement of January 2012, noting his view that “that Guantánamo was damaging us, too. It was one of the images that was causing the radicalization of young Britons.”<sup>24</sup>

## International Political Consequences: Libya Case Study

The treatment of several Libyan detainees by U.S. forces and allies provides a valuable demonstration for policymakers of the potential problems of short-term tactical thinking and actions. History can take sudden turns and decisions that may have seemed reasonable or even clever in the moment can bring unfortunate consequences when circumstances change.

This is what occurred when the perception of Libya's ruler, Muammar el-Gaddafi, shifted in the West; he went from being regarded as a dangerous and unstable despot to someone who was to be courted as a valuable ally in the war against terrorism and an example of a leader renouncing dangerous weapons. Then, when he tried to crush a rebellion, the view of him shifted again as he was regarded once more as a dangerous tyrant whose overthrow we were proud to have aided.

During the course of these changes, several leaders of the principal nationalist Libyan movement were abused in U.S. custody — and in some cases, their wives were as well. One of the detainees was even subjected to waterboarding by U.S. forces. Then, in an effort to reward el-Gaddafi during the time he was in favor with the West, they were secretly handed over to his regime, where they faced further abuse. One of the detainees, Sada Hadium Abdulsalam al-Drake, estimated that about a dozen members of the Libyan Islamic Fighting Group (LIFG), were handed over to Libya by the Americans and British authorities during the period the West was trying to improve relations with el-Gaddafi. Those Libyan detainees who were mistreated and likely tortured by U.S. or allied forces had been in exile in Afghanistan or Pakistan before September 11.

Within a few years, those same Libyan nationalists who suffered under allied detention and rendition to el-Gaddafi became figures of some importance to the United States. They were even regarded as heroic democratic examples in the West as they toppled el-Gaddafi. There is a deep and unsettling irony in this as the United States would soon become instrumental in the NATO effort to help Libyans overthrow el-Gaddafi, and that meant depending on those same individuals who had been rendered and abused (some by U.S. forces) just a few years prior.

The worst of the potential consequences of the earlier U.S. actions appears to have been averted. In interviews with Task Force staff, the leaders of the revolt that overthrew el-Gaddafi expressed surprisingly little bitterness or even anger toward America. (Their attitude toward Britain is a different story.) This is significant and fortunate as the U.S. struggles to make sense of current Libyan politics.

However, it is difficult to evaluate the assertions of the Libyan nationalists interviewed who said they bear no lingering animosity to the United States. As to whether they were ever any threat to the United States, two of the leaders provided to Task Force staff fascinating accounts of their direct dealings and conversations with Osama bin Laden in Afghanistan before September 11. These encounters, they say, demonstrate that the Libyan rebels had mistakenly been regarded as threats to the United States from the beginning. In their accounts, bin Laden tried persistently and unsuccessfully to bring their nationalist movement into the Al Qaeda fold and he became exasperated when they declined. The accounts below provide some details of those conversations.

The history recounted in this section indicates that some Libyans who have been recently regarded as important national figures by American policymakers (such as U.S. Ambassador J.

Christopher Stevens, murdered by genuinely anti-American terrorists) are people we appear to have previously tortured or turned over to el-Gaddafi for torture. It is a complicated story — some of the people we apparently tortured were not mistreated by el-Gaddafi, and vice versa.

Apparently someone (almost certainly at the CIA) thought that since the United States was sending people all around the world in our secret rendition program to combat terrorism aimed at the United States, it would be a good idea to take advantage of the system to transfer some people to Libya in an effort to gain favor with that country's rulers at a time we were having a diplomatic rapprochement with the el-Gaddafi regime. The evidence that this was the thinking behind these renditions — that we and the British government thought we were buying favor with el-Gaddafi's secret service — is in seized cables found in the headquarters of Libya's former secret service chief after Tripoli fell. The cables were found in a remarkable discovery by researchers for Human Rights Watch who had the foresight to rush to the office of the chief of Libya's security service in downtown Tripoli after its sudden downfall. The files were discovered left unsecured in the haste of the retreat and translated. They were included in a September 2012 Human Rights Watch report, "Delivered Into Enemy Hands."<sup>25</sup>

In that report, one of the LIFG leaders, Mohammed al-Shoroeiya, provided an account of how he was subjected to waterboarding at the hands of Americans in Afghanistan. Al-Shoroeiya was not one of the three people the CIA has acknowledged waterboarding. Another LIFG leader, Khalid al-Sharif, provided Task Force staff with an account of being subjected to a similar water-suffocation procedure (which did not involve an actual board). Al-Sharif's account seemed credible to the Task Force staff for several reasons: He did not know anyone was coming to interview him when he was approached in Tripoli; he told the story of the water suffocation matter-of-factly in the middle of the interview; and he seemed to recall the terror he faced as he recounted the incidents. He was asked if, after he was subjected to water suffocation thesecond or third time, the procedure began to seem less threatening as he realized they did not intend to kill him, just torment him.

"It wasn't the idea of killing me," he said through a translator. "You know the person doesn't want to kill you. But the torture is harder than death."

Human Rights Watch's disclosures of al-Shoroeiya's waterboarding and al-Sharif's suffocation by water caused some consternation at the CIA, which had always maintained that only three people had been waterboarded.

Asked his occupation, al-Sharif said he was in the National Guard. When asked his rank, he responded that he was the commander. He is, in fact, the leader of the 8,000-member Libyan National Guard, a force relied upon by U.S. authorities. During the interview with Task Force staff, he took a call from the American embassy. This and other interviews with Libyan nationalists were conducted in Libya in August and September 2012.

### ***Abdel Hakim Belhadj***

Belhadj was interviewed by Task Force staff at his political party's headquarters on the outskirts of Tripoli on September 5, 2012. As a senior rebel military commander, he led the successful assault on Tripoli in the summer of 2011.<sup>26</sup>

Yet in 2004, Belhadj and his wife, Fatima Bouchar, were seized by U.S. agents in Thailand,

questioned harshly, and within days bundled aboard a plane to be delivered to el-Gaddafi. It was an operation conducted with the cooperation of British intelligence.

Belhadj told the Task Force interviewer that he bore no continuing anger toward the United States, but noted that it has been especially difficult for him to reach that view because of how his wife was treated. “What happened to my wife is beyond belief,” he said through a translator. She was not part of his political life, he said, and “what my wife went through doubled my pain.”<sup>27</sup>

In an account given to the *Guardian* newspaper, his wife, Fatima Bouchar, said that when she and Belhadj were seized, she was 4½ months pregnant. She said they were taken to a secret prison near the Bangkok airport where they were separated. “They took me to a cell and they chained my left wrist to the wall and both my ankles to the floor,” she told the *Guardian*. She was given water but no food over the next five days.

At the end of that period, she was forced to lie on a stretcher and was wrapped tightly from head to toe with tape. When they got to her head, she said, she made the mistake of keeping one eye open and it was taped in that position. It remained that way for the duration of a long flight to Libya, later determined to have lasted about 17 hours. “It was agony,” she said.<sup>28</sup>

Belhadj said he was shackled to the floor of the plane in an uncomfortable position for the journey and occasionally kicked.<sup>29</sup>

When they landed in Tripoli, they were driven separately to Tajoura prison where Bouchar would spend the next four months in a cell. She was released just before giving birth to a son. Belhadj would spend another five years in prison before being released.<sup>30</sup>

He described the treatment he and his wife endured as barbaric and said, “I can confirm to you that if I wanted revenge or wanted to rally people around me who would seek revenge, I would have done it. But I didn’t and I will never think about the idea of revenge.”<sup>31</sup>

Instead, he said, he would be grateful to all who had helped in the overthrow of el-Gaddafi and indicated that he distinguished between the Bush and Obama administrations. “The American government and the new administration had a positive role in backing this revolution,” he said. “And we thank them for that.”<sup>32</sup>

Belhadj’s son born during his imprisonment is now almost nine years old and he and Bouchar have since had a baby girl born to them. He told the Task Force interviewer that he had met several times with Ambassador Stevens, the U.S. envoy who would be killed less than a week after the interview. “During all those meetings what we talk about is the mutual common interest we have, the relationship between Libya and the world, including the United States,” he said.<sup>33</sup>

Asked about the relationship between the LIFG, the Libyan nationalist movement, and Al Qaeda in Afghanistan, he replied: “There was never a relationship. On the contrary, I have met with Osama bin Laden on many occasions and whenever we met and discussed ideas, I make sure to say these ideas (of killing) are not acceptable to Muslims.”<sup>34</sup> He also said that he argued with bin Laden over Al Qaeda’s tactics. “I told him, ‘how is it possible that Islam allows killing non-Muslims who are civilians? In what part of our Koran does it say that?’ ”<sup>35</sup>

The documents found in the office of el-Gaddafi’s intelligence chief, Moussa Koussa, included



messages from British intelligence officials whose contents were deeply embarrassing for Britain.<sup>36</sup> One particular message found in the bombed office of Gaddafi's intelligence chief was from Mark Allen, then head of MI-6's anti-terrorism unit, who wrote to Moussa Koussa: "I congratulate you on the safe arrival of [Belhadj as identified by his *nom de guerre*]. This was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over the years."<sup>37</sup>

Two weeks after Belhadj and his wife were rendered to Libya, Tony Blair visited Tripoli and praised el-Gaddafi, declaring that Libya had come to recognize "a common cause with us in the fight against al Qaeda extremism."<sup>38</sup> Around the same time, the *Guardian* reported, Shell, the Anglo-Dutch oil conglomerate, announced it had signed a lucrative deal to obtain gas exploration rights off the Libyan coast.<sup>39</sup> Within days of the Blair visit and the Shell contract, British agents helped render a second leading member of the Libyan resistance to el-Gaddafi.<sup>40</sup>

Belhadj is suing Mark Allen and Jack Straw, who was foreign secretary at the time. He told the Task Force interviewer that he would not have brought suit or sought damages if the British government had simply apologized to him.<sup>41</sup>

### ***Sami Al Saadi***

If Belhadj was the military leader of the Libyan nationalist militant group, LIFG, Sami Al Saadi was its chief intellect and religious figure. He was interviewed by Task Force staff in Tripoli on Sept. 5, 2012.

Al Saadi came from a wealthy merchant family, one of the oldest in Tripoli. He said that most of the family wealth was seized by el-Gaddafi and his supporters. Both of his brothers were killed in a notorious massacre at Abu Salim prison in 1996.<sup>42</sup>

He first went to Afghanistan in 1988, he said, as part of the Libyan exile group (LIFG) opposed to el-Gaddafi. There were many such groups in Afghanistan, he said and, "[i]n the 90's, we were asked by al Qaeda to join them. We had refused because we were concentrating on the resistance against the Libyan regime. ... All of the groups and the Arabs who were in Afghanistan at the time, they know us as a group we were opposing the ideology of Al Qaeda."<sup>43</sup>

Al Saadi said that he had a few meetings with Osama bin Laden, the last in Kandahar a month before September 11. The subject was the legitimacy of using Afghanistan as a base to stage strikes against the United States. Al Saadi described the meeting as being in a big tent where lunch was served. The Libyans arrived late, he said, but bin Laden gestured to him to come sit by him at the center of the gathering. "I said I was uncomfortable here, but he gestured I must sit next to him," Al Saadi recounted. He said that bin Laden knew that the Libyan group did not support Al Qaeda, especially in using Afghanistan as a base to launch strikes. "He said he heard about our stand and wanted to discuss it."<sup>44</sup>

Al Saadi said that bin Laden argued he was justified in using Afghanistan as a base even if the Taliban government did not approve. He eventually got up to walk out and bin Laden followed him and said, "I wish you would review your stand."

"I told him, 'this is our stand and we had discussed this so many times' and that was the last time I met with Osama bin Laden."<sup>45</sup>

On September 11, 2001, he was walking to buy some bread when someone urged him to get into a car and listen to the news about a strike in the United States. Asked if he and others were happy, he said the mood was not one of celebration but of analyzing what would happen next. The next day he and other Libyans left Afghanistan for Pakistan to avoid what they expected would be a swift reaction from U.S. forces. Al Saadi then traveled with his family to Malaysia and then China where he was arrested about February or March, 2004. He arrived in Libya on March 28, 2004.<sup>46</sup>

**“You know the person doesn’t want to kill you. But the torture is harder than death.”**

Al Saadi, his wife and four children spent months in Tajoura prison. The family members were released in a few months, but he stayed there for three years before being transferred to Abu Salim prison, where he remained for another three years.<sup>47</sup> He said he was tortured in Tajoura with beatings on his hands and feet using electrical wires. After he was transferred to Abu Salim prison, he was visited by some outside groups — he believes that the International Committee of the Red Cross (ICRC) was among them — and he credits the awareness of prison authorities that his conditions were being monitored with the cessation of torture. However, on March 23, 2010, he was sentenced to death by a court inside the prison and given a certificate attesting to that.<sup>48</sup>

Both Belhadj and Al Saadi, along with other members of the LIFG, were eventually pardoned through the efforts of el-Gaddafi’s son, Seif al-Islam, who had been assigned to broker some peace with the rebels.<sup>49</sup> In December 2012, Al Saadi received a £2.2 million (approximately \$3.5 million) settlement (without admission of liability) from the UK government over his claims that MI-6 was involved in his rendition back to Libya and responsible for his subsequent torture.<sup>50</sup>

### ***Khalid al-Sharif***

Another leader of the LIFG who was rendered to Libya, Khalid al-Sharif, said that while in the custody of U.S. forces in Afghanistan, he was subjected to a treatment that was very much like waterboarding (described above). Here is a partial transcript of al-Sharif’s interview as conducted through a translator:

*Q:* You were waterboarded? How?

*Al-Sharif:* They lay you down this way, on your back. On a big piece of plastic and there will be personnel holding the plastic from the corner so the water wouldn’t get out. The piece of plastic. It’s like a carpet but it’s made out of plastic.

*Q:* Are you lying on this?

*[Clarification by translator]:* He’s lying on this.

*Al-Sharif:* There are people holding the plastic from the edges so the water doesn’t get out. And then the interrogator starts pouring the water on your face and your face is, of course, covered — there’s a cover on your face.

*Q:* Covered like with a cloth?

*Al-Sharif:* It’s that bag that they put on the detainees.

*Q:* A hood?

*[Clarification by translator]* The whole face.

*Q:* What is it made of, is it cloth?

*Al-Sharif:* Yes, it's cloth. You can't see from it but you can breathe and water could obviously come in.

*Q:* There's a bag on your face and the water is poured on it?

*Al-Sharif:* Yes. So with the constant pouring of water on your face you start suffocating.

*Q:* Did you think you were going to drown?

*Al-Sharif:* Of course, because you start moving your face to the right and left and looking to breathe and you completely smothered by the water pouring on you.

*Q:* How long did this go on?

*Al-Sharif:* Depends on the interrogation.

*Q:* How many times did it happen? They were asking questions at the same time?

*Al-Sharif:* While pouring the water they are asking questions.

*Q:* How many times?

*Al-Sharif:* I don't remember. It was several times.

Al-Sharif said he was tortured during the three months he was held by Americans but the water torture was only in the beginning.

*Q:* After it was repeated, did you then realize they weren't going to kill you?

*Al-Sharif:* It wasn't the idea of dying or killing me, the problem was how many times they bring you close to death because you start looking for air.

*Q:* It did not make it better that you knew you weren't going to die?

*Al-Sharif:* You know the person doesn't want to kill you, but the torture is harder than death.

*Q:* This was at the airbase? Were there Americans in uniform?

*Al-Sharif:* Some people were wearing the uniform, some people weren't. For example, one of the people who were torturing was the prison warden and he was wearing a uniform.

*Q:* American?

*Al-Sharif:* Yes.

*Q:* And this was Afghanistan?

*Al-Sharif:* Yes.

*Q:* What was the room like where this occurred?

*Al-Sharif:* There were basically two rooms. The first room was for when they ask you the questions. The room had carpets all over its walls — red carpets — all over its walls. The wall and the ceiling, it was all covered with carpet. Red carpet, to be exact. And it had headlights pointed at you.

That's for the interrogation.

The other room was for the torture.

*Q:* What questions were asked in the interrogation? Questions about Al Qaeda?

*Al-Sharif:* Basically they would ask you — the first question is whether you're Al Qaeda and they would ask you about what are the next operations that Al Qaeda will carry out in the States. All the questions about the operations and people from Al Qaeda even though I told them from the first day that I was not Al Qaeda that I belong to a different group. This group is solely an opponent to the Libyan regime. We left our country in the 1980s and couldn't go back — that's why we live here.<sup>51</sup>

The ongoing release of information regarding U.S. detention operations, including CIA operations abroad, have stilted relations between the United States and other countries in several notable cases, and have had the potential to destroy relations with post-el-Gaddafi Libya. The United Kingdom, Sweden, Ireland and Finland have also requested further information from the United States about alleged rendition flights through their territories, and have imposed strict regulations on CIA aircraft, which have frustrated U.S. authorities<sup>52</sup> [see Chapter 5]. It can be expected that the continued release of information regarding U.S. detention operations spanning the globe will trigger further inquiries and lawsuits abroad in the next few years.

## Operational Consequences for the U.S. Military

*As detailed in this report [see Chapters 2 and 3], the use of harsh techniques that sometimes amounted to torture had widespread consequences. In both Iraq and Afghanistan, detention operations, including use of torture by U.S. forces, were changed dramatically after they contributed to rising insurgencies and breakdowns in command authority. Aside from these strategic changes, U.S. personnel were affected by the abuse in two ways: The negative mental consequences for them after engaging in abusive tactics and negative practical consequences for their collaborations with foreign military personnel. Both influenced the efficiency and success of U.S. military operations in Iraq and Afghanistan.*

## The Impact of Abuse on U.S. Personnel

Although Abu Ghraib was the most visible example of soldiers abusing detainees, there were many similar situations in Bagram Detention Facility in Afghanistan, Camp Bucca in Iraq, National Directorate of Security detention facilities throughout Afghanistan, and detainee deaths at the point of capture in the field.<sup>53</sup> The culture of abuse, in turn, spawned further insurgency movements.

In 2003, after the release of the Abu Ghraib photos, a reporter asked a young Iraqi man about the reasons for the rise in violence against U.S. soldiers. His response emphasized the imperative for revenge: 'It is a shame for foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. ... This is a great shame for the whole tribe. It is the duty of that man, and of our tribe, to get revenge on that soldier — to kill that man. Their duty is to attack them, to wash the shame. The shame is a stain, a dirty thing — they have to wash it. We cannot sleep until we have revenge.'<sup>54</sup>

At Camp Bucca in Iraq, six sailors were accused of abusing detainees by means that included throwing them into a cell they had filled with pepper spray.<sup>55</sup> When appointed to command detention operations in Iraq, Major General Doug Stone placed improved treatment in detention at the heart of the larger strategy to win over public support. Poorly conceived and executed "detention [operations] would kill the war [and] the service ... there is no question," he told Task Force staff.<sup>56</sup>

An often-overlooked problem, perhaps because of the dearth of empirical studies, is the impact of detainee abuse on the U.S. forces involved. As explained by Jennifer Bryson, a former Guantánamo interrogator,

Engaging in torture damages the torturer. The starting point for torture is the dehumanization of a detainee. Those who dehumanize others corrupt themselves in the process; dehumanization of other is a paradigm shift in how two people relate to each other, and as such it has an impact on both sides of the relationship. Once the detainee's human status no longer matters in the mind of the torturer, he or she can unleash personal, even national, aggression. The detainee is subjected to suffering and the torturer lets go of reason, one of the marks of humanity, and descends into rage.<sup>57</sup>

Psychologists Mark Costanzo and Ellen Gerrity point out that studies examining the effects of torture on the torturers extend back to post-World War II: "It may be only later, outside of that specific environment, that the torturer may question his or her behavior, and begin to experience psychological damage resulting from involvement in torture and trauma. In these cases, the resulting psychological symptoms are very similar to those of victims, including anxiety, intrusive traumatic memories, and impaired cognitive and social functioning."<sup>58</sup>

There is abundant anecdotal evidence of psychological trauma affecting U.S. forces who engaged in abuse of detainees. Damien Corsetti, a notorious former interrogator, was responsible for the death of the detainee named Dilawar [see Chapter 2] and the alleged abuse of then-teenager Omar Khadr.<sup>59</sup> He is now a disabled veteran of two wars, suffering from post-traumatic stress disorder (PTSD).<sup>60</sup>

Ben Allbright, a former prison guard in Iraq who arrived in 2003 at the beginning of U.S. operations, reported the techniques he was ordered to use to “soften up” detainees during interrogations, which were often “crowded with guards, military-intelligence officers, and OGAs [CIA officials].”<sup>61</sup> The techniques included banging pots and pans to scare the detainees, blaring loud music, and severe beatings.<sup>62</sup> “The sounds were meant to disorient, but also to mask the screams.”<sup>63</sup> If the detainees sustained injuries during beatings, the military intelligence officers who had medical training “could stitch up or bandage injuries, avoiding a call to the medics and an entry in the logbooks that the Red Cross could read.”<sup>64</sup>

**“Engaging in torture damages the torturer. Those who dehumanize others corrupt themselves in the process.”**

From there, Allbright’s experiences became only grimmer.

In the summer of 2003, the interrogators threw a detainee against a concrete wall, punched him in the neck and gut, kicked him in the knees, threw him outside, and dragged him back in by his hair. For the entire two-hour ordeal, the prisoner wouldn’t talk; Ben later found out he spoke Farsi and couldn’t understand the interrogators’ English and Arabic. Afterward, Ben hid behind a building and cried for the first time since his dad’s death. ‘It was like a loss of humanity. Like we were trading one dictator in for another. I had to weigh my integrity against my duty. Why couldn’t I stand up more? Why was I hesitant?’<sup>65</sup>

When Allbright returned from Iraq in 2004, he had “nightmares and couldn’t remember things. ... A psychiatrist diagnosed him with PTSD, but he refused medication. Instead he blew \$14,000 on bar tabs his first four months home.”<sup>66</sup>

At a 2008 meeting of the American Academy of Forensic Sciences, psychologist John Smith (a retired Air Force captain) described treating former Guantánamo guards. One guard in particular, a National Guardsman in his early 40s, served at Guantánamo in the initial months:

Mr. H reported that he found conditions at the camp extremely disturbing. For example, in the first month two detainees and two prison guards committed suicide. ‘He was called upon to bring detainees, enemy combatants, to certain places and to see that they were handcuffed in particularly painful and difficult positions, usually naked, in anticipation of their interrogation,’ said Smith. On occasion he was told to make prisoners kneel, naked and handcuffed, on sharp stones. To avoid interrogation the prisoners would often rub their wounds afterwards to make them worse so that they would be taken to hospital. Some of the techniques used by interrogators resulted in detainees defecating, urinating, vomiting and screaming. ... The prisoners also threatened Mr. H. ‘They would tell him ... they would see to it that his family suffered the consequences.’<sup>67</sup>

When the guardsman returned to the United States, he was “suffering from panic attacks, insomnia, nightmares, flashbacks and depression.”<sup>68</sup>

Former military intelligence specialist Tony Lagouranis, who served in Iraq in 2004–05, bluntly admits: “I tortured people. You have to twist your mind up so much to justify doing that.”<sup>69</sup> The techniques used by Lagouranis included beatings, stress positions, mock executions and extreme hypothermia.<sup>70</sup> While still in Iraq, Lagouranis began suffering from panic attacks as a result of

his torture of detainees, and was diagnosed with adjustment disorder and honorably discharged from the Army.<sup>71</sup> He continued to experience extreme anxiety attacks and psychological episodes.<sup>72</sup> When Lagouranis was diagnosed by an Army psychologist, he was told that he needed to leave the Army (the cause of the stress) because otherwise, he “would continue to be a discipline problem and a drain on morale.”<sup>73</sup>

In September 2003, Army Specialist Alyssa Peterson died at the Tal Afar base near the Syrian-Iraqi border following what was initially reported to be a “non-combat weapons discharge,” which often connotes accidental or friendly fire.<sup>74</sup> The details of the investigation into her death were made public in 2005 following a request under the Freedom of Information Act.<sup>75</sup> According to the investigation, Peterson opposed the interrogation techniques being used by U.S. forces, and the official report noted that she had been “reprimanded” for showing “empathy” to the detainees.<sup>76</sup> Peterson also refused to participate in interrogations after two days of involvement.<sup>77</sup> Army spokespersons refused to describe the specific techniques to which Peterson objected.<sup>78</sup> However, a colleague of Peterson’s, Kayla Williams, described the interrogations she witnessed in Tal Afar as including burning prisoners with lit cigarettes and stripping prisoners naked to humiliate them.<sup>79</sup> The official report of Peterson’s death stated that “[Peterson] said that she did not know how to be two people; she ... could not be one person in the cage and another outside the wire.”<sup>80</sup> Finally, the official report acknowledged that days after refusing to participate in the interrogations, Peterson had committed suicide.<sup>81</sup> Williams told the press that “[a]t the memorial service, everyone knew the cause of [Peterson’s] death.”<sup>82</sup>

### **The Impact of Torture on Collaboration with Allied Personnel**

The abuse of detainees by U.S. forces also had a significant impact on relations with foreign militaries. In an interview with Task Force staff, former General Counsel of the Navy Alberto Mora described the changes in cooperation:

“The country doesn’t really understand the cost. ... [O]ne JAG officer came in and said that British military captured a terrorist — not a terrorist suspect, a terrorist — in Basra and released him. They gave him 48 hours head start and only then notified American authorities. They did not have detention facilities [at that time], and they did not trust either the United States or the Iraqi forces not to abuse this individual. So rather than engage in potentially aiding and abetting criminal activity, [the British forces] thought that the least worst option was to release a terrorist back into the field.”

Mora continued,

British deputy commander of NATO operations in Afghanistan would get up and leave any meeting in which detention operations were discussed, because he would not take a role in all of this. Australian Navy refused to train with the United States Navy in detention operations [because of the abuse]. I was [at] the Pacific Military Law Conference [in Singapore], the premier meeting of international military lawyers in the world. At one point I get cornered ... by the uniformed TJAGs of the UK, Canada, Australia, and New Zealand. And they’re around me, fingers in my chest, and they say, “We’ve trained with the United States military all our lives, and we deeply respect everything you do ...

but you need to know that our issues with detainee treatment and interrogation, we can't go along with that. Our countries won't do it. It's not a question of failure of communication; we know what you're doing. It's a question of criminal activity in our countries and we can't be party to this.

Speaking to Task Force staff, Mora concluded, "So towards the end of my tenure, [I told the service vice-chiefs that] we need to document the operational impact of these war on terror legal decisions [on interrogation techniques], because it's sizeable. I always knew that this was extracting a cost."

Even defenders of the CIA's "enhanced interrogation" technique program have recognized that relationships with allies can weigh in the decision of whether to engage in such practices. At a panel discussion on January 29, 2013, at the American Enterprise Institute, former CIA Director Michael Hayden acknowledged: "Look, even though we say it is effective, the consequences of doing it *vis-à-vis* our allies could outweigh any benefit we might gain."

No empirical study has been done on the consequences in terms of operational impact of U.S. forces suffering from torture-related mental problems.

## Impact on Detainees

*The detainees from the "War on Terror," whether held at Guantánamo or abroad, occupy a unique position in the international legal framework — that is to say, none at all. They are not criminals or convicts in the traditional sense, nor are they accorded the rights and protections of armed combatants under the Geneva Conventions [see Chapter 4, on Legal Process]. Detainees have not traditionally been objects of sympathy, but it is undeniable that a significant number are innocent and have suffered undeserved and life-shattering consequences that remained unaddressed.*

*The detainees in U.S. custody since 2001 bear the greatest resemblance in treatment to criminals in a prison system. Those who undertake hunger strikes to protest their detention are force-fed according to long-standing U.S. policy; they are not allowed food or clothing shipments; and as demonstrated in this report, they have often been the victims of violence and intimidation. Most importantly, when detainees are released from the Guantánamo Bay Detention Facility or from detention abroad, they retain the designations of "No Longer Enemy Combatants," which carries the clear implication that they were, at one time, enemy combatants of the United States and therefore previously involved in acts of terrorism.<sup>83</sup> Released prisoners from jails in the United States also forever carry the stigma and record of having been imprisoned for crimes committed. The key difference is that those prisoners have been tried and convicted for their crimes. Most detainees at Guantánamo Bay or any of the many former CIA prisons and proxy detention sites abroad have never been accorded a trial, although most have been cleared for release. The legal framework currently allows for this "twilight state" for detainees, whereby they have not been proven guilty, but are yet not considered innocent. Allowing this system of release without exoneration carries problematic ambiguities.*

*Although empirical studies on post-release effects are nearly impossible to conduct, given the international spread of former detainees, Task Force staff interviews along with NGO reports support the assertion that those individuals have been placed in extremely difficult situations. They are often tarred by social stigma, unable to obtain work or social benefits, without financial support, and suffering from a number of post-detention physical and mental issues stemming from their treatment while detained. Former detainees have, in many cases, been left in worse situations than before they were captured, leaving them vulnerable to health issues and family troubles. As Senator Dick Marty of the Council of Europe<sup>84</sup> said in his 2006 report on U.S.-administered secret detention, "Personal accounts of this type of human rights abuse speak of utter demoralization ... on a daily basis, stigma*



*and suspicion seem to haunt anybody branded as 'suspect' in the 'war on terror.'*”<sup>85</sup> *The most common refrain among former (uncharged and released) detainees seems to be the request for an apology for their treatment.*

## **Practical Issues Upon Release**

In 2007, the U.S. Federal Bureau of Prisons (BOP) released a statement on their “Release Preparation Program” for convicted inmates. The document states that “The Bureau of Prisons recognizes that an inmate’s preparation for release begins at initial commitment and continues throughout incarceration and until final release to the community.”<sup>86</sup> Moreover, “[t]he Release Preparation Program’s purpose is to prepare each inmate to re-enter the community successfully and particularly, the work force.”<sup>87</sup> The statement includes the use of “appropriate community resources” and creation of “employment folders” for releasing inmates to assist them upon release.<sup>88</sup> The purpose of all of these efforts and use of resources by the U.S. government: *“Inmate recidivism will be reduced through participation in unit and institution Release Preparation Programs and contact with community resources.”*<sup>89</sup>

In stark contrast to the BOP’s careful procedural guidelines for convicted criminals, and despite the U.S. government’s concern about recidivism among the released detainees [see Chapter 9], there are no agreed-upon public guidelines whatsoever regarding reintroduction of detainees into communities, primarily because they retain a new and ill-defined status in a “law of war” context, in contrast to domestic prisoners. Many of them may also not properly fall into the category of “recidivists,” having never taken up arms against U.S. forces. A 2008 study by the Berkeley Human Rights Center and International Human Rights Clinic entitled “Guantanamo and Its Aftermath,” discussing the after-effects of detention on former detainees, detailed:

With one exception, none of those yet released from Guantánamo has been convicted or punished for a crime by the U.S. government. [Three convicted detainees have now been released from Guantánamo; David Hicks, Salim Hamdan, and Omar Khadr, although Hamdan’s conviction was overturned in October 2012.]<sup>90</sup> Nor have they received any official acknowledgement of their innocence. The U.S. government has repeatedly stated that its decision to release detainees is not an admission that they are cleared of wrongdoing or that U.S. forces committed an error in capturing them or later detaining them in Guantánamo. Without a formal exoneration, people in some communities to which former detainees have returned have regarded them as suspect, even a threat to public safety.<sup>91</sup>

The problem is compounded by the fact that each receiving country takes different approaches to resettling former detainees, although some American and European groups are lobbying to standardize release procedures.<sup>92</sup> Even the best of circumstances, when families were supporting the detainees in every way possible during detention, has yielded difficulties post-release due to the “great sacrifices” many families made in obtaining legal counsel and making lobbying efforts.<sup>93</sup> “[My father] sold our land in order to seek my release,” one [former detainee] reported. And another said: “[T]hey spent all the money I had at home just looking for me. ... And at the moment, there isn’t anything I have to survive on or to make a better life.”<sup>94</sup> The Berkeley study states that most of the former detainees they interviewed “said they received little or no support from *any* group — government or private — upon their arrival in their country of origin or a third country. One respondent in Europe noted that convicted criminals in his country receive more assistance than he did.”<sup>95</sup>

## Enduring Stigma

**“I had to weigh my integrity against my duty.”**

The struggle to resettle/return detainees begins with the stigma associated with being held on terror suspicions by the United States, as detailed to Task Force members by former detainee Moazzam Begg, director of British charity CagePrisoners (which raises awareness about Guantánamo prisoners). “I’ve gone to many governments within Europe and asked for them to accept GTMO prisoners who can’t return to their homes. ... [O]ne of the things I’ve been presented by the governments, whether it’s Luxembourg or Germany, is that ‘The United States is not taking these people, why should we?’ And I say to them in response almost incredulously ‘You’ve taken refugees from Bosnia, to Afghanistan, to Iraq. ... [T]he problem here is you’re using the same language [as] the United States government, to determine us not as victims but rather still as terrorist suspects — as convicted terrorists, in fact.’ ”<sup>96</sup>

The Berkeley study confirms the impact of the stigma in former detainees’ home countries, stating:

The stigma of Guantánamo interfered with the ability of several ... former detainees to regain their former positions. Those who were government employees found they could not reclaim their jobs. “The government authorities think we are terrorists,” said one respondent. “I want my job back,” exclaimed another. “I want my rights, like the salaries that I was supposed to receive, and I want [a] promotion.” Another respondent, a highly-educated man, expressed frustration that his time in Guantánamo indelibly marred his reputation and career. He was a practicing physician, who had operated a clinic before his arrest. Now he had to “start again from a drugstore so that people can trust me.”<sup>97</sup>

Another released Guantánamo detainee reported the same stigma: “It doesn’t matter I was found innocent. It doesn’t matter that they cleared my name by releasing me. We still have this big hat on our heads that we were [considered] terrorists.”<sup>98</sup> “The big problem is after their release,” said Lal Gul, a Kabul lawyer who heads the Afghan Human Rights Organization. In an interview with Task Force staff, Lal described how prisoners released by Americans who go back to their villages are typically left in a difficult position, often saddled with psychiatric problems and no position. “They have a bad name in society,” because of their imprisonment. “They are unable to settle back in. That’s why some of these people have been easily forced to go back to the Taliban.”<sup>99</sup>

Former Moroccan detainee Kassim el-Britel faced the stigma after his release from CIA proxy detention in Morocco after nearly 10 years of imprisonment (following a sham trial) and gruesome torture [see Chapter 5].<sup>100</sup> El-Britel had been held in Morocco since May 2002 and was abruptly released in April 2011, following a royal pardon. He rejoined his wife in Italy shortly thereafter.<sup>101</sup>

[I wasn’t told that I was being released] until the very last minute, when they called me to release me. I wasn’t expecting to be released until September 2012, when the sentence was finished. There was no reason given for my early release, but I think it was because of the Arab Spring riots ... probably a political move to calm the rage that was felt in Morocco as well as other countries. I returned home [to Italy] after about nine days from Morocco.<sup>102</sup>

Also disappointing to el-Britel was the lack of assistance from NGOs following his release. As Khadija Anna told Task Force staff, “In Italy, no NGOs have offered any real help. People don’t know about Kassim’s case; they know more in the rest of the world than in Italy.”<sup>103</sup> In the absence of any monetary, legal, or social support, el-Britel’s life post-release has been “very bad.”<sup>104</sup>

Although he has attempted to continue his former Arabic translation business, his wife says that “he now has trouble because his Italian is not as good as it used to be after his imprisonment.”<sup>105</sup> El-Britel has searched for work, but said:

If you want work, you cannot find work. I’ve been free now for 1.5 years, but I still don’t have a job, not able to find a job. The problem [with job applications] is that one has to submit a *curriculum vitae*, and I have a ten year gap which dissuades anyone from calling me back. There was one case where I tried to explain my situation to a co-op where I was looking for a job. They went to visit my website [“Giustizia per Kassim” (“Justice for Kassim”) at <http://www.giustiziaperkassim.net>], but as soon as they saw the “terrorist” charge, they were very scared and didn’t call me back.<sup>106</sup>

El-Britel and his wife participated in the *Mohamed v. Jeppesen Dataplan* lawsuit,<sup>107</sup> which was thrown out of the Ninth Circuit after the government’s invocation of the State Secrets Doctrine [see Chapter 5], and they continue to explore their legal options with respect to the United States, Italy and Morocco.<sup>108</sup>

Australian citizen Mamdouh Habib echoed el-Britel’s dismay over the stigma following him post-release:

When I first came back to Australia, I was deeply disappointed by the reaction of many people, especially fellow Muslims. I had naively thought that, once people knew I had been kidnapped, sent to Egypt by the Americans and Australians, tortured, sent back to Afghanistan, and finally to Guantánamo Bay, people would be outraged. Instead many asked, “But what were you doing in Afghanistan? Explain yourself.” Despite my having been held for nearly four years by the Americans in Guantánamo Bay and having been interrogated continually — with not a shred of evidence to support their terrorist accusation ever being produced — some people were still uncertain about me. ... Any suspicions that people do have about me have been fomented by the government, which still treats me as a terror suspect.<sup>109</sup>

As can be seen by the economic hardship and limits on mobility faced by former detainees, the stigma associated with being a former detainee released from U.S. custody permeates every aspect of life post-release.

### ***Economic Hardship***

Despite the fact that educational/language programs are now provided to most detainees at Guantánamo or in detention facilities in Afghanistan and Iraq [see “Operational Consequences,” above], many former detainees are released without any contacts, money, or guidance on job opportunities.<sup>110</sup> In its report *Broken Laws, Broken Lives*, the group Physicians for

Human Rights [PHR] noted: “All the former Guantánamo detainees [interviewed] reported losing their employment or being in a precarious financial situation as a result of their detention. All former Guantánamo detainees reported having been unable to find employment since release.”<sup>111</sup> As recounted by Begg, “I think one of the things we get is constant phone calls and messages from people who have been released from GTMO who need help, financial, medical, and finding a job, and we try to do from our limited resources as much as we can.”<sup>112</sup>

Former Guantánamo Bay detainee Sherif El-Mashad, an Egyptian national, had been living and working in Italy for four years before his capture in Afghanistan while on what he described as a business and charity trip (for which he had booked a round-trip ticket from Italy).<sup>113</sup> El-Mashad, who had arrived in Afghanistan in July 2001, tried to leave after September 11, but when he made it over the Pakistani border, he was captured and handed over to U.S. authorities.<sup>114</sup> He spent the next 8.5 years in U.S. custody, first in Kandahar and then at Guantánamo Bay.<sup>115</sup> He was cleared of any charges in military review boards at Guantánamo Bay, and by President Obama’s Interagency Task Force, and released to Albania in February 2010.<sup>116</sup> In an interview with Task Force staff, El-Mashad described his release (along with Saleh Bin Hadi Asasi and Rauf Mohammed Omar Abu Al-Qusin, two other GTMO detainees):

**“When the guardsman returned to the United States, he was ‘suffering from panic attacks, insomnia, nightmares, flashbacks and depression.’”**

I didn’t care where I was going; the most important thing for me was to leave. [On the flight leaving Guantánamo] I was blindfolded, there was something in my ears, and I was in chains. But it was only 12 hours, easier than the flight to Guantánamo. When we arrived, we were in Albania. An Albanian official came to meet us at the plane. We took a bus to a refugee camp [the Babrru Reception Centre outside Tirana]. Everyone at the camps were from neighboring countries; they were normal refugees. We had no money, and were told by Albanian officials at the camp that we could try to find work, but it never happened. We were never allowed any identity documents; we just eat and sleep in the camp and that’s it. If you go to the hospital, there’s no space, and if you want to buy medicine you have to pay for it yourself. The Albanians give me \$400 per month as allowance, which is hardly enough for ten days. I pay everything from that; utilities, medicine. All of Albania knows that we are from Guantánamo — even the children in the street. The reaction has been totally negative and we feel as if we are not human beings. The surveillance is so excessive. Sometimes the Albanians walk behind you, just a meter behind you. I just wish they would let us live a semi-normal life now.

The Berkeley study contains details regarding other detainees released to Albania, which closely mirror El-Mashad’s account.<sup>117</sup> They were initially transferred to the Babrru Reception Centre: “None of the refugees spoke Albanian, and language instruction was halting, making social integration particularly difficult. The new arrivals struggled to learn the language, but twice the language course offered at the refugee center was discontinued. At the time of the interviews, none of the refugees was employed and their job prospects were bleak, especially since some potential employers did not want to hire anyone who had been held in Guantánamo.”<sup>118</sup> El-Mashad still resides in Albania, albeit more recently in his own house, but has not been allowed to work for wages.<sup>119</sup> Until August 2012, he was told, without explanation, that he would not be allowed to leave Albania, even though he wished to return to Egypt where his family resides. He

was informed in late August 2012 that he would finally be allowed to return to Egypt, but had not yet been issued travel documents.<sup>120</sup> His goal, as told to Task Force staff, is to go back to school and start a new business in Egypt.<sup>121</sup>

Each former detainee's account is slightly different, but for those transferred to third countries, the theme of being left without contacts or resources is constant. Former detainee Mohammed el-Gharani was captured in Pakistan in 2001, aged 14 at the time.<sup>122</sup> He was released from Guantánamo in 2009 at age 22 (after a U.S. federal court determined that the accusations against him were based on unreliable testimony).<sup>123</sup> He had been born and lived his entire life in Medina, Saudi Arabia, and his family was still there.<sup>124</sup> However, el-Gharani was a Chadian citizen through his parents, who were (legal) foreign workers in Saudi Arabia, and he was therefore sent to Chad from Guantánamo.<sup>125</sup> Upon arrival, el-Gharani was imprisoned for a week and questioned about his nationality, then released without any identification papers so he was unable to travel to see his family.<sup>126</sup> He tried to enroll in English classes, but could not do so without identification.<sup>127</sup> He was also assaulted by armed men in N'Djamena who believed that he had been given a multi-million dollar settlement by the U.S. government — which was untrue.<sup>128</sup> After release, el-Gharani relied on “handouts from friends to support himself,” and said that he has “no job.”<sup>129</sup> “I have a hard time finding somewhere to live.”<sup>130</sup>

Economic hardship is not limited to detainees released to new countries. The Berkeley study details how

[m]any Afghan former detainees in particular said they were destitute and had little hope of recouping lost capital. They had lost wealth in a variety of ways: their property was destroyed or confiscated during capture or seized in their absence, sold by their families, or expended by family members to pay bribes or search for them. Several also remarked they were struggling to buy medicines prescribed in Guantánamo for their mental health. Recalled one Afghan respondent: “I am now needy and destitute. . . . I even have to ask people to lend me money to buy medicines.” For some, physical impairments compounded difficulties in paying off debt and supporting their families. One former detainee lost not only his business and built up debts to his family while he was in U.S. custody, he also lost the use of his leg from an untreated injury sustained when he was arrested.<sup>131</sup>

Monetary post-release problems were also reported by British ex-detainees Moazzam Begg, Bisher al-Rawi, and Omar Deghayes, who met with Task Force members Asa Hutchinson and David Irvine and Task Force staff in April 2012.<sup>132</sup> The three former detainees insisted that “we are the more privileged ones, in the UK,” following a 2010 settlement from the British government made on the basis of claims of British involvement in their abuse or torture.<sup>133</sup> However, as al-Rawi described, “When I was [first] released from Guantánamo, I did not have a penny and I did not have any clothes. That's a fact, I only had the clothes that were on me. Nothing else and not a penny in my pocket. And I was [47] years old . . . and not a penny in my pocket. And I didn't really feel very comfortable asking my family. [Luckily], CagePrisoners gave me a gift of [around] 300 pounds. I had a couple of friends who also gave me something. And my mom supported me . . . I didn't feel comfortable asking my mom to support me. [Most of the people] leaving GTMO . . . they haven't got anything. There must be a system to assist them to become normal.”<sup>134</sup>

Deghayes also described a piecemeal approach to reintegration, noting that Cage-Prisoners had given him £1000 (approximately \$1600) upon release.<sup>135</sup> However, outside of the UK and select NGOs, many former detainees are left to the charity of friends and acquaintances. Al-Rawi, who assists with resettling former detainees in Britain, said: “Although [some have said it can be] easy to collect money for people who left Guantánamo, I think that was on a small scale. In fact, I’ve found it very, very difficult to be able to help people from Guantánamo because generally when people hear you were in Guantánamo, they run away from you.”<sup>136</sup>

**“I tortured people. You have to twist your mind up so much to justify doing that.”**

### **Limited Mobility**

Former detainees are also severely limited in mobility. The Luxembourg Agreement makes special provision for European countries (whose borders are normally open to other Schengen member states) to share information such that nonreceiving states can voice concerns about the resettlement or movement of former detainees.<sup>137</sup> In practice, a number of former detainees like El-Mashad and el-Gharani, have been released without identification documents, which make travel an impossibility, even for those, like El-Mashad, who wish to return home to their families.

However, even those with valid passports must tread carefully. Former detainees have never been allowed to enter the United States [see Chapter 5, on Rendition], as Khaled El-Masri and Maher Arar learned when they needed to testify on their own behalf in lawsuits against former Bush administration officials and rendition flight operators.<sup>138</sup> They both testified via video link.<sup>139</sup>

Begg, who speaks internationally about his experiences in U.S. custody, also recounted his problem traveling post-release:

I have been refused entry into two countries [Canada and Qatar]. [Both] said their reasons for why they weren’t letting me in is because “You were a Guantanamo prisoner.” I don’t know any free former Guantanamo prisoner who’s ever walked on the shores of North America, anywhere. ... [B]eing a former Guantanamo prisoner is enough to deny you, and that’s certainly what the Canadians told me. It wasn’t just that I came to immigration and they saw my passport and they said “Oh sorry, we can’t let you in,” — they had a team of armed police walk onto this [landed] plane, full of five hundred people, took me off. ... I couldn’t argue it any stronger than when I was refused entry into Canada. I said to them, “Do you understand what you are doing? That you are refusing entry based upon the fact that I was a Guantanamo prisoner and based upon evidence or statements that have come out under duress or under torture?” and so forth, *i.e.* the content of my “confession,” and they said “Well, we have the right to do so.” The more concerning one ... was Qatar. I’d been invited to Qatar to discuss the possibility of Qatar accepting some GTMO prisoners who are unable to return to their countries for fear of persecution. I was surprised when they said that my name had come up on a [watch] list, and I did ask them almost in tongue in cheek “Whose list is this?” and they said “It’s not a Qatari list.”<sup>140</sup>

### ***Establishing Post-Release Procedures***

Efforts to address post-release problems have met with some success in Europe.<sup>141</sup> The British NGO Reprieve, which represents a number of current and former detainees, has refocused post-release efforts on receiving countries, rather than the United States.<sup>142</sup> The 2009 Luxembourg Agreement established, among member states of the European Union, modes of “information-sharing” regarding former detainees released to EU states, given the open borders of the Schengen.<sup>143</sup> However, the procedures established by the Luxembourg Agreement did not deal directly with former detainees.

To encourage the standardization of procedures regarding the treatment of former detainees in Europe, Reprieve first identified the “key challenges” facing former detainees in Europe. These include dealing with stigma (faced equally by resettled detainees and those sent to their native countries); seeking justice and reparations; contending uncertain legal status; finding accommodation; education/skills training and employment; and, accessing appropriate health care.<sup>144</sup> The Reprieve report discussed methods of offsetting these challenges, in particular the necessity of detailed conversations between the European delegations sent to Guantánamo Bay and the soon-to-be-released detainees prior to resettlement.<sup>145</sup>

“Best practices” were also highlighted from certain countries. For example, for the purpose of relieving former detainees of stigma, Reprieve highlighted that in Switzerland, “the government stressed that [the former detainee] is a free man who has never been charged with any offense; he has committed to learning one of the national languages and intends to look for work to support himself.”<sup>146</sup> Based on Reprieve’s work with former detainees who lack resources, the report also issues a policy recommendation that “[a]ccommodation and a living stipend should be provided for 3 years to ensure the men have time to recover from their long incarceration without the threat of destitution. Other costs, such as family reunion, medical costs, language and vocational training should be budgeted for. If further funding is needed, host governments could consider making requests to the United States government.”<sup>147</sup>

The Kingdom of Saudi Arabia runs a rehabilitation program for former detainees that incorporates a number of these ideas. The Care Rehabilitation Center, located outside Riyadh, is part of a counterterrorist campaign launched by the Kingdom of Saudi Arabia following a series of terrorist attacks beginning in 2003. At the center, detainees formerly engaged in terrorism participate in sports and art therapy, visit and even temporarily stay with family members, and make day trips outside the center — all opportunities designed to prepare a detainee for life in Saudi society.<sup>148</sup>

Once released from the center, the men are offered various forms of social support, such as assistance in finding a job and other benefits, including additional government stipends, a car and an apartment.<sup>149</sup> Single men are also encouraged to get married. “The important thing is that these men should not be idle and frustrated, because that could send them back to their old haunts, their old friends,” said Brigadier General Mansour al-Turki, spokesman for the Saudi Interior Ministry, which runs the rehab program.<sup>150</sup> Although the detainees continue to be monitored occasionally by authorities, their families are primarily responsible for ensuring the detainees do not return to terrorism. The program has largely been praised by groups outside Saudi Arabia, although no specific statistics regarding recidivism from the Saudi program are available.<sup>151</sup>

Because many former detainees were never engaged in terrorist activity, the effects of a lack of social support upon release can be even more devastating.<sup>152</sup> In Sen. Dick Marty's 2006 rendition report, he notes, following extensive interviews with rendition victims, that "[l]inks with normal society appear practically impossible to restore."<sup>153</sup> Al-Rawi seems more hopeful, while emphasizing the importance of supportive programs for former detainees post-release: "I got married after my release. ... I have two kids now. And [because of that], I actually don't much look back at Guantanamo; I actually try to have Guantanamo as something very, very distant. And I think ... people who have actually moved on and started a new life, got married, have kids, they've left it behind them. But if people linger where they are and they're not doing anything useful with their lives, I think they will always look back at Guantanamo. [In terms of eliminating the stigma], even just giving non-governmental bodies the green light to assist those people, re-education, getting married, starting up a small business [would be helpful]. That's my number one priority in my life today ... for people who've left GTMO to have a fresh start in life."<sup>154</sup>

### **Lasting Impact: Physical and Mental Consequences**

Even with more robust procedures in place to reintegrate former detainees, certain complications will continue to persist — physical and mental reminders of the years of detention and abuse. Exhaustive empirical studies have not been conducted due to the difficulty in locating and interviewing many former detainees post-release. However, the enormous amount of anecdotal evidence available provides a guide to the physical and mental issues faced by current and former detainees, and the Task Force highlights them here.

#### ***Physical Effects***

According to the 2008 Berkeley study:

Many [former detainees] complained of a range of physical impairments, which they attributed to their incarceration by U.S. forces. The most common ailment was pain in the wrists, knees, back, and ankles as a result of prolonged short shackling, hanging, or stress positions. Another complaint was deteriorating eyesight. Some reported chronic pain, fatigue, or a generalized deterioration that interfered with their ability to perform physical labor for extended periods. One respondent, comparing his current state of health to his condition before Guantánamo, said, "I was a strong man. But at the moment, I am nothing."<sup>155</sup>

In *Broken Laws, Broken Lives*, Physicians for Human Rights detailed how all of the individuals they evaluated reported that "after their incarceration they suffered from headaches ranging from occasional to chronic, occurring as often as three times a day or lasting up to three hours at a time. ... [T]hese reports were highly consistent with a history of head trauma. One detainee also reported hearing loss, which he believed was due to the loud music that was blared at him in Abu Ghraib."<sup>156</sup> In addition: "All of the former detainees ... reported [suffering from] diffuse musculoskeletal pain that they did not experience prior to detention. Many of the persistent pain reported, as well as the descriptions of the abuse that caused these injuries, were supported by findings from the physical examination."<sup>157</sup> In particular:

One individual reported arm numbness and weakness following suspension by his arms, which is highly consistent with a brachial plexus injury often resulting from the type of suspension



he described enduring. Since his release from Abu Ghraib prison, he has been suffering from chronic pain in his neck, legs, right shoulder, and feet, all of which he attributed to, and are consistent with, reports of injuries sustained during his incarceration (e.g., beatings, being suspended in stress positions).<sup>158</sup>

British resident Omar Deghayes's eyesight was permanently affected by his detention at Guantánamo. According to Deghayes, his right eye was gouged by a guard when he refused to come out of his cell because he said he feared the sexual humiliation tactics used by the guards during cavity searches.<sup>159</sup>

I was chained to the floor and the guards were holding my head. ... [T]here were many of them, seven or six or more, they were holding me down to the floor so there was no fear of [me] fighting [back] or anything like that. Both eyes were completely open so [one of the guards] put his fingers and ... started to push inside my eyes. ... I could feel the coldness of his fingers [as] he was pushing hard digging into my eyes and I didn't want to scream because I didn't want to frighten the people in the other cells and then the other thing is I didn't want to give them that satisfaction of me screaming on the floor. I didn't scream, so he was pushing even harder digging inside my eyes. The officer standing was saying "More, more" and this guard was saying "I am, I am," shouting to the officer. And then, what I know is lots of liquid coming out from both of my eyes, I couldn't see anything for three days, I think. I was thrown back into the cell and food was thrown, because [I was in] an isolation cell, the food was thrown from the bean hole and I was eating food and just sleeping. I couldn't see anything, there was lots of pain in my eyes. And then slowly one of them recovered sight. ... [T]here was [no medical care] till after couple of months, a medical doctor came in and all his advice was that he would be willing to take the eye out from my head because he thought it looks really bad.<sup>160</sup>

Deghayes declined to have his right eye removed, but never regained his sight in that eye.

Sami al-Hajj, a journalist who heads the Liberties and Human Rights Affairs section of Al Jazeera, was held for nearly seven years in Afghanistan and Guantánamo, during which he was subjected to severe beatings, sleep deprivation, and at one time undertook a 480-day hunger strike at Guantánamo, during which he was force-fed by the military.<sup>161</sup> [See Chapter 6 for further details of al-Hajj's account.] To this day, al-Hajj said to Task Force staff, "I have some problem ... at the beginning of the stomach here [bottom of the esophagus], there is something [that should close], that now [does] not close." Al-Hajj takes medicine for the resulting reflux, and said that he knew other former detainees whose stomachs were so bad that they would not accept food.<sup>162</sup> Following his release, al-Hajj also walked with a limp and used a cane "because of injuries he says were incurred when he was pushed from a military helicopter blindfolded after his arrest in 2001."<sup>163</sup>

Adel Fattough Ali Al-Gazzar, an Egyptian national, signed up as a volunteer with the Red Crescent after September 11, 2001, to assist Afghan refugees from the bombings.<sup>164</sup> Shortly after he crossed the border from Pakistan, he was caught in an airstrike that injured his leg.<sup>165</sup> Al-Gazzar spent a month in a Pakistani hospital, but he was abruptly "moved" with several other patients to U.S. custody in Kandahar before he could undergo a necessary operation

on his leg.<sup>166</sup> He was held in Kandahar for 11 days and subjected to forced nudity, extreme temperatures, and beatings where guards “kicked my injured leg and I was screaming in agony, but they just laughed and danced like it was a joke.”<sup>167</sup> Al-Gazzar elaborated:

I was ... concerned about my leg, because I had severe pain and the environment was dirty so I was worried that it might get infected. The American doctors were telling me it had to be amputated. I resisted, arguing with them about what the Pakistani surgeons had said, that they could save my leg. I even showed them the X-rays that I had kept. The Americans just laughed and said the Pakistanis didn't know anything about medicine and treatments. In the end one of them admitted that they could save my leg but the operation would cost thousands of dollars and that America was a “poor country.”<sup>168</sup>

After transfer to Guantánamo, Al-Gazzar again tried to explain to the doctors at Camp X-Ray that his leg could be saved.<sup>169</sup>

I got the same as answer as I'd had in Kandahar: Pakistanis didn't know anything, the leg had to go. As the days passed the pain increased and the colour of my leg started to turn grey — almost black. I asked them to clean the wound, and to change the dressing every day and night but they wouldn't do it. When I asked them in the morning for a new dressing they said they will do it in the afternoon, and in the afternoon they said they will do it in the morning, like that. ... The wound was open and big — without any kind of treatment besides basic dressings. They forced us to take showers so the wound got wet many times — the pain became almost unbearable. ... [M]ost of the other prisoners advised me correctly that I had no option but to accept the amputation as it had passed the stage of being saved and had become gangrenous and could spread higher up the leg the longer it was left. I finally gave in.<sup>170</sup>

Al-Gazzar was given a prosthetic leg six months later. He was released from Guantánamo and sent to Slovakia in 2010 after eight years of detention.<sup>171</sup> Al-Gazzar has said that at least 13 other detainees received amputations at Guantánamo while he was there.<sup>172</sup> In 2011, Al-Gazzar returned home to Egypt, but was arrested and detained upon arrival under a prison sentence issued *in absentia* while he had been detained at Guantánamo.<sup>173</sup> Although his co-defendants were cleared after a judicial finding that the conviction had relied on false statements, Al-Gazzar remained in detention for seven months largely “[b]ecause of his status as a Guantanamo prisoner,” according to his lawyers.<sup>174</sup> He was finally released on bail in January 2012. Deghayes also attested that he knew of numerous “broken arms” and at least one other detainee who lost an eye: “People lost their limbs [at Guantánamo].”<sup>175</sup>

### **Mental Effects**

The category of “torture/CID survivors” is increasingly applied to anyone who was in U.S. custody in Afghanistan, Guantánamo Bay, Iraq, or the “black sites” when enhanced interrogation techniques such as isolation, extreme temperatures, sleep deprivation, and sexual humiliation were used.<sup>176</sup> The category must also include individuals placed in CIA proxy detention in Morocco, Jordan, Syria, Egypt, or other areas where torture techniques were routinely used. Over the past five years, research has emerged showing that the psychological

effects of torture and abuse, even more than the physical effects, “can in fact have serious long-term mental health consequences.”<sup>177</sup>

Former detainees who were held incommunicado, for extended periods of time, or abused face very real mental trauma [see Chapter 6]. In their exhaustive examination of mental effects of torture or CID on Guantánamo detainees, *Break Them Down*, PHR stated that “[t]he lack of physical signs can make psychological torture seem less significant than physical torture, but the consensus among those who study torture and rehabilitate its victims is that psychological torture can be more painful and cause more severe and long-lasting damage even than the pain inflicted during the physical torture.”<sup>178</sup> The U.N. Special Rapporteur on Torture confirms this: “Even when the most brutal physical means are used, the long term effects may be mainly psychological. . . . A common effect is the disintegration of the personality.”<sup>179</sup> As al-Rawi has said, following the sleep deprivation, isolation, and beatings/strippings he endured and witnessed at Guantánamo: “I came out of Guantanamo and physically, I could not show anything. But I have to tell you, the pain I carry inside and the memories I have are really very great, and I have nothing to show.”

Moreover, “psychological torture and cruel, inhuman and degrading treatment can have extremely destructive health consequences for detainees.”<sup>180</sup> As described by Sen. Dick Marty in his 2006 rendition report, “[Rendition] victims have described to us how they suffer from flashbacks and panic attacks, an inability to lead normal relationships and a permanent fear of death. Families have been torn apart.”<sup>181</sup> Al-Rawi agrees:

I thought actually before I was released, “I can cope with this, no problem, I’ve survived Guantanamo, I can survive normal life.” Actually, I found normal life at that stage was harder than Guantanamo. I could deal with — I learned how to deal with GTMO. I can deal with the officers, I can deal with the guards, I can deal with the six or seven people who come into my cell and have a fight with me, but actually I could not deal with [normal] people.<sup>182</sup>

Difficulty reconnecting with families is a constant theme among former detainees. Begg recounted his experience of coming home to teenage children after nearly three years of detention:

[Y]ou now have to face . . . children who don’t know their father, who are now going through the ages of adolescence where they would already be rebelling. [Now you enter the family], where you are and for several years have been a stranger. Your introduction to the family and the fabric of family life doesn’t help to keep it together, it actually starts to break it apart. And there is nothing, no amount of compensation, psychiatric treatment, communal help, societal reference, whatever, that will ever fix that. And for those who are still in Guantánamo and those who have recently returned, it is a terrible ordeal.<sup>183</sup>

The difficult of reintegration combined with the years of detention and abuse have resulted in acute mental illnesses in current and former detainees. PHR noted that “[s]ymptoms shown by victims of psychological torture are typically those associated with anxiety disorders, including acute stress disorder, depression, and posttraumatic stress disorder [PTSD]. . . . One-third of PTSD sufferers fail to recover even after many years.”<sup>184</sup> PHR further describes how most, if not all, of the 11 former detainees in their 2008 *Broken Laws, Broken Lives* study suffer from

diagnosed severe depression, PTSD, and other disorders.<sup>185</sup> “It is like in my head I have never left Abu Ghraib,” said one former detainee to PHR.<sup>186</sup> Additionally, “[t]he persistent nature of PTSD symptoms may eventually lead to personality changes in torture survivors.”<sup>187</sup>

Kassim el-Britel experienced such a personality change following his rendition and torture for nine years in CIA proxy detention in Morocco. His torture allegedly included a Moroccan interrogation technique known as “bottle torture,” whereby a broken bottle is forced into the anus of a prisoner.<sup>188</sup> “I can’t bear the injustice I suffered; I will not find peace until justice is served. I have to take antidepressants and sometimes I feel aggressive and sometimes I feel depressed. It was very hard to bear. Of course, nothing can erase all the torture, there is no way to recover the years I have lost in prison.”<sup>189</sup> During the Task Force staff’s interview with el-Britel, he became visibly disturbed when asked about the lasting mental and physical effects of his detention, responding only that “[t]here are clinical results that show the effects of my trauma.”<sup>190</sup>

El-Britel’s wife, Khadija Anna, also attests to the changes in her husband.

[I]t’s hard to [live a normal life], given the circumstances. It is hard to understand the moments of depression and sadness that Kassim experiences. He went through some horrible experiences, which no human being should ever suffer. ... Kassim still experiences deep exhaustion. What happens is that people who seem normal, still suffer from the consequences [of torture]. It is hard to live in society, because you feel as if you are always alone even though you live in a modern society. When something like this happens, it eats at something inside of you, so the pain and sorrow is very deep.<sup>191</sup>

Sami al-Hajj reported similar social problems. “When I get my release, it’s not easy for me to talk. I can’t talk continuously. Even movie[s] [are] difficult for me, even to deal with other people, even my family. I don’t want [them] to talk to me, too much noise, I don’t want noise. ... Even with my child, it’s not easy.”<sup>192</sup> Al-Hajj confirmed that he has post-traumatic stress disorder, and that to this day he continues to see therapists.<sup>193</sup>

Anecdotes like these abound among former detainees. In 2009, doctors with PHR met with a former detainee using the name Adeel in Pakistan. Adeel had spent four years in U.S. custody in Afghanistan and Guantánamo, and subjected to sexual humiliation, isolation, extreme temperatures, loud music, and stress positions.<sup>194</sup> According to Adeel, since his release, “the sound of approaching footsteps or the sight of someone in a uniform can trigger bad memories and set off a panic attack. ... ‘I feel like I am in a big prison and still in isolation. I have lost all my life.’ ”<sup>195</sup> The doctors diagnosed him with PTSD and severe depression.<sup>196</sup>

In a March 2012 article for *Annals of Internal Medicine*, Dr. Sondra Crosby described meeting a former detainee, “Rashid,” during a visit to Pakistan on behalf of Physicians for Human Rights. According to Crosby,

[Rashid] described the horrors of his arrest, during which he was beaten so badly that he was admitted to a hospital with multiple fractures and internal injuries.

**“There are accounts, however, of the six confirmed suicides that have taken place at Guantánamo Bay in the 10 years since it opened, along with the hundreds of suicide attempts”.**

He described how he was kidnapped from his hospital bed and survived a five-year ordeal in U.S. custody in multiple detention sites, including Afghanistan. ... [H]e detailed the methods of his torture: severe beatings, prolonged painful stress positions, prolonged solitary confinement, forced nakedness and humiliation, sleep deprivation, withholding of food, sexual assault (anal rape and sodomy), forced intravenous medications during interrogations that he thought might be a truth serum, and painful shackling. At times, he was denied medical and psychiatric care. Rashid's prominent symptoms [post-release] included extreme sleep disturbance, sadness, loss of appetite with substantial weight loss, and difficult interacting with other people (including family and friends), resulting in profound isolation. The lack of self-sufficiency has caused further depression, feelings of inadequacy, and shame and humiliation when he has to rely on his family for his basic needs. ... [H]e meets diagnostic criteria for post-traumatic stress disorder and major depression, but those Western-based diagnoses do not adequately characterize his palpable suffering.<sup>197</sup>

At Crosby's behest, the U.N. Voluntary Fund for Victims of Torture (which has handled a number of post-release detainee cases) was able to arrange for Rashid's treatment.<sup>198</sup> The United States is not currently a donor to the fund.<sup>199</sup>

German detainee Khaled El-Masri is another compelling PTSD case that supports the argument for medical and reintegration assistance for former detainees. El-Masri returned to his home in 2003 after five months of confirmed rendition and abuse by the CIA, which allegedly included beatings, sodomy, and malnourishment [see Chapter 5]. He found that his wife and children had moved to Lebanon, believing that he had abandoned them.<sup>200</sup>

In the nine years since his release, El-Masri's mental state has drastically deteriorated and manifested in a string of incidents, despite having no criminal record prior to his rendition. In 2007, El-Masri was convicted of arson, having set fire to an electronics store that had refused to allow him to return an allegedly faulty purchase.<sup>201</sup> His lawyer, Manfred Gnjjidic, argued that he had pleaded with doctors and the government to get El-Masri psychiatric care prior to the fire, but "no one had offered to take him."<sup>202</sup> Gnjjidic also pointed out that El-Masri "live[d] cooped up most of the time in his apartment and in constant fear that his children could be shot. He has suffered a complete nervous breakdown."<sup>203</sup> During the trial, prosecutors also claimed that El-Masri had allegedly attacked a driving instructor who had criticized him for not attending lessons.<sup>204</sup> The court gave El-Masri a two-year suspended sentence on the grounds that he had been severely traumatized by his rendition and abuse, and had no prior record.<sup>205</sup>

El-Masri ran into further trouble in 2009, after attacking the mayor of Neu-Ulm, his town in Germany. Taking three of his children with him, El-Masri stormed into the mayor's office (after first being turned away by police), punched the mayor repeatedly, and threw a chair at him.<sup>206</sup> This time, El-Masri was sentenced to two years in prison.<sup>207</sup> During a trial, a psychiatrist "deemed el-Masri responsible for his actions, but noted his abduction had caused him great suffering."<sup>208</sup>

These anecdotes illustrate only a few of the possible effects of prolonged detention and abuse on detainees. For those who endured sexual abuse while in U.S. or proxy detention, such as El-Masri, Begg, al-Rawi, Deghayes, and Binyam Mohammed [see Chapters 1, 2 and 5], clinicians

at a Berlin psychological center, “who treat a large population of Muslims, have found that Muslim victims of sexual torture forever carry a stigma and will often be ostracized by the community.”<sup>209</sup> More generally, the International Committee of the Red Cross (ICRC) publicly warned the Bush administration in 2003 that “a system in which detainees were held indefinitely would inevitably lead to mental health problems.” During the ICRC’s June 2004 visit to Guantánamo, they “found a high incidence of mental illness produced by stress, much of it caused by prolonged solitary confinement.”<sup>210</sup>

**“This is a prison that does not know humanity, It does not differentiate between a criminal and the innocent”**

The most extreme manifestation of the mental effects of abuse and prolonged detention are the suicides and attempted suicides that have occurred among current and former detainees. In *Broken Laws, Broken Lives*, the PHRs states: “Seven of the eleven individuals evaluated disclosed having contemplated suicide as a result of the abuses they suffered while in US custody. Suicidal ideation is particularly significant and pathological in these cases given the strict prohibition against suicide in the Muslim religion.”<sup>211</sup> No empirical figures are available on self-harm incidents or suicides post-release.

There are accounts, however, of the six confirmed suicides that have taken place at Guantánamo Bay in the 10 years since it opened, along with the hundreds of suicide attempts.<sup>212</sup> The Department of Defense has not regularly released statistics on “self-harm incidents” at Guantánamo, but there were over 350 such attempts in 2003 alone.<sup>213</sup> In September 2012, 32-year-old Yemeni detainee Adnan Latif was found dead of suicide in his cell at Guantánamo after 11 years of detention.<sup>214</sup> Latif had made several previous suicide attempts, including slitting his wrists in 2009.<sup>215</sup> It also may be significant that he and the six men who committed suicide, along with dozens of other detainees who have attempted suicide, were long-term hunger-strikers in the prison, protesting the reasons, length, and conditions of their detention.<sup>216</sup>

Latif had been recommended for release three times, twice by the Department of Defense and once by President Obama’s Special Task Force for Guantánamo, on the grounds that he was “not known to have participated in any combatant/terrorist training.”<sup>217</sup> Latif consistently argued that he had been sold for bounty while he was in Pakistan for cheap medical care following a car accident in his native Yemen.<sup>218</sup> His immediate release was ordered by a U.S. district court in 2010, but the decision was overturned after the Department of Justice appealed, arguing essentially that the government’s evidence was entitled to a “presumption of accuracy” without accounting for the corroboration of and correction for interpretation/transcription errors and redactions that had terminated the DOJ’s case at the lower court.<sup>219</sup> Latif had a history of “depression and erratic behavior,” and was “mentally fragile and was at times sedated, placed on suicide watch and sent to the prison’s psychological ward.”<sup>220</sup> According to his lawyer, David Remes: “Every hope held out to him was dashed. ... He felt that his spirit was dying, that he couldn’t continue to bear his conditions.”<sup>221</sup>

In one of his last letters to Remes (from December 2010), Latif wrote

Do whatever you wish to do, the issue [of release] is over. ... This is a prison that does not know humanity, and does not know [anything] except the language of power, oppression and humiliation for whoever enters it. It does not differentiate between a criminal and the innocent. ... Hardship is the only

language that is used here. Anybody who is able to die will be able to achieve happiness for himself, he has no other hope except that ... [e]nding it is a mercy and happiness for this soul. I will not allow any more of this and I will end it. ... A world power failed to safeguard peace and human rights and from [*sic*] saving me.”<sup>222</sup>



The April 2012 meeting between Task Force members Asa Hutchinson and David Irvine,<sup>223</sup> and al-Rawi, Begg, and Deghayes in London seemed to be the first time that high-ranking former U.S. officials had come face-to-face with former detainees.<sup>224</sup> The long and often difficult discussion about the experiences of the three former detainees yielded samples of the challenges faced by all detainees.

Hutchinson later stated that “There is no doubt in my mind that these individuals suffered treatment that amounted, if not to torture, then cruel, inhuman, or degrading treatment.”<sup>225</sup>

At the end of the meeting, Irvine emphasized that the discussion had been enormously helpful, and commented that “I suspect that my country is at the beginning point of a long process of beginning to say ‘I’m sorry.’” All three men thanked Hutchinson and Irvine profusely, and noted that Irvine was “the most senior person who’s ever said something of that nature,” in keeping with the understanding that many former detainees are simply looking for acknowledgement of or apology for the abuse received at the hands of U.S. forces.

Deghayes added:

I always thought Guantanamo was [a missed] opportunity for the American government to explain the better side of the United States. To many youngsters who were imprisoned, seventeen years old, twenty years old, from all over the Middle East, to show them that there were other good things in America rather than what you hear in the news.

# Recidivism

*The U.S. Naval Station at Guantánamo Bay, Cuba (GTMO), began receiving detainees from the U.S. “War on Terror” on January 11, 2002.<sup>1</sup> As of January 14, 2012, 603 detainees have been released or transferred, and 166 remained in detention.<sup>2</sup>*

*The Defense Intelligence Agency provides periodic updates on GTMO detainees released or transferred from the base and either confirmed or suspected of “re-engaging” in terrorism. The generic designation/description of conduct in question has been referred to as “return to the battlefield,”<sup>3</sup> “re-engaging in terrorist or insurgent activities”<sup>4</sup> and “anti-coalition militant activities.”<sup>5</sup> The Department of Defense does not provide a list of criteria or the methodology employed in classifying individuals as “re-engaging in terrorism.”<sup>6</sup> The public must rely on a combination of broad terms and specific examples of re-engagement in order to understand the framework employed by the Defense Intelligence Agency, but the word “recidivism” has been used in application to all of the above categories. The dissection by non-governmental organizations and the media of the information provided by the Defense Intelligence Agency, as well as statements made by a broad spectrum of government officials, highlight the lack of reliable and explicit data necessary for a rigorous policy discussion on the consequences of transfer and release of GTMO detainees. “Recidivism” has become a controversial term, with former CIA officials such as Gary Berntsen declaring that “the number, as far as we know, is 33 percent. And those are only the ones we know about!”<sup>7</sup> On the other hand, groups such as the New America Foundation have said that the number is closer to 6 percent.<sup>8</sup>*

*“Return to the battlefield” implies engagement on the battlefield before capture and detention. For many of the detainees held at Guantánamo Bay, prior involvement in the fight has been poorly, if at all, established.<sup>9</sup> According to the unclassified summaries of the Combatant Status Review Tribunals, only 21 detainees (4 percent) have been alleged to be on the battlefield before their capture.<sup>10</sup> The term itself, “recidivism,” does not comport with the acknowledgement by General Michael Dunlavey, former commander of Joint Task Force Guantánamo, that “easily a third of the Guantánamo detainees were mistakes,” as those detainees can therefore not be properly classified as recidivists.<sup>11</sup> That estimate was later raised by General Dunlavey to half of the detainees held at Guantánamo.<sup>12</sup>*





## Department of Defense Data

The information available relies in large part on the Defense Intelligence Agency (DIA) terrorism report updates provided to the Department of Defense, and summaries of the director of national intelligence submitted pursuant to the requirements of the Intelligence Authorization Acts. The following is the list of data provided by the Defense Intelligence Agency and the Director of National Intelligence:

- On July 10, 2006, the DIA provided an update to the Department of Defense general counsel on the status of GTMO detainees “known/suspected of returning to terrorism after release.”<sup>13</sup> The paper identified seven individuals as released from GTMO and having returned to terrorism.<sup>14</sup>
- A December 4, 2007, DIA report stated there were 31 released detainees (7 percent of those transferred from U.S. custody) confirmed or suspected of re-engagement in terrorist activities.<sup>15</sup> The DIA report, further stated that the rate of the re-engagement for the period from 2004-2007 rate was between 5 and 8 percent.
- A May 12, 2008, DIA report raised the number to 36 detainees confirmed or suspected of re-engagement in terrorist activities.<sup>16</sup> The rate of re-engagement remained between 5 and 8 percent.
- A January 7, 2009, DIA report released two separate numbers for released detainees confirmed (18, or 3.4 percent) or suspected (43, or 8 percent) of re-engaging in terrorism. The 2004–2008 rate of re-engagement was between 4 and 8 percent with overall re-engagement rising to 11 percent.<sup>17</sup>
- An April 8, 2009, DIA report raised the number confirmed of re-engaging in terrorist activities to 27, and the number suspected to have done so to 47, with a corresponding re-engagement rate of 14 percent.<sup>18</sup>
- As of October 1, 2010, according to the director of national intelligence, 81 detainees (13.5 percent) were confirmed, and 69 (11.5 percent) were suspected to have re-engaged in terrorism. Of the 150 detainees confirmed or suspected of re-engagement, 13 are dead, 54 were in custody, and 83 were at large.<sup>19</sup>
- As of December 29, 2011, according to the director of national intelligence, 95 detainees (15.9 percent) were confirmed, and 72 (12 percent) were suspected to have re-engaged in terrorism. Of the 162 released detainees confirmed or suspected of re-engagement, 14 are dead, 54 were in custody, and 99 were at large.<sup>20</sup>
- As of July 19, 2012, according to the director of national intelligence, 95 detainees (15.8 percent) were confirmed, and 73 (12.1 percent) were suspected to have re-engaged in terrorism. Of the 168 released detainees confirmed or suspected of re-engagement, 17 are dead, 52 were in custody, and 99 were at large.<sup>21</sup> As of January 14, 2013, according to the

director of national intelligence, 97 detainees (16.1 percent) were confirmed, and 72 (11.9 percent) were suspected to have re-engaged in terrorism. Director of National Intelligence, Summary of the Reengagement of Detainees Formerly Held at Guantánamo Bay, Cuba (March 5, 2013) available at <http://www.dni.gov/files/documents/March%202013%20GTMO%20Reengagement%20Release.pdf>.

The rate of re-engagement per year remained between 3 and 8 percent through 2008, according to DIA figures. Starting in 2009, the rate of re-engagement rose to 11 percent in January and to 14 percent in April. After the April 2009 report, updates do not address the rise over time in the rate of confirmed or suspected re-engagement of detainees, which is currently at 27 percent.<sup>22</sup> It should be noted, however, that the Summary of Reengagement issued by the director of national intelligence in September 2012 lists only three confirmed recidivists out of 70 released since January 22, 2009.<sup>23</sup> There is a reported lag time between the release of a detainee and the intelligence either confirming or suggesting re-engagement. According to the 2006 Defense Intelligence Agency report, the lag time was one year.<sup>24</sup> According to the fiscal year 2010 report, the time between release and first report of confirmed or suspected terrorist activity was 2.5 years.<sup>25</sup> There is no information provided to account for the change in average lag time between release and first report of re-engagement.

### **Methodology / Criteria**

The specific methodology of how the Defense Intelligence Agency assesses re-engagement in terrorism is not publicly available. In the context of a Freedom of Information Act litigation, the Department of Justice explained: “[to] allow for the proper flexibility in analyzing all available evidence, DIA does not endeavor to create any sort of firm guidelines for identifying a detainee as having returned to the fight. The data collected to support this determination simply varies too greatly to allow for categorical simplification.”<sup>26</sup> The best official indicators of the criteria employed in providing the re-engagement numbers are the definitions provided by the DIA reports for “confirmed” and “suspected.” The 2007 update provides the following definitions:

Definition of “Confirmed” — A preponderance of evidence — fingerprints, DNA, conclusive photographic match, or reliable, verified or well-corroborated intelligence reporting — identifies a specific former Defense Department detainee as directly involved in terrorist activities.

Definition of “Suspected” — Significant reporting indicates a former Defense Department detainee is involved in terrorist activities, and analysis indicates the detainee most likely is associated with a specific former detainee or unverified or single-source, but plausible, reporting indicates a specific former detainee is involved in terrorist activities.<sup>27</sup>

The 2011 DIA report provides the following definitions:

Definition of “Terrorist” or “Insurgent” Activities. Activities such as the following indicate involvement in terrorist or insurgent activities: planning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, recruiting others for terrorist operations, and arranging for

movement of individuals involved in terrorist operations. It does not include mere communications with individuals or organizations — including other former GTMO detainees — on issues not related to terrorist operations, such as reminiscing over shared experiences at GTMO, communicating with past terrorist associates about non-nefarious activities, writing anti-U.S. books or articles, or making anti-U.S. propaganda statements.

Definition of “Confirmed.” A preponderance of information which identifies a specific former GTMO detainee as directly involved in terrorist or insurgent activities. For the purposes of this definition, engagement in anti-U.S. statements or propaganda does not qualify as terrorist or insurgent activity.

Definition of “Suspected.” Plausible but unverified or single-source reporting indicating a specific former GTMO detainee is directly involved in terrorist or insurgent activities. For the purposes of this definition, engagement in anti-U.S. statements or propaganda does not qualify as terrorist or insurgent activity.<sup>28</sup>

These definitions paint a general picture of the framework used in compiling the data presented by the DIA on re-engagement. The reports prior to 2010 provided illustrative examples of individual cases that fill in some of the details. The examples range from broad statements to specific conduct and include the following: “participating in an attack on U.S. Forces near Kandahar” while carrying a letter of good standing in the Taliban;<sup>29</sup> claiming responsibility for a hotel bombing;<sup>30</sup> press reports referring to the individual as a Taliban leader;<sup>31</sup> reportedly organizing a jail break; killed while fighting U.S. forces; killed by Afghan security forces; arrested and sentenced by the Russian government for gas line bombing;<sup>32</sup> “renewed his association with Taliban and al-Qaida members and has since become re-involved in anti-coalition militant activity”;<sup>33</sup> convicted by Moroccan officials for terrorist network recruiting;<sup>34</sup> committing suicide to evade capture by Pakistani forces;<sup>35</sup> arrested by Turkish authorities for leading an Al Qaeda cell;<sup>36</sup> conducting a suicide bombing; releasing a video announcing himself as the leader of an Al Qaeda cell.<sup>37</sup> The official statements do not indicate which of the above listed acts constitutes suspicion of re-engagement and which constitutes a confirmation.

## Congressional Report

Following the DIA updates, the Subcommittee on Oversight and Investigations of the House Committee on Armed Services issued a report in March of 2012 on detainees released or transferred from GTMO. The report specifically focused on the decision to close the base and transfer low-risk detainees and the subsequent re-engagement of released/transferred detainees in terrorism or insurgent activities.<sup>38</sup> According to the report, 27 percent of those released or transferred had re-engaged. The House Committee report provided three illustrative examples — Abdallah Saleh Ali al-Ajmi (repatriated to Kuwait in 2005), Said Ali Al-Shihri (transferred to Saudi Arabia in 2007), and Abdullah Zakir (transferred to Afghanistan in 2007) — but no additional details on the individuals that make up the purported 27 percent re-engagement rate.<sup>39</sup> While the House report focuses predominantly on the political, legal and security pressures that led to the decision in both the Bush and Obama administrations to close GTMO and to establish a presumption in favor of transfer or release,<sup>40</sup> it does not provide any lengthy analysis of re-engagement, its causes, consequences or alternatives.

In a dissenting statement, Rep. Jim Cooper, D-Tenn., criticized the report for its methodology, asserting that it relied too heavily on “press clippings and interview[s] [of] a handful of officials” with the goal of writing “ghost stories designed to scare voters.”<sup>41</sup> Rep. Cooper also took issue with the 27 percent rate of re-engagement, stating “the current rate of confirmed reengagement of transferees under the Obama Administration is closer to 3%.”<sup>42</sup> Additionally, in the “Dissenting Views of Minority Members” section of the report, the Democratic members focused on the confirmed rate of re-engagement (13.5 percent) rather than the combined confirmed and suspected rate (27 percent).<sup>43</sup> Of the combined confirmed and suspected re-engagers, 44 percent have been re-captured or are dead. Therefore, the number of released detainees actively engaged on the battlefield is closer to 9 percent.<sup>44</sup>

### **NGOs, the Academy, the Media**

The evaluation of Defense Intelligence Agency reports by academics and NGOs has focused on the need for systematic and detailed data to corroborate the summary broad statistics claiming substantial re-engagement. To date, the information disclosed has been characterized as inaccurate, incomplete and unsubstantiated.<sup>45</sup> No agency has released a comprehensive list of the individuals that make up the alleged 27 percent.<sup>46</sup> There is no data on how many of the detainees making up the recidivism percentage were released versus transferred to a third nation's authority. There is limited specific data on the countries to which these individuals were transferred or what evidence led to their transfer.

According to data compiled by the New America Foundation, based on information provided by both official sources and independent media sources, the indicated re-engagement rate of detainees involved in conduct harmful to the United States is 6 percent rather than the widely reported 27 percent.<sup>47</sup> The 6 percent rate is made up of 36 identified individuals, 12 confirmed, eight suspected, and 16 not listed by the Department of Defense but identified independently. Research conducted by Professor Mark Denbeaux at Seton Hall University School of Law finds further problems with the DIA data, namely: names provided by the Defense Intelligence Agency have gone from confirmed to suspected;<sup>48</sup> some have been removed from the confirmed list altogether;<sup>49</sup> some names provided do not appear on the official list of detainees held at Guantánamo;<sup>50</sup> and the reports make no attempt to account for the released detainees who have gone on to live productive lives;<sup>51</sup> Additionally, while the DIA's definition of re-engagement declares “engagement in anti-U.S. statements or propaganda does not qualify as terrorist or insurgent activity,”<sup>52</sup> according to Professor Denbeaux's research, vocal opposition to U.S. policies is the only conduct that led to certain individuals' names appearing on the list of detainees who have re-engaged in terrorism.<sup>53</sup>

The Defense Intelligence Agency data has further been criticized for conflating focused on the “confirmed” and “suspected” categories. The 27 percent re-engagement rate includes both categories, while the level of intelligence and corroborating evidence is vastly different between the two.<sup>54</sup> Even a Pentagon spokesman took issue with the conflation of the suspected and confirmed categories, saying “[s]omeone on the ‘suspected’ list could very possibly not be engaged in activities that are counter to our national security interests.”<sup>55</sup> Moreover, the acts described in the definition of “terrorist” and “insurgent activities” are vague; violent attacks against the United States, criminal conduct in detainees, their home states, or merely voicing criticism all could be included.<sup>56</sup> Such imprecise categories and definitions are dangerous because they paint an inaccurate picture of detainees leaving Guantánamo and returning to the battlefield with the aim of killing and harming American soldiers.<sup>57</sup>

The DIA report of March 2012 states:

We assess that some GTMO detainees transferred in the future also will communicate with other former GTMO detainees and persons in terrorist organizations. We do not consider mere communication with individuals or organizations — including other former GTMO detainees — an indicator of reengagement. Rather, the motives, intentions, and purposes of each communication are taken into account when assessing whether the individual has reengaged.<sup>58</sup>

While the DIA report states that mere communication among detainees cannot constitute re-engagement, or the suspicion of it, because the other indicators of re-engagement remain classified, there is no way to determine whether a combination of highly circumstantial elements is sufficient to label a released detainee a recidivist. Is the combination of communicating with former GTMO detainees and persons in terrorist organizations sufficient? Is the content of the communication enough? Is the identity of the other party to the communication enough? How many organizations are deemed to be terrorist organizations for the purposes of determining re-engagement? Is there a distinction between organizations waging a fight against the United States and those waging a fight against other parties, *e.g.*, Russia, China, etc.? The implicit answer to these questions is: “we know it when we see it, leave it to us.”

The data on re-engagement of released or transferred GTMO detainees remains incomplete and ambiguous. The rate of re-engagement as reported by the government has risen dramatically and rapidly in the past few years without accompanying corroborating or specific data to substantiate the rise in numbers. There is, obviously, a potential problem in that such data could be used as a justification for long-term detention or greater deference to the executive branch based on fears of a high level of re-engagement, indicating conduct directly harmful to the national security interests of the United States.

Finally, hesitation to publicize explicit definitions of re-engagement (and the accompanying guarantee that speech is excluded) is a symptom of the lack of public information of how these broad standards find practical expression. Two years ago, the U.S. Supreme Court, in its interpretation of a federal criminal statute on providing “material support” to terrorism, threaded the legal needle through First Amendment jurisprudence to distinguish speech and support:

The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do — provide material support to the PKK and LTTE in the form of speech.”<sup>59</sup>

Given the reframing of the speech/conduct distinction by the Supreme Court in the national-security context, the guarantees of the Defense Intelligence Agency on the precise classified application of the publicly disclosed standards leaves open questions without the means to conduct a rigorous policy analysis in search of the answers.

**PUBLICLY AVAILABLE NAMES OF INDIVIDUALS CONFIRMED OR SUSPECTED OF RE-ENGAGEMENT**

	<b>Name</b>	<b>Date Released</b>	<b>Suspected Acts</b>	<b>Source<sup>1</sup></b>
1.	Mohammed Ismail	2004	Made verbal claims of being a Taliban member, was recaptured in Kandahar. Confirmed.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011
2.	Said Mohammed Alim Shah, aka Abdullah Mahsud	2004	Press reports referring to Mahsud as a member of the Taliban. Committed suicide to avoid capture, and reportedly directed other suicide attacks. Confirmed.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011
3.	Mohamed Yusif Yaqub (Yousef Muhammed Yaaqoub), aka Mullah Shazada	2003	Reportedly linked to Taliban activities, including a jail break in Kandahar. Killed in 2004 while fighting U.S. forces. Confirmed.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011
4.	Maulavi Abdul Ghaffar, aka Sabi Jahn Abdul Ghafour	2002–2003	Reportedly linked to Taliban activities in Afghanistan. Killed in 2004 by Afghan security forces. Suspected.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011
5.	Mohammed Nayim Farouq	2003	“Renewed his association with Taliban and al-Qaida members.” Suspected.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011
6.	Ravil Shafeyavich Gumarov	2004	Arrested for a line bombing incident in Russia. Found guilty by Russian Court. Confirmed.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011
7.	Timur Ravilich Ishmurat	2004	Arrested for a line bombing incident in Russia. Found guilty by Russian Court. Confirmed.	DIA – 2006 Report DIA – 2007 Report DIA – 2008 Report DIA – April 2009 Report New America Foundation Report 2011

	<b>Name</b>	<b>Date Released</b>	<b>Suspected Acts</b>	<b>Source<sup>1</sup></b>
8.	Ibrahim Bin Shakaran		Convicted in Morocco for recruiting others to fight in Iraq. Confirmed.	DIA — 2007 Report DIA — 2008 Report DIA — April 2009 Report New America Foundation Report 2011
9.	Mohammed Bin Ahmad Mizouz		Convicted in Morocco for recruiting others to fight in Iraq. Confirmed.	DIA — 2007 Report DIA — 2008 Report DIA — April 2009 Report New America Foundation Report 2011
10.	Ruslan Anatolovich Odizhev		The Russians suspected Mr. Odizhev of involvement in terrorism in the Caucasus. Killed during attempted arrest by Russia's Federal Security Service. Suspected.	DIA — 2007 Report DIA — 2008 Report DIA — April 2009 Report New America Foundation Report 2011
11.	Ibrahim Shafir Sen	2003	Arrested in Turkey for involvement with Al Qaeda. Confirmed.	DIA — 2008 Report DIA — April 2009 Report New America Foundation Report 2011
12.	Abdallah Saleh Ali al-Ajmi	2005	Carried out a suicide bombing in Iraq. Confirmed.	DIA — April 2009 Report House Armed Services Report of 2012 New America Foundation Report 2011
13.	Abu Sufyan al-Azdi al-Shihri	2007	In an Al Qaeda video released claiming leadership of the cells in the Arabian Peninsula. Confirmed. One of three referred to in the 2012 House Armed Services report; named Said Al-Shihri.	DIA — April 2009 Report House Armed Services Report 2012 New America Foundation Report 2011
14.	Abu al-Hareth Mohammad al-Awfi, aka Muhammed Atiq al-Harbi	2007	In an Al Qaeda video released claiming leadership of the cells in the Arabian Peninsula. Confirmed.	DIA — April 2009 Report New America Foundation Report 2011
15.	Shah Mohammed	2003	"Killed fighting U.S. forces in Afghanistan." Confirmed.	DIA — April 2009 Report New America Foundation Report 2011



	Name	Date Released	Suspected Acts	Source <sup>1</sup>
16.	Abdullah Kafkas	2004	"Suspected involvement in an attack against a traffic police checkpoint I Nalchik." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
17.	Almasm Rabilavich Sharipov	2004	"Associated with terrorist group Hizb ut-Tahrir." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
18.	Abdullah Ghofoor (Listed separately in the same report as Jahn Abdul Ghafour, therefore presumably different detainee)	2004	Suspected Taliban commander killed by Afghan security forces. Suspected.	DIA — April 2009 Report New America Foundation Report 2011
19.	Isa Khan	2004	"Associated with Tehrik-i-Taliban." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
20.	Muhibullah	2005	"Association with the Taliban." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
21.	Abdullah Majid al-Naimi	2005	Arrested. "Involved in terrorist facilitation; has known associations with al-Qaida." Confirmed.	DIA — April 2009 Report New America Foundation Report 2011
22.	Saad Madhi Saad Hawash al Azmi	2005	"Association with al-Qaida." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
23.	Majid Abdullah Lahiq al Joudi	2007	"Terrorist facilitation." Confirmed.	DIA — April 2009 Report New America Foundation Report 2011
24.	Humud Dakhil Humud Said al-Jadan	2007	"Association with known terrorists." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
25.	Abd al Razaq Abdallah Hamid Ibrahim al Sharikh	2007	"Arrested in September 2008 for supporting terrorism." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
26.	Abd al Hadi Abdallah Ibrahim al Sharikh	2007	"Arrested in September 2008 for association with terrorist members; supporting terrorism." Suspected.	DIA — April 2009 Report New America Foundation Report 2011
27.	Zahir Shah	2007	"Participation in terrorist training." Confirmed.	DIA — April 2009 Report New America Foundation Report 2011

	Name	Date Released	Suspected Acts	Source <sup>1</sup>
28.	Abdullah Ghulam Rasoul	2007	“Taliban military commander for Afghanistan; Organized an assault on U.S. military aircraft in Afghanistan.” Suspected. Used as one example out of three of re-engagement in the 2012 House Armed Services report.	DIA — April 2009 Report New America Foundation 2011 House Armed Services Report 2012
29.	Haji Sahib Rohullah Wakil	2008	“Association with terrorist groups.” Suspected.	DIA — April 2009 Report New America Foundation Report 2011
30.	Abdul Rahman Noor	2003	“Fighting against U.S. forces in Kandahar.”	New America Foundation Report 2011
31.	Abdul Rauf Aliza	2007	“Aide to Abdul Qayyum, top deputy of Mullah Omar.”	New America Foundation Report 2011
32.	Hani Abdul Muslih al-Shulan	2007	“Field Commander in AQAP.”	New America Foundation Report 2011
33.	Ibrahim Sulaiman Mohammed Ar-Rabeish aka Abu Mohammed, Saad Al Ansari, Ibrahim Sulayman Al Rabeesh, Ibrahim Sulaiman Al Rubaish, Ibrahim El Roubish, Ibrahim Sulayman Muhammad, Ibrahim Sulayman Muhammad Al Rubaysh	2006	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
34.	Yusuf Muhammad Mubarak al-Jebairy al-Shehri, aka Yusuf Muhammad it Mubarak al-Shihri, Abu al-Harith, Abdul Aziz, Abu Hakim al-Shihri, Yusef Mohammed Aziz Saad Modaray	2007	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
35.	Fahd Jubran Ali al-Faify aka Jaber Alfefey	2006	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011

	Name	Date Released	Suspected Acts	Source <sup>1</sup>
36.	Fahd Saleh Suleiman al-Jutayli , aka Kamza Aqeedah, Hamza Al Nejdi, Hamza El Qassimi, Thamir, Hamza, and Hamzah Agida	2006	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
37.	Murtadha Ali Saeed Magram , aka Abul-Baraa al-Hadrami, Murtada Ali Said Magram, Murtadah Ali Said Qawm, Abu al-Bara Murtada Bin al-Hadrami, Khallad al-Muritani, Abdul Malik Abu al-Baraa al-Maghribi, Abu Masab, Abu Shaheed, Murtada Ali Said Qagam	2007	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
38.	Meshal Mohammed Rashid Al-Shedoky aka Mishale Ashadouki	2003	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
39.	Adnan Mohammed Ali, aka Adnan Muhammad Ali Al Saigh, Abu Malik Al Ta'ifi, Adnan, Al Ansari Maalek, Haydardi Al Lubnani, Al Saeh Adnan Mohammad, Al Saigh, Al Sayigh, Al Makdad Al Ta'ifi, Abu Malik, Abu Marzyah, Ibn Ul Mubarak, and Adnan Mohammed Ali Saig	2006	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
40.	Turki Mashawi Zayid al-Assiri, aka Al-Mutasim al-Makki, Turki Mash Awi Zaggd al-Asiri, Mutasim al-Mecci	2007	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011
41.	Othman bin Ahmed bin Othman al-Ghamdi aka Othman al-Omairah	2006	Wanted by the government of Saudi Arabia for involvement in terrorist activities.	New America Foundation Report 2011

	Name	Date Released	Suspected Acts	Source <sup>1</sup>
42.	Mohammad Ilyas aka Qari Jaml, Qari Jamil	2004	Alleged involvement in various terrorist plots with links to Al-Qaida according to Pakistani authorities.	New America Foundation Report 2011
43.	Hafizullah Shabaz Khail aka Hafizullah Shahbaz Kiel, Hafizullah Shahbaz Khail	2007	“Allegedly took part in a rocket attack against U.S. base in Afghanistan in 2007; re-arrested by Afghan police in 2008 for treating sick Taliban.”	New America Foundation Report 2011
44.	Ali Husayn Abdullah al Tays aka Ali Hussain alTais, Ali Hussein al-Taiss aka Abu Hussein	2006	“Joined AQAP before surrendering to Yemeni authorities in August 2010”	New America Foundation Report 2011
45.	Mehdi Mohammed Ghezali	2004	Alleged Al Qaeda contact, detained by Pakistani authorities.	New America Foundation Report 2011
46.	Mohammed Souleimani Laalami	2006	Sentenced by a Moroccan court for terrorist activities (criminal gang violence)	New America Foundation Report 2011
47.	Mubarak Hussain Bin Abul Hashem	2006	“Detained in Bangladesh for ‘suspected anti-state activities.’ ”	New America Foundation Report 2011
48.	Abdul Rahim Mulsim Dostaka, aka Abdul Rahim Muslimdost, Rahim Muslim Dost, Abdul Rahim Mannan	2005	Part of an exchange of prisoners between Pakistan and the Taliban.	New America Foundation Report 2011
49.	Usama Hassan Ahmed Abu Kadir (Usama Hassan Ahmed Abu Kabir)	2007	Sentenced for planned attacks on Israel.	New America Foundation Report 2011
50.	Slimane Hadj Abderrahmane	2004	Listed under a category of “former detainees involved in anti-American propaganda or criticism.” Under surveillance in Denmark.	New America Foundation Report 2009
51.	Ruhal (Rhuhel) Ahmed (Tipton Three)	2004	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009 Road to Guantánamo.

	Name	Date Released	Suspected Acts	Source <sup>1</sup>
52.	Shafiq Rasul (Tipton Three)	2004	Listed under a category of "former detainees involved in anti-American propaganda or criticism."	New America Foundation Report 2009 Road to Guantánamo.
53.	Asif Iqbal (Tipton Three)	2004	Listed under a category of "former detainees involved in anti-American propaganda or criticism."	New America Foundation Report 2009 Road to Guantánamo.
54.	Adel Abdulhehim (Albania Uighur), aka Muhammad Qadir, Abu Bakr Qasim	2006	Listed under a category of "former detainees involved in anti-American propaganda or criticism." Uighurs cited as an example of re-engagement by the DOD. <sup>2</sup>	New America Foundation Report 2009
55.	Ahmed Adil (Albanian Uighur), aka Oblekim Abdurasul, Oblekim Abdursal	2006	Listed under a category of "former detainees involved in anti-American propaganda or criticism." Uighurs cited as an example of re-engagement by the DOD.	New America Foundation Report 2009
56.	Haji Mohammed Ayub (Albanian Uighur) aka Haji Mohammed Ayub	2006	Listed under a category of "former detainees involved in anti-American propaganda or criticism." Uighurs cited as an example of re-engagement by the DOD.	New America Foundation Report 2009
57.	Akhdar Qasem Basit (Albanian Uighur), aka Niyas Muhammed	2006	Listed under a category of "former detainees involved in anti-American propaganda or criticism." Uighurs cited as an example of re-engagement by the DOD.	New America Foundation Report 2009
58.	Abu Bar Qasim	2006	Listed under a category of "former detainees involved in anti-American propaganda or criticism." Uighurs cited as an example of re-engagement by the DOD.	New America Foundation Report 2009

	<b>Name</b>	<b>Date Released</b>	<b>Suspected Acts</b>	<b>Source<sup>1</sup></b>
59.	Salim Mahmoud Adem Mohammed Bani Amir, aka Benny Ah-Amir, Abu Ahmed, Abu Abdul Salem	2007	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
60.	Adel Hasan Hamad	2007	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
61.	Moazzam Begg	2005	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
62.	Mourad Benchellali, aka Abdullah Mihoub, Jean-Baptiste Mihoub	2004	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
63.	Jumah al-Dossari	2007	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
64.	Mustafa Ibrahim Mustafa al Hassan, aka Mustafa Ibrahim al-Qufa, Abu Attica, Abu Safwan, Abdul Jami Khoday Nazan	2008	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
65.	Muhammad Saad Iqbal, aka Hafez Qari Mohamed, Saad Iqbal Madni	2008	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
66.	Sadeq Mohammed Saeed Ismail	2007	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
67.	Abdurahman Khadr, aka Abdul Khadr	2003	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009

	Name	Date Released	Suspected Acts	Source <sup>1</sup>
68.	Murat Kurnaz	2006	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
69.	Binyam Mohammed aka Talha al Kini, Fouad Zouaoui, Binyam Ahmed Mohammad, Mohammed Ahmed Binyam, Binyam Mohamed al Habashi, Talha al-Nigeri, Ben, Benjamin Ahmad Muhammad, John Samuel, Fouad Zouaoui, Nabil, Binyamin Zouioue	2009	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
70.	Adil Kamil Abdullah al Wadi	2005	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
71.	Mullah Abdul Salam Zaeef	2005	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009
72.	Lakhdar Boumediene aka Ahmed al-Muntasir	2009	Listed under a category of “former detainees involved in anti-American propaganda or criticism.”	New America Foundation Report 2009

### (Footnotes)

<sup>1</sup> When there are references to multiple DIA reports there is seldom, if ever, additional information since first reported. Later reports summarize and restate of previously reported cases of re-engagement.

<sup>2</sup> *National Security Deserves Better*, *supra* note 51, at 15 (“In the July 2007 DoD news release, the five Uighurs relocated to Albania were listed as examples of recidivist activity. ... Since their release — following three years of incarceration at GTMO — the five men have lived at the same refugee camp in Tirana, Albania.”) (The press release was removed by the DOD and is no longer available online, the copy is reproduced in the cited report).

# The Obama Administration

*During the 2008 campaign, President Obama repeatedly denounced the Bush administration's treatment of detainees. Candidate Obama promised to close Guantánamo, and to "reject torture — without exception or equivocation." In 2007, he wrote in Foreign Affairs magazine that his administration would end*

*the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands without charge or trial, of maintaining a network of secret prisons to jail people beyond the reach of the law.*

*In February 2008, Obama criticized the decision to try the six detainees accused of plotting the September 11 attacks before a military commission:*

*These trials will need to be above reproach. ... These trials are too important to be held in a flawed military commission system that has failed to convict anyone of a terrorist act since the 9/11 attacks and that has been embroiled in legal challenges.*

*Obama argued that in order to "demonstrate our commitment to the rule of law," the co-conspirators should instead be tried in civilian court or court-martialed.*

*Obama was more circumspect in statements regarding the possibility of criminal prosecutions for detainee abuse. In response to one reporter's question, he said he would "have my Justice Department and my Attorney General immediately review the information that's already there and to find out are there inquiries that need to be pursued.... [I]f crimes have been committed, they should be investigated." He added, though, that "I would not want my first term consumed by what was perceived on the part of Republicans as a partisan witch hunt because I think we've got too many problems we've got to solve."*

*Obama criticized the previous administration for excessive secrecy, including the repeated invocation of the state-secrets privilege to get civil lawsuits thrown out of court. In a 2007 speech at DePaul University, he said he would lead "a new era of openness":*

*I'll turn the page on a growing empire of classified information, and restore the balance we've lost between the necessarily secret and the necessity of openness in a*



*democratic society by creating a new National Declassification Center. We'll protect sources and methods, but we won't use sources and methods as pretexts to hide the truth.*

*The Obama administration has fulfilled some of these promises, and conspicuously failed to fulfill others — in some cases because Congress has blocked them, but in other cases for reasons of their own.*

*The CIA is now prohibited by executive order from using “enhanced interrogation techniques,” or any technique not included in the Army Field Manual. The secret prisons have been closed, and access by the International Committee of the Red Cross to detainees has dramatically improved. But Guantánamo remains open, and releases and transfers of detainees have declined sharply due to congressional opposition. In 2011 and 2012, nearly as many detainees have died in Guantánamo (three total, two in suspected suicides) as been transferred (five). After a failed effort to bring them to the United States for civilian trial, the alleged September 11 co-conspirators are being tried in a military commission that still has critics who say it will not provide a fair trial, despite some modifications to the Military Commissions Act in 2009. The Justice Department opened a criminal investigation into two detainee homicides, but closed it without charging anyone. The administration asserts it retains the right to render detainees to foreign custody in reliance on “diplomatic assurances” that they will not be tortured, with some increased safeguards to ensure detainees’ humane treatment, but it is not clear if any renditions have occurred. And there has been no apparent lessening of official secrecy.*

# The First Year

## Early Executive Orders

Two days after taking office, President Obama signed several major executive orders related to detainee treatment.

The first, Executive Order 13491,<sup>1</sup> ordered the CIA to close any detention facilities under its operational control “as expeditiously as possible,” and not to open any such future facilities. It prohibited officials from subjecting any detainee under effective U.S. control to any interrogation technique not listed in the current Army Field Manual on interrogation, Army Field Manual 2-22.3. Executive Order 13491 also re-affirmed the U.S. Supreme Court’s holding in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions provided the minimum standards for treatment of detainees in U.S. custody, while preventing the executive branch from relying on the Bush-era Office of Legal Counsel’s interpretations of Common Article 3 or the rest of the Geneva Conventions, the Convention Against Torture (CAT), and the federal criminal prohibitions on war crimes and torture. It required “all departments and agencies of the Federal Government [to] provide the International Committee of the Red Cross (ICRC) with notification of, and timely access to, any individual detained in any armed conflict.” Finally, the order established an interagency task force to examine interrogation and transfer policies, with representatives from the military, CIA, and the departments of Justice (DOJ), State (DOS), Defense (DOD), and Homeland Security (DHS). According to a DOJ press release, the task force completed its report and issued recommendations to the president on August 24, 2009. The Obama administration has not, however, made the report or recommendations public.

Executive Order 13492<sup>2</sup> called for the closing of detention facilities at Guantánamo “as soon as practicable,” and specifically “no later than 1 year,” and for the “immediate” review of the status of all Guantánamo detainees, including “a thorough review of the factual and legal bases for [their] continued detention.” A second task force was placed in charge of the review. Pending its completion, the executive order halted all proceedings in military commissions.

A third executive order, E.O. 13493,<sup>3</sup> created an Inter-Agency Task Force on Detention Policy Options, whose membership overlapped with the task force on interrogation and transfer.

A majority of the public supported these steps, though not by a particularly wide margin. The day President Obama signed those orders, ABC News and *The Washington Post* released the results of a poll on detainee issues. Fifty-eight percent of those surveyed agreed with Obama’s position that the United States should never use torture, while 40 percent said that there were cases where “the United States should consider torture against terrorism suspects.” Forty-two percent favored continuing to hold terrorism suspects at Guantánamo, while 53 percent supported closing the prison. Fifty percent favored an Obama administration investigation into “whether any laws were broken in the way terrorism suspects were treated under the Bush administration,” while 47 percent opposed such an investigation.<sup>4</sup>

**“In most cases, though, detainees could not be tried because the relevant criminal statutes ‘didn’t apply extraterritorially at the time of the conduct’ for non-U.S. persons.”**

## The Debate over the Uighurs

In an interview with Task Force staff, former White House Counsel Greg Craig said he also did not encounter much congressional opposition when he initially briefed several relevant committees about the executive orders. At the time, Craig said, “[n]o one seemed to have any problems” with the proposals.<sup>5</sup> Craig noted that President George W. Bush had also expressed support for closing Guantánamo, and said the White House “thought it was not going to be an issue. It wasn’t an issue in the campaign.”<sup>6</sup> Craig did remember Democratic Sen. Sheldon Whitehouse telling him “as a friend” that based on conversations among members of the Intelligence Committee, the administration might have underestimated the difficulty in transferring detainees from Guantánamo to the United States.<sup>7</sup> Whitehouse’s concerns proved to be prescient.

Seventeen of the inmates at Guantánamo when Obama took office were Uighurs, Turkic-speaking Muslim dissidents from Xinjiang province in northwest China. The U.S. government has long condemned the Chinese government’s repression of the Uighur minority in Xinjiang. One prominent critic of China’s actions in Xinjiang is Republican Rep. Frank Wolf, who represents the 10th District of Virginia and is co-chair of the U.S. Congress Tom Lantos Human Rights Commission. In 2008, after a trip to China, Wolf noted that “[t]he Chinese government has a long record of criminalizing any form of political dissent expressed by Uyghurs,” and that Uighurs had been harassed, beaten and jailed for practicing their religion.<sup>8</sup>

The Uighurs at Guantánamo had fled China, in some cases simply to escape, in others to receive military training to fight the Chinese government. Several had received basic weapons training at a camp in Afghanistan before fleeing the United States’ airstrikes; others said they had not done so. They eventually walked over the border to Pakistan, where they allege that bounty hunters sold them to the United States military. By 2003, most of them had been cleared for release from Guantánamo; several recounted being told by their interrogators that they would soon be released. But the Uighurs could not safely be repatriated to China because they were at risk of torture and execution. Five Uighur detainees were resettled in Albania in 2006, but both the Bush and Obama administrations had difficulty convincing any other countries to offer them asylum, despite a court order for their release.

In the early days, Craig thought that resettling some Guantánamo detainees in the United States would greatly increase other countries’ willingness to accept other detainees. The administration decided that two of the Uighurs would be especially good test candidates.

There had been agreement among a group of officials working at the very highest levels of government that ... eight be brought, eight Uighurs of the seventeen, and that we start with two. And then, if it goes well, and there’s no security concerns, than we can bring the rest.<sup>9</sup>

According to press reports, that decision was reached in a meeting on April 14, 2009, chaired by White House Chief of Staff Rahm Emanuel.<sup>10</sup> CIA Director Leon Panetta, Attorney General Eric Holder, FBI Director Robert Mueller, DHS Secretary Janet Napolitano, and intelligence advisors Dennis Blair and John Brennan were also present.<sup>11</sup>

The administration did not, however, notify Congress of the proposed transfer — including

Wolf, in whose district the Uighurs were likely to be resettled due to the large Uighur community there. On April 22, Wolf met with Matthew Olsen, the chair of the Guantánamo Review Task Force. Wolf asked Olsen about reports that had leaked to him about resettling the Uighurs in his district; Olsen replied that nothing had been finalized and he was not authorized to discuss specifics about the Uighurs or any other individual detainees.<sup>12</sup> According to journalist Daniel Klaidman, Wolf responded that the detainees were “terrorists,” and were never coming into his district or anywhere in the United States.<sup>13</sup>

Craig said that Olsen “got his head handed to him” by Wolf, and this surprised him because of Wolf’s record of concern about Chinese human rights violations:

I was surprised to see that Frank Wolf didn’t understand that these Uighurs that were coming into his jurisdiction reinforced everything that he stood for in terms of being critical of the Chinese human rights records. Well, I don’t know if anybody had talked with him about that, or pointed that out to him. I don’t know if anybody in the Uighur community had been brought to him, saying, “We want these people to come, we want to be part of solving the War on Terrorism, these are not terrorists, Bush doesn’t believe they’re terrorists, they were never enemy combatants, they do not threaten the United States.” I don’t know if anybody ever had that conversation with him.<sup>14</sup>

Wolf and Senate Minority Leader Mitch McConnell publicly objected to the Uighurs’ transfer. On the House floor, Wolf characterized the Uighurs as “terrorists” who were “more dangerous than the public has been led to believe,” and denounced the administration for refusing to provide him with information about the potential transfer:

After learning that this decision was imminent, I requested briefings from a number of relevant agencies, but all the agencies have told me that our Department of Justice is now preventing them from speaking to me directly on this issue. So much for being open. So much for disclosure.<sup>15</sup>

In the face of Wolf’s opposition, the plan to transfer the Uighurs was quickly shelved. According to *The Washington Post*, Emanuel made the decision.<sup>16</sup>

The White House’s reversal on the Uighurs did not lessen congressional opposition to its plans for Guantánamo. Instead, facing a united Republican caucus and hearing little from the White House, Democratic congressional support for closing the prison evaporated. On May 20, 2009, the Senate voted by a 90–6 margin to strip \$80 million of funding for closing Guantánamo out of a Defense Department appropriations bill, and to bar any funds being used to transfer detainees to the United States.<sup>17</sup> The Guantánamo closing funds had already been removed from the corresponding House bill the week before. Some Democratic senators and members of Congress said that they were open to funding closure if the administration provided detailed plans for it, but as discussed further below, over time Congress has only increased the legal hurdles to closing the prison.

All but three of the Uighur detainees have now left Guantánamo, and have been resettled in Bermuda, Palau, Switzerland, El Salvador and Albania.<sup>18</sup> But the refusal of the United States

**“The Bush administration had in fact frequently tried and convicted terrorism suspects in civilian court after September 11 ...”**

to allow any detainees into the country increased European allies' resistance to accepting detainees. A State Department cable from January 2009, for example, stated that France would consider accepting Guantánamo detainees but “first, the U.S. must agree to resettle some of these same low-risk DETAINEES in the U.S.”<sup>19</sup> In an interview with Task Force staff, Harold Hongju Koh, then DOS's legal advisor, said that bringing the Uighurs to the United States would have made a major difference in other countries' willingness to help resettle detainees and close the prison at Guantánamo.<sup>20</sup>

### **Disclosure of the Torture Memos, Nondisclosure of Abuse Photographs**

At approximately the same time as the controversy over the Uighurs, the Obama administration similarly reversed its position on public disclosure of evidence of detainee abuse.

On April 16, 2009, President Obama ordered the disclosure of several Office of Legal Counsel (OLC) memoranda that described the CIA's “enhanced interrogation techniques” in detail. He did so over the objections of several current and former intelligence officials.

In releasing the OLC memos, Obama reassured the intelligence community that “this is a time for reflection, not retribution,” and assured “those who carried out their duties relying in good faith upon legal advice from the Department of Justice (DOJ) that they will not be subject to prosecution” — statements that were strongly criticized by human rights activists and civil libertarians.<sup>21</sup> He nonetheless argued that the release of the “Torture Memos” was “required by the rule of law,” for three reasons:

First, the interrogation techniques described in these memos have already been widely reported. Second, the previous Administration publicly acknowledged portions of the program — and some of the practices — associated with these memos. Third, I have already ended the techniques described in the memos through an Executive Order. Therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time. This could contribute to an inaccurate accounting of the past.<sup>22</sup>

The OLC memos were disclosed, in part, because of Freedom of Information Act (FOIA) litigation by the ACLU. In the same lawsuit, the ACLU also sought disclosure of previously unreleased photographs of detainee abuse in Iraq and Afghanistan, and won a court order calling for the photos' release. On April 23, 2009, DOJ notified the court that it would release the images by May 28.<sup>23</sup>

But on May 13, the administration reversed its position and informed the U.S. Court of Appeals for the Second Circuit that upon “further reflection at the highest levels of government,” it would instead appeal to the Supreme Court to prevent release of the photos.<sup>24</sup> Multiple press reports said that Obama had changed his mind after receiving personal pleas from General Ray Odierno and General David McKiernan, the top military commanders in Iraq and Afghanistan, that releasing the photos would endanger U.S. troops.<sup>25</sup> Obama said:

The publication of these photos would not add any additional benefit to our understanding of what was carried out in the past by a small number of

individuals. ... [T]he most direct consequence of releasing them, I believe, would be to further inflame anti-American opinion and to put our troops in danger.<sup>26</sup>

The DOJ had made similar arguments against releasing the photographs during the Bush administration. The Second Circuit had rejected them in 2008, writing that “the public interest in disclosure of these photographs is strong” despite previously released written evidence of the same misconduct. The court held that to justify withholding the documents the government had to demonstrate danger to at least one named individual rather than “some unspecified member of a group so vast as to encompass all United States troops, coalition forces and civilians in Iraq and Afghanistan.”<sup>27</sup>

But in October 2009, Congress passed and Obama signed legislation to override FOIA and permit the Defense Secretary to withhold photographs if he determined that their disclosure would endanger U.S. citizens or members of the Armed Forces. The Supreme Court vacated the lower court’s ruling ordering release of the photos,<sup>28</sup> and they have never been disclosed.

The amendment to FOIA only applied to the photographs, but the Obama administration’s reversal on public disclosure of past abuses did not. As discussed further below, the release of the OLC memos with minimal redaction was a high-water mark for the disclosure of evidence that the CIA or military wanted to remain secret. Other important evidence was released after more delays, with more redactions — and a great deal has never been released.

### **Military Commissions, Civilian Courts and Detention Without Trial**

On May 15, 2009, two days after the reversal on detainee abuse photos, President Obama announced that his administration would continue to prosecute detainees in military commissions, albeit ones that he said would provide greater protections for the accused.<sup>29</sup> Obama outlined his rationale for the decision in a speech at the National Archives on May 21. Obama said that “whenever feasible, we will try those who have violated American criminal laws in federal courts.” But he also stated that some would be

best tried through military commissions. Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.<sup>30</sup>

Obama promised that his administration would bring

our commissions in line with the rule of law. We will no longer permit the use of evidence — as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay. And we will give detainees greater latitude in selecting their own counsel, and more protections if they refuse to testify.<sup>31</sup>

The administration proposed these changes — genuine improvements that still fell short of the

standards in federal criminal trials — in the 2009 Military Commissions Act, which became law that October.

In his May 2009 National Archives speech, in addition to restoring military commissions Obama announced that there was another category of detainees who would be held without being tried in any forum:

[T]here may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. ... We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.<sup>32</sup>

When the administration's Guantánamo Review Task Force issued its final report in January 2010, it stated that there were 48 detainees who could neither be tried nor safely released. The task force reported:

While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee's guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee's conduct does not constitute a chargeable offense in either a federal court or military commission.<sup>33</sup>

The Guantánamo Review Task Force did not give the names of individual detainees in this category, or specify the reasons why they could not be tried. In an interview with Task Force staff, Harold Hongju Koh, the DOS legal advisor at the time, stated that the review had been an “incredibly fact based and elaborate process,” where all of the government's available information on a detainee across agencies was gathered and reviewed.<sup>34</sup>

A government official who participated in the review said that the Guantánamo review included information obtained under duress, but the fact that information was coerced was given “appropriate weight.” The official said that in some cases detainees could not be tried in part because the evidence against them was tainted by coercion. In most cases, though, detainees could not be tried because the relevant criminal statutes “didn't apply extraterritorially at the time of the conduct” for non-U.S. persons.<sup>35</sup>

The Obama administration never articulated a clear basis for which cases would be brought in civilian courts and which in military commissions. Military commissions are only authorized to try detainees for war crimes. But even after the 2009 amendments, the Military Commissions Act included several offenses — such as conspiracy and material support to a terrorist organization — that violate the U.S. criminal code but are not internationally recognized war crimes.<sup>36</sup>

On November 13, 2009, Attorney General Eric Holder announced that Khalid Sheikh Mohammed (KSM) and four alleged co-conspirators would be tried in federal court in New York City for the September 11 attacks. The same day, Secretary of Defense Robert Gates announced that Omar Khadr would be tried by military commission. Khadr, a Canadian citizen whose family has multiple connections to Al Qaeda, was 15 years old at the time of his capture. He was accused of killing

U.S. Army combat medic Sergeant Christopher Speer by throwing a grenade at him in a firefight, in which Khadr himself was also wounded. Although Khadr eventually pleaded guilty, many experts have argued that killing a soldier in battle was not a war crime.<sup>37</sup> In contrast, deliberate massacres of civilians such as the September 11 attacks clearly do violate the laws of war.

Holder's decision to try the September 11 suspects in Manhattan sparked intense opposition from the start — from White House Chief of Staff Rahm Emanuel, as well as from congressional Republicans and even some Democrats.<sup>38</sup> In an interview with Task Force staff, Sen. Lindsey Graham said he “objected to the high heavens” to trying KSM in federal court because: “[i]f he's not an enemy combatant, who would be? If the guy who planned the attacks on our country doesn't fall into that category, who would be?”<sup>39</sup> New York City Mayor Michael Bloomberg was initially supportive, stating that it was “fitting that 9/11 suspects face justice near the World Trade Center site where so many New Yorkers were murdered.”<sup>40</sup>

But Bloomberg and many others changed their mind after an attempted terrorist attack on Christmas Day in 2009. Umar Farouk Abdulmutallab, a Nigerian-born operative for Al Qaeda in the Arabian Peninsula, attempted to ignite a bomb concealed in his underwear on board a plane to Detroit. The attack was unsuccessful and the plane landed safely, but the intelligence community had missed several warning signals about Abdulmutallab — including a warning from Abdulmutallab's own father to the U.S. embassy in Nigeria. Republican leaders criticized these lapses, and the decision to read Abdulmutallab his Miranda rights shortly after his capture and try him in civilian court. Former Vice President Dick Cheney accused Obama of “trying to pretend that we are not at war. ... He seems to think that if we give terrorists the rights of Americans, let them lawyer up, and read them their Miranda rights, we won't be at war.”<sup>41</sup>

The Bush administration had in fact frequently tried and convicted terrorism suspects in civilian court after September 11 — including Richard Reid, who in December 2001 had attempted to bring down a plane by detonating explosives in his shoe. Reid is currently serving a life sentence at ADX Florence, the federal “supermax” prison in Colorado.

Despite being read his rights, Abdulmutallab would later provide a great deal of useful intelligence about both his plot and Al Qaeda in the Arabian Peninsula, including the role of U.S. citizen Anwar al-Awlaki in that organization.<sup>42</sup> But the criticism took its toll, and led to changes from the administration. On January 5, 2010, President Obama announced that the United States would suspend transfers of Yemeni detainees — the largest group of prisoners in Guantánamo — to their home country.<sup>43</sup> They have never been resumed. Near the end of January 2010, Bloomberg reversed his position on the September 11 trial, and Sen. Charles E. Schumer, Democrat of New York, quickly followed suit. The White House asked Holder to look into other locations for the trial, which was eventually transferred back to the Guantánamo military commissions system.

Guantánamo, of course, remains open today. Congress has imposed restrictions forbidding not only detainees' release in the United States, but also their prosecution in federal court. It has forbidden overseas transfers unless the secretary of defense makes a series of certifications that the detainee cannot possibly constitute a future threat. President Obama has repeatedly

**“The United States denied that the CIA was running a secret prison in Somalia, but acknowledged providing ‘support to the [Somali government] during debriefings of terror detainees’ on rare occasions.”**



objected to these restrictions, but has also regularly signed into law defense bills that include the provisions — most recently on January 2, 2013.<sup>44</sup> This has slowed transfers from Guantánamo sharply. Since the restrictions on overseas transfers first became law on January 7, 2011, four detainees have been transferred from Guantánamo — two of whom had won their *habeas* cases, and two of whom were transferred to fulfill a military commission plea agreement.<sup>45</sup>

### **Detainee Transfers and Proxy Detention**

President Obama's early executive orders closed the CIA's "black sites," but their effect on the CIA's rendition of detainees to foreign custody was less clear. Executive Order 13491 required a task force to "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices ... do not result in the transfer of individuals to other nations to face torture."

In his confirmation hearings for the post of CIA director, Leon Panetta said that President Obama had prohibited "extraordinary rendition — when we send someone for the purpose of torture or actions by another country that violate our human values." But Panetta said "renditions where we return individuals to another country where they prosecute them under their laws" were "an appropriate use of rendition."<sup>46</sup> Rendition for the purpose of torture has always been formally forbidden, though. All renditions under President Bill Clinton and many renditions under President George W. Bush were ostensibly for the purpose of prosecution (rather than solely for interrogation); many nonetheless resulted in torture.

On August 24, 2009, the Special Task Force on Interrogations and Transfer Policies issued a press release outlining its transfer recommendations.<sup>47</sup> Despite the history of renditions resulting in torture, the task force announced that the United States could continue to transfer individuals based on "assurances" from the receiving country that they would not be tortured. They recommended "that the State Department be involved in evaluating assurances in all cases," and that the inspectors general from DOS, DOD and DHS "prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances."<sup>48</sup> They also recommended

that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government.<sup>49</sup>

It is not clear whether these recommendations have been fully implemented. The interrogations and transfer task force's recommendations as to transfers by the CIA remain classified, and its full recommendations and report have never been released.

The Obama administration has not abandoned the Bush administration's argument that Article 3 of the CAT — which prohibits refoulement of prisoners to countries where they are in serious danger of torture — is not legally binding for transfers occurring entirely outside the United States. The Department of Defense and the CIA have never publicly adopted implementing regulations for Article 3 of CAT.

In an interview with Task Force staff, Harold Hongju Koh said the process of obtaining diplomatic assurances regarding detainee treatment is overseen by DOS, and that the CIA no

longer had the authority to transfer suspects to foreign intelligence services without DOS's approval. Koh noted that some of the most controversial renditions under the Bush administration occurred without DOS involvement.<sup>50</sup>

Within DOS, both the Legal Advisor's Office and the Bureau of Democracy, Human Rights, and Labor now must approve any transfers that require diplomatic assurances. Koh said that he and Michael Posner, head of the Bureau of Democracy, Human Rights, and Labor, were scrupulous about evaluating assurances:

The day the Obama administration transfers someone to a condition where they will be tortured, without adequate assurances, is the day I leave the administration. ... I'm saying unequivocally it has not happened since I've been here, and that's three years. It's not going to happen while I'm here. It's not going to happen while Posner is here. I believe you can have confidence in that.<sup>51</sup>

Under the Obama administration, there have been no public allegations of suspects being tortured after the United States transferred them across an international boundary. (This excludes transfers within Afghanistan, discussed below.) But there have been credible reports of the United States providing intelligence and assisting in transfers and interrogations carried out by allies.

In 2011, *The Nation* reporter Jeremy Scahill wrote that the CIA was interrogating Al Qaeda-affiliated prisoners in

a secret prison buried in the basement of Somalia's National Security Agency (NSA) headquarters, where prisoners suspected of being Shabab members or of having links to the group are held. Some of the prisoners have been snatched off the streets of Kenya and rendered by plane to Mogadishu. While the underground prison is officially run by the Somali NSA, US intelligence personnel pay the salaries of intelligence agents and also directly interrogate prisoners.<sup>52</sup>

Former detainees did not allege that they were beaten or physically tortured, but did describe being held for extended periods without counsel, in squalid conditions.

Somali intelligence officials and former detainees told Scahill that Americans conducted interrogations at the prison. One detainee, Kenyan citizen Ahmed Abdullahi Hassan, told fellow detainees that he had been rendered "Guantánamo style" on a plane from Nairobi to Mogadishu. A U.S. intelligence official told Scahill that the United States "provided information which helped get Hassan — a dangerous terrorist — off the street" but did not carry out the rendition itself.<sup>53</sup> The United States denied that the CIA was running a secret prison in Somalia, but acknowledged providing "support to the [Somali government] during debriefings of terror detainees" on "rare occasions."<sup>54</sup>

An American teenager, Gulet Mohamed, was detained, interrogated, and allegedly beaten and deprived of sleep by Kuwaiti authorities in late 2010 after being placed on the United States' no-fly list. Mohamed and his family alleged that he had been interrogated by FBI agents in

**"Of 28 former detainees at Department 124, 26 told UNAMA they had been tortured by methods such as 'beating, suspension, and twisting and wrenching of genitals.' Seventeen of those 26 had been captured by coalition forces. Five of the 26 were children."**

Kuwait even after attempting to assert his right to counsel, and claimed that he was being detained at the United States' behest. A State Department official denied this. Mohamed was eventually allowed to return to the United States after suing the United States, when it appeared that a federal judge would shortly order his return. Another American citizen, Sharif Mobley, has made similar allegations about a threatening interrogation by U.S. officials in Yemen.<sup>55</sup>

Another case of proxy detention involves a Yemeni journalist, Abdulelah Haider Shaye. Shaye, who had reported on civilian deaths resulting from U.S. targeted killings in Abyan province and interviewed Anwar al-Awlaki, was convicted of terrorism charges by a Yemeni state security court in January 2011, after a trial criticized by some human rights groups. His attorneys alleged that he had been kept in solitary confinement and tortured in prison. It is unknown whether the United States had any role in his initial arrest, but in February 2011 President Obama intervened to prevent the Yemeni president from pardoning Shaye.<sup>56</sup>

Even more troubling than those cases is the evidence that Afghan detainees have been tortured after U.S. forces turned them over to the Afghan National Directorate of Security (NDS). An October 2011 report from the U.N. Assistance Mission in Afghanistan (UNAMA) found

compelling evidence that 125 detainees (46 percent) of the 273 detainees interviewed who had been in NDS detention experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in a number of NDS detention facilities throughout Afghanistan.<sup>57</sup>

The U.N. reported that coalition forces were involved in the capture or transfer of 19 individuals who were subsequently tortured in NDS custody.<sup>58</sup> (Coalition forces transferred approximately 2,000 individuals to Afghan security in 2009 and 2010, most of whom the U.N. team did not interview.)

Torture was especially pervasive in Department 124, the NDS's facility for "high-value detainees" in Kabul. Of 28 former detainees at Department 124, 26 told UNAMA they had been tortured by methods such as "beating, suspension, and twisting and wrenching of genitals." Seventeen of those 26 had been captured by coalition forces. Five of the 26 were children.<sup>59</sup>

According to *The Washington Post*, Department 124 is across the street from the United States' military headquarters in Kabul, and was built with U.S. funds.<sup>60</sup> Afghan and U.S. officials said that CIA officials met with Department 124's leadership once a week, and reviewed their interrogation reports.<sup>61</sup> In contrast, the International Committee of the Red Cross (ICRC), the United Nations, and Afghanistan's Independent Human Rights Commission (AIHRC) had no access to the facility, and the ICRC had warned the United States about reports of torture there. Several Afghan intelligence officials told the *Post* that the CIA knew of detainees' mistreatment, though they disapproved of it.<sup>62</sup>

The CIA's relationship with the NDS is long-standing. Leaked government documents show that it was only in 2008 that the government of Afghanistan, rather than the CIA, began supplying the agency's budget. Allegations of the NDS's torture of prisoners are equally long-standing, and were included in several of DOS's annual human rights reports on Afghanistan. For example, the 2010 report relayed an allegation from Human Rights Watch that in December 2009, a detainee named Abdul Basir

died as a result of abuse in a National Directorate of Security (NDS) detention facility. Although NDS authorities claimed that Basir committed suicide, small dark circles on his forehead, cuts on his back, bruising in several places, and a large cut on the shin were found on Basir's body.<sup>63</sup>

In an interview with Task Force staff, a former U.S. official who served in Afghanistan said that "everyone has always had concerns about NDS."<sup>64</sup> Canadian Diplomat Richard Colvin put it more bluntly in 2009 testimony to the Canadian parliament: "[T]he NDS tortures people, that's what they do. And if we don't want our detainees tortured, we shouldn't send them to the NDS."<sup>65</sup>

Despite having the strongest ties to NDS, the United States was slower than its allies to respond to allegations of torture. In September 2007, the United States, Canada, the United Kingdom, Norway, the Netherlands and Denmark exchanged letters with the Afghan government stating that coalition forces could access NDS facilities to monitor the treatment of detainees they transferred.<sup>66</sup> At the time, the Netherlands, the U.K. and Canada already had bilateral agreements with Afghanistan for monitoring detainees' treatment after a transfer. By February 2010, according to a DOS cable, the United States had the "dubious distinction" of being "the only detaining nation in Afghanistan that does not have a monitoring program" for detainees transferred to Afghan custody.<sup>67</sup> President Obama's task force on interrogation and transfers recommended that the U.S. embassy in Kabul "develop a plan to physically monitor the status of detainees transferred by U.S. forces,"<sup>68</sup> but as of spring 2012 that recommendation had not been fully implemented.<sup>69</sup>

In an interview with Task Force staff, the former U.S. official said that there was "ample reason why the U.S. government should've had a monitoring program in place" before it did, and that "[t]here's no doubt in my mind that more torture took place in Afghanistan due to the [government's] failure to put in place, at a sooner date, a monitoring program."<sup>70</sup> But until the 2011 U.N. report, there was very little public or press outcry about allegations that U.S. forces had transferred detainees to be tortured by the NDS. This was in contrast to several allies, particularly Canada. On December 30, 2009, Canadian Prime Minister Stephen Harper suspended Parliament until March, a move the opposition denounced as "almost despotic," in an attempt to evade a parliamentary investigation into Canadian complicity in abuse by the NDS.<sup>71</sup>

The United States' allies in Afghanistan consider themselves to have a binding legal obligation under CAT Article 3 not to transfer a detainee to a country where he will be at serious risk of torture. To enforce this prohibition, a Canadian court ordered a halt to transfers to certain NDS facilities in 2008, and a British court did the same in 2010.<sup>72</sup> By contrast, the United States executive branch takes the position that Article 3 of CAT is not legally binding overseas, and so its prohibition on refoulement is a matter of policy rather than a legal requirement.<sup>73</sup> The former official said that the United States would likely have acted on reports of the NDS torturing detainees "long before it did" if the government applied Article 3 of CAT as a matter of law.<sup>74</sup>

The United States eventually did respond to the allegations of torture by NDS. In mid-July 2011, it banned transfers to the NDS facility in Kandahar.<sup>75</sup> Before the UNAMA report was published, the mission's human rights chief briefed U.S. officials on its findings. After that briefing, the former official said, "it took the military only a few days" to suspend transfers to the NDS, and only a few more weeks

**"[t]here's no doubt in my mind that more torture took place in Afghanistan due to the [government's] failure to put in place, at a sooner date, a monitoring program."**

In order for transfers to an NDS facility to resume, the United States would interview detainees about whether they or fellow prisoners had been abused, making every possible effort to protect the detainees' identities and prevent retaliation for reporting torture. The guards and interrogators had to attend a human rights training course. If a second round of detainee interviews also revealed no indications of abuse, transfers could resume subject to ongoing monitoring by the United States and/or the AIHRC. Having left Afghanistan, the former official did not know the details of the monitoring program's implementation, but thought the military personnel who designed it "were doing a good job. ... I wish the State Department could've moved at the speed the military did."<sup>77</sup>

Despite these steps, a March 2012 report by the AIHRC and the Open Society Institute (OSI) identified several gaps in the United States' monitoring of detainee transfers. First, the post-transfer monitoring program only applied to U.S. forces under the command of the International Security Assistance Force (ISAF) for Afghanistan, not to Special Forces troops assigned to counterterrorism missions. The State Department had not yet created a monitoring program for transfers by non-ISAF U.S. military forces, and the AIHRC was not informed of non-ISAF detainees' transfers to NDS custody.<sup>78</sup>

Second, there was evidence that the military's restrictions on transfers were not being applied to transfers by the CIA. Eleven detainees told AIHRC researchers that they had been detained by U.S. personnel and transferred to the NDS detention facility in Kandahar, despite a July 2011 ban on U.S. military transfers to that prison.<sup>79</sup> Four of the detainees told AIHRC that they were subsequently tortured by the NDS in Kandahar:

According to one detainee, "I was severely beaten by cable in the head and neck. I was shackled and they connected the shackles to an electrical current and shocked me until I was unconscious. They also beat me on the back and waist very hard. As a result, my left hand is still hurting and even my tongue is severely damaged from the electric shock." Three other transferred detainees also alleged that they were abused in NDS Kandahar, including being subjected to beatings with cables.<sup>80</sup>

AIHRC and OSI found these allegations credible.<sup>81</sup>

U.S. military officials told OSI that the prohibition on transfers to NDS-Kandahar remained in effect and was binding on special forces as well as the regular military. But this left open the possibility that it was not binding on the CIA, and that the CIA was continuing to transfer detainees to the NDS facilities where there was a high likelihood of torture.<sup>82</sup> Notably, several of the detainees who were transferred to NDS-Kandahar told AIHRC that before they were transferred they were taken to "Mullah Omar's House." According to OSI, "Mullah Omar's House" is a local nickname for Firebase Maholic, a facility that the press has reported the CIA used as a base for operations in Kandahar.<sup>83</sup> OSI reported that an unidentified but credible source confirmed in December 2011 that U.S. intelligence and Special Forces personnel continued to operate out of the facility, as does a U.S.-trained paramilitary force.<sup>84</sup>

None of the above reports suggest that the United States transferred detainees to the NDS for the purpose of torture. But there is strong evidence of transfers occurring when the United States knew or should have known that torture was a likely outcome. That is a violation of

Article 3 of CAT, regardless of which U.S. forces are responsible for the transfer, and regardless of whether it begins on U.S. soil or takes place entirely overseas.

A former U.S. official argued that the United States' responsibility should not arise only from "putting the handcuffs on someone."<sup>85</sup> Rather, "[i]f the U.S. is going to put its reputation and resources on the line working hand in glove with another country's security forces, they need to have a clear understanding regarding what's acceptable treatment of detainees."<sup>86</sup> This meant a detailed, independent assessment of the intelligence services' human rights records — the source pointed out that the U.S. government is in a far better position than NGOs or journalists to conduct such an evaluation given the secret nature of these services — ongoing oversight, and a willingness to "step back" when serious violations occur.<sup>87</sup>

These steps are especially important given serious allegations that Asadullah Khalid, who became head of the NDS in late 2012, has personally taken part in detainee abuse. The Canadian diplomat Richard Colvin alleged in testimony in 2009 that Khalid was

an unusually bad actor on human rights issues. He was known to have had a dungeon in Ghazni, his previous province, where he used to detain people for money, and some of them disappeared. ... [I]n Kandahar we found out that he had indeed set up a similar dungeon under his guest house. He acknowledged this. When asked, he had sort of justifications for it, but he was known to personally torture people in that dungeon.<sup>88</sup>

Khalid has denied these allegations, stating "this is just propaganda about me,"<sup>89</sup> but human rights groups believe they are credible.<sup>90</sup>

A June 2012 document released by the British Ministry of Defence reported that according to the director of the UNAMA's Human Rights Unit, there was "systematic abuse taking place in Kandahar ... of many times the magnitude of the problem elsewhere" and Khalid was one of the "principal culprits."<sup>91</sup> Based in part on this evidence, the British High Court ruled in November 2012 that the Ministry of Defence could not resume transfers to the NDS.<sup>92</sup>

Most recently, in January 2013 the United Nations released a follow-up report on treatment of detainees in Afghan custody, which found that torture continues to be a serious problem. Of the prisoners it interviewed, UNAMA found that "178 out of 514 detainees held in NDS facilities, or 34 percent, experienced torture or ill-treatment, down 12 percent from the previous year."<sup>93</sup> The rate of torture by Afghan National Police or Afghan Border Police actually increased, from 35 percent to 43 percent.<sup>94</sup>

Abuse was more systematic in Kandahar than in any other location. Half of the detainees the U.N. interviewed in Kandahar provided graphic, detailed descriptions of torture.<sup>95</sup> There were also credible reports of the enforced disappearance of 81 detainees in Kandahar.<sup>96</sup> Five detainees in Kandahar alleged that they were tortured at "Mullah Omar's House" by being repeatedly beaten with a pipe or stick on the soles of their feet.<sup>97</sup> (The U.N. report did not address the AIHRC/OSI report that "Mullah Omar's house" is a local nickname for a base also used by U.S. intelligence forces.)

UNAMA found that despite NATO coalition members' efforts at monitoring and preventing

abuse, there was “reliable and credible evidence that 25 of the 79 (31 percent) detainees transferred by international forces experienced torture” — an increase from 2011.<sup>98</sup> According to the U.N. report, restrictions on transfers better monitoring by international forces had led to “early improvement in some NDS facilities with a decrease in allegations of torture. ... However, after ISAF resumed transfers to these facilities and reduced its monitoring, UNAMA observed an increase and resumption in incidents of torture.”<sup>99</sup>

Some detainees were tortured after international forces sent them to prisons where the U.S. and allied militaries had not lifted the prohibition on transfers. According to the U.N. report,

following investigations into the cases referred ... ISAF maintained in all instances that international military forces, including U.S. Special Forces, had not been involved in the capture or transfer of the detainees in question. ISAF recommended that UNAMA attempt to confirm the allegations of capture and transfer with an “other government agency.”<sup>100</sup>

“Other government agency” is a commonly used government euphemism for the CIA. The U.N. report and OSI and AIHRC’s reporting suggest that the CIA continues to transfer detainees to Afghan prisons where torture is known to be widespread, in violation of the Convention Against Torture. Detainees likely have also been transferred to torture prisons by the military, despite genuine efforts to prevent this from occurring.

The CIA has not publicly commented in response to the new U.N. report. The U.S. military has once again halted transfers to the facilities where the U. N. alleges that torture has occurred, and has asked Afghanistan to investigate allegations of torture by U.S.-trained units.<sup>101</sup> Past requests for investigation have had little effect, though. According to press reports, General John Allen, the commander of U.S. forces in Afghanistan, said his staff had requested that Afghanistan investigate 80 specific allegations of detainee abuse. “To date, Afghan officials have acted in only one instance,” Allen said, and the official responsible was transferred rather than fired.<sup>102</sup>

As of January 2013, Asadullah Khalid was receiving medical treatment in the United States after an assassination attempt in December. President Obama and Defense Secretary Leon Panetta both visited him in the hospital. In response to human rights groups’ criticism of the visit, White House spokesman Tommy Vietor said it was “appropriate” given that “Mr. Khalid and the team he oversees work closely with the United States to protect Afghan citizens and American civilians and military service members in Afghanistan.”<sup>103</sup>

## **Red Cross Access and “Separation” of Detainees**

Under the first executive order issued by President Obama on January 22, 2009, U.S. forces cannot use any interrogation technique not listed in the 2006 Army Field Manual. But the Field Manual may leave the door open for certain inhumane practices.

First, the 2006 Field Manual deleted language from the 1992 version specifically prohibiting the use of sleep deprivation and stress positions. The 1992 manual listed “forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time” as a form of physical torture, and “abnormal sleep deprivation” as an example of “mental torture.”<sup>104</sup> Both of these references were

deleted from the 2006 version. Second, a new section of the manual, Appendix M, describes the “restricted interrogation technique” of separation. The rationale given for separation is

to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; decreasing the detainee’s resistance to interrogation.<sup>105</sup>

Separation is also meant to “[p]rolong the shock of capture ... and foster a feeling of futility.”<sup>106</sup>

Appendix M also authorizes sleep deprivation as part of the separation regime, without explaining the rationale for doing so. It says that separation “must not preclude the detainee getting four hours of continuous sleep every 24 hours.”<sup>107</sup> Human rights groups and former interrogators have pointed out that this

could be interpreted to permit interrogators to bookend the detainee’s rest around a 40-hour interrogation period. And there is no prohibition against stringing these 40-hour sessions along indefinitely — for a period of months or even years — as long as it is approved by the combat commander every 30 days.<sup>108</sup>

Appendix M forbids “sensory deprivation,” which it warns “may result in extreme anxiety, hallucinations, bizarre thoughts, depression, and anti-social behavior.”<sup>109</sup> But in the next paragraph, it permits field interrogators to use “goggles or blindfolds and earmuffs ... to generate a perception of separation” for up to 12 hours. Blindfolds, earmuffs and goggles may also be used for longer periods for security purposes.<sup>110</sup>

Because it can be used in combination with blindfolding and extended periods of sleep deprivation, the Field Manual states that separation can be approved only for “unlawful enemy combatants,” not prisoners of war. Interrogators are required to draft written plans for its use, which must be approved by the first general officer in their chain of command.<sup>111</sup> The Field Manual does allow “segregation” (as opposed to separation) of detainees from one another without these restrictions, but a Department of Defense directive states that segregation may only be used for

purposes unrelated to interrogation, including administrative, health, safety, or security reasons or law enforcement questioning. ... [S]egregation may not be requested or conducted for the purpose of facilitating interrogation.<sup>112</sup>

In an interview with Task Force staff, veteran Army interrogator Colonel Stuart Herrington said the restrictions on separating detainees from one another were “ridiculous.”<sup>113</sup> He said Appendix M would have outlawed the humane, successful interrogation centers he ran in Panama during the 1989 U.S. military operation there and Iraq during the First Gulf War.<sup>114</sup> Herrington has said:

In all interrogation centers I have worked in or commanded, we separated the guests from one another. Most welcomed this. A prisoner might cooperate if decently and cleverly treated, but only if we could provide a discreet environment where he could feel comfortable spending long hours talking with us. That meant each “guest” had to have a private room, and could not be exposed to any other detainee (encounters in the hallways, for example). This was critical. Housing high-value detainees communally is fatal to successful interrogation.<sup>115</sup>



Herrington said that there was a “huge difference” between giving detainees individual cells and “throwing you in a dark room to punish you. ... And unfortunately, that difference has been obfuscated a bit” in Appendix M.<sup>116</sup>

There is very limited public evidence about how U.S. interrogators have employed “separation” in practice under the Obama administration. Conditions of detention at the U.S. prisons in Bagram and Guantánamo have improved, but most interrogation likely occurs at other sites, closer to the point of capture.

To its credit, the administration has improved procedures for ICRC notification and access to detainees, a crucial safeguard against abusive implementation of the “separation” technique. *The New York Times* reported in August 2009 that according to three military officials, “the military for the first time is notifying the International Committee of the Red Cross of the identities of militants who were being held in secret at a camp in Iraq and another in Afghanistan run by United States Special Operations forces.”<sup>117</sup> The *Times* said:

Under Pentagon rules, detainees at the Special Operations camps can be held for up to two weeks. Formerly, the military at that point had to release a detainee; transfer him to a long-term prison in Iraq or Afghanistan, to which the Red Cross has broad access; or seek one-week renewable extensions from Defense Secretary Robert M. Gates or his representative.

Under the new policy, the military must notify the Red Cross of the detainees’ names and identification numbers within two weeks of capture, a notification that before happened only after a detainee was transferred to a long-term prison. The option to seek custody extensions has been eliminated, a senior Pentagon official said.<sup>118</sup>

In May 2010, a Red Cross representative confirmed this policy change to the BBC, stating:

The ICRC is being notified by the US authorities of detained people within 14 days of their arrest. ... This has been routine practice since August 2009 and is a development welcomed by the ICRC.<sup>119</sup>

Despite these safeguards, a number of former detainees have alleged mistreatment at a facility they called the “Black Jail” or “Tor Jail,” located at Bagram Air Base but separate from the main prison there. On November 28, 2009, *The Washington Post* reported allegations from two Afghan juveniles, Issa Mohammed and Abdul Rashid, that they were “beaten by American guards, photographed naked, deprived of sleep and held in solitary confinement in concrete cells for at least two weeks while undergoing daily interrogation.” The nakedness was reportedly part of a medical examination, but Rashid said that it occurred in front of about six soldiers who “took pictures, and they were laughing and laughing.”<sup>120</sup>

On the same day, *The New York Times* published an article about the prison, based on interviews with three other detainees. The men the *Times* interviewed did not allege beatings but did say they were held incommunicado for up to 35 or 40 days, denied contact with anyone but their interrogators, and deprived of sleep. The detainees had been held at Tor Jail before the August policy change regarding ICRC notification, but the *Times* said that the military still did not allow the Red Cross “face-to-face access to the detainees” at the classified facility.<sup>121</sup>

*The Atlantic* reported in May 2010 that the facility was operated by the DIA's Defense Counterintelligence and Human Intelligence Center (DCHC), which was performing interrogations "for a sub-unit of Task Force 714, an elite counter-terrorism brigade."<sup>122</sup> Other reports have stated that Task Force 714 was commanded by Admiral William McRaven, the head of Joint Special Operations Command from 2008 to 2011 and now the commander of the U.S. Special Operations Command.<sup>123</sup>

**“Ninety-nine other cases of alleged detainee abuse were closed without proceeding to a full investigation.”**

In October 2010, the OSI published a report based on interviews with 18 former detainees at Tor Jail, nine of whom said they were detained there in 2009 or 2010. OSI reported that the detainees “repeatedly and consistently described” being exposed to cold temperatures, which some said made it impossible to sleep for a few hours a night. Detainees also described being kept in constantly lighted isolation cells with no exposure to natural light, which made it impossible to pray or track the passage of time. Detainees had no contact with the Red Cross or each other, and were blindfolded and ear-muffled when taken to interrogation rooms or to the bathroom.<sup>124</sup>

In response to the OSI report, a Pentagon spokesperson told reporters that “the Department of Defense does not operate any ‘secret prisons,’ ” but acknowledged that it operates classified “temporary screening detention facilities.” The spokesperson said that the ICRC knew about the sites, and conditions there complied with the Geneva Conventions and the Army Field Manual.<sup>125</sup>

In April 2011, the Associated Press reported that the maximum amount of time any detainee had spent at the temporary detention center was approximately nine weeks:

After the first two weeks in temporary detention, the first possible extension is for three weeks, for reasons including “producing good tactical intel” to “too sick to move,” according to a U.S. official familiar with the procedure. The next extension is for an additional month, adding up to a total of roughly nine weeks.<sup>126</sup>

An intelligence official told the Associated Press that further extensions would require an appeal to either the secretary of defense or the president, and the military had never requested one.<sup>127</sup> An ICRC spokesman, Simon Schorno, would not comment on conditions at the detention facilities but said the Red Cross “has a transparent relationship with the Department of Defense and is satisfied with progress made as regards access to detention facilities.”<sup>128</sup>

In addition to facilities in Afghanistan, “separation” has likely been used in interrogations of suspects aboard naval vessels. Admiral McRaven testified to the Senate Armed Services Committee on June 28, 2011, that when U.S. forces captured a suspect in Yemen, Somalia or other locations besides Afghanistan, “[i]n many cases, we will put them on a naval vessel, and we will hold them until we can either get a case to prosecute them in a U.S. court,” transfer them to foreign custody or release them.<sup>129</sup>

The only confirmed case of U.S. detention and interrogation aboard a naval ship involves Ahmed Abdulkadir Warsame, a terrorism suspect accused of involvement with Al Qaeda in the Arabian Peninsula, and the Somali terrorist group Al Shabab. U.S. forces captured Warsame in international waters in the Gulf of Aden on April 19, 2011, and interrogated him for two months

aboard a naval ship. *The Los Angeles Times* reported that his initial interrogation was conducted by a High-Value Interrogation Group, which includes FBI, CIA and DOD personnel.<sup>130</sup>

According to *The New York Times*, at some point, the United States notified the Red Cross of Warsame's capture. After about two months of interrogation a Red Cross representative was permitted to meet with him aboard ship. The visit occurred during a four-day break between Warsame's questioning by the High-Value Interrogation Group and his questioning by the FBI. FBI agents gave him a Miranda warning before resuming questioning, but Warsame waived his rights and continued to speak to the FBI.<sup>131</sup>

In early July 2011, Warsame was indicted on terrorism charges and flown to New York. Court documents contain no information about his treatment in custody.<sup>132</sup> *The New York Times* reported in May 2012 that a court filing in another terrorism case, against Eritrean suspect Mohamed Ibrahim Ahmed, cited a former Shabab commander who matched Warsame's description as a cooperating witness. Both the prosecution and defense declined to comment on the witness's identity, and Ahmed pleaded guilty before his case went to trial.<sup>133</sup>

## Secrecy and Accountability

Despite the president's opposition to "looking backwards" regarding torture allegations, on August 24, 2009, Attorney General Holder announced he would open "a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations" by the CIA. Holder appointed U.S. Attorney John Durham, who was already investigating the CIA's destruction of videotapes of interrogations at black sites, to conduct the review.

In November 2010, Durham concluded that he would not pursue charges in connection with the destruction of the tapes.<sup>134</sup> The Justice Department did not specify the reason for declining prosecution, but made the announcement the same week that the statute of limitations on the relevant criminal charges expired.

In June 2011, DOJ announced the results of Durham's preliminary review of the CIA's treatment of detainees. It opened full criminal investigations into the deaths of two detainees in CIA custody — Gul Rahman, an Afghan killed at the Salt Pit in November 2002, and Manadel al-Jamadi, the Iraqi detainee whose corpse is shown in several of the Abu Ghraib photographs. Ninety-nine other cases of alleged detainee abuse were closed without proceeding to a full investigation.<sup>135</sup>

Holder announced on August 30, 2012, that no charges would be brought for al-Jamadi's or Rahman's deaths because "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."<sup>136</sup> The Justice Department declined to elaborate further, or respond to questions. There had been previous press reports of grand juries being convened to hear evidence about both cases, but it is unknown whether prosecutors ever presented indictments.

The U.N. special rapporteur on torture, Juan Mendez, has denounced the closure of Durham's investigations without charges as violating the obligation under CAT to hold perpetrators of torture accountable:

I have to say that the decision not to investigate, prosecute and punish what happened when those torture memos were in effect is a refusal to accept an obligation in international law that the United States has. Unfortunately, there has been no serious investigation and recently the only investigation that was still going on, by Special Prosecutor [John] Durham, was completely terminated with a decision not to prosecute even cases in which the torture victims had died. ... It is a very disappointing position because you can imagine how hard it is for the Special Rapporteur on Torture to go around the world saying you have to investigate, prosecute and punish when the first reaction is, “If the United States doesn’t do it, why should we?”<sup>137</sup>

**“Without CIA approval, classified information about the circumstances of a detainee’s death could not be discussed while interviewing witnesses, or presented to the grand jury.”**

Without being in a position to examine the evidence or the reasons prosecution was declined, it is difficult to dismiss Durham’s investigations as not “serious,” or comment on prosecutors’ disposition of any individual case. But there is no question that many acts of torture or complicity in torture have resulted in no prosecution, no conviction, or a disproportionately low sentence — even in cases where U.S. personnel went beyond the techniques that were legally authorized.<sup>138</sup>

One potential reason for the lack of prosecutions is the ongoing level of secrecy that surrounds the CIA program, despite the substantial public disclosures that have occurred. The Justice Department’s rules for cases involving classified information greatly restrict prosecutors’ ability to act without the approval of the original classifying agency. Without CIA approval, classified information about the circumstances of a detainee’s death could not be discussed while interviewing witnesses, or presented to the grand jury. This may have been a formidable obstacle to prosecutions for detainee deaths in CIA custody, though it is impossible to know if it was decisive without public disclosure of the reasons DOJ declined to prosecute.

Manadel al-Jamadi’s death, for example, was the subject of a 98-page report by the CIA’s Office of the Inspector General (OIG), dated November 3, 2005. In 2011, the CIA informed the ACLU that the entire report was being withheld under the Freedom of Information Act because: (1) it was properly classified and its disclosure would harm national security, and (2) it would reveal intelligence sources and methods protected under the 1947 National Security Act. The CIA said it made this decision after it

conducted a line-by-line review of this document to determine whether meaningful, reasonably segregable, non-exempt portions of the document could be released.

This document is withheld in full because there is no meaningful non-exempt information that can reasonably be segregated from any exempt information.<sup>139</sup>

The CIA withheld 10 other OIG reports relevant to detainees’ treatment on the same basis, including one — a December 13, 2005, Investigation on the Nonregistration of Detainees — that may have been relevant to al-Jamadi’s death.<sup>140</sup> The U.S. District Court for the District of Columbia has upheld CIA’s authority to keep that information secret.<sup>141</sup>

It is quite possible that there are considerations unrelated to official secrecy that led to the closure of various CIA investigations without charges: the inability to locate eyewitnesses overseas in war zones for events that occurred almost a decade ago; destruction of evidence; expiration of statutes of limitations for offenses other than homicide; or some degree of legal

authorization for the fatal techniques. But because of the ongoing classification of the CIA's treatment of prisoners, it is also difficult to see how prosecutors could investigate intelligence officers without either the cooperation of the CIA, or the president's willingness to override the CIA on classification decisions.

In a number of other civil and criminal cases, the Obama administration has robustly defended the CIA's prerogative to keep information about its treatment of detainees secret. Obama's Department of Justice successfully argued for the dismissal of *Mohamed v. Jeppesen Dataplan, Inc.*,<sup>142</sup> a suit by five rendition victims against a Boeing subsidiary that allegedly participated in flying them to torture overseas, on the basis of the state-secrets privilege. It also successfully opposed Supreme Court review of another rendition victim's suit, *Arar v. Ashcroft*.<sup>143</sup>

The Obama administration has also criminally prosecuted more individuals under the Espionage Act for providing classified information to the press than all other presidential administrations combined. From its passage in 1917 until 2009, the Espionage Act was used in three criminal prosecutions. It has been used six times under the Obama administration, most recently to prosecute CIA officer John Kiriakou for unauthorized disclosures to journalists about the identities of CIA personnel involved in the interrogation and torture of Abu Zubaydah. Kiriakou was sentenced to 30 months in prison for these revelations.

The DOJ has repeatedly and successfully argued against requiring disclosure of evidence regarding CIA rendition and torture in FOIA litigation. The government's position is that while the OLC memos released in 2009 revealed a great deal of information about the CIA's "enhanced interrogation techniques" (EITs):

The recently declassified OLC memoranda are legal analyses by Department of Justice (DOJ) attorneys. Although they discuss the legality of specific proposed intelligence activities, they do not reveal the type of information in the operational documents at issue: details of actual intelligence activities, sources, and methods. Even if the EITs are never used again, the CIA will continue to be involved in questioning terrorists under legally approved guidelines. The information in these documents would provide future terrorists with a guidebook on how to evade such questioning. ...

Additionally, disclosure of explicit details of specific interrogations where EITs were applied would provide al-Qa'ida with propaganda it could use to recruit and raise funds. Al-Qa'ida has a very effective propaganda operation. When the abuse of Iraqi detainees at the Abu Ghraib prison was disclosed, al-Qa'ida made very effective use of that information. ... Information concerning the details of EITs being applied would provide ready-made ammunition for al-Qa'ida propaganda. The resultant damage to national security would likely be exceptionally grave.<sup>144</sup>

The government has made the same argument to justify wide restrictions on what information former CIA detainees and their attorneys may publicly disclose in *habeas corpus* and military commissions proceedings.

Detainees' statements are presumptively classified until a security officer clears them for release. Joseph Margulies, one of the first attorneys to represent Guantánamo detainees and currently

counsel for Abu Zubaydah, said that “I don’t really mind the logistical obstacles” to public disclosure of detainee statements, but for former CIA detainees, it had become impossible to get “even the most trivial stuff declassified.”<sup>145</sup> Margulies said the current restrictions were “preposterous ... just ridiculous,” and that it was more difficult for counsel to get approval to disclose detainees’ statements than it had been under the Bush administration.<sup>146</sup> In January 2005, for example, Margulies had gotten permission to publicly file a declaration recounting his client Mamdouh Habib’s allegations of rendition to torture in Egypt. This had ultimately resulted in Habib’s release from Guantánamo, but Margulies said “my declaration of what happened to Habib never would have been cleared now.”<sup>147</sup> Without jeopardizing his security clearance, though, he could not give specific examples of information that he was forbidden to disclose today.<sup>148</sup>

**“To characterize our clients as having been participants in the CIA program would be like characterizing an assassination victim as a participant in the assassination program.”**

The attorneys representing the September 11 defendants before military commissions have argued that the “presumptive classification” regime has interfered with their relationship with their clients, and made a full factual investigation of the case “virtually impossible.”<sup>149</sup>

In response, the government slightly modified its proposed protective order so that only certain categories of information from the defendants would be presumptively classified — but this still included all statements from the detainees about their capture (other than the date and location), the countries where they were held, the people who detained and interrogated them, and

[t]he enhanced interrogation techniques that were applied to the Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and ... [d]escriptions of the conditions of confinement of the Accused from on or around the aforementioned capture dates through 6 September 2006.<sup>150</sup>

Defense counsel are also explicitly prohibited from revealing their clients’ “observations and experiences” about their treatment in CIA custody. The ACLU has called this last restriction

a chillingly Orwellian claim: because a defendant was “detained and interrogated in the CIA program” of secret detention, torture, and abuse, he was “exposed to classified sources, methods, and activities” and must be gagged lest he reveal his knowledge of what the government did to him.<sup>151</sup>

At a military commission hearing on October 17, 2012, Lieutenant Commander Kevin Bogucki, military defense counsel for Ramzi bin al Shibh argued that

to characterize our clients as having been participants in the CIA program would be like characterizing an assassination victim as a participant in the assassination program. It is ridiculous to suggest that somehow they’ve been afforded access to classified information and that therefore their memories need to be treated as classified information.<sup>152</sup>

At the same hearing, defense counsel argued that classifying their clients’ memories made it

impossible to locate and interview witnesses who might be able to corroborate their client's statements.<sup>153</sup> Despite these arguments, the court adopted the government's proposed protective order on December 6, 2012.

Defense attorneys and human rights groups have also raised the possibility that the commissions' rules allowing the admission of hearsay, when combined with the ongoing classification of the CIA's treatment of detainees and the use of summaries in lieu of classified evidence, might make it impossible for the defense to prevent the introduction of evidence obtained through coercion.<sup>154</sup>

It is difficult to fully evaluate whether this is a realistic possibility, because the government's full "Classification Guidance for Rendition, Detention and Interrogation Program Information" is itself a classified document, as are many of the court papers detailing discovery disputes. According to James Connell, a defense attorney for September 11 defendant Ammar al-Baluchi, "[t]he government has not yet provided any discovery or information about our clients' treatment at the black sites. ... If the trial were tomorrow, I would have no way of introducing it."<sup>155</sup>

## Can It Happen Again?

The Obama administration has ended the most inhumane treatment of detainees, though some troubling questions about current policies remain unanswered. But it is unclear whether it has taken sufficient steps to prevent a future administration from resorting to torture or cruel treatment, particularly if terrorists succeed again in conducting horrific crimes against Americans as they did on September 11.

Legally, the major barriers to torture are much the same as they were under the latter part of the Bush administration. Obama's executive orders, while binding on the executive branch, could be rescinded on the first day of any new president's term — and this could be done without public notice.

The Convention Against Torture and the Geneva Conventions clearly outlaw torture, but those prohibitions were also in place in 2001. The Supreme Court's decision in *Hamdan v. Rumsfeld* removes any doubt that the Geneva Conventions apply to the United States conflict with Al Qaeda, and that Common Article 3 is the minimum standard for treatment of detainees.<sup>156</sup> Common Article 3 prohibits not only "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," but also "outrages upon personal dignity, in particular humiliating and degrading treatment." The breadth of the prohibition led Congress to narrow the scope of War Crimes Act after *Hamdan* to apply only to certain narrowly defined "grave breaches" of Common Article 3. The revised statute explicitly says, though, that the amendment was "intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that article."<sup>157</sup>

In July 2007, the Office of Legal Counsel nevertheless found that several of the CIA's "enhanced interrogation techniques" — including slaps to the face and body, and sleep deprivation by means of shackling diapered detainees to the ceiling of their cells for up to 96 consecutive hours — complied with Common Article 3.<sup>158</sup>

Those memos, and all of the OLC memos finding that torturous and cruel interrogation techniques were lawful, have been suspended. But there is no institutional barrier to future

OLC attorneys adopting their legal reasoning. The author of the 2007 memo on Common Article 3, Steven Bradbury, was a member of Republican presidential nominee Mitt Romney's national security law subcommittee. In September of 2012, *The New York Times* published a draft policy paper by members of the national security law subcommittee recommending that Romney "commit his Administration to authorizing (classified) enhanced interrogation techniques against high-value detainees" analogous to those listed in the 2007 memo.<sup>159</sup>

There have been no professional sanctions against legal, medical or mental health personnel who participated in or authorized cruel treatment and torture. The criminal laws against torture have not been enforced against any CIA employee, even in cases of homicide and where the public evidence very strongly suggests that interrogators went beyond OLC's and their headquarters' authorization. The Uniform Code of Military Justice also retains its clear prohibitions on mistreating prisoners, but the track record of prosecutions in the military is mixed at best, with many serious cases leading to no jail time or no conviction at all.<sup>160</sup> As stated above, without access to the case files or any classified information, the Task Force is not in a position to evaluate prosecutorial decisions in individual cases. But taken as a whole, the lack of successful prosecutions demonstrate major gaps in enforcement of the laws against torture and war crimes, which likely reduces their deterrent effect.

Even without the risk of prosecution, the risk of public disclosure and disapproval might deter a future administration from authorizing torture. But public opposition to torturing terrorism suspects under any circumstances has fallen since President Obama took office. A recent poll commissioned by Stanford Professor Amy Zegart and run by the polling firm YouGov found that 41 percent of Americans said the United States should use torture on terrorism suspects, and only 34 percent said it should not.<sup>161</sup>

Zegart's poll also asked the exact same questions as a January 2005 *USA Today / Gallup / CNN* poll about specific abusive techniques, and found that public support had increased for almost all of them. In Zegart's words,

Respondents in 2012 are more pro-waterboarding, pro-threatening prisoners with dogs, pro-religious humiliation, and pro-forcing-prisoners-to-remain-naked-and-chained-in-uncomfortable-positions-in-cold-rooms. In 2005, 18 percent said they believed the naked chaining approach was OK, while 79 percent thought it was wrong. In 2012, 30 percent of Americans thought this technique was right, an increase of 12 points, while just 51 percent thought it was wrong, a drop of 28 points. In 2005, only 16 percent approved of waterboarding suspected terrorists, while an overwhelming majority (82 percent) thought it was wrong to strap people on boards and force their heads underwater to simulate drowning. Now, 25 percent of Americans believe in waterboarding terrorists, and only 55 percent think it's wrong.<sup>162</sup>

Zegart thought the most likely explanation for this change was the glamorized pop-culture depiction of torture in shows like "24": "Before the 9/11 attacks, torture was almost always depicted in television and movies as something that bad guys did. That's not true anymore."<sup>163</sup> If so, the portrayal of waterboarding as essential to finding Osama bin Laden in the recent

**"Obama's executive orders, while binding on the executive branch, could be rescinded on the first day of any new president's term — and this could be done without public notice."**



film *Zero Dark Thirty* — which unlike “24” purports to be a “journalistic” study of events — will unfortunately likely add to the public’s support.

It is also possible that the robust public defenses of the CIA program from Dick Cheney, Jose Rodriguez, former CIA Director Michael Hayden, and former Attorney General Michael Mukasey have convinced many people that the CIA program was carefully limited, unconnected from abuses by low-level troops in Iraq and Afghanistan, and saved lives. As discussed above, much of the evidence that might definitively contradict these sanitized portrayals of torture remains classified. Since 2009, there have been no trials, civil or criminal, and no official commission of inquiry. The unclassified evidence is scattered across hundreds of unofficial media and NGO reports, and hundreds of thousands of pages of government documents.



The strongest barrier to a return to torture and cruel treatment may be the military’s and intelligence community’s reluctance to engage in it again. Hayden and Mukasey have predicted that disavowing the OLC memos would also deter CIA personnel:

Even with a seemingly binding opinion in hand, which future CIA operations personnel would take the risk? There would be no wink, no nod, no handshake that would convince them that legal guidance is durable.<sup>164</sup>

In an interview with Task Force staff, former CIA General Counsel John Rizzo agreed:

I thought I had done everything, to cauterize and get all the legal and policy authority necessary to protect the agency and protect the people who were carrying out the program, but it wasn’t enough.<sup>165</sup>

Rizzo said investigations of the CIA were “a corrosive experience,” and that many agency personnel believed they were “being persecuted for political purposes.”<sup>166</sup> Retired Colonel Stuart Herrington, whose disagreements with Rizzo about the CIA program are discussed in Chapter 7, also thought the CIA’s experience since September 11 would reinforce its historical risk aversion about interrogation.<sup>167</sup>

Ali Soufan said that some CIA personnel had objected to the use of torture long before any DOJ investigation, and credited them with ending the use of the most brutal techniques in 2005. Soufan said that the CIA’s Office of Inspector General’s investigation into the program had started because of CIA personnel “who came and complained about the program to the IG. And that’s why the IG initiated an investigation and that’s why the program was shelved.”<sup>168</sup>

Retired Colonel Steven Kleinman was less confident than the others. He said it was quite plausible that soldiers were using cruel techniques on detainees in a field site “somewhere right now in Afghanistan. So yes it is a danger to come back.”<sup>169</sup>

# The Role of Congress

*It is now evident that Congress did little to fulfill its primary obligations in addressing how the United States treated prisoners from Afghanistan, Iraq and other countries during the first few years of the Bush administration. At the very least, the first job of Congress in such a situation is oversight, finding out what may be going on and informing the public, through hearings and reports.*

*This was in notable contrast to two previous periods in U.S. history. In 1902, regarding Filipinos, and 1949, regarding Germans, it had confronted the unpopular issue of prisoner abuse openly. But this time Congress stepped aside, effectively ceding that task to the press.*

*There was one striking exception to this passivity. In late 2005, brushing off threats of a veto, Congress passed legislation restricting the military to the interrogation techniques listed in the Army Field Manual on interrogation, and banning “cruel, inhuman, or degrading treatment” by the CIA. But that shining moment aside, Congress’ approach to detainee treatment paralleled its reluctance to question the war in Iraq more generally.*

*That is not what the framers of the Constitution intended. They wanted the legislative branch to be coequal. That is why its powers are detailed in Article I, before the executive branch. But in 1787 the framers did not envision political parties, and now, more than two centuries later, Congress is a hyper-partisan institution, with lawmakers routinely placing loyalty to party above pride in their own institution.*

*This phenomenon flares most clearly in the attitude of some members if their own party holds the presidency. They yield to the president’s agenda and fail to exercise their historic oversight role. This is not specific to either party. Indeed, the GOP was largely unwilling to challenge the Bush administration from 2001 to 2006. But at least until recently, few Democrats expressed even a whisper of doubt about President Barack Obama deciding which alleged terrorists to kill with drone strikes.*



## Reaction to Post-September 11 Abuses

The first time the Congress generally displayed any concern about how detainees were handled came after the CBS News program “60 Minutes II”, on April 28, 2004, showed pictures of degrading treatment of prisoners at the Abu Ghraib prison near Baghdad. Outrage was heard from members of Congress ranging from Senators John McCain, Republican of Arizona, and Patrick Leahy, Democrat of Vermont, to Rep. Tom DeLay of Texas, the House Republican majority leader. After the din of congressional shock over Abu Ghraib, the Department of Defense (DOD) pointed out that several dozen lawmakers had visited the prison but showed little interest in how prisoners were treated.<sup>1</sup>

This was hardly the first time Congress had heard of prisoner abuse, though it was the first with dramatic photographs. *The Washington Post* had run front-page articles — in March 2002, on how the United States transported terrorism suspects to countries where torture was used; in December 2002, on how prisoners in Afghanistan were kept in stress positions, like standing or kneeling for hours; and in November 2003, on how the United States had sent a Canadian suspect to be tortured in Syria.<sup>2</sup>

Two explanations for the earlier diffidence came from senior Republicans. Rep. Ray LaHood, a blunt-spoken Illinois congressman, said: “Our party controls the levers of government. We’re not about to go out and look beneath a bunch of rocks to try to cause heartburn.” Sen. John Warner of Virginia, chairman of the Armed Services Committee, said of the Pentagon, “We entrust to the department the wisdom to notify us when there is a situation that merits our attention.”<sup>3</sup>

Even so, when confronted by the disgusting photos from Abu Ghraib (and a *New York Times* story revealing waterboarding), Republicans promised to investigate. But Warner was quickly discouraged by the administration, agreeing that two hours was all Donald Rumsfeld, the secretary of defense, should have to spend testifying. Warner also moved to silence Sen. Edward M. Kennedy of Massachusetts when he tried to question Paul Wolfowitz, the deputy secretary of defense, about abuse of prisoners. *Congressional Quarterly* questioned whether Warner had the “will” to “conduct more than a perfunctory inquiry.”<sup>4</sup>

Sen. Pat Roberts of Kansas, chairman of the Intelligence Committee, also promised hearings and pledged a “more activist role” for his committee. But he never really followed through, leading to a remarkable confrontation months later with the committee’s Democratic vice chairman, Sen. Jay Rockefeller of West Virginia. On April 21, 2005, Rockefeller told the Senate that it should ask the committee to investigate because until then it had been “sitting on the sidelines.” He said, “Despite the critical importance of interrogation-derived intelligence and the growing controversy surrounding detention, interrogation, and rendition practices and policies, the Congress has largely ignored the issue, holding few hearings that have provided only limited insight.” Roberts sharply replied that the committee knew all that it needed to know, and the proposed investigation “will hinder ongoing intelligence collection, and I believe it will damage morale” and make interrogators “risk averse.” He said, “I am fast losing patience with what appears to me to be almost a pathological obsession with calling into question the actions of the men and women who are on the front line in the war on terror.”<sup>5</sup>

**“As the 9/11 Commission rightly pointed out, allowing torture of prisoners only makes it more difficult to build the alliances and support we need to defeat terrorism.”**

In the House, there was no serious move to investigate the issue. Rep. Duncan Hunter of California, chairman of the House Armed Services Committee, even complained that Warner's desultory hearings were keeping generals from fighting the war.<sup>6</sup>

A few members of Congress had already been given information about what the administration called "enhanced interrogation techniques," although there is a partisan disagreement about how much. CIA records list six briefings of the chairman and ranking minority member of the Senate and House intelligence committees (sometimes called the "Gang of Four") between September 2002 and September 2003, long before the *Times* broke the story on waterboarding.<sup>7</sup>

Jose Rodriguez, the former director of the CIA's National Clandestine Service, later wrote: "A briefing was given on September 4, 2002, to the chairman of the House Intelligence Committee, Congressman Porter Goss, and the ranking member, Congresswoman Nancy Pelosi. ... We went through each of the specific techniques used in the interrogation of Abu Zubaydah that had been used for a couple of weeks in August. ... We held nothing back."<sup>8</sup>

Pelosi denied that account in April 2009, when she was no longer the senior Democrat on the committee, but Speaker of the House. She told a news conference: "[W]e were not — I repeat — were not told that waterboarding or any of these other enhanced interrogation methods were used. What they did tell us is that they had some legislative counsel — the Office of [Legal] Counsel opinions that they could be used, but not that they would. And they further — further the point was that if and when they would be used, they could brief Congress at that time."<sup>9</sup> Pelosi also said, "The only mention of waterboarding at that briefing was that it was not being employed."<sup>10</sup>

Rep. Porter Goss of Florida, the House Intelligence Committee's 2002 chairman and later the head of the CIA, said Pelosi was suffering from "amnesia" about the briefing they received. Goss said that his colleagues "understood what the CIA was doing," and he could not "recall a single objection from my colleagues" about the CIA's interrogation techniques.<sup>11</sup> Goss, however, declined to specify whether the CIA told members of Congress that they had already used techniques including waterboarding on Abu Zubaydah.<sup>12</sup> Former Sen. Bob Graham, Democrat of Florida, then the chair of the Senate Intelligence Committee, said that when the CIA briefed him on detainee interrogations in September 2002, "There was no discussion of waterboarding, other excessive techniques or that they had applied these against any particular detainees." Graham, who is known for keeping detailed, meticulous notes of his daily activities in spiral notebooks, said that nothing the CIA told him "surprised me or has subsequently proven to be incorrect...It was a matter of omission, not commission."<sup>13</sup> CIA documents show that agency personnel briefed Goss and Pelosi about interrogations on September 4, 2002, but due to redactions, omissions and errors in the publicly available documents, they do not resolve the discrepancy between Pelosi's and Rodriguez's accounts.<sup>14</sup>

The rules for such briefings are basically set by an administration, which decides whom to tell and how much. And whatever Pelosi and six other lawmakers were told in 2002 and 2003, the conditions of their briefings prohibited taking notes or discussing what they heard with other members, and clearly barred them from legislating on the subject. Yet even without their insights or any serious congressional investigation, some senators outside the intelligence committees had heard and read enough and were ready to act.

The first attempt to set higher standards for treating prisoners came on June 16, 2004. Without opposition or even a roll call, the Senate adopted an anti-torture amendment to the DOD authorization bill. It was proposed by Sen. Richard J. Durbin, the Illinois Democrat who served as his party's whip. Sen. Warner and Sen. Carl Levin of Michigan, the ranking Democrat on Armed Services Committee, joined Durbin in advocating the amendment. It said, "No person in the custody or under the physical control of the United States shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States."<sup>15</sup>

The amendment was sharply opposed by the administration, presumably because it covered interrogations by the CIA, which by mid-2004 was handling important detainees and using what it termed "enhanced interrogation techniques." It all but died in a House-Senate conference. The final version called on the Defense Department to establish firm rules on handling prisoners, which the DOD general counsel's office said it had already done.<sup>16</sup>

The Senate tried again that autumn. Sen. John McCain, who was tortured as a POW in Vietnam, and Sen. Joseph I. Lieberman, Democrat of Connecticut, worked with Durbin's staff and developed language for an amendment to a major bill that would reorganize the top levels of the intelligence community, following recommendations of the 9/11 Commission. Noting that the Durbin amendment was stalled in conference, McCain told the Senate:

We must continue pressing to ensure that America treats individuals in its custody humanely, as the Commission rightly advocates. As the 9/11 Commission rightly pointed out, allowing torture of prisoners only makes it more difficult to build the alliances and support we need to defeat terrorism. Portrayals of inhumane treatment of captured terrorists hinder our ability to engage in the wider struggle against them. The McCain-Lieberman amendment covered many issues, but its language on prisoners paralleled Durbin's.<sup>17</sup>

This amendment, adopted on September 30, 2004, led to a higher level of administration protests, in a letter from Condoleezza Rice, the president's national security adviser, and Joshua Bolten, director of the Office of Management and Budget. While the objections to the Durbin provision by the Defense Department had been chiefly that it duplicated current policy, Rice and Bolten said the new amendment would provide "legal protections to foreign prisoners to which they are not now entitled under applicable law and policy." Their letter did not mention the CIA. Again, House Republican conferees went along with the White House and the amendment died.<sup>18</sup>

The press, which basked in credit and prizes for revealing prisoner abuse, paid little attention to what the Senate was trying to do about it in 2004. Durbin's amendment got some attention from *Congressional Quarterly* and The Associated Press and an editorial urging its adoption in *The Washington Post*, but no news stories in a major newspaper like the *Post*, *The New York Times* or *The Wall Street Journal*. The McCain-Lieberman amendment got no coverage at all until January 2005. Its authors made no effort to publicize it, fearing to bring down the entire intelligence bill, but journalists who had penetrated official secrecy on prisoners failed to penetrate public Senate action.<sup>19</sup>

**“Graham’s amendment was an attempt to reverse the Supreme Court’s decision in *Rasul v. Bush* that Guantánamo detainees could challenge their detention in federal courts by petitioning for a writ of *habeas corpus*.”**

That changed in 2005. First came a *Times* story in January reporting on the previous year's intelligence measure and the administration's effort to block the McCain-Lieberman anti-torture amendment. *The Post* reported the dispute between Rockefeller and Roberts. Then Durbin finally succeeded in getting a ban on torture and "cruel, inhuman, or degrading" treatment of prisoners into law, as part of a supplemental appropriation for the war. It applied only to the military, and the administration did not fight it. The *Times* reported its passage.<sup>20</sup>

The central figure in Congress's attempt to end prisoner abuse was McCain. He asked Durbin if he could take the lead and Durbin agreed, recognizing that McCain's stature as a former Vietnam POW who had been tortured would give the cause great authority. McCain, working with Warner and Sen. Lindsey Graham of South Carolina, set out to recruit other Republicans in July. Their effort alarmed the administration, and Vice President Dick Cheney met with them and threatened a veto by President George W. Bush.<sup>21</sup>

The amendment required military personnel to follow the rules set out in the Army Field Manual. And it covered CIA agents by prohibiting "cruel, inhuman, or degrading treatment or punishment of persons under the detention, custody or control of the United States Government."<sup>22</sup>

A false start in July showed the administration could not win in the Senate. The majority leader, Sen. Bill Frist of Tennessee, took the DOD authorization bill off the floor to block adoption of the McCain amendment. But McCain brought the measure up again when the Senate considered the separate Pentagon spending bill in October. The Bush administration suffered its worst defeat in the Senate when it passed, 90 to 9, with 46 Republicans, including Frist, voting for it.<sup>23</sup>

So the administration turned to the House, where the leadership routinely provided support. It sought backing for a provision allowing the president to determine that the CIA should be exempted from the McCain amendment. McCain had rejected that idea when Cheney pressed for it earlier.<sup>24</sup>

But McCain's amendment appealed to a surprisingly large number of the usually docile House Republicans. When a vote finally came in the House in December — on a motion urging conferees on the spending bill to accept the amendment — 107 Republicans voted yes, while 121 voted no. The measure, proposed by Rep. John P. Murtha of Pennsylvania, the senior Democrat on the Armed Services Committee, passed by a vote of 308 to 122.<sup>25</sup>

Facing congressional majorities that could easily override a veto, Bush capitulated the next day. He said he had "been happy to work with" McCain and would sign the legislation. The final version also included a provision giving civilian interrogators protections from lawsuits and another, urged by Graham, barring detainees who were not U.S. citizens from access to federal courts.<sup>26</sup> Graham's amendment was an attempt to reverse the Supreme Court's decision in *Rasul v. Bush* that Guantánamo detainees could challenge their detention in federal courts by petitioning for a writ of *habeas corpus*. However the Supreme Court later interpreted the restriction on *habeas* not to apply to already-pending cases, in *Hamdan v. Rumsfeld*.<sup>27</sup>

Congress returned to the issue of detainee treatment the next year, after the Supreme Court's *Hamdan* decision. The court held that the Guantánamo military commissions were not specifically authorized by Congress, and violated international law — specifically, Common Article 3 of the Geneva Conventions.<sup>28</sup> The Court's decision undermined not only the military

commissions, but the Bush administration's argument that detained Al Qaeda suspects were outside the protections of the Geneva Conventions. At the time, the War Crimes Act defined any violation of Common Article 3 as a criminal offense punishable by life in prison.

The administration asked Congress to reinvent the commissions on the same terms it had used, and to add several provisions. One stated that the writ of *habeas corpus* could not be used by detainees. Another asserted that the obligations created by the Geneva Conventions were satisfied as long as the United States complied with the McCain amendment — a provision that opponents saw as an improper unilateral redefinition of the Conventions. The Bush measure also sought to create a limited list of offenses against the Conventions that could be prosecuted in the United States under the War Crimes Act. And, it included two provisions denying defendants the right to be present at trial or to exclude hearsay evidence or evidence obtained by torture.<sup>29</sup>

Congressional Democrats largely left it to Warner, McCain and Graham to spearhead opposition to the Bush proposal.<sup>30</sup> But the GOP senators quickly reached a compromise that gave the administration most of what it wanted. The final bill, the Military Commissions Act of 2006, passed easily in both houses after the Senate narrowly defeated a Democratic bid to allow *habeas corpus* rights to detainees. The Military Commissions Act did not limit the obligations imposed by Geneva, but it did narrow the reach of the War Crimes Act, and attempted to eliminate detainee's *habeas* rights (though the Supreme Court invalidated the *anti-habeas* provision in 2008 — as several senators predicted at the time). Another rewrite of the law in 2009 gave defendants greater procedural safeguards.<sup>31</sup>

Most of the early protests, aside from McCain's, came from Democrats. But the Senate minority was not nearly as united in criticism of detainee treatment as the majority was in defending, or ignoring, it. Sen. Tom Daschle of South Dakota, who was minority leader in 2004, said some Democrats' reluctance to challenge the policies was based on believing the practices were proper. For others, he said, fear of political damage cautioned silence, just as it had kept all but one of the Democratic senators running for president from voting against the war itself in 2002.<sup>32</sup>

In any case, by the time Democrats regained control of both houses of Congress after the 2006 elections, their leaders had little appetite for a vast public re-examination of prisoner treatment. But the Senate Armed Service Committee, with bipartisan support, used staff for an 18-month effort that produced a thorough, 242-page report, made public in 2008 and 2009, that rehearsed the history of how the military used harsh methods to interrogate detainees. It put the blame squarely on Donald Rumsfeld, the secretary of defense when the policies were shaped.<sup>33</sup> The Senate Intelligence Committee's study of the CIA's detention and interrogation program was completed and adopted in December 2012. It is reportedly even more detailed than the Senate Armed Services Committee's report, but has yet to be publicly released in any form.

The only time Congress can be said to have acted swiftly and decisively about detainees came in 2009, when it blocked Obama's plans to try some detainees in federal district courts, and to resettle some innocent prisoners in the United States [see Chapter 10.] However, at John Brennan's confirmation hearing for the post of CIA Director, several Senators expressed

**“Finally, the only time Congress can be said to have acted swiftly and decisively about detainees came in 2009, when it blocked Obama’s plans to try some detainees in federal district courts, and to resettle some innocent prisoners in the United States.”**



frustration with the CIA for concealing or providing inaccurate information to Congress about the interrogation program. Senator Barbara Mikulski said that on her ten years in the intelligence committee, “with exception of Mr. Panetta, I feel I’ve been jerked around by every CIA director,” and that the CIA had “evaded” and “distorted” in response to the committee’s questions about the interrogation program. Senator Jay Rockefeller asked why the CIA had briefed only the “gang of four” and not the full committee or committee staff, and described the restrictions placed on briefings he did receive when he was the ranking Democratic member of the intelligence committee: “I can remember driving with Pat Roberts when he was chairman and I was vice chairman, we weren’t allowed to talk to each other driving up or driving back. You weren’t allowed to do that. Staff were a part of nothing.” Brennan acknowledged that the Senate Intelligence Committee’s still-classified report about the interrogation program “talked about mismanagement of the program, misrepresentation ... providing inaccurate information.” Brennan said he wanted to read the CIA’s response to the report before drawing conclusions.

### **Historical Perspective**

This was not the first time Congress faced a decision on how to deal with accusations that Americans had abused prisoners in wartime. On at least two occasions — the war to subdue Filipino resistance against American conquest, from 1899 to 1902, and World War II — Congress investigated and held thorough public hearings.

#### ***The Philippine Insurrection***

The Philippine-American War, or the Philippine Insurrection, as Americans called it, followed the Spanish-American war. The United States took the Philippines as spoils of war in 1899, seeing them as a naval base in the Pacific and valuable for trade with Asia.<sup>34</sup> But Filipinos who fought Spain with the Americans turned on the U.S. Army when their hopes of independence were dashed.

Guerilla warfare, with its surprise attacks and ambushes and a foe who did not wear uniforms, was new to the Americans and there were hundreds<sup>35</sup> of complaints, through soldiers’ letters home, of killings of prisoners and civilians, of burning of houses in rebel areas, and most notoriously, of the “water cure,”<sup>36</sup> in which gallons of water were forced down a prisoner’s throat and then his captors jumped on his stomach to make him confess or give up information. Most of the accusations could not be checked out. But Richard E. Welch, one of the foremost scholars on the subject, found that 57, including 14 water cures, could be verified.<sup>37</sup>

The first of these accusations was printed in 1900 in the *Omaha World-Herald*,<sup>38</sup> but it had little impact until early in 1902. Then one of a handful of anti-imperialist Republican senators, George Frisbie Hoar of Massachusetts, urged the Senate to investigate. He wanted a special committee, but the other Massachusetts senator, Henry Cabot Lodge, arranged to have the task assigned to a standing committee he chaired, the Committee on the Philippines.<sup>39</sup> Lodge “made no secret of his impatience with those who would slander the American soldier,” Welch wrote.

The hearings began with officials. William Howard Taft, governor of the Philippines, testified in early February. Pressed by a Democratic senator, Taft conceded that “cruelties have been inflicted; that people have been shot when

they ought not to have been; that there have been in individual instances of water cure, that torture which I believe involves pouring water down the throat so that the man swells and gets the impression that he is going to be suffocated and then tells what he knows, which was a frequent treatment under the Spaniards, I am told — all these things are true.”<sup>40</sup>

Theodore Roosevelt’s administration in Washington, more attuned than Taft to politics and growing press interest in the issue, responded sharply. Secretary of War Elihu Root told the committee that offenses were “few and far between” and always promptly and firmly dealt with. The war “has been conducted with scrupulous regard for the rules of civilized warfare with careful and genuine consideration for the prisoner and the non-combatant.”<sup>41</sup>

But the committee did not just hear from higher-ups during its sporadic hearings. On April 14, Charles S. Riley, a Northampton, Mass., clerk who had served as a sergeant, described the water cure treatment administered to the chief local official in the town of Igaras to get him to confess to being an insurgent.<sup>42</sup> Two other soldiers from his unit testified and backed his story, adding that the town had been burned as punishment.<sup>43</sup> Several other veterans testified on the water cure over the next weeks.<sup>44</sup>

But Roosevelt, in a Memorial Day speech, proclaimed torture “wholly exceptional” and defended troops against critics who denigrated them.<sup>45</sup> Lodge refused to reopen the hearings after a summer break,<sup>46</sup> and the committee dropped the subject without a report.<sup>47</sup> In retrospect, it appears that the Senate hearings on atrocities had little effect on American efforts in the Philippines. Courts martial continued for some enlisted men, but the penalties remained light.<sup>48</sup> In any case, the war was winding down, the anti-imperialists had lost, and the country wanted to forget.

### ***The Malmedy Massacre***

Forty-six years later, Congress dealt with charges of mistreatment of even less sympathetic prisoners — German SS troops convicted of shooting and killing more than 70 American POWs near Malmedy, Belgium, in 1944 during the Battle of the Bulge. It was probably the worst atrocity against American troops of the war in Europe. Seventy-three members of a notorious SS unit were convicted by a military court in 1946 of war crimes in connection with the incident. Forty-three were sentenced to be hanged.<sup>49</sup>

But German clergymen and Willis M. Everett, an American lawyer who had unsuccessfully defended the SS members, protested that the confessions that convicted them had been coerced and the prisoners, rounded up from many places in Europe after the war, had been tortured and beaten.<sup>50</sup>

Members of Congress with heavy concentrations of German-Americans in their constituencies, including Sen. Joseph R. McCarthy of Wisconsin, took up their cause. So did the National Council for the Prevention of War, a prominent pacifist organization, the American Civil Liberties Union, the Federal Council of Churches of Christ in America. *Time Magazine* was also sympathetic.<sup>51</sup>

The Senate Armed Services Committee took on the investigation through a subcommittee chaired by a Republican, Raymond A. Baldwin of Connecticut, along with two Democrats.

Over six months, the subcommittee sent investigators to Germany and followed to hear 108 witnesses there and in Washington, examined thousands of documents, and produced a 1700-page hearing record and a 35-page report.<sup>52</sup>

One of the strongest elements of the committee report was its belief that the protests were part of a plot “to revive the German nationalistic spirit by discrediting the American military government.” It suggested there might be a plot “to bring parts of Germany into closer relationship with the Soviet Union.”<sup>53</sup> Those concerns came to the committee from a CIA operative who came to their quarters in Germany one night and later testified. The transcript of his secret testimony later disappeared.<sup>54</sup>

On misconduct in the prosecutions and trials — the central question before it — the subcommittee sided largely with the Army. It rejected claims that prisoners were beaten, and charges that punitive solitary confinement, inadequate food and water, threats against prisoners’ families, and fake hangings were used as methods to coerce confessions. But it did find that conducting mock trials in a candlelit room to gain confessions was a “grave mistake.” It concluded that trying the accused *en masse* was unfair and that the defense attorneys had not been given adequate time to prepare for trial.<sup>55</sup>

The report sparked three hours of angry debate on the Senate floor. McCarthy, who had called the inquiry a “whitewash” in July, termed the report “a farce.” Baldwin insisted the Army had gone to great lengths to be fair.<sup>56</sup>

Thirty-seven of the original 43 death sentences had been commuted — chiefly because of the Army’s own concerns over the trials’ fairness — when the investigation ended. By then, the Army had enough of the controversy. In 1951, the remaining six death sentences were cancelled and by 1956 all the accused were freed.<sup>57</sup>

The Senate hearings, with their charges and denials, had been covered extensively by the American press. *The New York Times* and *The Washington Post* ran many articles, mostly Associated Press dispatches. The most exhaustive coverage came in *The Chicago Tribune*, which took the charges far more seriously than the denials and trumpeted McCarthy’s attacks. A leading student of the case, Fred L. Borch, III, a former Guantánamo prosecutor, concluded: “It is clear that Gen. Lucius Clay and the Pentagon felt that the Senate hearings had cast such a bad light on the Malmedy proceedings that it would have been unwise to carry out the death sentences. More than anything, the Army wanted this story to go away.”<sup>58</sup> While defending the Army, the subcommittee had aided the prisoners, too.



History has largely forgotten the water cure and the prosecutions over the Malmedy Massacre. With modern communications and a worldwide web that never forgets, that hardly seems likely when future scholars examine how the United States treated detainees suspected of terrorism. And this time, Congress’s reluctance to take on the issue will entitle it to a significant share of the responsibility.

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# Memo in Support of Finding #1

This memo provides the raw analytical materials for determining whether such abuses may be characterized as torture and/or cruel, inhuman or degrading treatment (CID).

## Is Torture Prohibited?

Unequivocally, yes.

Torture is illegal under the domestic law of virtually every nation, including the United States.<sup>1</sup> The American legal prohibition against torture extends back to the Bill of Rights of the U.S. Constitution,<sup>2</sup> while explicit official rejection of its use, even during times of national emergency, extends back to at least the American Civil War.<sup>3</sup> Prohibitions against torture are so widespread that, according to the Supreme Court, “the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.”<sup>4</sup>

Under U.S.<sup>5</sup> and international law,<sup>6</sup> as well as the laws of war,<sup>7</sup> the prohibition of torture is absolute, allowing neither exception nor modification for any reason whatsoever, including for reasons related to national security.<sup>8</sup> Under international law, the prohibition against torture is considered *jus cogens*, a non-derogable norm that may not be altered or qualified by state consent under any circumstances.<sup>9</sup> This view of torture is similarly embraced by the European Court of Human Rights,<sup>10</sup> the Inter-American Court of Human Rights,<sup>11</sup> the Inter-American Commission on Human Rights,<sup>12</sup> the International Criminal Tribunal for the former Yugoslavia,<sup>13</sup> and the International Criminal Tribunal for Rwanda,<sup>14</sup> among many others.

## What is the Legal Definition of Torture?

Torture is defined by various international and domestic legal instruments,<sup>15</sup> which differ on their specific details, but share certain core elements. These elements are clearly stated in the U.N. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which forms the basis for many countries’ definition of torture, including the United States. Article 1 of CAT defines torture as:

- [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating

or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. <sup>16</sup>

The U.S. adopted the CAT's definition of torture when it ratified the treaty in 1988 but with certain caveats, including a requirement for specific intent (rather than simple intent), an enumerated list of underlying offenses associated with mental pain or suffering, and a requirement that the victim be within the perpetrator's physical control, among others.<sup>17</sup>

The definition of torture with respect to U.S. criminal law is contained within the U.S. Torture Statute, passed in 1994 in compliance with CAT's requirement to enact enabling legislation.<sup>18</sup> The U.S. Torture Statute defines torture as:

[A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.<sup>19</sup>

It further specifies what is meant by "severe mental pain or suffering" as:

[T]he prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>20</sup>

Unlike "severe *mental* pain and suffering," "severe *physical* pain and suffering" is left undefined beyond the ordinary meaning of the words, and without an enumerated list of underlying offenses.<sup>21</sup> U.S. courts, the Army Field Manual, military courts-martial, administrative courts, and other official and judicial sources have had no difficulty labeling certain acts as torture or Cruel, Inhuman or Degrading (CID).<sup>22</sup> Typically, judges and officials take a totality-of-the-circumstances, common-sense approach when determining what constitutes torture,<sup>23</sup> an approach that reflects the reality that abusive techniques are almost always inflicted in combination, rarely if ever in isolation.

The Military Commissions Act of 2009,<sup>24</sup> the War Crimes Act,<sup>25</sup> and the Torture Victims Protection Act<sup>26</sup> incorporate similar definitions of torture as that contained in the Torture Statute, but with one additional element, namely, the requirement that the act causing severe physical or mental pain or suffering be done with a specific purpose in mind. Such purposes

include: obtaining information or a confession, punishment, intimidation, coercion, or discrimination of any kind.<sup>27</sup>

The key difference between the CAT and U.S. definitions of torture pertains to the requirement for specific intent. Unlike CAT, which requires that the act of torture be *intentionally inflicted*,<sup>28</sup> the United States requires the act to be *specifically intended*.<sup>29</sup> American courts have interpreted the specific-intent requirement to mean that the perpetrator must harbor “the intent to commit the act as well as the intent to achieve the consequences of that act, namely the infliction of severe pain and suffering.”<sup>30</sup> The distinction is not, according to the U.S. Court of Appeals for the Second Circuit, between whether or not severe pain and suffering were foreseeable, but strictly whether or not severe pain and suffering were the intended goals.<sup>31</sup> U.S. courts have also made clear that the act need only be specifically intended to inflict severe pain and suffering, and not specifically intended “to commit torture.”<sup>32</sup> In other words, even in situations where a perpetrator did not intend to inflict torture *per se*, so long as he or she intended to cause severe pain and suffering, the specific-intent requirement for the crime of torture is met.

## What is the Legal Difference Between Torture and CID?

CID is, like torture, banned under international and U.S. domestic law.<sup>33</sup> Under U.S. law, CID is prohibited under the War Crimes Act of 1996 (WCA), the Detainee Treatment Act of 2005 (DTA), the Military Commissions Act of 2009 (MCA), the Uniform Code of Military Justice, Army Regulation 190-8, the Eighth Amendment, the Convention Against Torture, and the Geneva Conventions.

The DTA and the MCA, which incorporates the DTA’s definition,<sup>34</sup> tie the definition of CID to the “cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments” of the U.S. Constitution.<sup>35</sup> The United States, upon ratifying CAT, lodged the same reservation to its interpretation of CID.<sup>36</sup>

The definition of CID for purposes of criminal law, contained in the War Crimes Act, is narrower than the Eighth Amendment or CAT definition. The War Crimes Act defines CID as:

The act of a person who commits, or conspires or attempts to commit an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions), including serious physical abuse, upon another within his custody.<sup>37</sup>

## How Did the Early Bush Administration Define “Severe Pain and Suffering”?

During the Bush administration, the definition of “severe pain and suffering” was intensely debated. An initial definition was articulated by the Office of Legal Counsel (OLC) in August 2002 in a memo by OLC Director Jay Bybee to Alberto Gonzales. According to the OLC’s original definition, “severe pain” was interpreted as pain rising to a level that “death, organ failure, or serious impairment of bodily functions will reasonably result.”<sup>38</sup>

“Severe pain,” according to the memo, includes only “extreme acts” and is generally of the kind “difficult for the victim to endure.”<sup>39</sup> Where the pain is physical, according to the original OLC analysis, it is likely to be accompanied by “serious physical injury, such as damage to one’s organs or broken bones.”<sup>40</sup>

OLC derived the definition not from a treaty or criminal definition of “severe pain” but from a statute regulating Medicare benefits. Moreover, as Jack Goldsmith, Jay Bybee’s successor as the head of the OLC later pointed out, “the health benefit statute did not define ‘severe pain.’ Rather, it used the term ‘severe pain’ as a sign of an emergency medical condition that, if not treated, might cause organ failure and the like.”<sup>41</sup> Goldsmith wrote that in his opinion, “[i]t is very hard to say in the abstract what the phrase ‘severe pain’ means, but OLC’s clumsy definitional arbitrage didn’t seem even in the ballpark.”<sup>42</sup>

Bybee’s memo was leaked to the press, and published on *The Washington Post* website on June 13, 2004. The definition of torture contained in the Bybee memo was rejected by many members of the legal community as well. A group of nearly 130 lawyers, including law school professors, retired judges, seven past presidents of the American Bar Association, and a former FBI director concluded that the OLC’s legal analysis of torture “circumvent[s] long established and universally acknowledged principles of law and common decency,” and that “[t]he position taken by the government lawyers in these legal memoranda amount to counseling a client as to how to get away with violating the law.”<sup>43</sup> Harold Hongju Koh, then Dean of Yale Law School, characterized the definition as “blatantly wrong,” stating that it was based on “erroneous legal analysis.”<sup>44</sup> Cass Sunstein, a law professor at the University of Chicago, and Martin Flaherty, another expert of international law, both similarly rejected the OLC’s definition of torture. Flaherty described it as “extreme, one-sided and poorly supported by the legal authority relied on,”<sup>45</sup> while Sunstein described it as “egregiously bad,” “very low level,” and “embarrassingly weak, just short of reckless.” Other commentators criticized the definition for ignoring Supreme Court precedent, straying from the definition contained in the CAT,<sup>46</sup> and for representing a “pre-ordained result” requested by the CIA.<sup>47</sup>

The Bybee memo’s interpretation of “severe pain” was ultimately repudiated by the Bush administration itself. On June 15, 2004, Goldsmith informed Attorney General John Ashcroft of his intention to withdraw the Bybee memo. In December 2004, OLC issued a superseding memo, written by Daniel Levin, which concluded that

“severe” pain under the statute is not limited to “excruciating or agonizing” pain or pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.” The statute also prohibits certain conduct specifically intended to cause “severe physical suffering” distinct from “severe physical pain.”<sup>48</sup>

On July 29, 2009 the Justice Department’s Office of Professional Responsibility (OPR) released a 289-page report documenting its 5½-year investigation into OLC relating to the CIA’s interrogation program. OPR concluded that John Yoo and Jay Bybee, the attorneys primarily responsible for the original memo “dishonored their office and the entire Department of Justice” and committed “professional misconduct” when they defined torture in such a narrow way.<sup>49</sup> Associate Deputy Attorney General David Margolis did not adopt

OPR's findings of professional misconduct, but did agree that the memo's definition of "severe pain" was deficient.<sup>50</sup>

## What Specific Coercive Techniques Did the Bush Administration Find Not to Be Torture or CID?

The OLC issued a second memorandum signed by Bybee in August 2002 (hereinafter Bybee Techniques Memo) that concluded 10 specific "enhanced" techniques were not torture, and could be used lawfully by the CIA. The techniques were: "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard."<sup>51</sup>

In finding that the 10 techniques were not torture, the Bybee Techniques Memo relied not only on a narrow legal definition of torture, but on factual representations about how the techniques would be implemented that later proved inaccurate. To give one example, the OLC memorandum stated the volume of water used to waterboard a suspect would be carefully controlled, and that while enhanced techniques might be used more than once, "repetition will not be substantial." In fact, one detainee was waterboarded 83 times, and another detainee 183 times, by interrogators who "continuously applied large volumes of water."<sup>52</sup>

The Bybee Techniques Memo also relied heavily on the CIA's assurance that "a medical expert ... will be present throughout," and "the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm."<sup>53</sup>

Later memoranda placed even greater reliance on medical experts from the CIA's Office of Medical Services (OMS) to ensure that the pain and suffering interrogators inflicted on detainees would not reach the level of torture.<sup>54</sup> Those memos, signed by acting OLC head Steven Bradbury in 2005 and declassified in 2009, give the most detailed description available of the "enhanced" CIA techniques.

In addition to the techniques listed above, the Bradbury memos approved "water dousing," in which interrogators pour cold water on a detainee. In order to prevent hypothermia, "[a] medical officer must observe and monitor the detainee throughout application of this technique" and "ambient temperatures must remain above 64°F," and there were time limits placed on detainees exposure:

- For water temperature of 41°F, total duration of exposure may not exceed 20 minutes without drying and rewarming.
- For water temperature of 50°F, total duration of exposure may not exceed 40 minutes without drying and rewarming.
- For water temperature of 59°F, total duration of exposure may not exceed 60 minutes without drying and rewarming.<sup>55</sup>

The Bradbury memoranda considered the legality of two techniques under the torture statute — waterboarding and extended sleep deprivation by means of shackling — to present a "substantial question."<sup>56</sup>



## **Sleep Deprivation**

According to Bradbury's memo,

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two-to-three foot diameter of movement. The detainee's feet are shackled to a bolt in the floor. Due care is taken to ensure that the shackles are neither too loose nor too tight for physical safety. We understand from discussions with OMS that shackling does not result in any significant physical pain for the subject.<sup>57</sup>

Bradbury wrote that detainees were continually monitored by closed-circuit television to ensure that they would not fall asleep and dangle from their shackles, and monitored for edema, swelling in the lower legs:

OMS has advised us that this condition is not painful, and that the condition disappears quickly once the detainee is permitted to lie down. Medical personnel carefully monitor any detainee being subjected to standing sleep deprivation for edema or other physical and psychological conditions.<sup>58</sup>

Because several detainees did experience edema as a result of standing sleep deprivation, the CIA, in consultation with OMS, developed an alternative protocol for "horizontal sleep deprivation," which involved shackling detainees' arms and legs to the floor far enough away from their bodies that the limbs "cannot be used for balance or comfort" but not so far as to "force the limbs beyond natural extension or create tension on any joint." The CIA assured OLC that this was "not significantly painful, according to the experience and professional judgment of OMS and other personnel."<sup>59</sup>

While they were being shackled in a standing position for purposes of sleep deprivation, detainees were kept in diapers rather than being unshackled or allowed to use a bucket or latrine. The CIA told OLC in 2005 that releasing a detainee from shackles during sleep deprivation to urinate or defecate "would interfere with the effectiveness" of the sleep deprivation technique.<sup>60</sup> Written guidelines from the CIA Office of Medical Services in May 2004 list diapering "generally for periods not greater than 72 hours" as a standard measure, "prolonged diapering" as an enhanced measure, and states that only the medical limitation on diapering is "[e]vidence of loss of skin integrity due to contact with human waste materials."<sup>61</sup> In 2005, however, the CIA assured OLC that diapers were regularly checked and changed if soiled, and detainees had not developed skin lesions.<sup>62</sup>

According to the Bradbury memos, the longest consecutive period a detainee was deprived of sleep was 180 hours.<sup>63</sup>

## **Waterboarding**

Waterboarding, according to written guidelines by the CIA's Office of Medical Services, was "by far the most traumatic of the enhanced interrogation techniques." OMS described serious risks

based on the CIA's previous experience administering the waterboard:

[F]or reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness. An unresponsive subject should be righted immediately, and the interrogator should deliver a sub-xyphoid thrust to expel the water. If this fails to restore normal breathing, aggressive medical intervention is required. Any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard.<sup>64</sup>

Before this occurred, however, OMS stated that “a series of several relatively rapid waterboard applications is medically acceptable. ... Several such sessions per 24 hours have been employed without apparent medical complication.” OMS recommended a careful medical assessment before more than 15 waterboard applications within a 24 hour period, and warned of “cumulative” effects after three to five consecutive days of intense waterboarding.<sup>65</sup>

The 2005 OLC memos contain more details about potential medical complications of waterboarding, and precautions taken to avoid them. These included: (1) feeding detainees liquid diets beforehand to reduce the risk of vomiting, and (2) using saline solution instead of water to reduce the risk of pneumonia. The memo also states that that equipment for emergency resuscitation and medical supplies for performing a tracheotomy are available for detainees subjected to waterboarding.<sup>66</sup>

Throughout the 2005 memos, Bradbury placed great reliance on OMS's assurances about the safety of the techniques and their role in monitoring interrogation and modifying techniques as needed. A May 10 memorandum on the legality of individual techniques under the Torture Statute cited a CIA assurance that medical and psychological personnel are continuously present and that “[d]aily physical and psychological evaluations are continued” during the entire period of use for “enhanced” techniques.<sup>67</sup>

OMS participation was especially crucial to Bradbury's finding that waterboarding and sleep deprivation enforced by shackling did not violate the Torture Statute. Footnote 31 stated that OMS had assured OLC that “although the ability to predict is imperfect — they would object to the initial or continued use of any technique if their psychological assessment of the detainee suggested that the use of the technique might result in post-traumatic stress disorder (PTSD), chronic depression, or other condition that could constitute prolonged mental harm.”<sup>68</sup> The memorandum concluded with a paragraph again emphasizing the crucial role of medical and psychological personnel, and OLC's assumption that in addition to monitoring interrogations and stopping or adjusting techniques when needed, “medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees.”<sup>69</sup>

A second memo, on whether combined techniques would rise to the level of torture, states of medical professionals' evaluations of detainees and monitoring of interrogations that “these safeguards, which were critically important to our conclusions about individual techniques, are even more significant when techniques are combined.” The same memo later states that OMS's role is “essential to our advice” that the CIA program does not violate the torture statute.<sup>70</sup> A third memo, regarding whether the CIA program constitutes cruel, inhuman, or degrading treatment, places similar reliance on OMS.<sup>71</sup>

In 2006, in response to revelations about the role of mental health professionals' involvement in "enhanced" interrogation, the American Medical Association adopted ethical guidelines stating that physicians may not "directly participate in an interrogation" or "monitor interrogations with the intention of intervening in the process," because "a role as physician-interrogator undermines the physician's role as healer."<sup>72</sup> Similarly, the American Psychiatric Association has stated that "[n]o psychiatrist should participate directly in the interrogation of persons held in custody."<sup>73</sup>

Over the objections of some members, the American Psychological Association (APA) permits its members to participate in interrogation, but since 1985 it has forbidden them from facilitating "cruel, inhuman, or degrading treatment or punishment" even if it did not reach the level of torture.<sup>74</sup> In 2007, the APA forbade any participation in the following techniques:

Mock executions; water-boarding or any other form of simulated drowning or suffocation; sexual humiliation; rape; cultural or religious humiliation; exploitation of fears, phobias or psychopathology; induced hypothermia; the use of psychotropic drugs or mind-altering substances; hooding; forced nakedness; stress positions; the use of dogs to threaten or intimidate; physical assault including slapping or shaking; exposure to extreme heat or cold; threats of harm or death; isolation; sensory deprivation and over-stimulation; sleep deprivation; or the threatened use of any of the above techniques to an individual or to members of an individual's family.<sup>75</sup>

## What Specific Acts Have U.S. Courts Identified as Torture or CID?

Certain patterns and themes appear in those U.S. cases in which the offense of torture is found. First, if a practice is considered a violation of the Fifth, Eighth or 14th Amendment then it will likely be deemed CID at the very least.<sup>76</sup> Second, courts focus on the duration, repetition and combination of methods when considering whether torture has occurred.<sup>77</sup> The longer and more repetitious a practice's duration, particularly when combined with other abusive acts, the more likely it will be considered torture.<sup>78</sup> Third, serious harm resulting from the treatment makes a finding of torture more likely.<sup>79</sup> Lasting medical conditions will make a finding of torture or CID more likely.<sup>80</sup> Methods that lead to broken bones,<sup>81</sup> loss of organ function,<sup>82</sup> scarring,<sup>83</sup> loss or limited use or maiming of limbs and other appendages,<sup>84</sup> or ongoing mental-health issues have been found to constitute torture or CID.<sup>85</sup>

U.S. courts, using the sort of totality-of-the-circumstances approach discussed above, have determined that the following combinations of acts amount to torture:

- Slapping that causes temporary hearing loss; kicking with boots; physical beating; beating the head and chest until consciousness was lost;<sup>86</sup>
- Twenty days of physical beatings and electric shocks through needles;<sup>87</sup>
- Brutal beating with an electric baton, a leather belt, and iron chains until the victim bled and lost consciousness;<sup>88</sup>
- Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;<sup>89</sup>

- Administration of the “water cure,” where “a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation;”<sup>90</sup>
- Russian roulette;<sup>91</sup>
- Binding the victim’s hands and arms behind his back and leaving him naked outside for 25 days, providing very little food and water, and regularly whipping him until he bled;<sup>92</sup>
- Binding the victims, forcing them to lie in shallow pits of dank water filled with corpses and vermin, beating them, burning them, shocking them with cattle prods, cutting their genitals, forcing them to play soccer with heavy stones while barefoot, denying them medical treatment, rape, covering them with ants among other practices;<sup>93</sup>
- Beatings and cigarette burns;<sup>94</sup>
- Beatings, suffocation, dousing victims with cold water, slapping, hair-pulling, forcing victims to kneel for hours, sleep deprivation, binding and suspending victims by their arms.<sup>95</sup>

Several U.S. courts have decided cases involving allegations of torture through the forcible administration of water, though most of the precedents predate the ratification of the Convention Against Torture. In the early 20th century, U.S. Army Captain Elwin Glenn was court-martialed for administering the “water cure” to civilians during the combat operations in the Philippines.<sup>96</sup> Japanese military personnel were convicted of war crimes by the International Military Tribunal for the Far East for using the “water treatment” method on POWs.<sup>97</sup> And several lower-ranking soldiers were convicted of waterboarding, a war crime, in the years following the war.<sup>98</sup>

Several state courts have decided cases involving waterboarding as well. In *White v. State*, the Mississippi Supreme Court threw out a 1922 murder conviction because the defendant’s confession had been obtained using the “water cure.”<sup>99</sup> In that case, men held the appellant down while one stood on him and the other poured water into his nose in order to gain a confession.<sup>100</sup> The court described this treatment as “barbarous” and “brutal treatment,” “causing pain and horror.”<sup>101</sup>

In *Cavazos v. State*, the Texas Court of Criminal Appeals similarly reversed a murder conviction where officers had extracted a confession by coercive means, including the water cure.<sup>102</sup> The Cavazos court found in 1942 that the trial judge had improperly admitted a confession that was “obtained by force and physical and mental torture.”<sup>103</sup>

Four decades after *Cavazos*, four Texas law-enforcement officers who had waterboarded suspects were convicted of “violating and conspiring to violate the civil rights of prisoners in their custody.”<sup>104</sup> The defendants, a sheriff and three deputies, had “draped a towel over each man’s face and pour[ed] water over it until the men gagged.”<sup>105</sup> While not considering the nature of the treatment itself on appeal, the U.S. Court of Appeals for the Fifth Circuit in 1984 repeatedly described the actions of the sheriff and deputies as “torture.”<sup>106</sup>

While all of the above cases were decided prior to CAT's ratification, U.S. courts have held that waterboarding is a form of torture after the U.S.'s ratification as well. For example, in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, the U.S. District Court for the District Court of Hawaii specifically listed waterboarding (or "water cure") as one form of torture practiced by the Marcos regime, which used such techniques against political dissidents who then brought their claims in U.S. courts when seeking asylum.<sup>107</sup> The U.S. Court of Appeals for the Ninth Circuit subsequently supported this finding.<sup>108</sup> The Marcos regime used waterboarding against political dissidents while it was in control of the Philippines, and it was the basis of many claims by victims in the ensuing litigation in American courts.

## What Specific Acts do International and Foreign Cases Identify as Torture?

International and foreign cases may also be helpful in evaluating what constitutes torture. War crimes tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the European Court of Human Rights (ECHR), and foreign courts have generated a large body of case law regarding torture and CID. While these decisions are not binding on U.S. courts, they provide examples of how other courts around the world have interpreted torture and CID. Though uncommon, some U.S. courts have cited foreign decisions when considering allegations of torture or other violations of international law.<sup>109</sup>

The enacting statute for every international criminal tribunal includes torture as a punishable offense.<sup>110</sup> Typically, these international tribunals have fewer required elements for torture than in U.S. law. These elements include: (1) an act or omission (2) intentionally inflicted (3) to cause severe mental or physical pain and suffering (4) for a prohibited purpose such as obtaining information or a confession, punishing, humiliating, coercing, or discriminating.<sup>111</sup>

Unlike most of the U.S. torture statutes, the ICTY and the ICTR do not require that the perpetrator be a public official, have no explicit custody requirement, and do not require specific intent.

The ICTY uses an approach similar to that used by the ECHR when evaluating claims of torture. The Trial Chamber of the ICTY has stated that when assessing a claim of torture, the tribunal should

take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and the method used and the position of inferiority of the victim. Also relevant to the Chamber's assessment is the physical or mental effect of the treatment on the victim, the victim's age, sex, or state of health. Further, if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole.<sup>112</sup>

The Extraordinary Chambers in the Courts of Cambodia (ECCC), a tribunal established jointly by the United Nations and the Cambodian government to prosecute atrocities committed by the

Khmer Rouge regime, has held waterboarding to be torture. In Judgment 001, the Cambodian tribunal convicted Kaing Guek Eav (aka “Duch”) of the crime against humanity of persecution, enslavement, imprisonment, torture and grave breaches of the Geneva Conventions of 1949 due to his involvement with the notorious S-21 prison camp. Waterboarding was one of the acts of torture charged, specifically “pouring water into [the victim’s] nose to induce a sensation of suffocation and drowning.”<sup>113</sup> Applying CAT’s definition of torture, the court found that waterboarding was torture since it “inflicted severe physical pain or mental suffering for the purpose of obtaining a confession or punishment.”<sup>114</sup>

In *Ireland v. The United Kingdom*, the ECHR found that the following practices, applied “for hours at a stretch” for a total period of up to one week, constituted “inhuman and degrading treatment” but did not rise to the level of torture:

- Wall-standing: forcing the detainees to remain for hours in a “stress position,” described by those who underwent it as being spread-eagled against the wall, with fingers placed high above the head against the wall, legs spread apart and feet back, causing them to stand on their toes and to put most of the body’s weight on the fingers;
- Hooding: placing a dark-colored bag over the detainee’s head and, at least initially, keeping it there continually except during interrogation;
- Subjection to noise: pending an interrogation, holding a detainee in a room with continuous loud and hissing noises;
- Deprivation of sleep: keeping detainees awake for prolonged periods prior to interrogation;
- Deprivation of food and drink: subjecting detainees to a reduced diet.<sup>115</sup>

The ECHR found that the distinction between torture and inhuman and degrading treatment “derives primarily from a difference in the suffering inflicted” and that the five practices enumerated above “did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”<sup>116</sup> Each of these five techniques has been used, repeatedly and systematically, on detainees in U.S. custody over the course of the past decade — often for much longer consecutive periods than discussed in the ECHR decision.<sup>117</sup>

In *Aksoy v. Turkey*, the ECHR found that a man subjected to “Palestinian hanging,” whereby a prisoner has his hands tied behind his back and is then suspended by his arms, had been tortured.<sup>118</sup> Variations of this treatment lasted for four days, leaving him unable to use his hands.<sup>119</sup> The court held that this practice was “of such a serious and cruel nature that it can only be described as torture.”<sup>120</sup>

Most recently, in *El-Masri v. Macedonia*, the ECHR found that the CIA’s treatment of German citizen Khaled El-Masri amounted to torture. The court credited El-Masri’s allegations that at the Skopje airport, he was

beaten severely by several disguised men in black. He was stripped and sodomised with an object. He was placed in a [diaper] and dressed in a dark

blue short-sleeved tracksuit. Shackled and hooded, and subjected to total sensory deprivation, the applicant was forcibly marched to a CIA aircraft. ... When on the plane, he was thrown down to the floor, chained down, and forcibly tranquilised. While in that position the applicant was flown to Kabul. ... In the Court's view, such treatment amounted to torture.<sup>121</sup>

The court found that El-Masri had been further mistreated in Afghanistan, but examined those allegations in less detail because it was primarily concerned with evaluating Macedonia's responsibility.<sup>122</sup>

## What Acts are Prohibited Under the Army Field Manual?

The 1992 Army Field Manual on interrogation, which remained in effect until a revision in 2006, absolutely banned torture and CID. The 1992 Field Manual listed the following acts as examples of prohibited "physical torture":

- Electric shock;
- Infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape);
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time;
- Food deprivation;
- Any form of beating;<sup>123</sup>

The 1992 Field Manual listed as examples of banned "mental torture";

- Mock executions;
- Abnormal sleep deprivation;
- Chemically induced psychosis.<sup>124</sup>

The 2006 revision of the Army Field Manual lists the following (when used in connection with interrogation) as examples of prohibited behavior:

- Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes;
- Applying beatings, electric shock, burns, or other forms of physical pain;
- Waterboarding;

- Using military working dogs;
- Inducing hypothermia or heat injury;
- Conducting mock executions;
- Depriving the detainee of necessary food, water, or medical care.<sup>125</sup>

The 2006 Field Manual makes it clear that the above list is not exhaustive. Even so, it no longer includes the 1992 version's specific prohibitions on stress positions, sleep deprivation and improper use of restraints.<sup>126</sup>

## What Acts has the U.S. Government Defined as Torture or Abuse When Performed by Other Governments Around the World?

The United States has routinely and firmly condemned as torture and/or abuse many of the same techniques used by U.S. personnel against detainees over the course of the past decade.

The Department of State (DOS), in its annual U.S. country reports on human rights practices, has characterized many of the coercive techniques used against detainees in U.S. custody in the post-September 11 era as torture, abuse or cruel treatment. These reports, assessing the human rights situation in 194 countries around the world, are submitted annually as required by both the Foreign Assistance Act of 1961 and the Trade Act of 1974.

The CIA, in an internal review, acknowledged that the “[enhanced interrogation techniques] used by the [CIA] ... are inconsistent with the public policy positions that the United States has taken regarding human rights.”<sup>127</sup>

The following techniques and treatments have both been used by the U.S. against detainees within its control and been deemed torture, abuse or cruel treatment in DOS's annual Human Rights Reports.<sup>128</sup>

***Stress Positions:*** DOS criticized Jordan in its 2006 Human Rights Report for subjecting detainees to “forced standing in painful positions for prolonged periods.” In its 2000, 2001 and 2002 reports on Iran, “suspension for long periods in contorted positions” is described as torture. In its 2001 and 2002 Human Rights Reports on Sri Lanka, “suspension by the wrists or feet in contorted positions” and remaining in “unnatural positions for extended periods” are described as “methods of torture.”

***Temperature Manipulation:*** In its 2005 Human Rights Report on Turkey, DOS classified “exposure to cold” as torture. Similarly, in its 2005 human rights report on Syria, it referred to “dousing with cold water” as a form of “torture and ill-treatment,” while referring to “dousing victims with freezing water and beating them in extremely cold rooms” as “torture.” Exposure to cold was similarly cited as “torture and abuse” in the 2006 reports for both Turkey and Syria, and as “torture and degrading treatment” in its report for China. Dousing with hot or cold water was similarly described as “torture” in the 2000 Human Rights Report on Egypt.



**Waterboarding:** In the section entitled Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the 2003–2007 Human Rights Reports on Sri Lanka classified “near-drowning” as “torture and abuse.” In its Human Rights Reports for Tunisia from 1996 to 2004, “submersion of the head in water” is deemed “torture.” In the 2005 and 2006 Human Rights Reports for Tunisia, this practice is considered “torture and abuse.”

**Threats of Harm to Person, Family or Friends:** In its 2002 and 2006 Human Rights Reports for Brazil, Egypt, Tunisia and Turkey, DOS referred to the use of threats against prisoners as a form of torture or cruel, inhuman or degrading treatment.

**Sleep Deprivation:** In the 2005 Human Rights Reports on Indonesia, Iran, Jordan, Libya, Saudi Arabia and Turkey, sleep deprivation was condemned as torture or CID. In its 2000, 2001 and 2002 reports on Pakistan, denial of sleep is described as a common torture method.

**Sensory Overload-Noise and Light:** The 1999, 2001 and 2002 Human Rights Reports on Turkey refer to the use of “loud music” as a “[c]ommonly employed method[] of torture.” Interrogating prisoners for long periods of time under “bright lights” was considered “mistreatment” and included under the “Torture and CID” section in the 2001 Human Rights Report on Burma.

**Sexual Humiliation:** The United States regularly criticizes other governments for subjecting detainees to torture through sexual humiliation. In its 2006 Human Rights Report on Egypt, and in its 2000, 2001, 2002 and 2006 Human Rights Reports on Turkey, the State Department noted that detainees were subject to “torture” by forcing them to strip in front of the opposite sex, subjecting them to sexual touching or insult, or threatening them with rape.

**Prolonged Solitary Confinement:** In the 2005 and 2006 Human Rights Reports on Jordan, “extended solitary confinement” is deemed “torture.”

**Forced Nudity:** In the 2000, 2001 and 2002 Human Rights Reports for Cameroon, the United States refers to the stripping of inmates as “degrading treatment.”

**Confinement in Small Space:** The 2001 and 2002 Human Rights Reports on Iraq described extended solitary confinement in small dark compartments as torture. In its 2002 report on North Korea, “confinement to small ‘punishment cells,’ in which prisoners were unable to stand upright or lie down, where they could be held for several weeks” is defined as a method of torture.

**Forced Prolonged Standing:** In its 2001 and 2002 Human Rights Reports on Turkey, forced prolonged standing is described as a method of torture.

## **Have Any Former Bush Administration Officials or Military Officials Concluded That Detainees in U.S. Custody Have Been Tortured?**

Yes, various Bush officials and military officials have publicly stated that certain detainees in U.S. treatment were tortured, though many others maintain that the “enhanced interrogation techniques” did not rise to the level of torture.

Susan J. Crawford, the convening authority for the Guantánamo military commissions from 2007 to 2010, is one such example. According to Crawford, “We tortured [Mohammed al] Qahtani,” whose “treatment met the legal definition of torture.”<sup>129</sup> Because of this, Crawford refused to refer al Qahtani to the military commissions for trial.<sup>130</sup>

Alberto Mora, who served as general counsel of the Navy, strongly opposed the use of many of the interrogation techniques approved by a Secretary of Defense Donald Rumsfeld on Dec. 2, 2002, and subsequently used in Guantánamo Bay. According to Mora, many of these techniques, whether used singly or in combination, could “rise to the level of torture.”<sup>131</sup> In 2006, Mora publically stated that cruel, inhuman or degrading treatment had been applied in Abu Ghraib, Guantánamo, “and other locations” and that the treatment “may have reached the level of torture in some instances.”<sup>132</sup>

Colonel Lawrence Wilkerson, chief of staff to Secretary of State Colin Powell, is another example. According to Wilkerson:

America’s armed forces were involved in practices that violated the Geneva Conventions, the International Convention Against Torture, U.S. domestic law, and the written and unwritten moral code of the American soldier. Simply put, American fighting men and women were abusing detainees.<sup>133</sup>

He has also publically stated that “waterboarding is a war crime.”<sup>134</sup>

Major General Antonio Taguba, who led the U.S. Army investigation of prisoner abuse at Abu Ghraib, has also publicly stated that detainees in U.S. custody there were tortured.<sup>135</sup>

Many more Bush administration officials, including President George W. Bush, Vice President Cheney, Rumsfeld, and CIA Directors George Tenet, Michael Hayden, and Porter Goss, have denied that the approved CIA techniques constitute torture or that detainees were tortured as a result of administration policy.

## **Has the Red Cross Referred to the Treatment of Detainees as Torture or Abuse?**

Yes. While most reports from the International Committee of the Red Cross (ICRC) are typically confidential and not available to the public, those that have become public include allegations of abuse, which in some cases — in the ICRC’s words — “amount to torture”<sup>136</sup> or are “tantamount to torture.”<sup>137</sup>

Two reports in particular have been publicly released. The first discusses the treatment of detainees in Iraq,<sup>138</sup> and the second discusses the treatment of 14 “high-value detainees” in CIA custody.<sup>139</sup> In each, the ICRC finds evidence of detainee abuse, including torture, as further discussed below.

In its report on detainee treatment in Iraq, the ICRC highlights a series of “serious violations of International Humanitarian Law,” some of which are “tantamount to torture.”<sup>140</sup> The primary violations occurred largely in the beginning stages of the internment process, except for those labeled “high value,” who experienced mistreatment throughout their detention.<sup>141</sup> Some of the violations catalogued by the ICRC include:

- Brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury;
- Absence of notification of arrest of persons deprived of their liberty to their families causing distress ...;
- Physical or psychological coercion during interrogation to secure information;
- Prolonged solitary confinement in cells devoid of daylight;
- Excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.<sup>142</sup>

In this report, the ICRC describes the “brutality”<sup>143</sup> and “ill-treatment” experienced by detainees upon capture as “frequent,” indicating a “consistent pattern with respect to times and places of brutal behavior during arrest.”<sup>144</sup> More specifically, those suspected of security offenses or deemed to have an “intelligence value,” were at “high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture.”<sup>145</sup> Among other harsh treatments, they were kept in strict solitary confinement in cells devoid of sunlight for nearly 23 hours a day, an act that, according to the ICRC, constitutes “a serious violation of the Third and Fourth Geneva Conventions.”<sup>146</sup> At least one allegation involved “death resulting from harsh conditions of internment and ill-treatment during initial custody.”<sup>147</sup> However, high-value detainees were not the only ones subjected to ill-treatment, some of which constituted torture. Indeed, the ICRC notes that “the use of ill-treatment” against “persons deprived of their liberty,” not just high-value detainees, “went beyond exceptional cases and might be considered as a practice tolerated” by the coalition forces, of which the United States had the lead.<sup>148</sup> This is compounded by the fact that according to the ICRC’s own estimate, which was based on military intelligence officers, “between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake.”<sup>149</sup>

The report cites the 12 most frequently alleged “methods of ill-treatment,” which were used “in a systematic way to gain confessions and extract information” from those suspected of security offenses or deemed to have an intelligence value.<sup>150</sup> These systematically observed and documented methods include:<sup>151</sup>

- Hooding. This was used to restrict vision, to disorient, and to prevent the detainee from breathing freely. It lasted anywhere from a few hours to 2–4 consecutive days, and was “sometimes used in conjunction with beatings” to “increase anxiety as to when blows would come.”
- Extremely tight handcuffing with flexi-cuffs. At times they were made so tight and used for such extended periods that they caused skin lesions and long-term medical consequences, such as nerve damage.
- Beatings with hard objects, such as pistols and rifles, slapping, punching, and kicking with knees or feet.
- Pressing the face into the ground with boots.

- Threats of ill-treatment, reprisals against family members, imminent execution or transfer to Guantánamo.
- Forced nudity for several days while held in solitary confinement in an empty and completely dark cell that included a latrine.
- Solitary confinement combined with threats, insufficient sleep, food/water deprivation, minimal access to showers, denial of access to open air, and prohibition of contacts with other detainees.
- Being paraded naked outside of cells in front of other detainees and guards, while hooded or with women's underwear over their heads.
- Acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women's underwear over their head for prolonged periods, while being mocked by guards, including female guards, and sometimes photographed.
- Being attached repeatedly over several days, for several hours each time, with handcuffs to the bars of the cell door in humiliating (naked or in underwear) and/or uncomfortable positions causing physical pain.
- Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun over several hours, including during the hottest time of the day.
- Being forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.

Other findings reported by the ICRC include:

- Suspects being “severely beaten” by coalition forces after having their neck stamped on by soldiers and their money confiscated without receipt.<sup>152</sup>
- A detainee being forced to sit “on the hot surface of what he surmised to be the engine of a vehicle, which had caused severe burns to his buttocks. The victim lost consciousness. The ICRC observed large crusted lesions consistent with his allegation.”<sup>153</sup>
- Another detainee was forced to lie face down, on a hot surface during transportation, causing “severe skin burns that required three months hospitalization,” which involved skin grafts, the amputation of his right index fingers, and the loss of use of another finger.<sup>154</sup>
- Occasional observations of “haematoma and linear marks compatible with repeated whipping or beating.”<sup>155</sup>

The report highlights problems at the Abu Ghraib prison at a time prior to the public uproar over the abuses occurring there following the release of pictures depicting torture and cruel conditions. The report notes that “[i]n certain cases, such as in Abu Ghraib military intelligence

section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information.”<sup>156</sup> More specifically, several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process [at Abu Ghraib] to ... use inhumane and degrading treatment, including physical and psychological coercion” in order to secure the detainees’ cooperation.<sup>157</sup>

Confirming how widespread and systematic the abuses were at certain detention centers throughout Iraq (not just at Abu Ghraib), the report cites various memoranda given to coalition forces documenting episodes of “ill-treatment.” In one such memo, “over 200 allegations of ill-treatment” are catalogued; in other, “approximately 50” are reviewed.<sup>158</sup> In a description of one detainee’s experience, the report states:

In one illustrative case, a [detainee] arrested at home by the [coalition forces, “CF”] on suspicion of involvement in an attack against the CF, was allegedly beaten during interrogation in a location in the vicinity of Camp Cropper. He alleged that he had been hooded and cuffed with flexi-cuffs, threatened to be tortured and killed, urinated on, kicked in the head, lower back and groin, force-fed a baseball which was tied into the mouth using a scarf and deprived of sleep for four consecutive days. Interrogators would allegedly take turns ill-treating him. When he said he would complain to the ICRC he was allegedly beaten more. An ICRC medical examination revealed haematoma in the lower back, blood in urine, sensory loss in the right hand due to tight handcuffing with flexi-cuffs, and a broken rib.<sup>159</sup>

At the same time, the report makes clear that at “regular internment facilities,” the treatment of detainees was generally “respectful,” with a few “individual exceptions.”<sup>160</sup>

Also in 2004, the ICRC reported that medical personnel in Guantánamo were reporting to interrogators about prisoners’ mental health and vulnerabilities, usually through a group of psychologists called the Behavioral Science Consultation Team who advised interrogators. The ICRC called this “a flagrant violation of medical ethics,” and stated that it was part of a systematic effort to coerce prisoners through

humiliating acts, solitary confinement, temperature extremes, use of forced positions. ... The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.<sup>161</sup>

In the 2007 ICRC report on the treatment of 14 high-value detainees held in CIA custody before being transferred to Guantánamo Bay under Defense Department authority, the ICRC concludes that the “allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture.”<sup>162</sup> The report then goes on to catalogue the various “methods of ill-treatment” alleged by the detainees, which are variously described as “severe and multifaceted,”<sup>163</sup> “extremely harsh,”<sup>164</sup> and “intrusive and humiliating,”<sup>165</sup> among other such descriptions. These methods, which were inflicted in combination — “either simultaneously, or in succession” — include:

- Continuous solitary confinement and incommunicado detention.”<sup>166</sup> All 14 detainees were kept in continuous incommunicado, solitary confinement while in CIA custody, ranging from 16 months to 4½ years. For 11 of the 14 detainees, it was for more than three years.<sup>167</sup> During this time they had “no knowledge of where they were being held,” no contact with legal representation, no contact whatsoever with their families, no access to an independent third party (including the ICRC), and “no contact with persons other than their interrogators or guards,” the latter of whom were typically masked and rarely, if ever, communicated with the detainees.<sup>168</sup> Essentially, the ICRC concludes, the detainees were “missing persons,” a phenomenon that “violates, or risks violating, a range of customary [international] rules, most notably ... the prohibition of torture and/or other cruel, inhuman or degrading treatment (CID).<sup>169</sup>
- Suffocation by water poured over a cloth placed over the nose and mouth, alleged by three of the fourteen.
- Prolonged stress standing position, naked, held with the arms extended and chained above the head, as alleged by ten of the fourteen, for periods from two or three days continuously, and for up to two or three months intermittently, during which period toilet access was sometimes denied resulting in allegations from four detainees that they had to defecate and urinate over themselves.
- Beatings by use of a collar held around the detainees neck and used to forcefully bang the head and body against the wall, alleged by six of the fourteen.
- Beating and kicking, including slapping, punching, kicking to the body and face, alleged by nine of the fourteen.
- Confinement in a box to severely restrict movement alleged in the case of one detainee.
- Prolonged nudity alleged by eleven of the fourteen during detention, interrogation and ill-treatment; this enforced nudity lasted for periods ranging from several weeks to several months.
- Sleep deprivation was alleged by eleven of the fourteen through days of interrogation, through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music. One detainee was kept sitting on a chair for prolonged periods of time.
- Exposure to cold temperature was alleged by most of the fourteen, especially via cold cells and interrogation rooms, and for seven of them, by the use of cold water poured over the body or, as alleged by three of the detainees, held around the body by means of a plastic sheet to create an immersion bath with just the head out of the water.
- Prolonged shackling of hands and/or feet was alleged by many of the

fourteen.” One detainee alleged to have been shackled for 19 months straight. Another detainee’s shackles had to be cut off his ankles “as the locking mechanism [had] ceased to function, allegedly due to rust.”<sup>170</sup>

- Threats of ill-treatment to the detainee and/or his family, alleged by nine of the fourteen.
- Forced shaving of the head and beard, alleged by two of the fourteen.
- Deprivation/restricted provision of solid food from 3 days to 1 month after arrest, alleged by eight of the fourteen.<sup>171</sup>

The above techniques were “further exacerbated” by the conditions of confinement, which were “clearly manipulated in order to exert pressure on the detainees concerned” according to the ICRC.<sup>172</sup>

In the section on “prolonged stress positions,” the ICRC provides the following description:

While being held in this position [a prolonged standing stress position involving being shackled to a bar or hook in the ceiling by the detainee’s wrists, typically while naked, for a continual period of time, ranging from two to three days continuously, up to two or three months intermittently] some of the detainees were allowed to defecate in a bucket. A guard would come to release their hands from the bar or hook in the ceiling so that they could sit on the bucket. None of them, however, were allowed to clean themselves afterwards. Others were made to wear a garment that resembled a diaper. This was the case for Mr. Bin Attash in his fourth place of detention. However, he commented that on several occasions the diaper was not replaced so he had to urinate and defecate on himself while shackled in the prolonged stress standing position. Indeed, in addition to Mr. Bin Attash, three other detainees specified that they had to defecate and urinate on themselves and remain standing in their own bodily fluids. ... Although this position prevented most detainees from sleeping, three of the detainees stated that they did fall asleep once or more while shackled in this position. ... When they did fall asleep held in this position, the whole weight of their bodies was effectively suspended from the shackled wrists, transmitting the strain through the arms to the shoulders.<sup>173</sup>

The ICRC emphasizes repeatedly how the methods of ill-treatment were always used in combination, never in isolation.<sup>174</sup> In the section of the report discussing the practice of placing detainees in small confinement boxes, the report makes this point clear:

The boxes were used repeatedly during a period of approximately one week in conjunction with other forms of ill-treatment, such as suffocation by water, beatings and use of the collar to slam him against the wall, sleep deprivation, loud music and deprivation of solid food. During this period, between sessions of ill-treatment he [Abu Zubaydah] was made to sit on the floor with a black hood over his head until the next session began.<sup>175</sup>

The report also highlights how the detainees’ conditions of confinement, which were “clearly

manipulated in order to exert pressure on the detainees concerned,” “exacerbated” the “ill-treatment to which the fourteen were subjected.”<sup>176</sup> These abusive conditions of confinement were a core part of the CIA’s detention regime, which was “clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalisation and dehumanisation.”<sup>177</sup>

Such conditions involved the deprivation and restriction of various basic needs, including:

- Deprivation of access to the open air
- Deprivation of exercise
- Deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation
- Restricted access to the Koran linked with interrogation<sup>178</sup>

The ICRC wrote that “the consistency of the detailed allegations provided separately by each of the fourteen adds particular weight to the information provided” in the report.<sup>179</sup>

The former detainees’ accounts of their own torture, their medical records, and their current medical status are considered classified information, so it is not possible to further corroborate or evaluate their accounts.

## Have U.S. Civilian Courts Found Evidence of Abuse and/or Torture of Detainees in U.S. Custody?

Yes, in some cases.

In *United States v. Ghailani*, the U.S. District Court for the Southern District of New York held that the government may not use in a criminal trial “the testimony of a witness whom the government obtained only through information it allegedly extracted by physical and psychological abuse of the defendant.”<sup>180</sup> Finding such abuse, the court suppressed the testimony of a key witness.<sup>181</sup> The government itself did not dispute that all statements made by defendant that related to the present motion “were coerced and obtained in violation of his Fifth and Sixth Amendment rights.”<sup>182</sup>

Courts, evaluating the *habeas corpus* petitions of detainees, have similarly found evidence of torture and abuse.

In *Ali Ahmed v. Obama*, the U.S. District Court for the District of Columbia suppressed the statements of certain detainee witnesses due to the fact that they were subjected to torture.<sup>183</sup> Though the opinion, which is heavily redacted, fails to specify the details of this torture in the un-redacted sections, the court makes clear that “there is evidence that [redacted] underwent torture, which may well have affected the accuracy of the information he supplied to interrogators. [Redacted] spent time at Bagram and the Dark Prison, and alleges that he has



been tortured.”<sup>184</sup> The court further doubts the identification by the witness “due to the fact that it was elicited at Bagram amidst actual torture or fear of it.”<sup>185</sup> The court, finding that the government “presented no evidence to dispute the allegations of torture at Bagram or the Dark Prison,”<sup>186</sup> and citing the existence widespread, credible reports of torture and detainee abuse<sup>187</sup> at Bagram Prison, said it could not conclude “that past instances of torture did not impact the accuracy of later statements.”<sup>188</sup>

In *Saki Bacha v. Obama*, the U.S. District Court for the District of Columbia granted the detainee’s unopposed motion to suppress his out-of-court statements because the statements were made “as a product of torture.”<sup>189</sup> Ultimately, the judge granted the detainee’s petition for *habeas corpus* because of the failure to justify the reasons for his detention.<sup>190</sup>

In *Mohammed v. Obama*, the U.S. District Court for the District of Columbia suppressed the testimony of a key witness, Binyam Mohammed, because it was the product of torture.<sup>191</sup> In a sworn declaration summarized by the court, Mohammed stated that he “was brutalized for years while in United States custody overseas at foreign facilities.”<sup>192</sup> Much of the alleged mistreatment occurred after a rendition to Morocco,<sup>193</sup> but some took place in the so-called “Prison of Darkness” in Kabul. As summarized by the court, Mohammed’s head was banged against the wall of his cell repeatedly; he was chained to the floor and locked in complete darkness; he was deprived of sleep; and he was shackled frequently, “once for eight days on end in a position that prevented him from standing or sitting.”<sup>194</sup> Initially, Mohammed’s cell was kept dark for 23 hours a day. Showers were not permitted, and he received food once every 36 hours. Gradually, however, conditions improved, though only slightly.<sup>195</sup> The government did not challenge or deny any of the evidence of Mohammed’s abuse recounted above.<sup>196</sup>

In *Anam v. Obama*,<sup>197</sup> the U.S. District Court for the District of Columbia once again suppressed the majority of the government’s evidence because they were based on statements “tainted by the coercive interrogation techniques which Al Madhwani was subject [to] and [therefore] lack sufficient indicia of reliability.”<sup>198</sup> The court recounts the abuse inflicted on Al Madhwani, which included being blasted with music 24 hours a day where his “sole respite from the deafening noise was the screams of other prisoners,”<sup>199</sup> and being suspended in his cell from his left hand, causing long-term medical consequences.<sup>200</sup> Notably, the court found that not only did the government fail to refute the petitioner’s descriptions of his confinement, but it corroborated his “debilitating physical and mental condition ... thereby confirming his claims of harsh treatment.”<sup>201</sup> This harsh treatment involved, according to the court, “forty days of solitary confinement, severe physical and mental abuse, malnourishment, sensory deprivation, anxiety, and insomnia.”<sup>202</sup> Though his treatment improved once he was transferred to Guantánamo, the court concluded that “the Government fail[ed] to establish that months of less-coercive circumstances provide sufficient insulation from forty days of extreme coercive conditions [while detained by the U.S. in Afghanistan].”<sup>203</sup>

In *Hatim v. Obama*,<sup>204</sup> the U.S. District Court for the District of Columbia similarly found that the detainee petitioning for *habeas* review “was tortured at Kandahar and that he told his interrogators that he had attended [an Al Qaeda terrorist camp] only to avoid further punishment.”<sup>205</sup> As before, the court also noted that the government “does not refute the petitioner’s allegations of coercion or the widespread allegations of torture of other detainees prior to their arrival at [Guantánamo].”<sup>206</sup> The “torture” experienced by the detainee included, according to the allegations accepted by the court, being “severely mistreated,” being “beaten

repeatedly” and “kicked in the knees,” having “duct tape used to hold blindfolds on his head,” and being “threatened with rape if he did not confess to being a member of the Taliban or al-Qaida.”<sup>207</sup> Given the detainee’s “unrefuted allegations of torture,” the court stated:

When — as here — the government presents no evidence to dispute the detainee’s allegations of torture and fails to demonstrate that the detainee was unaffected by his past mistreatment, the court should not infer that the prior instances of coercion or torture did not impact the accuracy of the detainee’s subsequent statements.<sup>208</sup>

On the basis of such unrefuted claims, the court granted the detainee’s *habeas corpus* petition.<sup>209</sup>

In *Abdah v. Obama*, the U.S. District Court for the District of Columbia similarly rejected the statements of two detainee witnesses because of “unrebutted evidence in the record that, at the time of the interrogations at which they made the statements, both men had recently been tortured.”<sup>210</sup> Such torture included, according to the sworn testimony of the detainees, being “kept in complete darkness,” and being “hooded, given injections, beaten, hit with electric cables, suspended from above, made to be naked, and subjected to continuous loud music.”<sup>211</sup> Moreover, according to the court:

At a detention facility at Bagram, Afghanistan, Kazimi [one of the detainee witnesses] was “isolated, shackled, ‘psychologically tortured and traumatized by guards’ desecration of the Koran’ and interrogated ‘day and night, and very frequently.’ ” Both men asserted that they confessed to their interrogators’ allegations so that the torture would cease.<sup>212</sup>

In another *habeas* petition adjudicated in *Abdah*, the district court acknowledged “evidence in the record to support the contention that Esmail [the detainee petitioning for *habeas* review] was subjected to mistreatment while in United States custody,” but found that the detainee had exaggerated the extent of his mistreatment and declined to suppress his statements to interrogators.<sup>213</sup>

In *Salahi v. Obama*, the U.S. District Court for the District of Columbia found “ample evidence” that Salahi, the detainee petitioning for habeas review, “was subjected to extensive and severe mistreatment at Guantánamo.”<sup>214</sup> While admitting that Salahi had been mistreated by interrogators from mid-June through September of 2003, the U.S. government argued that subsequent statements made by Salahi should be admissible because their connection to the mistreatment was sufficiently attenuated through the passage of time to remove any taint.<sup>215</sup> The court, however, dismissed this argument concluding instead that Salahi’s statements were “tainted by coercion and mistreatment.”<sup>216</sup>



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## Memo in Support of Finding #2

In the immediate aftermath of September 11, the nation's leaders determined that they needed to invoke extraordinary powers to prevent terrorists from committing similar atrocities.

On September 16, Vice President Dick Cheney told Tim Russert on "Meet the Press" that the United States would have to work on "the dark side, if you will. We've got to spend time in the shadows in the intelligence world." Russert asked whether this meant the United States would lift restrictions on seeking the assistance of human rights violators to gather intelligence, and Cheney replied, "Oh, I think so. ... It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena."<sup>1</sup>

Cofer Black, the head of the counterterrorism center at the CIA, expressed similar sentiments, explaining that he wanted to prepare operatives for a drastic change from their previous rules of engagement "where we were staked to the ground like a junkyard dog. ... I was fully expecting a nasty, nasty war and I wanted the guys ready for a nasty war."<sup>2</sup>

The administration began to take the steps it believed were necessary to untie the intelligence community's hands. A classified presidential finding signed on September 17, 2001, gave the CIA broad authority to capture suspected terrorists. On November 13, the president signed an order authorizing the secretary of defense to establish military commissions to try terrorism suspects.<sup>3</sup> On December 28, 2001, the Office of Legal Counsel (OLC) concluded that federal courts did not have *habeas corpus* jurisdiction over detainees held at Guantánamo Bay.<sup>4</sup>

The most crucial legal question, though, was whether captives would be protected by the 1949 Geneva Conventions, which forbid all acts of torture, cruelty, violence or degrading treatment of detainees. The United States had applied the Conventions' protections to every enemy it faced since 1949, even in the face of gross violations of the treaties by communist North Korea and North Vietnam. But this time, the president reached a different decision.

### The Decision Not to Apply the Geneva Conventions

On February 7, 2002, President George W. Bush issued an order formally finding that the Geneva Conventions did not apply to the United States' conflict with Al Qaeda, and that "Taliban detainees are unlawful combatants" not entitled to the Conventions' protection. The order states:

As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.<sup>5</sup>

This confirmed Secretary of Defense Donald Rumsfeld's earlier order overriding the military's initial decision to apply Geneva in Afghanistan. General Tommy Franks, the commander of U.S. forces in Afghanistan, had ordered the military to apply the Conventions' requirements on October 17, 2001.<sup>6</sup> But on January 19, 2002, a little over a week after the first prisoners arrived at Guantánamo, Rumsfeld rescinded Franks's order,<sup>7</sup> in reliance on legal advice from the OLC that Geneva did not apply. Rumsfeld made his decision without consulting the military services' judge advocates general (JAGs), who would later oppose the decision not to apply Geneva.<sup>8</sup>

Department of State (DOS) legal advisor William H. Taft IV also strongly disagreed with Rumsfeld's decision. He acknowledged that detainees might not ultimately be entitled to prisoner of war status, but argued that at least with regard to Taliban fighters, "under the Geneva Conventions, these persons would be entitled to have their status determined individually" at a hearing known as an Article 5 tribunal.<sup>9</sup> As Taft later told the Task Force staff, these tribunals would have had the additional policy benefit of determining whether detainees were combatants at all, or whether "actually it just turns out that he's a person the other person hates, just had a family feud. ... [Y]ou should be a little careful about that."

But the "War Council" of lawyers closest to the White House on these issues — among them White House counsel Alberto Gonzales, OLC attorney John Yoo, and counsel to the vice president David Addington — strongly disagreed with Taft, and their position ultimately prevailed. A January 25 memo signed by Gonzales acknowledged that "[s]ince the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either U.S. or opposing forces engaged in armed conflict, despite several opportunities to do so."<sup>10</sup> He nevertheless recommended that the president set them aside. "The war against terrorism is a new kind of war," the memo said, in which it was essential to

quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians. ... In my judgment, this new paradigm renders obsolete Geneva's strict limits on questioning enemy prisoners.

Finding that Geneva did not protect any captured detainee, the memo noted, "[s]ubstantially reduces the threat of domestic prosecution under the War Crimes Act."<sup>11</sup>

## **The CIA: High-Level Authorization of Brutal Techniques**

The policy statement regarding "humane treatment" and "the principles of Geneva" in President Bush's February 7 order applied only to the military, not the CIA. This distinction was not accidental. Taft's notes summarizing discussions leading up to that decision state that "CIA lawyers believe," to the extent that Geneva protections are applied as a policy matter, "it is desirable to circumscribe that policy so as to limit its application to the CIA."<sup>12</sup>

In December 2001, the CIA had asked psychologist James Mitchell to review the "Manchester Manual," an Al Qaeda manual seized in the United Kingdom that advised operatives on

resisting interrogations. Mitchell was a retired psychologist from the military's Survival, Evasion, Resistance, and Escape program (SERE), which trains U.S. troops to resist interrogation if captured by enemy forces that do not follow the Geneva Conventions. The training is based, in part, on treatment of American POWs during the Vietnam and Korean Wars. The SERE program is administered through the Joint Personnel Recovery Agency (JPRA) of the Department of Defense (DOD). Mitchell contacted another SERE psychologist, Bruce Jessen, and the two drafted a proposal to use those techniques against captured members of Al Qaeda.<sup>13</sup>

On March 28, 2002, Abu Zubaydah was captured in a gunfight in Faisalabad, Pakistan. He was believed at the time to be the highest level Al Qaeda suspect in U.S. custody. He was transported to a secret CIA site, most likely in Thailand. There, FBI interrogators Ali Soufan and Stephen Gaudin began interviewing Abu Zubaydah while doctors worked to stabilize his condition. Soon after, according to Soufan, a CIA team including contractor James Mitchell began directing the interrogation, and using "enhanced" techniques such as nudity and sleep deprivation. When Soufan argued that his questioning had gained valuable intelligence and expressed skepticism about the new techniques, Mitchell reportedly replied, "This is science."<sup>14</sup>

Not long after that, Soufan saw a "confinement box" that "looked like a coffin," in which Mitchell was seeking authorization to place Abu Zubaydah.<sup>15</sup> He concluded that "the interrogation was stepping over the line from borderline torture. Way over the line." Soufan left the interrogation, with the approval of his FBI superiors, Assistant Director Pat D'Amuro and FBI Director Robert Mueller.<sup>16</sup>

CIA officials, particularly former counterterrorism center director Jose Rodriguez, have disputed Soufan's account. Most of the disputes concern whether the FBI agents using traditional interrogation techniques or CIA interrogators using "enhanced" methods had more success in obtaining intelligence from Abu Zubaydah — an issue discussed elsewhere. Rodriguez also asserted that Soufan<sup>17</sup> overestimated the contract psychologist's role, and "seemed to blame our contractor for everything," even threatening the contractor with violence at one point. Rodriguez wrote that "[a]t the time the contractor was just an advisor. He was not in charge of the interrogation." Rodriguez, however, does not dispute that the contract psychologist was advising FBI agents as well as CIA interrogators from the beginning, and Soufan does not dispute that Mitchell had CIA headquarters' authorization for his actions.<sup>18</sup>

According to Rodriguez, after Soufan and the FBI left, he met with the contract psychologist and CIA personnel involved in the interrogation and asked the psychologist how long it would take for more aggressive techniques to be effective:

"Thirty days" was his estimate. I thought about it overnight and the next morning asked the contractor if he would be willing to take charge of creating and implementing such a program. He said he would be willing to take the assignment but could not do it himself. ... I agreed that the contractor should bring in someone from the outside to help him work with Agency officers in crafting a program we hoped would save lives.<sup>19</sup>

The program had approval from the highest levels of the U.S. government, as Bush wrote in his memoirs:

CIA experts drew up a list of interrogation techniques that differed from those Zubaydah had successfully resisted. George [Tenet] assured me all interrogations would be performed by experienced intelligence professionals who had undergone extensive training. Medical personnel would be on-site to guarantee that the detainee was not physically or mentally harmed.

At my direction, Department of Justice and CIA lawyers conducted a careful legal review. They concluded that the enhanced interrogation program complied with the Constitution and all applicable laws, including those that ban torture.

I took a look at the list of techniques. There were two that I felt went too far, even if they were legal. I directed the CIA not to use them. Another technique was waterboarding, a process of simulated drowning. No doubt the procedure was tough, but medical experts assured the CIA that it did no lasting harm.<sup>20</sup>

It is unclear what techniques Bush determined went too far. The ones that the OLC deemed legal included not only waterboarding, but: (1) sleep deprivation for up to 11 consecutive days; (2) “cramped confinement” in small, darkened boxes; (3) the placement of an insect inside a confinement box, which the suspect could be told was a stinging insect but was in fact “a harmless insect such as a caterpillar”; (4) “wall standing” and other stress positions; (5) physical techniques including grabbing a suspect’s collar, grabbing his face, slapping him, and slamming him into a specially constructed “flexible wall.”<sup>21</sup>

Years later, after he was transferred to Guantánamo Bay, Abu Zubaydah described the “confinement box” to the International Committee of the Red Cross (ICRC):

Then the real torturing started. Two black boxes were brought into the room outside my cell. One was tall, slightly higher than me, and narrow. Measuring perhaps in area 1 m x 0.75 m and 2 m in height. The other was shorter, perhaps only 1 m in height. ... After the beating I was then placed in the small box. They placed a cloth or cover over the box to cut out all light and restrict my air supply. As it was not high enough even to sit upright, I had to crouch down. It was very difficult because of my wounds. The stress on my legs held in this position meant my wounds both in the leg and stomach became very painful. I think this occurred about 3 months after my last operation. It was always cold in the room, but when the cover was placed over the box it made it hot and sweaty inside. The wound on my leg began to open and started to bleed. I don’t know how long I remained in the small box, I think I may have slept or maybe fainted.

I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out again with the black cloth over my face and water poured on from a

bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.<sup>22</sup>

None of the other 13 high-value CIA detainees the ICRC interviewed at Guantánamo alleged placement in the “confinement box.” Two others were subjected to waterboarding, which the ICRC termed “suffocation by water.”

More common techniques were “prolonged stress standing,” in which detainees were shackled upright, and sleep deprivation for extended periods. According to the ICRC,

Ten of the fourteen alleged that they were subjected to prolonged stress standing positions, during which their wrists were shackled to a bar or hook in the ceiling above the head for periods ranging from two or three days continuously, and for up to two or three months intermittently. All those detainees who reported being held in this position were allegedly kept naked throughout the use of this form of ill-treatment. ...

While being held in this position some of the detainees were allowed to defecate in a bucket. A guard would come to release their hands from the bar or hook in the ceiling so that they could sit on the bucket. None of them, however, were allowed to clean themselves afterwards. Others were made to wear a garment that resembled a diaper. ... Many of the detainees who alleged that they had undergone this form of ill-treatment commented that their legs and ankles swelled as a result of the continual forced standing with their hands shackled above their head. They also noted that while being held in this position they were checked frequently by US health personnel. ...

Although this position prevented most detainees from sleeping, three of the detainees stated that they did fall asleep once or more while shackled in this position. These include Mr. Khaled Shaikh Mohammed and Mr. Bin Attash; the third did not wish his name to be transmitted to the authorities. When they did fall asleep held in this position, the whole weight of their bodies was effectively suspended from the shackled wrists, transmitting the strain through the arms to the shoulders. ...

Eleven of the fourteen alleged that they were deprived of sleep during the initial interrogation phase from seven days continuously to intermittent sleep deprivation that continued up to two or three months after arrest.<sup>23</sup>

It is not clear how many other detainees were subjected to these techniques by the CIA. Administration officials, in defending the program, have argued that it was carefully limited in scope. Former CIA Director Michael Hayden testified at a congressional hearing on February 5, 2008, that “[i]n the life of the CIA detention program, we have held fewer than 100 people. And actually, fewer than one-third of those people have had any techniques used against them, enhanced techniques.”<sup>24</sup> Acting OLC director Steven Bradbury gave similar estimates in a May 30, 2005, legal memorandum, stating that the CIA had taken custody of 94 detainees and had



employed “enhanced” interrogation techniques on 28 of them.<sup>25</sup> But these appear to exclude all prisoners interrogated by the CIA in Iraq, and may also exclude those held at CIA-run facilities in Afghanistan.

There were at least three such prisons in Afghanistan: a section of Bagram Air Base; a prison northeast of Kabul, known as the “Salt Pit”; and another location closer to the center of Kabul. Of these, the Salt Pit is likely the best known, as the site of both a death in custody and the erroneous detention of an innocent German citizen, Khaled El-Masri.

The prisoner who died was a suspected militant named Gul Rahman. Rahman was captured in Pakistan on October 29, 2002, and taken to the Salt Pit. He died less than a month later. The Associated Press (AP), which first publicly identified Rahman by name, has reported that after he threatened guards and threw a latrine bucket at them, his hands were shackled over his head and he was soaked with water. The morning of his death, the temperature was 36 degrees, and Rahman was in his cell naked from the waist down. CIA physicians concluded that he died of hypothermia. It is not known what happened to his body.<sup>26</sup>

During the Bush administration, the Department of Justice (DOJ) reviewed the case, but declined to bring charges against either “Matt,” the top CIA officer at the prison, or “Paul,” the Afghanistan Station Chief. (AP has identified both by their first names.) The CIA held an internal review board, which found that Matt had not intentionally killed Rahman, and that he had made requests for guidance about detainee treatment that his superiors had disregarded. They did not recommend disciplinary action against Paul or any higher officials. Eventually, Dusty Foggo, the third-highest ranking official at the agency, decided that Matt should not be disciplined either. According to AP, both continue to work for the CIA, and Paul had been promoted to head of the Near East division.<sup>27</sup>

Several dozen detainees have given accounts of abuse at CIA prisons in Afghanistan, at least some of which come with some form of credible corroboration.<sup>28</sup> Many of these refer to a site near Kabul, which they call either the “Dark Prison,” or the “Prison of Darkness,” where they were kept shackled to the wall in complete darkness for weeks at a time, deprived of adequate food, and subjected to constant loud music to deprive them of sleep. Federal courts have examined these allegations in several Guantánamo detainees’ *habeas cases*, and, in varying degrees, have treated them as credible.

In *Anam v. Obama*, for example, a district court judge evaluated Yemeni detainee Musa’ab Omar Al Madhwani’s allegations of being mistreated for 30 days in the “dark prison” in Afghanistan, including

being suspended in his cell by his left hand. To this day he suffers pain in his left arm. Petitioner also alleges guards blasted his cell with music twenty-four hours a day. The sole respite from the deafening noise was the screams of other prisoners.<sup>29</sup>

The court notes that “[t]he Government made no attempt to refute the Petitioner’s description of his confinement conditions” in Afghanistan. Rather, medical records showed that when he was transferred to Guantánamo he weighed 104 pounds; was suffering from severe post-traumatic stress disorder; and his low blood pressure indicated “severe dehydration that would normally require hospitalization in the United States.”<sup>30</sup> Several other prisoners captured in the

same raid as Madhwani have made similar allegations about their treatment in the Dark Prison in their *habeas cases*, combatant status review tribunals, or both.

In *Ali Ahmed v. Obama*,<sup>31</sup> the court found that the government could not rely on statements from a witness who “spent time at Bagram and the Dark Prison, and alleges that he has been tortured. ... The Government has presented no evidence to dispute the allegations of torture at Bagram or the Dark Prison.” In *Mohammed v. Obama*, the court found that statements from Binyam Mohammed to interrogators were tainted based on Mohammed’s detailed allegations of abuse in Morocco and the Dark Prison. Again, the government did not deny Mohammed’s allegations that he was subject to near-continual darkness; deprived of sleep; and shackled in painful positions, including “once for eight days on end in a position that prevented him from standing or sitting.”<sup>32</sup>

Detainees held at other CIA prisons in Afghanistan allege similarly brutal conditions. The German citizen Khaled El-Masri and the Algerian Laid Saidi, two detainees apparently held because of mistaken identity, have given reporters detailed accounts of their abusive treatment in the Salt Pit.<sup>33</sup>

In an interview with Task Force staff, Libyan former detainee Khalid al-Sharif said that he was tortured by U.S. interrogators at a prison in Kabul, including being suffocated by water:

*Al-Sharif*: ...And then the interrogator starts pouring the water on your face and your face is, of course, covered — there’s a cover on your face.

*Q*: Covered like with a cloth?

*Al-Sharif*: It’s that bag that they put on the detainees.

*Q*: A hood?

[clarification by translator] The whole face.

*Q*: What is it made of, is it cloth?

*Al-Sharif*: Yes, it’s cloth. You can’t see from it but you can breathe and water could obviously come in.

*Q*: There’s a bag on your face and the water is poured on it?

*Al-Sharif*: Yes. So with the constant pouring of water on your face you start suffocating.

*Q*: Did you think you were going to drown?

*Al-Sharif*: Of course, because you start moving your face to the right and left and looking to breath and you completely smothered by the water pouring on you.

*Q*: How long did this go on?

*Al-Sharif*: Depends on the interrogation.

*Q:* How many times did it happen? They were asking questions at the same time?

*Al-Sharif:* While pouring the water they are asking questions.

*Q:* How many times?

*Al-Sharif:* I don't remember. It was several times.<sup>34</sup>

Another Libyan detainee, Mohammed Shoroeyia, has described being waterboarded by the CIA in Afghanistan to Human Rights Watch.<sup>35</sup> According to Human Rights Watch, Sharif, Shoroeyia and three other Libyan detainees described other abuses in CIA facilities, including

being chained to walls naked — sometimes while diapered — in pitch dark, windowless cells, for weeks or months at a time; being restrained in painful stress positions for long periods of time, being forced into cramped spaces; being beaten and slammed into walls.<sup>36</sup>

Sharif and Shoroeyia are not among the three detainees whose waterboarding the United States has publicly acknowledged.

Mohamed Farag Bashmilah, a Yemeni citizen, has described and drawn diagrams of a facility in Afghanistan where he was held for months. In sworn court documents, Bashmilah alleges treatment that includes being shackled to the wall, deprived of sleep, and made to wear a soiled diaper for weeks at a time.<sup>37</sup> His attorneys believe this occurred in Bagram.

The allegations of abuses in CIA custody at Bagram are consistent with press reports from late 2002 and 2003. In December 2002, *The Washington Post* described the CIA holding and interrogating high-value detainees in a makeshift prison made out of metal shipping containers and razor wire at Bagram. The Post alleged based on accounts from witnesses that “captives are often “softened up” by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms ... blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep.” One intelligence official told the Post, “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”<sup>38</sup> A few months later, *The New York Times* described the detention and interrogation of Omar al-Faruq at the CIA facility in Bagram after his capture in Indonesia in June 2002. Officials told the Times it was “likely” that Faruq was kept naked with his hands and feet bound; deprived of food, sleep and light; and subjected to prolonged isolation and extreme temperatures. One Western intelligence official said Faruq’s interrogation was “not quite torture, but about as close as you can get.”<sup>39</sup> Faruq later escaped from Bagram in 2005, and was killed in Iraq in 2006.

## **The Military: The Old Rules Gone and No Clear Replacement**

Lieutenant General Ricardo Sanchez, the commander of U.S. coalition troops in Iraq from 2003 to 2004, later wrote in his memoirs of the decision not to apply Geneva in Afghanistan:

In essence, the administration had eliminated the entire doctrinal, training, and procedural foundations that existed for the conduct of interrogations. It

was now left to individual interrogators to make the crucial decisions of what techniques could be utilized. ...

Having eliminated the Conventions, it was the responsibility of the Department of Defense and the U.S. Army (as the executive agent) to publish new standards to steer our soldiers away from techniques that could be deemed torture. The fact that this was not done constitutes gross negligence and dereliction of duty.<sup>40</sup>

In an interview with Task Force staff, Rear Admiral James McPherson, the top Navy JAG from 2004 to 2006 offered a cogent explanation of why a directive to treat detainees in a “manner consistent with the principles of Geneva” was not an adequate substitute. Military personnel, McPherson said, are accustomed to being told rules in simple and explicit terms. “You can’t tell a soldier or sailor or airman what the policy is,” he said. “You have to tell them what they can do and what they can’t do.” Rules of engagement for battlefield troops can be reduced to 3 x 5 cards that can be understood at the platoon level. “The problem with the abuses [involving interrogation and detention] was that there was no 3 x 5 card,” he said. “No ‘do’s’ and ‘don’ts.’”<sup>41</sup>

An example McPherson gave involved Navy pilots who are given explicit rules on when they may engage in firing on an enemy. These rules, McPherson said, are in the form of a simple checklist that each combat pilot carries on his kneeboard. If an adversary “paints” the pilot’s plane with radar, the instructions are to veer away. If it happens a second time, the pilot must again veer away. The third time, the aircraft is “painted” with hostile radar, the pilot is supposed to return fire. A pilot may be disciplined for not following those rules, McPherson said, although the pilot is allowed to argue mitigating circumstances for any deviation. But the rules are clean and straightforward and discourage any improvisation or freelancing.<sup>42</sup>

## **Guantánamo**

Some commanders, understanding soldiers’ need for clear rules, simply ordered them to comply with Geneva, with the exception of some of the heightened protections that prisoners of war receive. This happened during the early days of Guantánamo Bay. General Michael Lehnert, the first commander of the prison, and Manuel Supervielle, the lead JAG at SOUTHCOM, had made repeated requests up the chain of command to authorize ICRC presence in Cuba. With a request still pending, and the first transports of prisoners set to leave Afghanistan, Supervielle simply called Geneva and invited the Red Cross himself. DOD General Counsel William J. Haynes later made clear that he disagreed with this decision, but Supervielle’s chain of command decided it was too late to un-invite the ICRC. Supervielle also thoroughly analyzed each article of the Third Geneva Convention, and recommended that U.S. troops comply fully with most of them.<sup>43</sup>

Conditions of confinement at Camp X-Ray were austere at best; Colonel Terry Carrico, the head of the military police at the camp, acknowledged to Task Force staff that the original wire-mesh cells were “essentially dog pens.” But Carrico stated that he told the troops under his command to treat the detainees as prisoners of war, and MPs observed interrogations to ensure that there was no abuse.<sup>44</sup>

In February 2002, the Department of Defense set up a new task force, JTF-170, to run military

interrogations at Guantánamo. Its first commander was Major General Michael Dunlavey. Donald Rumsfeld had personally selected Dunlavey for the job, and told Dunlavey to report directly to him each week about the interrogations of detainees Rumsfeld had described as “among the most dangerous, best trained vicious killers on the face of the earth.”<sup>45</sup> Dunlavey later told Philippe Sands, “No one ever said to me ‘the gloves are off.’ But I didn’t need to talk about the Geneva Conventions, it was clear that they didn’t apply.”<sup>46</sup>

Dunlavey’s subordinates included Lieutenant Colonel Jerald Phifer, JTF-170’s head of intelligence; David Becker, the head of Guantánamo’s Interrogation and Control Element (ICE), and Lieutenant Colonel Diane Beaver, his staff judge advocate.

During the summer of 2002, a military psychiatrist, psychologist, and psychiatric technician were deployed to Guantánamo Bay, and told that they had been assigned to a Behavioral Science Consultation Team (BSCT or, colloquially, “biscuit team”) in support of interrogations. In September, the three BSCT members and four interrogators received training in SERE techniques at Fort Bragg, N.C. On October 2, 2002, the BSCT team signed a memo requesting authorization to use additional interrogation techniques. “Category II techniques” included stress positions; the use of isolation for up to 30 days (with the possibility of consecutive 30-day periods if authorized by the chain of command); deprivation of food for 12 hours; handcuffing; hooding; and consecutive 20-hour interrogations once a week. “Category III” techniques included daily 20-hour interrogations; isolation without access to medical professionals or the ICRC; removal of clothing; exposure to cold or cold water; and “the use of scenarios designed to convince the detainee he might experience a painful or fatal outcome.”<sup>47</sup> While these and even harsher techniques had been authorized for use against high-value detainees in CIA custody, this would apply to a far larger population in military custody at Guantánamo. At its peak in 2003, the prison in Cuba held 680 inmates.

On October 11, 2002, General Dunlavey submitted a request to SOUTHCOM’s commanding general, James Hill, for authorization to use Category I, II and III techniques. In addition to the Category III techniques listed in the BSCT memo, there was an addition, which had been discussed at the October 2 meeting with the CIA: “use of a wet towel and dripping water to induce the misperception of suffocation.”<sup>48</sup> The list of techniques stated, however, that Category III techniques were only intended for use against “exceptionally resistant detainees ... less than 3%” of the detainee population at Guantánamo,<sup>49</sup> which at that time numbered close to 600.<sup>50</sup>

Dunlavey’s request was accompanied by a legal memorandum by Beaver, who wrote that neither the Geneva Conventions nor the dictates of the Army’s interrogation Field Manual 34-52 were binding at Guantánamo. She wrote that the “enhanced” techniques would not violate the Torture Statute

because there is a legitimate governmental objective in obtaining the information necessary ... for the protection of the national security of the United States, its citizens, and allies. Furthermore, these methods would not be used for the “very malicious and sadistic purpose of causing harm.”<sup>51</sup>

Beaver acknowledged that the techniques might “technically” violate several articles of the Uniform Code of Military Justice. She nevertheless recommended that they be approved, and

suggested that “it would be advisable to have permission or immunity in advance ... for military members utilizing these methods.”<sup>52</sup>

Beaver’s analysis has been widely criticized, and she herself has stated that she did not have adequate time to research it:

I wanted to get something in writing. That was my game plan. I had four days. Dunlavey gave me just four days. But I was in Guantánamo, there wasn’t access to much material, books and things.<sup>53</sup>

On October 25, Hill forwarded Dunlavey’s request to the General Richard Myers, chairman of the Joint Chiefs of Staff, who sent it to the individual services for comment. JAGs from all four services recommended against approval of the techniques without more careful review. The Air Force, Army and Marine Corps JAGs warned that several techniques could subject service members to prosecution under the Torture Statute or the UCMJ. The Guantánamo Criminal Investigative Task Force (CITF), which carried out interrogations and conducted investigations of potential war crimes by detainees, had similar concerns.<sup>54</sup>

Captain Jane Dalton, the legal counsel to the Joint Chiefs, began her own review, finding Lieutenant Colonel Beaver’s analysis “woefully inadequate.”<sup>55</sup> General Myers, however, instructed her to stop the review, telling Dalton that Haynes was concerned about too many people seeing the paper trail.<sup>56</sup> On November 27, Haynes recommended to Rumsfeld that he approve all of the Category I and II techniques and one Category III technique (noninjurious physical contact). Rumsfeld gave his sign-off on December 2, adding the following handwritten note: “However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?”<sup>57</sup>

Haynes’ recommendation contained no legal analysis. Beaver later told Senate investigators that she was “shocked” that her opinion, which she expected the chain of command to review thoroughly and independently, “would become the final word on interrogation policies and practices within the Department of Defense.”<sup>58</sup>

Before Rumsfeld approved them for more general use at Guantánamo, the techniques were being implemented against detainee number 63, Mohammed al Qahtani. Al Qahtani was suspected of being the intended 20th hijacker in the September 11 attacks. In October, he was interrogated with military dogs present, deprived of sleep, and placed in stress positions, all while in isolation.<sup>59</sup> When this failed to yield intelligence, JTF-170 halted the interrogation and began developing a new “Special Interrogation Plan.” Al Qahtani remained in isolation, however, and, according to an FBI agent, by the end of November he was “evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end).”<sup>60</sup>

A publicly released interrogation log, dated from November 23, 2002, to January 11, 2003, shows that his treatment only became harsher.<sup>61</sup> Al Qahtani was interrogated for approximately 20 hours a day for seven weeks; given strip searches, including in the presence of female interrogators; forced to wear women’s underwear; forcibly injected with large quantities of IV fluid and forced to urinate on himself; led around on a leash; made to bark like a dog; and subjected to cold temperatures. Not surprisingly, his condition deteriorated further. On December 7, 2002, al

Qahtani's heartbeat slowed to 35 beats per minute, and he had to be taken to the hospital for a CT scan of his brain and ultrasound of a swollen leg to check for blood clots.<sup>62</sup>

Al Qahtani's interrogation plan was approved by and implemented under the supervision of Major General Geoffrey Miller, who replaced Dunlavey as the commanding general in Guantánamo in November 2002.<sup>63</sup>

The Schmidt-Furlow Report, the official DOD investigation into allegations of abuse at Guantánamo, found that "every technique employed against [al Qahtani] was legally permissible under the existing guidance," but "the creative, aggressive, and persistent interrogation of [al Qahtani] resulted in the cumulative effect being degrading and abusive." It criticized Miller for failing to adequately supervise al Qahtani's interrogators, which "allowed subordinates to make creative decisions." The investigation nevertheless concluded that al Qahtani's interrogation "did not rise to the level of inhumane treatment."<sup>64</sup>

Others have strongly disagreed. Susan Crawford, the convening authority of the Guantánamo military commissions during the latter part of the Bush administration, told *The Washington Post* in January 2009 that "[w]e tortured Qahtani. ... His treatment met the legal definition of torture."<sup>65</sup>

There were also contemporaneous objections to the coercive techniques from FBI agents and agents of the Naval Criminal Investigative Service (NCIS). In December 2002, David Brant, the head of NCIS, told Navy General Counsel Alberto Mora that NCIS agents stationed in Guantánamo had witnessed detainees being abused.<sup>66</sup> On December 18, Mora and Brant met with NCIS chief psychologist Dr. Michael Gelles, who told them that guards and interrogators had started using "abusive techniques" including "physical contact, degrading treatment (including dressing detainees in female underwear, among other techniques), the use of "stress" positions, and coercive psychological procedures."<sup>67</sup> Gelles said that he believed these techniques were unlawful in themselves, and would also open the door to worse abuses. As recounted by Mora in a statement to the Navy's inspector general,

[Gelles] believed that commanders took no account of the dangerous phenomenon of "force drift." Any force utilized to extract information would continue to escalate, he said. If a person being forced to stand for hours decided to lie down, it probably would take force to get him to stand up again and stay standing. ... [T]he level of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached.<sup>68</sup>

After Mora reviewed the request for coercive techniques at Guantánamo, Beaver's legal analysis, and Rumsfeld's authorization, he met with DOD General Counsel Haynes and told him that "some of the authorized techniques could rise to the level of torture." When Haynes disagreed, Mora:

urged him to think about the techniques more closely. What did "deprivation of light and auditory stimuli" mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in? Not only could individual techniques applied singly constitute torture, I said, but also the application

of combinations of them must surely be recognized as potentially capable of reaching the level of torture.<sup>69</sup>

On January 15, 2003, Mora presented Haynes with a draft memorandum advising that most Category II techniques and all Category III techniques were unlawful “in that they constituted, at a minimum, cruel and unusual treatment and, at worst, torture,” and told him he would sign it unless Rumsfeld’s December 2 authorization was suspended. That day, Rumsfeld rescinded the authorization for Category II and III techniques, and directed Haynes to set up a “Detainee Interrogation Working Group” to evaluate the law and policy for DOD interrogations.<sup>70</sup> The group consisted of JAGs as well as civilian attorneys at the Pentagon. Mary Walker, the Air Force general counsel, Mora’s counterpart for the Air Force, had volunteered to lead the Working Group, which would ultimately produce a report with its findings. Rumsfeld wanted the work to be done quickly — the group had a tight deadline.

Jack Rives, the Deputy Air Force JAG and a member of the Working Group, told Task Force staff that its meetings were contentious. Mary Walker, the lawyer in the DOD general counsel’s office who headed the group, was an adamant supporter of the harsh detention and interrogation regimes. She believed that Mora and the service JAG lawyers were overstepping their bounds in pressing their objections. They were, she said, bound to obey the directives of the general counsel and accept fully the opinions of the OLC. “Haynes was frustrated that he couldn’t make it just go away,” Rives said.

Rather than the JAGs, Haynes relied on advice from John Yoo, the deputy at the Office of Legal Counsel who had drafted the August 2002 “torture memos” for the CIA. Over the objections of the service JAGs and the legal counsel to the Joints Chiefs of Staff, Haynes directed that the Working Group would be bound by Yoo’s analysis of the laws governing interrogation. Yoo’s final memo, signed on March 14, 2003, adopted many of the same conclusions as the August 2002 memos. It also concluded that federal criminal statutes prohibiting torture, assault, and maiming could not constitutionally apply to the Armed Forces in wartime, because “it is for the president alone to decide what methods to use to best prevail against the enemy.”<sup>71</sup>

The Working Group report was finalized and issued on April 4, 2003. In addition to the Army Field Manual techniques, it recommended the approval of hooding; isolation; “sleep adjustment”; 20-hour interrogations; sleep deprivation “not to exceed four days in succession”; prolonged standing (not to exceed four hours); “mild physical contact”; “dietary manipulation”; “environmental manipulation,” (which could include raising or lowering the cell temperature); “false flag” (convincing a detainee that individuals from another country were interrogating him); the threat of transfer “to a third country ... [that would] subject him to torture or death”; forcibly shaving detainees’ hair and beards; forcing detainees to exercise; slapping the detainee on the face or stomach (“limited to two slaps per application, no more than two applications per interrogation”); nudity; and “increasing anxiety by use of aversions,” such as the presence of a dog.<sup>72</sup> The final report was not sent to the lawyers who had objected to the techniques, nor did they even know it had been completed.<sup>73</sup>

On April 16, 2003, Rumsfeld authorized a list of techniques that included dietary manipulation, environmental manipulation, sleep adjustment, false flag, and isolation — although the last was authorized only if the SOUTHCOM commander were to “specifically determine that military necessity requires its use and notify me in advance.”<sup>74</sup> Other additional techniques



were available if the commander sent a written request. Rumsfeld's memorandum concludes by stating that "[n]othing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees"<sup>75</sup>— most likely a reference to the practices of Guantánamo's Extreme Reaction Force, which forcibly removed detainees from cells for disciplinary action and was repeatedly accused of using excessive force.

In July 2003, Miller submitted a request for approval for a "Special Interrogation Plan" for Mohamedou Ould Slahi, which was approved by Rumsfeld on August 13. The plan included moving Slahi on a boat to make him believe he had been taken away from Guantánamo; the presence of military working dogs; shackling Slahi to the floor and leaving him there for hours at a time; prolonged standing; limiting sleep to four hours every 16 hours; and isolation in an interrogation room designed to reduce "outside stimuli" such as light. These techniques were designed to show Slahi that "the rules have changed and nobody knows he is there."<sup>76</sup>

Interrogators apparently began implementing the plan before securing formal approval. On August 2, an interrogator told Slahi he would "very soon disappear down a very dark hole. His very existence will become erased. ... [N]o one will know what happened to him and eventually, no one will care." Slahi was also shown a letter falsely stating that his mother had been detained, and that if she did not cooperate with interrogators she might be transferred to Guantánamo.<sup>77</sup>

On August 7, Slahi told his interrogator that he would cooperate fully.<sup>78</sup> Nonetheless, interrogators continued to carry out the interrogation plan through September and October. The Senate Armed Services Committee uncovered documents suggesting that interrogators eventually became concerned about Slahi's mental state. On October 17, an interrogator emailed a BSCT psychologist that Slahi "told me he is 'hearing voices' now. ... He is worried as he knows this is not normal. ... [I]s this something that happens to people who have little external stimulus such as daylight, human interaction etc???? Seems a little creepy."<sup>79</sup> A Guantánamo prosecutor, Lieutenant Colonel Stuart Couch, eventually refused to prosecute Slahi because he concluded that his statements to interrogators were tainted by torture and coercion.<sup>80</sup>

Two other "Special Interrogation Plans" for Guantánamo detainees are referenced in the Senate Armed Services Committee's Investigation, but virtually all details about them are redacted and it is unclear if they were implemented.<sup>81</sup>

The use of harsh tactics was not restricted to the "Special Interrogation Plans," however. Detainees' allegations of brutal treatment have been corroborated by the FBI and the ICRC's continued objections to the treatment of detainees at Guantánamo. An FBI agent sent the following email to a superior on August 2, 2004, describing an incident she had witnessed earlier:

On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room that the barefooted detainee was shaking with cold. When I asked the (military police) what was going on I was told that interrogators from the day prior had ordered this treatment and the detainee was not to be moved.<sup>82</sup>

A second FBI agent reported a detainee being short-shackled for 12 hours after an interrogation. The Schmidt-Furlow Report said it could not corroborate these allegations. This conclusion, however, may have overlooked an interview included in the annexes to the report, in which an operations offer stated

The detainee might be left in the booth for an extended period of time after interrogations awaiting MPs. The short chain was done as a control measure. The chain was close to the floor. The interrogator would ask the MPs to put the detainee in that position.<sup>83</sup>

The interviewee did not specify how long the “extended” period was.

After a June 2004 visit to the camp, the Red Cross charged in a confidential report obtained by *The New York Times* that detainees in Guantánamo were being subjected to a systematic effort to break them, through

humiliating acts, solitary confinement, temperature extremes, use of forced positions. ... The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.

The ICRC had criticized interrogation methods before, but said that had grown “more repressive and refined” over time.<sup>84</sup>

## Afghanistan

In Afghanistan, there was less legal guidance, and less high-level involvement. But it was there that replacement of the Geneva Conventions’ detailed requirements with an ill-defined “humane treatment” standard proved most destructive. By the time that Michael Gelles and Alberto Mora warned the Pentagon about “force drift” in December 2002, it had already lead to pervasive abuse and two deaths in custody.

In December 2002, two Afghans, named Dilawar and Habibullah, were beaten to death at Bagram Air Base, the United States’ largest detention facility in Afghanistan. In each case, the beating was delivered as the men were cuffed with their hands high so they could not sleep. In each case, there is evidence that they were being “sleep adjusted” at the request of interrogators, and that the soldiers who suspended them from the ceiling believed they were using an authorized technique.

The autopsy showed that the men had been beaten on their legs, and the investigation uncovered that they had been kned by the MPs repeatedly. In Habibullah’s case, the beating dislodged a blood clot that may have formed partially as a result of his being forced to stand for an extended period.<sup>85</sup> Angela Birt, who investigated the case for the Army’s Criminal Investigative Division (CID), stated in an interview with Task Force staff,

they chained them in a standing position. And doing that you can cause deep vein thrombosis, just like you can get on an aircraft, and that was one contributing things that killed one of the detainees. One of them had very serious thrombosis in his lower legs.<sup>86</sup>

According to the coroners who examined Dilawar's body, the beatings had "pulped" his legs, which would likely have needed to be amputated had he survived. Dilawar had actually been approved for release at the time of his death.<sup>87</sup> By the time of his final interrogation, his legs had been kicked repeatedly as he hung from the doorway, and he could barely walk. He was delirious, and believed his wife had died and that her ghost had come to the interrogation cell.<sup>88</sup>

Joshua Claus was one of the interrogators, and he was convicted for his conduct, which included grabbing Dilawar by the collar and yanking his head straight, forcing him to drink water, and ramming his hood down on his head. In an interview with Task Force staff, Claus asserted that his commanding officer, Captain Carolyn Wood, had repeatedly asked for guidance about how to treat detainees and received no answers:

We had no lines. And we asked thousands of times. Where are our lines? Define it! Captain Wood would ask that once a week. Ok, what's our rules? Where are our boundaries. You are saying these don't matter but what are the new ones?...

I remember Captain Wood and Sgt. Loring in our meetings saying: OK, we have no guidelines but we are going to try to get some for you. And she'd go to those meetings. That's why JAG would come through. We would randomly see her wandering through with eagles, stars, and in suits and ties. And you are like, who are you people? Please give us something we could use.

So I don't understand why people kept bitching at us saying we are evil.<sup>89</sup>

The initial investigation of the deaths was abortive. The MPs convinced the first set of criminal investigators that the blows they'd dealt to the legs of Dilawar and Habibullah were completely authorized and routine. Angela Birt was at the Criminal Investigative Division and told Task Force staff she was shocked that the investigators didn't pursue it at first.

I'll be really candid. [The investigators] drank the Kool-Aid. They wrote reports saying these were authorized use of force and that these were accidental deaths. ... They really believed it was authorized, and I could never understand where they got that from. ...

To me it was a great big billboard: "Murder, Murder, Murder!" And it was on the death certificate: Homicide. And I didn't understand how we got from there to "Oh, it was just an accident." You don't accidentally hang someone from a ceiling and beat them to death.<sup>90</sup>

Eventually a serious investigation into the deaths led to 27 people being charged for abusing Dilawar, Habibullah, and other Bagram prisoners. But the longest sentence was for Claus, who received a total of five months after pleading guilty. Private William Brand, the MP who allegedly caused Dilawar's death by kneeling him repeatedly in the thigh, was reduced in rank.<sup>91</sup>

The sentences were so low in part because of testimony from multiple witnesses corroborating the defendants' claims that there were no clear rules on how soldiers could treat "persons under control" in Afghanistan, and many of the abusive techniques were common knowledge. Sergeant Betty Jones, a soldier who often passed through the prison but was not assigned as a guard or interrogator, said in a sworn statement to military investigators that:

when they would first bring the PUC's [persons under control] in, the detainees were thrown on the floor with their feet and hands bound and hoods and they would let the dogs with muzzles walk on the detainees with the dogs growling in their ear. It was a big joke.<sup>92</sup>

Asked who, besides those implicated in the deaths, was aware of the use of sleep deprivation, standing restraints, and "peroneal strikes," Jones replied:

Everybody. People would come to the prison all the time. Everyone at Bagram wanted to see the prison. Everyone that is anyone went through the facility at one time or another.<sup>93</sup>

Jones said that she had directly witnessed prisoners with their arms handcuffed over their heads for "hours and hours," but had only heard from another soldier about detainees being beaten. She reported this before the deaths, but her commander "told me to stay out of the prison because it was none of my business."<sup>94</sup>

Another Sergeant, Marianne Plummer, testified that

When they first came in, it was a form of punishment, but it was also used to keep them awake, make sure they stood up, and MI [Military Intelligence] directed that we'd have them stand and be chained.<sup>95</sup>

Plummer said it was "standard procedure" to imprison detainees in the isolation cells when they first came to the facility, and chain them to the ceiling:

[T]he chaining was over the head with arms outstretched some. The chaining could have had the hands above the head. It was two positions. It was whoever chained them up who made the decision how the hands would be placed.<sup>96</sup>

Major Jeff Bovarnick, the staff judge advocate stationed there, told military investigators that sleep deprivation, enforced by shackling detainees in a standing position, was authorized at Bagram:

[P]eople were consistently shackled to the airlock, even during the ICRC visits. No effort was made to hide it. They were restrained with their hands cuffed together and the cuffs were affixed to the airlock at about waist level.<sup>97</sup>

Asked what the legal justification was for this, Bovarnick replied that Army Regulation 190-8, which contains detailed prohibitions against mistreatment of detainees, did not apply because of the decision that the detainees were unprotected under the Geneva Conventions. The ICRC argued that violated the administration's stated policy of humane treatment, particularly an incident where a prisoner "was kept chained to the ceiling for over a day." Bovarnick said that the military police captain, Christopher Beiring, denied the allegation about chaining to the ceiling, and he did not believe chaining the hands at waist level or eye level was "inhumane." He stated that Colonel David Hayden, the leading staff judge advocate in Afghanistan, agreed with this conclusion.<sup>98</sup>

Hayden, in a video obtained by documentary filmmaker Alex Gibney, says the following about the prisoners' deaths:

This is not a hotel. This is not a place for them to get fat, lazy and happy. ... There was an approved technique for the MPs when somebody was a difficult prisoner that you could hit them on the legs. It was supposedly considered not a lethal blow. Over two days, everybody's hitting you in the legs, it can cause some severe problems.<sup>99</sup>

In 2004, military investigators asked Hayden if the findings of Dilawar's and Habibullah's autopsies showed that "excessive force" was used. Hayden replied that based on what the first CID agents told him,

I can't say that. If you wanted to call anything excessive it would have been the repeated blows over time. However, at the time, it was reasonable to conclude ... that repetitive administration of legitimate force resulted in all the injuries we saw.<sup>100</sup>

A January 24, 2003 memo from Lieutenant Robert Cotell, the deputy staff judge advocate for Afghanistan to the DOD Working Group describes techniques that had previously been used in Afghanistan, including: (1) sleep "adjustment," defined as "four hours of sleep every 24 hours, not necessarily consecutive"; (2) up to 96 hours of isolation; (3) the use of "safety positions"; (4) hooding during interrogation; (5) removal of light and sound; (6) use of an individual's fears; (7) the use of female interrogators to create "discomfort"; and (8) mild physical contact.<sup>101</sup>

It is not clear exactly where the use of shackling to the ceiling to enforce sleep deprivation originated. Birt believed that the MPs in the 377th were simply "lazy" and wanted to avoid having to check to make sure the detainees were awake. But Marianne Plummer testified that military intelligence directed the MPs to do it. The technique is also strikingly similar to descriptions of prisoners being shackled in standing positions for extended periods at CIA facilities in Afghanistan, one of which was located at Bagram Air Base. The court-martial documents demonstrate that there was some contact between the CIA and the interrogators from the 519th. One interrogator, Jennifer Higginbotham, testified that interrogators from the military and "Other Governmental Agencies" would attend daily briefings together, and sometimes discussed specific interrogation techniques.<sup>102</sup>

## **Iraq**

In Iraq, unlike Afghanistan and Guantánamo, the Geneva Conventions were acknowledged to provide some protections. On May 7, 2004, shortly after photographs of guards abusing prisoners at Abu Ghraib became public, Rumsfeld testified to Congress that soldiers' "instructions are to, in the case of Iraq, adhere to the Geneva Conventions. The Geneva Conventions apply to all of the individuals there in one way or another."<sup>103</sup>

This was not a complete picture, however. First, many prisoners in Iraq were interrogated by the CIA or by Joint Special Operations Command (JSOC) troops, who did not answer to the same chain of command as the regular military and did not consider themselves bound by Geneva. Second, even among the regular military, there was widespread and pervasive confusion as to whether the Geneva Conventions applied and what protections they provided.

*Special Forces and “Other Government Agencies”*

Many high-value detainees in Iraq were interrogated by a JSOC task force, which over time was known as Task Force 20, Task Force 121, Task Force 6-26, and Task Force 145. The task force was originally based at a facility outside the Baghdad International Airport, known as “Camp Nama.” It was not under the authority of General Ricardo Sanchez, the overall commander of U.S. troops in Iraq; Sanchez later said he did not even know what techniques the task force was authorized to use. An interrogator based at Camp Nama in the first half of 2004 described to Human Rights Watch his unusual chain of command:

I didn’t have any contact with my normal uniformed battalion. [Task Force 121/6-26] was my new chain of command for several months. ... There was no rank as far as team member or interrogative analyst and so forth. Everybody was in civilian clothes. There was no rank.<sup>104</sup>

The interrogator said there was a colonel who was “actually in charge of this,” but

We called the colonel by his first name, called the sergeant major by his first name. ... I couldn’t tell you the sergeant major’s last name if I tried. Same with the colonel. A lot of my fellow interrogators, I didn’t know their last names either. ... [W]hen you asked someone their name they don’t offer up the last name. ... [M]ore often than not, when they gave you their name it probably wasn’t their real name anyway.

In addition to Special Forces personnel, the interrogator said, he worked with the CIA, who were stationed at another building nearby. Because of the level of secrecy, “[w]e knew that we were only a couple steps removed from the Pentagon, but it was a little unclear, especially to the interrogators who weren’t really part of that task force.”<sup>105</sup>

According to the DOD inspector general and the Senate Armed Services Committee, the task force’s written standard operating procedures (SOPs) authorized sleep deprivation, loud music, stress positions, “light control,” and the use of military dogs. Although not in the written SOPs, nudity was also commonly used, with the knowledge of the task force’s commander and legal advisor.<sup>106</sup>

In the summer of 2003, Brigadier General Lyle Koenig, then the head of the task force, asked Colonel Randy Moulton, the commander of the Joint Personnel Recovery Agency (JPRA), for help with interrogation. Moulton had been corresponding with Bruce Jessen and others about the possibility of using SERE techniques against detainees since February of 2002.<sup>107</sup>

JPRA sent a team of three people led by Lieutenant Colonel Steven Kleinman, its senior intelligence officer. On September 6, Kleinman “walked into an interrogation room all painted black.” A detainee was kneeling on the floor, and a Special Forces interrogator was asking him questions, and slapping his face with every response. Kleinman stopped the interrogation and told the interrogator it was a violation of the Geneva Conventions. Kleinman later stopped interrogators from implementing a plan that called for sleep deprivation and holding a detainee in stress positions for hours at a time, and informed Moulton and the task force commander of what he had done.<sup>108</sup>

But Moulton, after consulting with task force commander, told Kleinman that the JPRA team

was authorized to use the full range of SERE techniques on prisoners, including “walling, sleep deprivation, isolation, physical pressures (to include various stress positions, facial and stomach slaps, and finger pokes to the chest, space/time disorientation, [and] white noise.)”<sup>109</sup>

Kleinman spoke repeatedly to the special operations task force commander and legal advisor, and got the impression they agreed with his concerns and his decision to refuse to participate in abuse, but “it seemed to fall into a void. ... [T]here were never any orders issued.”<sup>110</sup> After one Army Ranger sharpened a knife near his face, and warned him not to sleep too soundly, Kleinman wondered if his life was in danger.<sup>111</sup>

Shortly before Kleinman's team visited Iraq, the task force legal advisor expressed similar concerns to Lieutenant Colonel Diane Beaver. As summarized by the Senate Armed Services Committee's Report:

According to LTC Beaver the SMU TF legal advisor raised concerns with her about physical violence being used by SMU TF personnel during interrogations, including punching, choking, and beating detainees. He told her he was “risking his life” by talking to her about these issues.<sup>112</sup>

Many other sources have made similar allegations about the task force's overt noncompliance with the Geneva Conventions, and hostility to those who reported violations. Retired Colonel Stuart Herrington learned of similar allegations in December 2003, when he visited U.S. interrogation facilities in Iraq at the request of General Barbara Fast. Herrington provided (TCP) Task Force staff with a copy of his report, which states that his team learned from an officer at the Iraq Survey Group (ISG) detention and interrogation facility (JIDC) at Baghdad airport that

prisoners arriving at his facility who had been captured by Task Force 121 showed signs of having been mistreated (beaten) by their captors. ... Detainees captured by TF 121 have shown injuries that caused examining medical personnel to note that “detainee shows signs of having been beaten.”... I asked the officer if he had reported this problem. He replied that “Everyone knows about it.”<sup>113</sup>

Herrington said he had heard similar allegations from a former ISG JIDC employee before traveling to Iraq. The same employee told investigators in August 2004 that “by mid-June 2003, a pattern of reports of abuse of prisoners” by the task force “was coming to me” from the interrogators at Camp Cropper.<sup>114</sup> The ISG employee had relayed these reports to his superiors, but nothing came of them. According to Herrington, his source eventually “gave up and asked to leave. Asked to depart theater. He didn't want to have anything do with it.”<sup>115</sup>

Herrington's report also describes discussions with “an interagency representative,” most likely from the CIA, who told him that the agency had been directed not to have contact with Task Force 121's interrogation facility.<sup>116</sup> This is consistent with a later *New York Times* report that the CIA had barred its personnel from Camp Nama in August 2003.<sup>117</sup> Herrington concluded, “[I]t seems clear that TF 121 needs to be reined in with respect to its treatment of detainees.”<sup>118</sup>

In March or April 2004, the CJTF-7 legal advisor's office wrote to Herrington that they had investigated his sources' allegations and found no evidence of mistreatment. Herrington said

he expressed “blunt dismay” and incredulity at this conclusion, and said his source “could be excused for thinking this is a cover-up.”<sup>119</sup>

The Camp Nama interrogator who spoke to Human Rights Watch, meanwhile, had witnessed several weeks of abuses. He and several colleagues had gone to the colonel in charge of the facility, and told him they were “uneasy” with the detainees’ treatment:

And within a couple hours a team of two JAG officers, JAG lawyers, came and gave us a couple hours slide show on why this is necessary, why this is legal, they’re enemy combatants, they’re not POWs, and so we can do all this stuff to them and so forth. ... And then they went on to the actual treatment itself ... that’s not inhumane because they’re able to rebound from it. And they claim no lasting mental effects or physical marks or anything, or permanent damage of any kind, so it’s not inhumane.<sup>120</sup>

The interrogator said that neither the ICRC nor the Army’s Criminal Investigative Division had access to Camp Nama. Theoretically, he could have gone to his normal unit’s chain of command and reported to CID, but he had been told on his first day at the camp that he was not allowed to disclose anything that happened at the Special Forces facility to his normal command.<sup>121</sup> According to Angela Birt, if he had reported to Army CID there was little they could have done:

[A]ny investigations that came out of [JSOC facilities] were referred to a couple of agents embedded with the folks at Fort Bragg. And they operate and work directly for them. And as soon as we saw something visible to us that belonged to them we had to hand it over. You don’t see it again. We’d hear about it from other detainees but as soon as we referred something it went into a black hole and we never saw it again.<sup>122</sup>

But the reports of abuse kept coming. According to *The New York Times*, an FBI agent on June 25, 2004, emailed his superiors and alleged that a detainee captured by Task Force 6-26 alleged torture, and had suspicious burn marks on his body.<sup>123</sup> The same day, Vice Admiral Lowell Jacoby wrote to Undersecretary of Defense for Intelligence Stephen Cambone, alleging that two Defense Intelligence Agency (DIA) personnel had observed prisoners arriving at a detention facility “with burn marks on their backs. Some have bruises, and some have complained of kidney pain.” A DIA interrogator had also witnessed “TF 6-26 officers punch a prisoner in the face to the point the individual needed medical attention.” When DIA personnel objected, task force members confiscated their keys, confiscated their photographs of detainees’ injuries, forbade them from leaving the compound, and threatened them.<sup>124</sup>

The next day, Cambone wrote a handwritten note on Jacoby’s report to his deputy, Lieutenant General William G. Boykin, ordering him to “[g]et to the bottom of this immediately. This is not acceptable.”<sup>125</sup> The results of Boykin’s review have never been made public, but a 2006 inspector general’s report (OIG report) suggests that DOD leadership ultimately sided with the Special Forces task force. The OIG report states that “the disagreements between the DIA and special mission units were not reconciled to the benefit of all those conducting interrogation operations in Iraq.” Instead, the DOD seems to have concluded that the problem was “disaffected interrogators from DIA who were not prepared for the demanding and exacting pace of operations.”<sup>126</sup>



The Special Mission Unit task forces and the CIA did not confine their activities to Camp Nama. They also operated at different locations around Iraq, and are connected to several detainees' deaths in detention, including Dilar Dababa, Manadel al-Jamadi, Abed Hamed Mowhoush, and Abdul Jameel.

Manadel al-Jamadi is sometimes called the "Ice Man," because there are notorious photographs of Abu Ghraib guards Sabrina Harman and Charles Graner posing with his ice-packed corpse. On November 4, 2003, he was arrested by a team of Navy SEALs and CIA agents. Al-Jamadi struggled violently; even after he was subdued he was reportedly struck and "body slammed into the back of a Humvee." He was interrogated in a CIA facility, and then driven to Abu Ghraib.<sup>127</sup>

Several of the military police present when al-Jamadi was arrived have spoken to government investigators and journalists about what happened next. One MP, Jason Kenner, told military investigators that al-Jamadi was naked from the waist down when he arrived at the prison, with a bag over his head. Two CIA personnel (whom guards referred to as "OGA," an abbreviation for "Other Government Agency"), an interrogator and a translator, asked Kenner and another MP to take him to tier one. Kenner said they placed al-Jamadi in an orange jumpsuit and steel handcuffs, which was "common procedure" for CIA prisoners, and

walked the prisoner to the shower room on Tier 1B. ... The OGA personnel followed behind us. The interrogator told us that he did not want the prisoner to sit down and wanted him shackled to the wall. I got some leg irons and shackled the prisoner to the wall by attaching one end of the leg irons to the bars on the window and the other end to the prisoner's handcuffs.<sup>128</sup>

The window was five feet off the ground. According to Kenner and another MP, Dennis Stevanus, there was enough slack that al-Jamadi could stand with his legs supporting his weight, but not if he slumped forward or kneeled. The MPs exited the shower room, leaving al-Jamadi with CIA interrogator Mark Swanner and a contract interrogator.<sup>129</sup>

According to a National Public Radio (NPR) report, the CIA personnel involved told investigators that al-Jamadi had been talking "about the city of Mosul and hating Americans, when all of a sudden he dropped, falling to at least one knee. ... [T]hey immediately called for a medic."<sup>130</sup>

The MPs contradicted this. Walter Diaz stated that Swanner had called the MPs in, and asked them to re-shackle al-Jamadi's hands higher on the window frame, even though his arms were already

almost literally coming out of his sockets. I mean, that's how bad he was hanging. The OGA guy, he was kind of calm. He was sitting down the whole time. He was, like, "Yeah, you know, he just don't want to cooperate. I think you should lift him a little higher."<sup>131</sup>

Diaz asked for help from two other MPs, Stevanus and Jeffrey Frost, to lift al-Jamadi up and re-fasten the handcuffs. Frost said that Swanner assured them the detainee was just "playing possum,"<sup>132</sup> but when they released him,

[h]e didn't stand up. His arms just kept on bending at this awkward — not

awkward position, but it was — you know, I was almost waiting for a bone to break or something and just thinking, you know, this guy — he’s really good at playing ’possum.<sup>133</sup>

The MPs removed al-Jamadi’s hood, and realized that he was dead. When they lowered him to the floor, according to Frost, “blood came gushing out of his nose and mouth, as if a faucet had been turned on.”<sup>134</sup> The military autopsy classified the death as a homicide, caused by “compromised respiration” and “blunt force injuries” to the head and torso, including several broken ribs. Other pathologists who reviewed the autopsy report believed that what was fatal was the combination of the broken ribs and al-Jamadi’s position. Dr. Michael Baden, the chief forensic examiner for the New York State police, told Jane Mayer, “You don’t die from broken ribs. But if he had been hung up in this way and had broken ribs, that’s different. ... [A]sphyxia is what he died from — as in a crucifixion.”<sup>135</sup>

Lieutenant Andrew Ledford, a Navy SEAL from the unit that captured al-Jamadi was court-martialed, but acquitted based on evidence that he did not cause al-Jamadi’s death. No CIA officer was ever charged. According to AP, a grand jury was convened, and focused not on Swanner but on the role of a former CIA officer named Steve Stormoen, who ran the agency’s “detainee exploitation cell” at Abu Ghraib. The AP reported that Stormoen had processed al-Jamadi into Abu Ghraib, but was not present in the room where he died, and that he had been reprimanded after an internal CIA probe for permitting agents to “ghost” prisoners, *i.e.*, detain them without registering them or acknowledging their identity, without headquarters authorization. The grand jury also reportedly heard testimony about a CIA employee nicknamed “Chili,” who was at Abu Ghraib the day al-Jamadi died and still works for the agency.<sup>136</sup>

But the grand jury did not lead to any indictments, and it is unclear whether the Department of Justice ever proposed any indictments. On August 30, 2012, Attorney General Eric Holder released a statement that no charges would be brought because “the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.”<sup>137</sup> The DOJ declined to elaborate further, or respond to questions about the investigation.

Charles Graner, the soldier who received the longest prison sentence for abusing prisoners at Abu Ghraib, spoke to Army investigators about “Chili” in April 2005. Graner said that Chili had said he was an FBI contract worker, but “lo and behold he ends up being the interrogator over the analyst that the fellow in the shower dies with.”<sup>138</sup> He also described another incident where Chili and his colleagues were interviewing a detainee in the back stairwell, and “drug him back unconscious to his cell.”<sup>139</sup>

The MPs’ handwritten log books corroborate Graner’s allegations about CIA involvement in interrogation, though they use euphemisms. The entry that, according to Graner, corresponded to the detainee being carried unconscious from the stairwell reads simply: “OGA in cell 13 was taken away will be taken off of the count at this time.”<sup>140</sup> The only record of al-Jamadi’s death is an entry stating: “Shift change Normal relief 1 OGA in IB shower not to be used until OGA is moved out.”<sup>141</sup>

One entry from November 11, 2003 is more explicit, stating:

The 4 new OGA’s are in 2, 4, 6, and 8 they are to have no contact with each

other or anyone else — they are not to sleep or sit down until authorized by OGA personnel also we were informed that all four are neither hungry nor thirsty.<sup>142</sup>

Walter Diaz also reported that the CIA routinely interrogated “ghost prisoners” at Abu Ghraib. According to Diaz, the agency “would bring in people all the time to interview them. We had one wing, Tier One Alpha, reserved for the O.G.A. They’d have maybe twenty people there at a time.” Diaz said, “We, as soldiers, didn’t get involved. We’d lock the door for them and leave. We didn’t know what they were doing,” but “we heard a lot of screaming.”<sup>143</sup>

Major General Antonio Taguba and Major General George Fay confirmed that MPs held “ghost detainees” for the CIA. Taguba reported that one MP unit had helped hide detainees from a visiting Red Cross survey team.<sup>144</sup> Fay found that Lieutenant Colonel Steven Jordan “became fascinated with the ‘Other Government Agencies,’ a term used mostly to mean Central Intelligence Agency (CIA),” and “allowed OGA to do interrogations without the presence of Army personnel.”<sup>145</sup>

In addition to the criminal investigation, the CIA’s Office of the Inspector General (OIG) investigated al-Jamadi’s killing before the case was referred to DOJ. But the OIG report itself remains classified, and courts have ruled that the CIA is not required to disclose it under the Freedom of Information Act.

The Army CID file on al-Jamadi’s death does provide some clues as to the CIA OIG’s conclusions. According to the CID file, OIG personnel “advised their investigation had revealed that the CIA personnel involved in the interrogation of [al-Jamadi] had not been entirely truthful in their accounts of the incident, but declined to provide specifics.”<sup>146</sup> One individual whom the CIA OIG interviewed “had admitted removing the sand bag that was used to hood [al-Jamadi],” and his explanation for its removal was “not believable.”<sup>147</sup> The individual in question claimed that he had taken the bag to keep it secure in the event of an investigation, and had given it to a security officer, but “further information had not corroborated this statement.”<sup>148</sup> The hood was never recovered.

On November 10, less than one week after Manadel al-Jamadi’s death, former General Abed Hamed Mowhoush turned himself in to U.S. troops at Forward Operating Base Tiger near the border with Syria. On November 21, he was moved to a temporary detention facility in an old train station, known as the “Blacksmith Hotel.” Chief Warrant Officer Lewis Welshofer, a former SERE trainer, took charge of Mowhoush’s interrogation.

On November 24, according to classified documents obtained by *The Washington Post*, Mowhoush was interrogated by a CIA operative referred to as “OGA Brian” and a team of Iraqi paramilitaries working for the CIA, known as “the Scorpions.” The Iraqis “were hitting the detainee with fists, a club, and a length of rubber hose.”<sup>149</sup> The documents state that this was not uncommon treatment for uncooperative detainees at the Blacksmith Hotel.<sup>150</sup>

At Welshofer’s court-martial, the CIA’s role in Mowhoush’s interrogation was discussed only obliquely. One witness who testified at the court-martial did so anonymously and behind a tarp, to conceal his identity from the public and press.<sup>151</sup> At one point a defense attorney asked the witness if he had reported something “to the CIA,” but then stopped himself and apologized to the judge for the reference to the agency.<sup>152</sup>

Several witnesses did testify about the November 24 interrogation. Specialist Jerry Loper, also testifying under a grant of immunity, said that he had escorted Mowhoush to the interrogation room and waited outside. While waiting, “I heard loud thuds and screams. It sounded like he was being beaten.” When Mowhoush was brought out half an hour to an hour afterwards, “[h]is hands were severely swollen, and he couldn’t walk. His breathing was labored. ... It took five of us to get him back.”<sup>153</sup> Warrant Officer Jefferson Williams gave a very similar account to Loper’s.<sup>154</sup>

Todd Sonnek, a chief warrant officer with the Army Special Forces unit Operational Detachment Alpha, testified that Welshofer had brought in Special Forces troops, civilians, and Iraqis to interview Mowhoush with a “fear-up” technique, and supplied the Iraqis with the questions to ask. Sonnek testified that “from start to finish, this was Chief Welshofer’s interrogation,” though he acknowledged that Welshofer was not actually the one asking the questions and did not have “supervisory or operational control over the Iraqis.” Sonnek claimed that Mowhoush had tried to “strike out” and needed to be subdued, and denied that Mowhoush was unable to walk unassisted afterwards.<sup>155</sup>

Testifying in his own defense, Welshofer acknowledged that he was present for the November 24 incident but denied he was in control of it:

5 minutes into his interrogation, when he continued to deny, deny, deny, I noticed other people in the hallway. ... I passed control of the interrogation over to these individuals in the hallway. It is not correct that I was in control of the interrogation and that the others were just assisting me. I did not feel I had any command control over those people. ... When the general left the room, it was under his own power. I saw what look like a straight piece of radiator hose, a little bit softer material but of the same diameter, as well as a piece of something like insulation that might go around a door, only it was thicker and hollow on the inside with a camouflage net pole down in one end of it. These devices were used to beat the general. There were also some kicks, some slaps.<sup>156</sup>

CIA Director George Tenet refers in his memoirs to “the Agency-sponsored Iraqi paramilitary group known as ‘the Scorpions,’ ”<sup>157</sup> but details of their involvement with Mowhoush’s death have not been declassified. The CIA inspector general’s office prepared a report on Mowhoush’s death, but that also remains classified.

“OGA” and the Scorpions do not appear to have directly caused Mowhoush’s death. According to court-martial testimony, on November 26, Mowhoush was having obvious breathing difficulties at the beginning of an interrogation, but Welshofer nonetheless put him into a sleeping bag, and wrapped it in a cord to hold it in place. (Welshofer said that Mowhoush did not appear to require medical assistance, and he concluded he was using a “resistance technique” of “acting excessively fatigued.”) Welshofer asked Mowhoush questions while sitting on his chest, and sometimes obstructing his nose or mouth.<sup>158</sup> Mowhoush died soon after of “asphyxia due to smothering and chest compression,” according to the autopsy report.<sup>159</sup>

Welshofer was convicted of negligent homicide, but was sentenced to only two months of confinement to barracks. This was in part because of evidence that his commanding officers knew of the sleeping bag technique and allowed him to use it on a number of detainees. They also condoned a similar technique that involved placing detainees in wall lockers.<sup>160</sup>

Welshofer and his unit continued to use “close confinement” after Mowhoush’s death. Major Christopher Layton testified that while investigating the homicide in mid-January 2004, he had traveled to Forward Operating Base Rifles near Al Asad, where Welshofer’s unit was based. He saw a sleeping bag and wall lockers in an interrogation room there.<sup>161</sup> Another witness, Gerald Pratt, said that after Mowhoush’s death, CID took the original sleeping bag, but “Chief Welshofer procured another one. A detainee came in with a sleeping bag, and Chief got it.”<sup>162</sup>

Welshofer has denied that his actions caused Mowhoush’s death. In a 2009 interview with CBS, he said he only did what was necessary: “I helped save soldiers lives. I’m 100 percent convinced of that.”<sup>163</sup>

Welshofer’s unit, the Third Armored Cavalry Regiment, operated out of Forward Operating Base Rifles in Al Asad. Another detainee, 47-year-old Abdul Jameel, died there on January 9, 2004. According to Jameel’s autopsy, his death was a homicide, caused by

blunt force injuries and asphyxia. ... According to the investigative report provided by U.S. Army CID, the decedent was shackled to the top of a doorframe with a gag in his mouth at the time he lost consciousness and became pulseless.

The severe blunt force injuries, the hanging position, and the obstruction of the oral cavity with a gag contributed to this individual’s death.<sup>164</sup>

Another document summarizing the autopsy report describes the circumstances of death as: “Q by OGA, gagged in standing restraint.”<sup>165</sup> In addition to being gagged and shackled, the detainee had suffered “the fracturing of most of his ribs and multiple fractures of some of his ribs,” and a fractured hyoid bone.<sup>166</sup>

CID investigators concluded that a series of incidents had contributed to Jameel’s death. Jameel was captured by Operational Detachment Alpha 525 (ODA 525) of the 5th Special Forces Group on January 4, 2004. CID found that one soldier had kicked Jameel in the chest several times after he was already restrained in zip-ties.

On January 6, 2004, guards and other detainees saw masked interrogators take Jameel out for interrogation. He returned with severe bruises on his abdomen, and told other detainees and guards that he had been beaten.<sup>167</sup> One detainee said Jameel had difficulty breathing. Three soldiers in ODA 525 and one interpreter claimed that Jameel had attacked them, attempted to grab one of their weapons during interrogation, and they had been forced to strike him repeatedly for one to two minutes in order to subdue him because “[h]e was strong and fought back,” demonstrating “extreme resistance.”<sup>168</sup> CID investigators noted this conflicted with other descriptions of Jameel as appearing to be frail and in poor health.<sup>169</sup> The summary of Jameel’s interrogation on January 6 did not mention any struggle, and CID concluded that the interrogators’ account of the incident could not credibly account for the extent of Jameel’s injuries.<sup>170</sup>

At approximately 2 am on January 9, Jameel allegedly tried to escape from the isolation/sleep deprivation area. After he was re-captured, a soldier in the 3rd Armored Cavalry Unit used an MP baton to force Jameel to a standing position, by placing the baton under Jameel’s chin and lifting. CID investigators concluded that this had broken Jameel’s hyoid bone, an injury that

directly contributed to his death. CID also found that several soldiers had conspired to give a false account of the details of Jameel's attempted escape.<sup>171</sup>

Finally, shortly after 7 am on January 9, Jameel was "repeatedly ordered ... to stand as part of a mass punishment" of detainees for talking.<sup>172</sup> Jameel did not obey. According to military doctors, based on the number and manner of Jameel's broken ribs and other injuries, he "would have been in great pain and would have had great difficulty breathing and would not have been able to walk."<sup>173</sup> Soldiers handcuffed him to the door frame of his cell in a standing position, and forced a gag into his mouth after he "refused to stop making noises."<sup>174</sup> Five minutes later, he was dead.<sup>175</sup>

No one was ever prosecuted for Jameel's death, despite criminal investigators' recommendation of charges against 11 soldiers. According to an Army document,

The command, with the assistance of advice of command legal counsel, determined that the detainee died as a result of lawful applications of force in response to repeated aggression and misconduct by the detainee.<sup>176</sup>

The use of stress positions and "close confinement" by Special Forces and the CIA continued into mid-2004, and possibly beyond. An investigation into Special Forces task forces' treatment of detainees by General Richard Formica documented one incident in April or May 2004, in which detainees were held for periods between two and seven days in "small cells measuring 20 inches (wide) x 4 feet (high) x 4 feet (deep)," which did not provide enough room "to lie down or stand up. They were removed from the cells periodically for latrine breaks, to be washed, and for interrogations," and were "not kept in the cells for 72 continuous hours." The same detainees were sometimes kept naked, "blindfolded, sometimes with duct tape," and loud music was played to prevent them from communicating with each other and for "sleep management."<sup>177</sup>

Formica recommended against disciplining soldiers for these incidents. He acknowledged that the tiny cells were "inappropriate for long-term detention," but said they were not used for this purpose:

Rather, special forces secured combative, resistant detainees in these cells for short periods of time in order to elicit tactical intelligence. ... It is reasonable to conclude that this would be acceptable for short periods of time. ... [T]wo days would be reasonable; five to seven days would not.<sup>178</sup>

The conclusion that 24–48 hours in these conditions would be acceptable far exceeds the duration of "cramped confinement" authorized by the OLC for Abu Zubaydah. The August 2002 OLC techniques memo stated that confinement in the smaller box, in which the subject could not stand up, would be limited to two hours at a time.<sup>179</sup>

Formica also accepted the explanation that detainees were blindfolded with duct tape "for purposes of force protection and to prevent escape," and found that this was not inhumane. In part, this was because an interrogation policy for special forces troops in disseminated in February 2004 permitted interrogation techniques that had been rescinded for ordinary troops, including sleep deprivation, stress positions, and environmental manipulation.<sup>180</sup>

Formica stated that this had been corrected in May 2004. However, in interviews conducted by

attorneys in July 2007, two former detainees gave detailed descriptions of being imprisoned in tiny cells that detainees called “black coffins” in January 2006.<sup>181</sup> They were arrested together and interrogated about the kidnapping of the *Christian Science Monitor* reporter Jill Carroll, and then taken to a prison near Baghdad airport.<sup>182</sup> There, they alleged, they were held in small wooden cells, painted black, at most one meter wide and one meter high. One detainee stated that he was held there for over a week, and the other for 16 days.<sup>183</sup> Both said that they were continuously handcuffed and hooded, and allowed out of the cells only to use the toilet. One of the detainees said that he fainted twice inside his box, and taken out and given an IV nearby, but afterwards he was returned to the cell: “[e]verything was just the same.”<sup>184</sup> These accounts, while detailed and consistent with each other, could not be independently corroborated.

### ***Combined Joint Task Force 7 (CJTF-7)***

As to the issue of whether abuses in Iraq fit into those committed by sadistic and unsupervised individuals or abuses authorized at high levels of command, John Sifton of Human Rights Watch stated that detainee abuse in Iraq was

very widespread, but that doesn't mean it's all the same. There's been spontaneous abuse at the troops' level; there's been more authorized abuse; there's been overlap — a sort of combination of authorized and unauthorized. And you have abuse that passed around like a virus; abuse that started because one unit was approved to use it, and then another unit which wasn't started copying them.<sup>185</sup>

During the summer of 2003, 10 or 12 members of the 519th Military Intelligence Battalion, the same unit implicated in Dilawar's and Habibullah's deaths, traveled to Abu Ghraib to set up interrogation operations there. Captain Carolyn Wood became the officer-in-charge. On July 26, 2003, Wood sent a proposed interrogation policy that included sleep management, “comfort positions,” the presence of military dogs, 20-hour interrogations, isolation and light control.<sup>186</sup>

Wood did not hear back from her command about the proposal, and resubmitted it on August 27, 2003. This time, two lawyers from CJTF-7 visited Abu Ghraib, and told her that “they did not see anything wrong with it,” and would approve it and forward it to higher-ranking officers for review.<sup>187</sup>

In early September, Major General Miller visited Iraq to advise personnel there about improving interrogations. Several soldiers who met with him recalled him saying that they were treating detainees too leniently. For example, Major General Keith Dayton, also of the Iraq Survey Group, remembered Miller telling him that ISG “not getting much out of these people” because “you haven't broken [the detainees] psychologically.”<sup>188</sup>

On September 14, CJTF-7 issued its first theater-wide interrogation policy, signed by General Sanchez. The policy stated that the Geneva Conventions applied, but nonetheless authorized sleep “adjustment,” stress positions, the presence of military dogs, yelling, loud music, light control, environmental manipulation, and isolation. The policy went into effect immediately. According to Sanchez's autobiography, his legal advisor, Colonel Marc Warren, told him there was “unanimous agreement” among legal experts in Iraq that “every one of these is authorized by the Geneva Conventions.”<sup>189</sup>

At a hearing on May 19, 2004, Sen. Jack Reed of Rhode Island asked Warren how he could have concluded that those techniques complied with Article 31 of the Fourth Geneva Convention, which states that “physical or moral coercion shall not be exercised against protected persons, in particular to obtain information from them or from third parties.” Warren stated that they were permitted “when applied to security internees, in this case who are unlawful combatants,” and who “would have been permissibly under active interrogation.”<sup>190</sup>

A December 24, 2003, letter from the military to the Red Cross explains this interpretation in more detail. Warren apparently relied on Article 5 of the Fourth Geneva Convention, which states that if a party to a conflict

is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. ... [S]uch persons shall nevertheless be treated with humanity.

The letter cites this provision to argue that security detainees are not eligible for full protection under the Fourth Geneva Convention, and “in the context of ongoing strategic interrogation ... we consider their detention to be humane.”<sup>191</sup> This interpretation replaces the Fourth Geneva Convention’s protections with the same vague requirement of “humane treatment” that applied in Guantánamo and Afghanistan.

At Central Command, Major Carrie Ricci disagreed with Warren’s interpretation. She stated that many of the techniques in the September 14 policy violated the Third and Fourth Geneva Conventions, and should not be authorized.<sup>192</sup> On October 12, 2003, Sanchez released a new directive, which listed only techniques included in Field Manual, and stated that requests for unlisted techniques had to be submitted to him in writing.<sup>193</sup>

Many have argued that Sanchez’s second memo demonstrates that any subsequent abuses in Iraq were a function of undisciplined, sadistic soldiers, not policy. This is particularly true of the notorious Abu Ghraib photographs, which have been denounced by even the most ardent defenders of “enhanced interrogations.” Vice President Cheney described them as “deeply disturbing. The behavior recorded in them was cruel and disgraceful and certainly not reflective of U.S. policy.”<sup>194</sup> John Yoo denies any connection between the OLC memos he wrote and “what happened at Abu Ghraib. Abu Ghraib featured terrible examples of physical and sexual abuse, imposed not in any interrogation context, but as sadistic entertainment when higher officers were not present.”<sup>195</sup>

Some photographs do fit Yoo’s description, and it was these incidents on which the court-martial convictions of Charles Graner, Ivan Frederick, Lynndie England, and the other night-shift MPs rested. Captain Christopher Graveline, the lead Army prosecutor on the cases, later stated that his team had avoided “charging MPs if there was even a hint of MI involvement that may have led to confusion about how detainees should be treated.”<sup>196</sup> Instead, Graveline focused on a few incidents where the detainees involved were never interrogated by MI — a fact that he believed put “a stake in the heart” of the defendants’ claim that they were just following orders from interrogators.<sup>197</sup>



But many of the Abu Ghraib photographs depict abuses that began before Graner's unit arrived at the prison, and were widely condoned if not actually authorized. Brent Pack, the CID agent who examined the Abu Ghraib photographs, later told journalists that he asked of each photo, "[D]oes this one actually constitute a crime or is it standard operating procedure?" Pack regarded nudity and stress positions as "standard operating procedures."<sup>198</sup>

Damien Corsetti, an MP from the 519th Military Intelligence Brigade, has stated that his unit "set the same policies in Abu as we set at Bagram. The same exact rules."<sup>199</sup> A September 16, 2003, entry from the logbooks kept by the 72nd MP Company corroborates this, stating that a detainee "was stripped down per MI and he is [naked] and standing tall in his cell."<sup>200</sup>

The Red Cross came to a similar conclusion based on visits to Abu Ghraib in mid-October 2003, where they "witnessed the practice of keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days."<sup>201</sup> When they demanded an explanation, "[t]he military intelligence officer in charge of the interrogation explained that this practice was 'part of the process.'" The ICRC also witnessed sleep deprivation, threats, and detainees being "handcuffed either dressed or naked to the bed bars or the cell door." Its medical officer observed both physical and psychological symptoms resulting from this treatment, including bruising and cuts around the wrist, "incoherent speech, acute anxiety reactions, abnormal behavior, and suicidal tendencies."<sup>202</sup>

Lewis Welshofer's court-martial demonstrates that the belief that the "gloves were off" extended to the Blacksmith Hotel, FOB Rifles in Al Asad, and FOB Tiger in Al Qaim.<sup>203</sup> Other soldiers have testified to widespread abuse at a facility in Mosul, known informally as "The Disco,"<sup>204</sup> and FOB Mercury, in Falluja.<sup>205</sup>

The most troubling report may be the description from a unit stationed at Forward Operating Base Lion, near Balad, where six soldiers told reporter Joshua Phillips that they had routinely tortured detainees.<sup>206</sup> Two soldiers from that unit, Adam Grey and Jonathan Millantz, died in possible suicides, and in Millantz's case, it seems clear that his death was linked to remorse over his actions. Millantz was serving as a medic with his unit, and told Phillips in an initial interview that

My position pretty much was to take vital signs of prisoners while they were getting, for a lack of better words, questioned or interrogated. And I saw some stuff that really turns my stomach that I'm really not going to disclose.<sup>207</sup>

Millantz later disclosed more details; he said, for example, that one of the techniques they used was stimulated drowning. He also said that he had tried to report the abuse but,

When I said that these conditions were inhumane for the detainees and, um ... All my opinions were shut — shut down, basically. And I just, I was just told to, you know, mind my own business and do my job, and "don't make a fuss, don't make a scene." ...

It was beat into our brains the entire time we were there: "This is a company level operation. Do not talk about it. Do not tell anybody about this."<sup>208</sup>

Of course, this is very far from typical of units serving in Iraq, most of whom treated prisoners honorably and in accordance with the law. But it does illustrate the danger of relaxing the long-

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standing prohibitions against mistreating detainees whom soldiers may hold responsible for their friends' deaths.

A Pentagon survey of 1,700 U.S. troops serving in Iraq in 2007 found that approximately 10 percent acknowledged gratuitously mistreating civilians or damaging their property. Less than half would report a fellow soldier for immoral actions, and more than a third believed that torture should be allowed to save the lives of another soldier.<sup>209</sup> Soon after that survey was released, General Charles Krulak and General Joseph Hoar, retired commanders of the Marine Corps and U.S. Central Command, wrote:

As has happened with every other nation that has tried to engage in a little bit of torture — only for the toughest cases, only when nothing else works — the abuse spread like wildfire, and every captured prisoner became the key to defusing a potential ticking time bomb. Our soldiers in Iraq confront real “ticking time bomb” situations every day, in the form of improvised explosive devices, and any degree of “flexibility” about torture at the top drops down the chain of command like a stone — the rare exception fast becoming the rule.<sup>210</sup>



- 1 *Guantánamo Remarks Cost Policy Chief His Job*, CNN (Feb. 2, 2007), available at <http://www.cnn.com/2007/US/02/02/gitmo.resignation> (“When corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms.”).
- 2 Task Force staff interview with Moazzam Begg, Omar Deghayes, Bisher al-Rawi (Apr. 17, 2012) [hereinafter Begg, Deghayes, al-Rawi Interview].
- 3 Neil A. Lewis, *U.S. Military Eroding Trust of Detainees, Lawyers Say*, N.Y. TIMES (Mar. 9, 2005), available at <http://www.nytimes.com/2005/03/08/world/americas/08iht-gitmo.html> (“Another lawyer, Marc Falkoff of New York, whose firm represents several Yemenis at the naval base in Cuba, said some of his clients had told him that a person who said he was a lawyer and had civilian clothes had conferred several times with some detainees. That person, Falkoff said his clients had told him, later appeared at the detention center in uniform, leading the inmates to distrust anyone claiming to be a lawyer and acting in their interest.”). See also Neil A. Lewis, *Detainee’s Lawyer Says Captors Foment Mistrust*, N.Y. TIMES (Dec. 7, 2005), available at <http://www.nytimes.com/2005/12/07/international/07hamdan.html> (“The Guantánamo authorities violated a court order by moving a prisoner from the general population there and placing him in close contact with a hard-core operative for Al Qaeda known for urging detainees to refuse to cooperate with their lawyers, according to papers filed with the United States District Court here by Lt. Cmdr. Charles D. Swift.”).
- 4 Lewis, *U.S. Military Eroding Trust*, *supra* note 3.
- 5 Begg, Deghayes, al-Rawi Interview, *supra* note 2.
- 6 Task Force staff interview with Clive Stafford Smith (Apr. 16, 2012); William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES (May 5, 2007), available at <http://www.nytimes.com/2007/05/05/us/05gitmo.html> (“‘Some people don’t have full trust in attorneys,’ Mr. Khussrof said, according to Mr. Remes’s notes. ‘They think you work for government.’”).
- 7 Begg, Deghayes, al-Rawi Interview, *supra* note 2.
- 8 Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES (Oct. 17, 2004), available at <http://www.nytimes.com/2004/10/17/politics/17gitmo.html> (“They were also occasionally given milkshakes and hamburgers from the McDonald’s on the base”).
- 9 Neil A. Lewis, *Report Discredits F.B.I. Claims of Abuse at Guantánamo Bay*, N.Y. TIMES (July 14, 2005), available at <http://www.nytimes.com/2005/07/14/politics/14gitmo.html>
- 10 Senate Armed Servs. Comm. (110th Cong.), *Inquiry into the Treatment of Detainees in U.S. Custody* 19 (Nov. 20, 2008) [hereinafter Levin Report], available at [http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf). See also Jane Mayer, *Thoughts on the Levin Report*, NEW YORKER (Apr. 21, 2009), available at <http://www.newyorker.com/online/blogs/newsdesk/2009/04/levin-torture-interrogation-senate-report.html>
- 11 Levin Report, *supra* note 10, at 19.
- 12 See Michael Elliott, *Welcome to Camp X-Ray*, TIME (Jan. 20, 2002), available at <http://www.time.com/time/magazine/article/0,9171,195299,00.html>; Sgt. Jim Greenhill, *Outdated Images of Detention Center, Mission Frustrate Guantánamo Troopers*, AM. FORCES PRESS SERV. (Dec. 1, 2006), available at <http://www.defense.gov/news/newsarticle.aspx?id=2272>
- 13 Task Force staff interview with Col. (Ret.) Terry Carrico (Nov. 2, 2011) [hereinafter Carrico

Interview]. All the detainees had been transferred to Camp Delta by April 29, 2002.

14 Greg Miller, *Many Held at Guantánamo Not Likely Terrorists*, L.A. TIMES (Dec. 22, 2002), available at <http://articles.latimes.com/2002/dec/22/nation/na-gitmo22>

15 *Id.*

16 *Id.* See also Ted Conover, *In the Land of Guantánamo*, N.Y. TIMES (June 29, 2003), available at <http://www.nytimes.com/2003/06/29/magazine/29GUANTANAMO.html>

17 Mike Allen, *Lawmaker Tours Become Part of Guantánamo Life*, WASH. POST (Aug. 6, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/05/AR2005080501568.html>; Lewis, *supra* note 8; Josh White, *U.N. Inspectors Are Invited to Guantánamo Bay*, WASH. POST (Oct. 29, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102802043.html>

18 Vikram Dodd, *American Military Bans BBC Crew from Guantánamo Bay for Talking to Inmates*, GUARDIAN (UK) (June 21, 2003), available at <http://www.guardian.co.uk/media/2003/jun/21/cuba.usnews>; Ben Wedeman, *CNN Tours Gitmo Prison Camp*, CNN (Jul. 7, 2005), available at <http://edition.cnn.com/2005/US/07/06/gitmo.tour/index.html>

19 Conover, *supra* note 16.

20 U.S. Army Sgt. Sara Wood, *GITMO Photos*, DOD Website (Oct. 1, 2012), available at <http://www.defense.gov/home/features/gitmo/facilities.html>

21 Greenhill, *supra* note 12.

22 Kathleen T. Rhem, *Guantánamo Detainees Receiving “First-Rate” Medical Care*, AM. FORCES PRESS SERV. (Feb. 18, 2005), available at <http://www.defense.gov/news/newsarticle.aspx?id=25852>

23 Task Force staff interview with Albert Shimkus (July 26, 2012) [hereinafter Shimkus Interview].

24 *Id.*

25 *Id.*

26 The next most impressive element of the public relations tour was a talk visitors had with the camp's Muslim chaplain, Capt. James Yee, a Chinese-American graduate of West Point and a convert to Islam. Capt. Yee proudly explained how he played the Muslim call to prayer over the camp's loudspeaker system several times a day as required. He also told visitors how he insured that the food was halal, religiously appropriate for consumption by Muslims. He was later arrested on suspicion of espionage by base commanders and held in harsh conditions for several months. He eventually underwent a preliminary court-martial. He was acquitted of anything connected to espionage — it became evident that investigators had a hair-trigger on their suspicions and misfired completely. Some other Muslims in the military were also wrongly suspected of nefarious activities on behalf of Al Qaeda. In Capt. Yee's case, he was discovered in the course of the investigation to have had an extramarital affair at Guantánamo for which he was also charged. He was humiliated publicly when military prosecutors, finding their espionage case empty, enthusiastically presented details of Capt. Yee's relationship with a female Navy reservist from California, as well as his internet pornography habits. It led to the end of his military career. See Tim Golden, *Loyalties and Suspicions: The Muslim Servicemen; How Dubious Evidence Spurred Relentless Guantánamo Spy Hunt*, N.Y. TIMES (Dec. 19, 2004), available at <http://query.nytimes.com/gst/fullpage.html?res=9A04EEDC1230F93AA25751C1A9629C8B63>

27 Shimkus Interview, *supra* note 23.

- 28 See Faculty Profile, Albert J. Shimkus, U.S. Naval War College, <http://www.usnwc.edu/Academics/Faculty/Albert-Shimkus.aspx>
- 29 Shimkus Interview, *supra* note 23.
- 30 *Id.*
- 31 Begg, Deghayes, al-Rawi Interview, *supra* note 2.
- 32 Shimkus Interview, *supra* note 23.
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 Mark Denbeaux, *Drug Abuse, An Exploration of the Government's Use of Mefloquine at Guantánamo*, Seton Hall Univ. Sch. of Law, Ctr. for Pol'y & Res., Paper, No. 2010-33 (2011), available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/drug-abuse-exploration-government-use-mefloquine-gunatanamo.pdf>; Jason Leopold & Jeffrey Kaye, *Ex-Guantánamo Official Was Told Not to Discuss Policy Surrounding Antimalarial Drug Used on Detainees*, Truthout (Dec. 20, 2010), available at <http://truth-out.org/news/item/254:exGuantánamo-official-was-told-not-to-discuss-policy-surrounding-antimalarial-drug-used-on-detainees>; Carol Rosenberg, *U.S., Cuba Talk About Malaria*, MIAMI HERALD (Feb. 22, 2002), available at <http://www.cubanet.org/CNews/y02/feb02/22e3.htm>
- 37 Shimkus Interview, *supra* note 23.
- 38 Rosenberg, *supra* note 36.
- 39 Leo Shane III, *Experts: DOD Malaria Policy for Detainees is Malpractice*, STARS & STRIPES, Jan. 23, 2011, available at <http://www.stripes.com/experts-dod-malaria-drug-policy-for-detainees-is-malpractice-1.132623>
- 40 *Bush Delivers Ultimatum*, CNN (Sept. 20, 2001), available at [http://articles.cnn.com/2001-09-20/world/ret.afghan.bush\\_1\\_senior-taliban-official-terrorist-ringleader-osama-bin-mullah-mohammed-omar](http://articles.cnn.com/2001-09-20/world/ret.afghan.bush_1_senior-taliban-official-terrorist-ringleader-osama-bin-mullah-mohammed-omar)
- 41 See David Firestone, *A Nation Challenged: The Reaction; Sunday of Muted Cheers and Renewed Fears*, N.Y. TIMES (Oct. 8, 2001), available at <http://www.nytimes.com/2001/10/08/us/a-nation-challenged-the-reaction-sunday-of-muted-cheers-and-renewed-fears.html>; Patrick Wintour, Kamal Ahmed, Ed Vulliamy & Ian Traynor, *It's Time for War, Bush and Blair Tell Taliban*, GUARDIAN (UK) (Oct. 7, 2001), available at <http://www.guardian.co.uk/world/2001/oct/07/politics.september11>
- 42 See ANGELO RASANAYAGAM, *AFGHANISTAN: A MODERN HISTORY* (2007); AMIN SAIKAL, A.G. RAVAN FARHADI & KIRILL NOURZHANOV, *MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL* (2006); United Nations, *Afghanistan & the United Nations*, available at <http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml>
- 43 *Celebrations, Confusion as Kandahar Falls*, CNN (Dec. 7, 2001), available at <http://archives.cnn.com/2001/WORLD/asiapcf/central/12/07/ret.kandahar.surrender>; *Taliban Surrender in Kandahar*, GUARDIAN (UK) (Dec. 7, 2001), available at <http://www.guardian.co.uk/world/2001/dec/07/afghanistan1>
- 44 *A Nation Challenged; Air Campaign So Far*, N.Y. TIMES (Oct. 13, 2001), available at <http://www.nytimes.com/2001/10/13/us/a-nation-challenged-air-campaign-so-far.html>; Dexter Filkins, *A Nation Challenged; The Prisoners; Taliban Arab, Like Many, Longs for Home but Faces a Doubtful Fate*, N.Y. TIMES (Dec. 2, 2001),

available at <http://www.nytimes.com/2001/12/02/world/nation-challenged-prisoners-taliban-arab-like-many-longs-for-home-but-faces.html>; Carlotta Gall, *A Nation Challenged: Mazar-i-Sharif; U.S. Bomb Wounds G.I.'s as Battle Rages at Fort*, N.Y. TIMES (Nov. 27, 2001), available at <http://www.nytimes.com/2001/11/27/world/a-nation-challenged-mazar-i-sharif-us-bomb-wounds-gi-s-as-battle-rages-at-fort.html>; Michael R. Gordon, *A Nation Challenged: Military; Tora Bora Attack Advances Slowly in Tough Fighting*, N.Y. TIMES (Dec. 16, 2001), available at <http://www.nytimes.com/2001/12/16/world/a-nation-challenged-military-tora-bora-attack-advances-slowly-in-tough-fighting.html>

45 Task Force staff interview with anonymous source.

46 Chief Warrant Officer 3 Sharon Curcio, *Generational Differences in Waging Jihad*, MIL. REV. 84 (2005) (“The recruiters used visual displays of persecuted Muslims, and routinely exposed recruits to films that featured suffering women and children in refugee camps in Chechnya or Palestine.”).

47 *Id.*

48 *Id.*

49 *Id.* at 85.

50 *Id.* at 85–86.

51 *Id.* at 86 (“But why did the older men not expect retaliation after the 9/11 attack? Because there had been no significant retaliation after the terrorist attacks on the Khobar Towers housing complex in Dhahran, Saudi Arabia, and the USS *Cole* in Port Aden, Yemen. It was reasonable to assume the United States would, once again, do little. Al-Qaeda also did not want to alert the young recruits that a larger, more dangerous game might have just begun.”).

52 *Id.* at 87 (“Arab recruits were told to exit Afghanistan as soon as possible because a price was on their heads. Many recruits sought cover in the Tora Bora Mountains but were caught in the bombing and suffered shrapnel wounds or lost limbs after stepping on landmines. . . . Quite a few hired Afghan guides to get them out of the mountains and spent many days on foot trying to get to the border. . . . Some recalled being rounded up and betrayed by Pakistanis who sold them to the Northern Alliance.”).

53 Neil A. Lewis, *Fate of Prisoners from Afghan War Remains Uncertain*, N.Y. TIMES, Apr. 24, 2003, available at <http://www.nytimes.com/2003/04/24/international/worldspecial/24GITM.ht>

54 *Id.*

55 ANDY WORTHINGTON, THE GUANTÁNAMO FILES 33–34 (2007); see also *The Guantánamo Docket—Tariq Mahmoud Ahmed al Sawah*, N.Y. TIMES, at <http://projects.nytimes.com/guantanamo/detainees/535-tariq-mahmoud-ahmed-al-sawah/documents/4> (last visited June 13, 2012) (“Massoud and Dostum were our enemies before. They are fighting Muslims. There are no rules in the United States to prevent it if you want to fight for religion. There are no rules to direct me not to defend people. . . . If Massoud and Dostum are American allies, they were not an alliance before September 11th, were they? I think they were not American allies.”).

56 Celestine Bohlen, *A Nation Challenged—An Overview: Dec. 6, 2001; Fall of Kandahar, Debating a Surrender and Firefighters’ Suspicions*, N.Y. TIMES (Dec. 7, 2001), available at <http://www.nytimes.com/2001/12/07/world/nation-challenged-overview-dec-6-2001-fall-kandahar-debating-surrender.html>; see also THE GUANTÁNAMO FILES, *supra* note 55.

57 Mil. Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57831 (Nov. 13, 2001), available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>

58 Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES (May 20, 2005), available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>; see also *The Guantánamo Docket*, N.Y. TIMES, available at <http://projects.nytimes.com/guantanamo>

59 Some of the detainees, in a case that has puzzled observers, included former prisoners of the Taliban. The Taliban had considered them spies, but the arrival of Western forces was no help to them, as they were not freed, but were then taken in as U.S. detainees, held in Kandahar, and later Guantánamo. They were Jamal al-Harith, Abdul Rahim Al Ginco, Airat Vakhitov, Sadiq Ahmad Turkistani, and Abdul Hakim Bukhary. Their journey from Taliban prisoners to U.S. detention in Afghanistan to Guantánamo was obviously one of the most ironic and incomprehensible. See THE GUANTÁNAMO FILES, *supra* note 55, at 114; Tim Golden, *Expecting U.S. Help, Sent to Guantánamo*, N.Y. TIMES (Oct. 15, 2006), available at <http://www.nytimes.com/2006/10/15/us/15gitmo.html>

60 Cullen Murphy, Todd S. Purdum, David Rose & Phillippe Sands, *Guantánamo: An Oral History*, VANITY FAIR (Jan. 11, 2012) (“Maybe they had been picked up on the battlefield, and maybe they were involved in low-level insurgency. That would’ve been the worst of it with a large portion of these characters. The majority of the ones that I saw—really, we just didn’t have anything on them.”), available at <http://www.vanityfair.com/politics/2012/01/guantanamo-bay-oral-history-201201>

61 CHRIS MACKEY AND GREG MILLER, THE INTERROGATORS 174 (2004) [hereinafter THE INTERROGATORS].

62 Mark Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall Univ. Sch. of Law Report (2006).

63 *Id.* at 12 (“The detainee participated in military operations against the United States and its coalition partners. 1. The detainee *fled*, along with others, when the United States forces bombed their camp. 2. The detainee was captured in Pakistan, along with other Uighur fighters.”).

64 *Id.* at 14.

65 THE GUANTÁNAMO FILES, *supra* note 55, at 34; *The Guantánamo Docket*, *supra* note 58.

66 THE INTERROGATORS, *supra* note 61, at 221.

67 *Id.* at 217.

68 Task Force staff interview with Richard Shiffirin (Mar. 9, 2012).

69 *Id.*

70 Eyewitness observation by Neil A. Lewis, Task Force staff Director.

71 Task Force staff interview with Pierre-Richard Prosper (Apr. 10, 2012).

72 *Final Report of the Independent Panel to Review DoD Detention Operations* 80 (Aug. 2004) (“Schlesinger Report”), available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>

73 Tony Perry, *Marine Officer Who Set Up Guantánamo Prison Expresses Dismay at What It Has Become*, L.A. TIMES (Sept. 25, 2009), available at <http://articles.latimes.com/2009/sep/25/world/fg-marine-gitmo25>

74 KAREN GREENBERG, THE LEAST WORST PLACE: GUANTÁNAMO’S FIRST 100 DAYS 55–59, 62–63 (2009).

75 *Id.* at 57.



- 76 Task force staff interview with William H. Taft IV (Sept. 27, 2011).
- 77 Carrico Interview, *supra* note 13.
- 78 Press Briefing, DOD Secretary Rumsfeld & Gen. Myers (Jan. 11, 2002), *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>
- 79 Carrico Interview, *supra* note 13.
- 80 *Id.*
- 81 Aram Roston, *Terry Carrico, Ex-Guantánamo Prison Commander, Says Facility Should Close*, DAILY BEAST (Jan. 6, 2012), *available at* <http://www.thedailybeast.com/articles/2012/01/06/terry-carrico-ex-guantanamo-prison-commander-says-facility-should-close.html>
- 82 *Id.*
- 83 Carrico Interview, *supra* note 13.
- 84 Gerry G. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, AM. FORCES PRESS SERV. (Jan. 27, 2002), *available at* <http://www.defense.gov/news/newsarticle.aspx?id=43817>
- 85 PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 51 (2008).
- 86 Levin Report, *supra* note 10, at 38-39, 43-47, 51-53.
- 87 *Guantánamo Bay 10-Year Anniversary: Timeline*, TELEGRAPH (UK) (Jan. 11, 2012), *available at* <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9006682/Guantanamo-Bay-10-year-anniversary-timeline.html>; Eli Clifton, *By the Numbers: 10 Years At Guantánamo Bay*, Think Progress (Jan. 11, 2012), *available at* <http://thinkprogress.org/security/2012/01/11/402586/ten-years-at-Guantánamo-bay-by-the-numbers>
- 88 *Levin Report, Supra* note 10, at 61–62, 65.
- 89 *Id.* at 62.
- 90 Julian Borger, *“Soft” Guantánamo Chief Ousted*, GUARDIAN (UK) (Oct. 16, 2002), *available at* <http://www.guardian.co.uk/world/2002/oct/16/usa.afghanistan>
- 91 Diane Beaver, Memorandum for Commander, JTF GTMO, *Legal Review of Aggressive Interrogation Techniques* (Oct. 11, 2002), *available at* <http://www.defense.gov/news/Jun2004/d20040622doc3.pdf>
- 92 KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 229–36 (2005).
- 93 SANDS, *supra* note 85, at 77.
- 94 Levin Report, *supra* note 10, at 66-70.
- 95 *Id.* at 70. Beaver has stated that she asked requested Dalton's assistance for her own review, but did not receive any. SANDS, *supra* note 85, at 77.
- 96 Levin Report, *supra* note 10, at 71.

- 97 GREENBERG & DRATEL, *supra* note 92, at 237.
- 98 Levin Report, *supra* note 10, at 96.
- 99 *Id.* at 60.
- 100 Letter from T.J. Harrington, FBI Dep. Ass't Dir., Counterterrorism Div., to Maj. Gen. Donald J. Ryder, Army Criminal Investigation Command, Re: Suspected Mistreatment of Detainees (July 14, 2004), available at [http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87\\_001914%20to%20001916\\_DOJFBI001914.pdf](http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87_001914%20to%20001916_DOJFBI001914.pdf)
- 101 DOD, *Interrogation Log, Detainee 063* (23 Nov. 2002 to 11 Jan. 2003) [hereinafter Detainee 063 Interrogation Log], available at <http://www.time.com/time/2006/log/log.pdf>
- 102 *Id.* at 27.
- 103 Maj. Gen. Geoffrey Miller, *Assessment of DOD Counterterrorism Interrogation and Detention Operations in Iraq* (2003) ["Miller Report"], available at <http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%2020.pdf>
- 104 *Id.*
- 105 Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* 9, 18 (May 2004) ["Taguba Report"] at 20, available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>
- 106 Dexter Filkins, *General Says Less Coercion of Captives Yields Better Data*, N.Y. TIMES (Sept. 7, 2004), available at <http://www.nytimes.com/2004/09/07/international/middleeast/07detain.html>; Dexter Filkins, *The Struggle for Iraq: The Warden; General Will Trim Inmate Numbers at Iraq Prison*, N.Y. TIMES (May 5, 2004), available at <http://www.nytimes.com/2004/05/05/world/the-struggle-for-iraq-the-warden-general-will-trim-inmate-numbers-at-iraq-prison.html>
- 107 Lt. Gen. Randall Schmidt & Brig. Gen. John Furlow, *Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* 1, 20 (Apr. 1, 2005), available at <http://www.defense.gov/news/Jul2005/d20050714report.pdf>
- 108 *Id.*
- 109 Bob Woodward, *Guantánamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>
- 110 Task Force staff interview with Sherif El-Mashad (Aug. 13, 2012) ("As Muslims we don't like to take off our clothes in front of men or women. They make you do it knowing the sensitivity of the issue.").
- 111 Task Force staff interview with Sami al-Hajj (Oct. 6, 2011) [hereinafter al-Hajj Interview].
- 112 *Id.* ("Every 30 minutes, they come and say for you to move, move. They do this for 2 days, continuously.").
- 113 *Id.*
- 114 Task Force staff interview with Sean Baker (Nov. 30, 2011) [hereinafter Baker Interview].
- 115 Amended Complaint, Baker v. United States, No. 05-221 (E.D. Ky. May 31, 2005); Decl. of

Anthony Adolph, *Baker v. United States*, No. 05-221 (E.D. Ky. Aug. 16, 2005).

116 Baker Interview, *supra* note 114.

117 Task Force staff interview with Alberto Mora (Apr. 24, 2012) [hereinafter Mora Interview].

118 Bill Dedman, *Gitmo Interrogations Spark Battle Over Tactics*, MSNBC (Oct. 23, 2006) available at [http://www.msnbc.msn.com/id/15361458/ns/world\\_news-terrorism/t/gitmo-interrogations-spark-battle-over-tactics](http://www.msnbc.msn.com/id/15361458/ns/world_news-terrorism/t/gitmo-interrogations-spark-battle-over-tactics)

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- 71    NOW Interview, *supra* note 65.
- 72    Petition for Writ of *Habeas Corpus*, at 4–5, Begg v. Bush, Civ. No. 04-1137 (D.D.C. July 2, 2004), *available at* <http://projects.nytimes.com/guantanamo/detainees/558-moazzam-begg/documents/4>
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- 75    *Id.*

- 76 *Id.*
- 77 Mark Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, Seton Hall Sch. of Law Report (2006).
- 78 *Id.*
- 79 *Id.* at 12 (“The detainee participated in military operations against the United States and its coalition partners. 1. The detainee *fled*, along with others, when the United States forces bombed their camp. 2. The detainee was captured in Pakistan, along with other Uigher fighters.”).
- 80 *Id.* at 14.
- 81 WORTHINGTON, *supra* note 2, at 34.
- 82 MACKEY & MILLER, *supra* note 40, at 221.
- 83 Cullen Murphy, Todd S. Purdum, David Rose & Philippe Sands, *Guantánamo: An Oral History*, VANITY FAIR (Jan. 11, 2012) [hereinafter *Guantánamo: An Oral History*], available at <http://www.vanityfair.com/politics/2012/01/guantanamo-bay-oral-history-201201> (“Maybe they had been picked up on the battlefield, and maybe they were involved in low-level insurgency. That would’ve been the worst of it with a large portion of these characters. The majority of the ones that I saw — really, we just didn’t have anything on them.”).
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- 87 Sharon Curcio, *Generational Differences in Waging Jihad*, MIL. REV. 84, 85 (2005).
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- 96 Al-Hajj Interview, *supra* note 55.

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- 124 *Id.* at 146.
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- 137 Jacoby Report, *supra* note 59, at 3.
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- 161 ISAF, *COMISAF's Initial Assessment 2-16* (Aug. 30, 2009) [hereinafter McChrystal Assessment], available at [http://media.washingtonpost.com/wp-srv/politics/documents/Assessment\\_Redacted\\_092109.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf), at § 2-16, p. 24.
- 162 *Id.* at F-1, p. 50.
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- 165 *Id.* at 199.
- 166 Ron Synovitz, *New U.S. Plan Reportedly to Let Afghan Prisoners Challenge Incarceration*, Radio Free Europe (Sept. 14, 2009), available at [http://www.rferl.org/content/New\\_US\\_Plan\\_Reportedly\\_To\\_Let\\_Afghan\\_Prisoners\\_Challenge\\_Incarceration/1822216.html](http://www.rferl.org/content/New_US_Plan_Reportedly_To_Let_Afghan_Prisoners_Challenge_Incarceration/1822216.html)
- 167 Bovarnick, *supra* note 153.
- 168 *Id.*
- 169 *Id.* at 18.
- 170 *Id.*, at 19.
- 171 *Id.* at 19–20 (“The panel of three officers also had the responsibility of dividing the detainees into separate categories: High Level Enemy Combatant (HLEC); Low Level Enemy Combatant (LLEC); and Threat only. Those who were to be released were categorized as No Longer Enemy Combatant (NLEC). As the UECRB worked its way through the [sic] hundred detainees in the BTIF, the files of all detainees assessed as LLECs were transferred to the DAB. The DAB, comprised of military intelligence analysts and military criminal investigators, assessed the detainee files for potential transfer to Afghan authorities for prosecution. To support the Rule of Law mission, the DAB would only recommend transfer of cases for prosecution if there was solid evidence. Those detainees not recommended for transfer remained interned until their next review in six months.”).
- 172 As of 2010. Bovarnick, *supra* note 153, at 22. The U.N. Sec. Council Res. 1386, 1413, 1444, 1510, 1563, 1623, 1707, 1776, 1833, 1817, 1890, 1917, 1943, & 2011.
- 173 Hum. Rts. First, *Fixing Bagram: Strengthening Detention Reforms to Align with U.S. Strategic Priorities* 2–3 (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Fixing-Bagram-110409.pdf> (“On the other hand, similarities between the DRBs and the discredited Combatant Status Review Tribunals (CSRTs) in Guantánamo are cause for concern. Specific problems with the CSRTs that may also arise in the DRBs involve enforcement of detainees’ entitlement to exculpatory information and their ability to review and challenge the evidence against them and produce their own evidence, including

witnesses, all in the absence of entitlement to legal representation or independent review of their detention.”).

174 Bovarnick, *supra* note 153, at 22–24.

175 *Id.*

176 See Alissa J. Rubin, *U.S. Readies New Facility for Afghan Detainees*, N.Y. TIMES (Nov. 15, 2009), available at <http://www.nytimes.com/2009/11/16/world/asia/16bagram.html>

177 Bovarnick, *supra* note 153, at 23 (“Since March 2010, the inclusion of Afghan witness testimony has had a noticeable impact on the DRB process, not only in terms of logistics, but also in the frequency of releases for detainees supported by witness testimony.”).

178 Hum. Rts. First, *Detained and Denied in Afghanistan 2* (May 2011) [hereinafter *Detained and Denied*], available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf> (“Former detainees we interviewed repeatedly emphasized that they believed they were wrongly imprisoned based on false information provided to U.S. forces by personal, family or tribal enemies, a view that they took back to their villages after their eventual release. Afghan lawyers and human rights workers confirmed that this is a big problem in Afghanistan, as have recent news reports.”).

179 *Id.* at 3.

180 Bovarnick, *supra* note 153, at 35 (“During roughly the same period — 6 March to 18 June 2010 — a total of 581 DRBs were conducted. In the 404 cases where no witnesses appeared, the board recommended continued interment in 55% of the cases. In the 177 cases, which involved either live or telephonic witnesses, the continued interment rates were considerably lower: 43% and 48% respectively.”).

181 *Id.* (“In large part, that is because the detainees are not represented by legal counsel in these proceedings, known as Detainee Review Boards. The detainees’ ‘personal representatives’ are uniformed U.S. soldiers with no legal background or training in the culture or language of the detainees they represent. Moreover, with only 15 such representatives assigned to Bagram at the time of this report, each representative is responsible for the defense of more than 100 detainees.”).

182 *Id.* (“Moreover, while most forensic evidence, which is more likely to be reliable, is not classified, evidence provided by informants, which is far more difficult to verify, is classified. These informants are never tested. It is also impossible to know if the classified evidence includes statements elicited from the detainee or from witnesses by coercion, torture, or cruel, inhuman or degrading treatment, despite the military’s rule excluding tortured evidence. Such evidentiary rules can only be enforced if the evidence can be tested in a truly adversarial system.”); Hum. Rts. First, *Undue Process: An Examination of Detention and Trials of Bagram Detainees in April 2009* (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Undue-Process-Afghanistan-web.pdf>

183 *Detained and Denied*, *supra* note 178, at 4.

184 Larisa Epatko, *Detention Centers in Iraq Move from “Chaos” to Reform*, PBS NewsHour (June 20, 2008), available at [http://www.pbs.org/newshour/indepth\\_coverage/middle\\_east/iraq/jan-june08/detainees\\_06-20.html](http://www.pbs.org/newshour/indepth_coverage/middle_east/iraq/jan-june08/detainees_06-20.html); Gerry J. Gilmore, *Iraq Detention Centers Give Glimpse Into al-Qaida*, GENERAL SAYS, AM. FORCES PRESS SERV. (June 9, 2008); Scott Horton, *Inside a Secret DOD Prison in Afghanistan*, HARPER’S (Oct. 19, 2010), available at <http://harpers.org/blog/2010/10/inside-a-secret-dod-prison-in-afghanistan>; Joshua Partlow, *U.S. Gives Tour of New Afghan Detention Center*, WASH. POST, (Nov. 16, 2009), available at [http://articles.washingtonpost.com/2009-11-16/world/36829899\\_1\\_detention-center-detainees-afghans](http://articles.washingtonpost.com/2009-11-16/world/36829899_1_detention-center-detainees-afghans); Walter Pincus, *U.S. Holds 18,000 Detainees in Iraq*, WASH. POST (Apr. 15, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR2007041401554.html>; Eric

Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. TIMES (Jan. 26, 2009), available at <http://www.nytimes.com/2009/01/27/washington/27bagram.html>; W. Thomas Smith Jr., *The New Counterinsurgency Front: A Conversation with Sen. Lindsay Graham*, NAT. REV. (Sept. 4, 2007), available at <http://www.nationalreview.com/articles/222008/new-counterinsurgency-front/w-thomas-smith-jr>; Doug Stanton, *Postcard from Parwan*, TIME (Aug. 16, 2010), available at <http://www.time.com/time/magazine/article/0,9171,2008892,00.html>

185 Maj. Gen. Douglas Stone, Speech at U.S. Institute of Peace (June 11, 2008), available at <http://www.usip.org/events/major-general-douglas-stone-mnf-i-deputy-commanding-general-detainee-operations>; DOD News Briefing with Maj. Gen. Doug Stone (June 9, 2008); Rubin, *supra* note 176.

186 Eric Schmitt, *Pentagon Seeks to Overhaul Prisons in Afghanistan*, N.Y. TIMES (July 19, 2009), available at <http://www.nytimes.com/2009/07/20/world/asia/20detain.html>

187 Andrew Woods, “*Good Muslim, Good Citizen*” *And Other Lesson Plans from Iraq Prisons*, SLATE (Jan. 23, 2009) available at [http://www.slate.com/articles/life/faithbased/2008/07/good\\_muslim\\_good\\_citizen.html](http://www.slate.com/articles/life/faithbased/2008/07/good_muslim_good_citizen.html) (“Prisons are where so many Islamist identities are born, nurtured, and plugged into violent networks. It was in Cairo’s prisons that Sayyid Qutb crafted an intellectual framework for modern Islamist terrorism, and Ayman al-Zawahiri underwent the transformation that would lead him to launch al-Qaida. . . . And now, along comes a Marine reservist from California, hard as hell, McKinsey-savvy, who claims he can turn detention facilities into a strategic asset.”).

188 Maria Yager, *Empowered Detainees to Leave Detention Facility in Parwan with New Knowledge*, U.S. Cent. Command (Feb. 6, 2011), available at <http://www.centcom.mil/news/empowered-detainees-to-leave-detention-facility-in-parwan-with-new-knowledge>

189 *Id.*

190 Afghanistan Indep. Hum. Rts. Comm’n, Press Release, Situation of Economic and Social Rights in Afghanistan (Dec. 10, 2011), available at <http://www.aihrc.org.af/en/press-release/514/situation-of-economic-and-social-rights.html>

191 DOD Report to Congress, *Report on Progress Toward Security and Stability in Afghanistan* 61 (Nov. 2010), available at [http://www.defense.gov/pubs/November\\_1230\\_Report\\_FINAL.pdf](http://www.defense.gov/pubs/November_1230_Report_FINAL.pdf)

192 DOD Report to Congress, *Report on Progress Toward Security and Stability in Afghanistan* 81 (Apr. 2012), available at [http://www.defense.gov/pubs/pdfs/Report\\_Final\\_SecDef\\_04\\_27\\_12.pdf](http://www.defense.gov/pubs/pdfs/Report_Final_SecDef_04_27_12.pdf)

193 Julian E. Barnes & Adam Entous, *U.S. Looks to Set Size of Afghan Presence After 2014*, WALL STREET J. (Nov. 26, 2012).

194 McChrystal Assessment, *supra* note 161, at § 2-7, p. 15.

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197 *Id.*

198 *Id.*; see also Charlie Savage & Graham Bowley, *U.S. to Retain Role as a Jailer in Afghanistan*, N.Y. TIMES (Sept. 5, 2012), available at <http://www.nytimes.com/2012/09/06/world/asia/us-will-retain-part-of-afghan-prison-after-handover.html>

199 *Id.*

200 Open Soc'y Found., *supra* note 155, at 3.

201 *Id.* at 4.

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245 Ctr. for Hum. Rts. & Global Justice, Hum. Rts. Watch, and Hum. Rts. First, *By the Numbers: Findings of the Detainee Abuse and Accountability Project* (Apr. 26, 2006), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/06425-etn-by-the-numbers.pdf>

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249 *Id.*

250 Thom Shanker, *With Troop Rise, Iraqi Detainees Soar in Number*, N.Y. TIMES (Aug. 25, 2007), *available at* [http://www.nytimes.com/2007/08/25/world/middleeast/25detain.html?\\_r=0](http://www.nytimes.com/2007/08/25/world/middleeast/25detain.html?_r=0)

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255 *Id.*

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- 260 Autopsy Report of Mohammed Ajimi al-Isawi (Sept. 4, 2007) (Army MEDCOM 785–93).
- 261 Stone Interview, *supra* note 254.
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- 265 *Iraq in Transition*, PBS NewsHour (June 20, 2008), available at [http://www.pbs.org/newshour/indepth\\_coverage/middle\\_east/iraq/jan-june08/detainees\\_06-20.html](http://www.pbs.org/newshour/indepth_coverage/middle_east/iraq/jan-june08/detainees_06-20.html); Elizabeth Detwiler, *Iraq: Positive Change in the Detention System*, U.S. Inst. of Peace (July 2008), available at [http://www.usip.org/files/resources/USIP\\_0708.PDF](http://www.usip.org/files/resources/USIP_0708.PDF); Vasilios Tasikas, *The Battlefield Inside the Wire: Detention Operations under Major General Douglas Stone*, MIL. REV. (Sept.–Oct. 2009), available at [http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview\\_20091031\\_art011.pdf](http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20091031_art011.pdf)
- 266 *Id.*
- 267 Stone Interview, *supra* note 254.
- 268 There was one exception: Ali Omar Ibrahim al-Mohammed Amin, a journalist who was arrested multiple times. He acknowledged that he had fought against Americans and fought for the insurgency. He did not know if he had ever injured or killed anybody, and the leader of his group told him he was not a competent soldier, but “[o]nce I burned a Bradley vehicle,” he said. He said he had been honest with interrogators about his involvement in the insurgency. Task Force staff interview with Ali Omar Ibrahim al-Mohammed al-Amin (Aug. 25, 2012).
- 269 Task Force staff interview with Nuri Nejem Abdullah (Aug. 27, 2012).
- 270 *Id.*
- 271 *Id.*
- 272 Task force staff interviews with Saad Rahim Abdelalratha (Sept. 1, 2012); Mohammed Abdlwarida (Aug. 25, 2012); Nuri Nejem Abdullah (Aug. 27, 2012); Tay Rahm Addularida (Aug. 27, 2012); Tamer Abdullah Abass al-Ameri (Aug. 28, 2012); Ali Omar Ibrahim al-Mohammed al-Amin (Aug. 25, 2012); Saddam Rahm (Aug. 28, 2012). There are troubling reports made by some Iraqis in interviews with Task Force staff that U.S. forces who came to their homes to make arrests also pilfered valuables. The accounts of Iraqi detainees as to what they claim was taken are specific and explicit, although there is no feasible way to properly evaluate what are only uncorroborated allegations. Of the more than two dozen Iraqis interviewed about their detention experiences, about a third reported that during the raids that led to their arrests, some soldiers took cash or gold, which Iraqis typically keep in their homes. One man said that at the time of his arrest, soldiers took cash, gold and a locked safe. He said he saw the safe later at the detention center to which he had been taken and that it had been broken open. He said that all the money and gold that had been in the safe was returned to him later but not the money and gold taken during the raid. Lt. Col. Todd Bresseale, a Defense Department spokesman said in response to a

request for comment that, "Allegations of this sort became a kind of cottage industry for a minority of those affected and are not only absolutely baseless but simply do not withstand meaningful, intellectual rigor." The Task Force emphasizes that it takes no position on the veracity of these uncorroborated allegations. Nonetheless, the Task Force thought it appropriate to note the existence of these reports for several reasons. They would be criminal violations of the Uniform Code of Military Justice and cannot be dismissed as implausible on their face. And, to whatever extent any of the accounts might be true, it would signify a lack of proper supervision and a failure of command discipline, which comports with documented and lamentable failures in the military command structure that the Task Force believes contributed to many of the verifiable incidents of physical abuse and torture that occurred.

273 Task force staff interview with Saddam Rahm (Aug. 28, 2012).

274 Task force staff interview with Tay Rahm Addularida (Aug. 27, 2012).

## CHAPTER 4 ENDNOTES

- 1 MICHAEL R. GORDON & BERNARD E. TRAINOR, *THE GENERALS' WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF* (1995).
- 2 U.S. CONST. amend. V.
- 3 *Id.* amend. XIV.
- 4 *Id.* amend. VIII.
- 5 *Rochin v. Calif.*, 342 U.S. 165, 172 (1952). *See also* Michael John Garcia, *Interrogation of Detainees: Overview of the McCain Amendment*, CRS Report RS22312 (Jan. 24, 2006), available at <http://www.au.af.mil/au/awc/awcgate/crs/rs22312.pdf>
- 6 The Geneva Conventions were ratified by the United States in 1955. The four Conventions include: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted 1864, last revision in 1949) [hereinafter GCI]; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949, successor of the 1907 Hague Convention X) [hereinafter GCII]; Third Geneva Convention Relative to the Treatment of Prisoners of War (first adopted in 1929, last revision 1949) [hereinafter GCIII]; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (first adopted in 1949) [hereinafter GCIV]. The two Conventions applicable to detainees are the Third and Fourth Geneva Conventions.
- 7 The law of war is referred to as “international humanitarian law” (IHL) and the law of armed conflict (LOAC). Those terms are used interchangeably in this report.
- 8 *See ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties*, available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_reaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_reaties/$File/IHL_and_other_related_Treaties.pdf)
- 9 The Geneva Conventions were adopted on August 12, 1949, and ratified by the United States in February 1955.
- 10 Jennifer Elsea, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, CRS Report RL32567, 18 (Sept. 8, 2004), available at <http://www.fas.org/irp/crs/RL32567.pdf> (citing the ICRC Commentary to the Geneva Conventions III, at 140).
- 11 ICRC, *Commentary on the Geneva Conventions of 12 Aug. 1949, Vol IV: Geneva Convention Relative to the Protection of Civilian Persons in the Time of War* 51 (Jean de Pictet ed., 1960) [hereinafter *Commentary to GCIV*].
- 12 *See supra* note 6.
- 13 ICRC, *U.S. Ratification Statement and Reservations* (Feb. 8, 1955), available at <http://www.icrc.org/ihl.nsf/NORM/D6B53F5B5D14F35AC1256402003F9920>
- 14 Senate Foreign Rel. Comm. (84th Cong.) *Hearing on Geneva Conventions for the Protection of War Victims* 3–4 (1955) (statement of Robert Murphy). *See also* Josef Kunz, *The Chaotic Status of the Law of War and the Urgent Necessity for their Revision*, 45 AM. J. INT'L L. 37, 57–60 (1951) (stating that the U.S. “actively supported” the initiative of the International Red Cross in revising the Geneva Conventions following WWII).
- 15 At a speech commemorating the Geneva Conventions’ 60th anniversary at the Library of Congress, Susan Rice, U.S. ambassador to the U.N., noted: “We embrace the Geneva Conventions because it is the right thing to do. ... We embrace them because hard experiences have taught us that

we are safer and stronger when we do. The United States will support and advance international humanitarian law, both as a matter of national policy and as a basic precept for the entire international community.” Kimberly Rieken, *Honoring the Geneva Conventions* (Jan.–Feb. 2010), available at <http://www.loc.gov/loc/lcib/10012/conference.html>

16 See Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(2) (1997); Dep’t of the Army, Field Manual No. 27-10, *The Law of Land Warfare*, ch. 3, § I, ¶ 71 (1956) (adopting art. 5 verbatim).

17 James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, MIL. REV. 44, 50 (Jan.–Feb. 2005) (quoting U.S. Army Field Manual, 1976 ed.).

18 See, e.g., 18 U.S.C. § 2441 (1996).

19 GCI, GCII, GCIII, GCIV art. 3.

20 *Id.*

21 *Id.* art. 3(1).

22 *Id.* art. 3(1)(a)–(d).

23 *Id.* art. 3(1).

24 GCIII.

25 GCIV.

26 Commentary to GCIII art. 3 ¶ 1(1)(A).

27 *Id.*

28 GCIII art. 2.

29 *Id.* art. 3 (Note that no statuses apply here in the only provision addressing noninternational armed conflict).

30 GCIV.

31 GCI, GCII, GCIII, GCIV art. 3.

32 Customary international law (CIL), which emerges from a general and consistent practice of states followed out of a sense of legal obligation, is binding on all states irrespective of implementing domestic legislation or treaty ratification. CIL is considered binding international law within the United States. See *Corfu Channel Case (U.K. v. Alb.)* 1949 I.C.J. 4, 22 (Apr. 9, 1949); *Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that “International Law is part of our law.”).

33 *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006) (quoting the ICRC’s own interpretation of Common Art. 3); *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 523 (June 27). The same conclusion was reached by the international criminal tribunals for the former Yugoslavia and for Rwanda. See *International Criminal Tribunal for the Former Yugoslavia (ICTY)*, *Prosecutor v. Tadic*, Case No. IT-94-1-T, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, ¶ 98 (Oct. 2, 1995); *International Criminal Tribunal for Rwanda (ICTR)*, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, *Judgment*, ¶ 608 (Sept. 2, 1998).

34 GCI, GCII, GCIII, GCIV art. 3(1)(a)–(d) (emphasis added). Common Article 3 also prohibits hostage taking and requires care for the wounded and sick. These provisions are not quoted since they have lesser application to detainees.

35 *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion on Jurisdiction, ¶¶ 65-74 (August 10, 1995) (finding that Common Art. 3 applied to the conflict in the former Yugoslavia whether or not that conflict was characterized as international or internal in scope. And, stating that Common Art. 3 sets forth “the most fundamental requirements of the law of war”); Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, 113-14 (June 27) (stating that “[t]here is no doubt that, in the event of international armed conflicts, [the provisions of Article 3] constitute a minimum yardstick. . . . Because the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether [the actions alleged to be in violation of Common Art. 3] must be looked at in the context of the rules which operate for one or for the other category of conflict.”).

36 *Hamdan*, 548 U.S. 557.

37 GCIII arts. 17, 87, 130 (designating torture as a “grave breach” of the Geneva Conventions); GCIV arts. 32, 147 (same as Article 130 from GCIII); U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85 [hereinafter CAT], art. 4, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>; 18 U.S.C. §§ 2340–2340A; 18 U.S.C. § 2441(d)(1)(A).

38 *See, e.g.*, CAT, *supra* note 37, art. 7; GCI, GCII, GCIII, GCIV art. 3(1)(c); 18 U.S.C. § 2441(d)(b).

39 In subsequent laws these concepts are generally stated together as a ban on “Cruel, Inhuman or Degrading treatment.” For purposes of brevity this report will shorthand this as “CID.” *See, e.g.*, 18 U.S.C. § 2441(d)(1)(B); CAT, *supra* note 37, art. 16.

40 CAT, *supra* note 37, arts. 5, 7.

41 GCI, GCII, GCIII, GCIV art. 3(1)(d).

42 ICRC, 1 CUSTOMARY INT’L HUMANITARIAN L. 355 (2005).

43 *Hamdan*, 548 U.S. at 632–33 (stating that the definition of “regularly constituted” is specific to the U.S., and in the U.S., courts-martial, not military commissions, are the “regularly constituted” courts. As such, the latter can be used only if there is a practical need for their deviation from that which is “regularly constituted.” In *Hamdan*, the Supreme Court in 2006 held that the government failed to show such a practical need.)

44 GCIII art. 3.

45 *Id.* art. 4.

46 *Id.* art. 5.

47 *Id.* arts. 2–78.

48 *Id.* art. 4.

49 *Id.* art. 4(A)(1).

50 *Id.* art. 4(A)(2)(a)–(d).

51 *Id.* art. 5.

52 *Id.*

53 *Id.* art. 13.

54 *Id.* art. 17.

55 *Id.*, e.g., arts. 21–32, 34–38, 82–107.

56 Civilians are defined, in Art. 50(1) Additional Protocol I of 1977, as individuals not belonging to one of the categories of persons referred to in Art. 4(A)(1),(2),(3), and (6) of GCIII as well as in Art. 43 of the Protocol. *See* Protocol I (1977): Protocol to the Geneva Conventions of Aug. 12, 1949, relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, available at <http://www.icrc.org/ihl.nsf/full/470>

57 *Commentary to GCIV*, *supra* note 11, art. 42 ¶ 1 (stating that “[t]he Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions,” and that such measures are “exceptional” in character).

58 GCIV art. 5.

59 *Id.*

60 *Id.*

61 *Id.* art. 78; see also Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. OF RED CROSS 375, 381 (2005), available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0892.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf)

62 GCIV art. 78.

63 *Id.*

64 *Id.* art. 147.

65 *Id.* art. 132.

66 *Id.* art. 27.

67 *Id.* art. 43.

68 CAT, *supra* note 37. The Convention was adopted by the U.N. General Assembly on Dec. 10, 1984, and took force on June 26, 1987. DOS, *Initial Report of the United States of America to the U.N. Committee Against Torture* (Oct. 15, 1999), available at <http://www.state.gov/documents/organization/100296.pdf> [hereinafter *U.S. Initial Report*]). CAT was ratified by the U.S. Senate on Oct. 20, 1994, and took effect as U.S. law on Nov. 20, 1994. *Id.* The U.S. Senate ratified CAT subject to a list of reservations, understandings, and declarations that limited the Convention.

69 The codified prohibition against torture goes back at least to the American Civil War, when it was absolutely banned in the 1863 Lieber Code. See Gen. Orders No. 100, § I, art. 16 (Apr. 24, 1863), reprinted in RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 48 (1983).

70 CAT, *supra* note 37, art. 16.

71 *Id.* arts. 17–22. To date, the United States has presented two periodic reports to the Committee Against Torture.

72 *Id.* art. 2.

73 *Id.* arts. 3, 15.

74 *Id.* arts. 4–14.

75 *U.S. Initial Report*, *supra* note 68.

76 *Id.* DOS observed that the U.S. took note of torture elsewhere, stating that “[t]he U.S. government pursues allegations of torture by other governments as an integral part of its overall human rights policy.” *Id.*

77 Ronald Reagan, Message to Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment (May 20, 1988), *available at* <http://www.presidency.ucsb.edu/ws/?pid=35858>

78 *Id.*

79 According to the Vienna Convention on the Law of Treaties, which governs the interpretation and binding force of treaties, a reservation is “a unilateral statement ... whereby [a State] purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties, art. 1(d), May 23, 1969, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). By contrast, understandings are statements interpreting the treaty language, and declarations are statements of purpose or position regarding the subject matter of the treaty. While reservations modify a state’s obligations under a treaty, understandings and declarations do not. *See also* U.S. Senate, *Treaties*, *available at* <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>

80 The text of the provision defining torture is:

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

CAT, *supra* note 37, art. 1(1).

81 There were further understandings and declarations made with regard to Art. 1, but here we address only those that pertain to detainee treatment.

82 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *available at* <http://www1.umn.edu/humanrts/usdocs/tortres.html> [hereinafter U.S. Reservations].

83 Senate Foreign Rel. Comm., *Report on Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. No. 101-30, at 9 (1990).

84 U.S. Reservations, *supra* note 82.



85 *Id.*

86 CAT, *supra* note 37, art. 16(1).

87 U.S. Reservations, *supra* note 82.

88 *U.S. Initial Report*, *supra* note 68.

89 CAT, *supra* note 37, art. 16.

90 CAT, *General Comment No. 2*, (Jan. 24, 2008) available at <http://www.unhcr.org/refworld/publisher,CAT,GENERAL,,47ac78ce2,0.html>. Although General Comments by U.N. treaty bodies are not legally binding, they provide authoritative guidance regarding the object and purpose of the treaty.

91 CAT, *supra* note 37, art. 2(1). Here as in other instances, U.S. law involved the interplay of international and domestic law. The Senate consented to ratification of CAT after a domestic torture statute (18 U.S.C. §§ 2340-2340A) had been adopted, as required to fulfill this requirement to enact domestic legislation.

92 *Id.* art. 2(4).

93 *Id.* arts. 2(2), 2(3).

94 U.S. Reservations, *supra* note 82.

95 CAT, *supra* note 37, art. 10.

96 *Id.*

97 *Id.* art. 12.

98 *Id.* art. 16(2).

99 CAT, *supra* note 37, art. 15 (emphasis added).

100 *Id.*

101 18 U.S.C. § 2340–2340A.

102 *Id.*

103 *Id.*

104 Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Report RL32438 (Jan. 26, 2009), available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf>

105 18 U.S.C. § 2340A(b).

106 CAT, *supra* note 37, art. 7.

107 18 U.S.C. §§ 2340–2340A.

108 *Id.* § 2441.

109 *Id.*

110 *Id.*

111 *Id.* Under the Conventions, “grave breaches” in international conflicts are willful killing, torture or inhuman treatment, biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of a hostile power, or willfully depriving a prisoner of war of the rights of fair and regular trial. GCIII art. 129.

112 *Id.*; Michael John Garcia, *The War Crimes Act: Current Issues* 1, CRS Report RL33662 (Jan. 22, 2009), available at <http://www.fas.org/sgp/crs/intel/RL33662.pdf>

113 Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 5, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

114 *Id.* (Art. 3 establishes that “[e]veryone has the right to life, liberty and the security of person.” Art. 9 holds that “no one shall be subjected to arbitrary arrest, detention or exile.” Art. 10 establishes the right to “a fair and public hearing by an independent and impartial tribunal ... to any criminal charges against him,” and Art. 11(1) confirms the “right to be presumed innocent until proven guilty according to law in a public trial in which he has had all the guarantees for his defence.”)

115 UDHR, *supra* note 113, G.A. Res. 217A, at 71. Torture and CID are banned under Art. 7 of the International Covenant on Civil and Political Rights, and arbitrary detention, under Art. 9. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

116 *See* International Covenant on Civil and Political Rights, *Declarations and Reservations* (Apr. 26, 2011), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en)

117 *See* Senate Foreign Rel. Comm., *International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 23, at 1(1992).

118 David P. Stewart, *The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1187–88 (1993). The ICCPR is similar in some respects to the U.S. Bill of Rights, as it recognizes freedom of thought, conscience, and religion (Art. 18(1)); freedom of opinion and expression (Art. 19(1)–(2)); freedom of association (Art. 22); the right of peaceful assembly (Art. 21); the right to vote (Art. 25(b)); equal protection of the law (Art. 14(1)); the right to liberty (Art. 9(1)); the right to a fair trial, including the presumption of innocence (Art. 14(1)–(2)).

119 Proclamation No. 7463, *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 66 Fed. Reg. 48,199 (Sept. 18, 2001), available at <http://www.torturingdemocracy.org/documents/20010914.pdf>

120 Authorization for Use of Military Force Against Terrorists, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001).

121 *Id.*

122 PETER BERGEN, MANHUNT 25 (2012).

123 *Id.*

124 *Id.*

125 *Id.*

- 126 See 28 C.F.R. § 0.25; see also *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004) [hereinafter *OLC Guide*], available at [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf)
- 127 *OLC Guide*, *supra* note 126
- 128 FY 2013 Budget Request for the Office of Legal Counsel (OLC), available at <http://www.justice.gov/jmd/2013summary/pdf/fy13-olc-bud-summary.pdf>
- 129 *Id.*
- 130 Senate Judiciary Comm. (107th Cong.), *Hearing on the Nomination of Jay S. Bybee to be Assistant Attorney General* (Oct. 4, 2001), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg80915/html/CHRG-107shrg80915.htm>
- 131 147 Cong. Rec. S10905 (Oct. 23, 2001) (Confirmation of Jay S. Bybee of Nevada to be Assistant Attorney General), available at <http://www.gpo.gov/fdsys/pkg/CREC-2001-10-23/pdf/CREC-2001-10-23-pt1-PgS10905-5.pdf>
- 132 JOHN YOO, *WAR BY OTHER MEANS* 20 (2006); see also House Judiciary Comm., Testimony of Judge Jay S. Bybee 18 (May 26, 2010) [hereinafter Bybee Testimony], available at <http://judiciary.house.gov/hearings/pdf/BTranscript.pdf>
- 133 See, e.g., John Yoo, *U.N. Wars U.S. Powers*, 1 CHI. J. INT'L L. 355 (Fall 2000); John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (Fall 1999); John Yoo, *Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (Dec. 1999); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (Mar. 1996).
- 134 Yoo, *U.N. Wars*, *supra* note 133, at 364.
- 135 JANE MAYER, *THE DARK SIDE* 66 (2008).
- 136 DOJ Office of Prof'l Resp. Report, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 39 (July 29, 2009) [hereinafter OPR Report], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.
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- 138 Transcript of Interview with Vice President Dick Cheney, ABC's This Week at 9 (Feb. 14, 2010), available at <http://abcnews.go.com/ThisWeek/week-transcript-vice-president-dick-cheney/story?id=9818034&page=9>
- 139 Robert Parry, *Bush/Cheney Pulled Torture Strings*, Consortium for Indep. Journalism (Mar. 4, 2010), available at <http://consortiumnews.com/2010/030410.html>
- 140 OPR Report, *supra* note 136, at 51.
- 141 House Judiciary Comm., Subcomm. on Const., Civ. Rts., & Civ. Liberties (110th Cong.), Testimony of David Addington 38, 42 (June 26, 2008) [hereinafter Addington Testimony], available at <http://judiciary.house.gov/hearings/printers/110th/43152.PDF>
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146 *Id.*

147 *Id.*

148 *Id.* In citing a number of Supreme Court decisions for the proposition that First Amendment liberties could be curtailed (including *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931), which had recognized the government’s ability to resist divulging information on the movement of troops) the memo, at page 24, posited “The current campaign against terrorism may require even broader exercises of federal power domestically.”

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150 *Id.*

151 *Id.*(emphasis added).

152 *Id.*

153 *Id.*

154 *Id.*

155 Memorandum from John C. Yoo (Deputy Ass’t Att’y Gen., OLC) & Robert J. Delahunty (Special Counsel) to John Bellinger III (Senior Assoc. Counsel to the President and Legal Adviser to NSC), *Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001), available at <http://documents.nytimes.com/bush-administration-terrorism-memos#p=51>

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161 *Id.*

162 *Id.* at 8.

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164 ACLU, *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance* 3 [hereinafter ACLU Index], available at [http://www.aclu.org/files/assets/olcmemos\\_chart.pdf](http://www.aclu.org/files/assets/olcmemos_chart.pdf)

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166 *Id.*

167 *Id.*

168 *But see* *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir.), cert. denied, 132 S. Ct. 2741 (2012). Critics of the Supreme Court argue the Supreme Court has failed to back up its decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and has allowed the U.S. Court of Appeals for the D.C. Circuit to effectively void *Boumediene*. See Libby Lewis, *Lawyer for Gitmo Detainees: "Less Hope Now Than Ever"* CNN (June 24, 2012), available at <http://www.cnn.com/2012/06/24/justice/guantanamo-lawyer-supreme-court>

169 ACLU Index, *supra* note 164.

170 *Id.*

171 *Id.*

172 The first time at least that is publicly known.

173 KAREN GREENBERG & JOSHUA DRATEL, *THE TORTURE PAPERS* 38 (2005) [hereinafter *TORTURE PAPERS*].

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181 *Id.*

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186 ACLU Index, *supra* note 164.

187 *Id.*

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189 *Id.*

190 *Id.*

191 TORTURE PAPERS, *supra* note 173, at 118.

192 *Id.* at 80.

193 *Id.* at 118.

194 *Id.*

195 *Id.* at 119.

196 *Id.* at 120.

197 *Id.*

198 *Id.* at 122.

199 *Id.* at 123.

200 Letter from John Ashcroft (Att’y Gen., DOJ) to President George W. Bush (Feb. 1, 2002), *available at* <http://www.torturingdemocracy.org/documents/20020201.pdf>

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202 *Id.*

203 *Id.*

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- 207 *Id.*
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- 209 *Id.* at 134.
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- 214 ACLU Index, *supra* note 164, at 6.
- 215 *Id.* at 7.
- 216 Memorandum from Patrick Philbin (Deputy Ass't Att'y Gen., OLC) to Daniel J. Bryant (Ass't Att'y Gen., DOJ Office of Legis. Affairs), *Swift Justice Authorization Act* (Apr. 8, 2002) [hereinafter Philbin Swift Justice Memo], available at <http://www.justice.gov/opa/documents/memojusticeauthorizationact0482002.pdf>
- 217 *Id.* at 2.
- 218 *See* Oct. 2001 Military Authority Memo, *supra* note 144.
- 219 Philbin Swift Justice Memo, *supra* note 216, at 20.
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- 222 *Id.* at 417.
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- 224 Memorandum from Jay S. Bybee (Ass't Att'y Gen., OLC) to John Ashcroft (Att'y Gen., DOJ), *Determination of Enemy Belligerency and Military Detention* (June 8, 2002) [hereinafter Bybee *Padilla* Memo], available at <http://documents.nytimes.com/bush-administration-terrorism-memos#p=126>
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- 226 *Ex Parte Milligan*, 71 U.S. 2 (1866).
- 227 Bybee *Padilla* Memo, *supra* note 224, at 6.
- 228 *Id.* at 9.
- 229 Memorandum from John C. Yoo (Deputy Ass't Att'y Gen., OLC) to Daniel J. Bryant (Ass't Att'y Gen., DOJ Office of Legis. Affairs), *Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United*

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230 Yoo Padilla Memo, *supra* note 229.

231 *Id.*

232 *Id.* at 136.

233 *Id.* at 137.

234 *Id.* at 141.

235 *Id.* at 138.

236 *Id.* at 143.

237 Memorandum from Jay S. Bybee (Ass't Att'y Gen., OLC) to William J. Haynes II (Gen. Counsel, DOD), *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (Mar. 13, 2002), available at <http://documents.nytimes.com/bush-administration-terrorism-memos#p=72>

238 *Id.* at 72.

239 *Id.*

240 *Id.*

241 *Id.* at 95.

242 Jason Leopold & Jeffrey Kaye, *Guidebook to False Confessions: Key Document John Yoo Used to Draft Torture Memo Released*, TRUTHOUT (Apr. 3, 2012), available at <http://truth-out.org/news/item/8278-exclusive-guidebook-to-false-confessions-key-document-john-yoo-used-to-draft-torture-memo-released>

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244 Leopold & Kaye, *supra* note 242.

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249 OPR Report, *supra* note 136, at 38.

250 Bybee Testimony, *supra* note 132, at 14.



- 251 Letter from John C. Yoo (Deputy Ass't Att'y Gen., OLC) to John Rizzo (Acting Gen. Counsel, CIA) (July 13, 2002), *available at* <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc1.pdf>
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- 253 *Id.*
- 254 *Id.*
- 255 OPR Report, *supra* note 136, at 49.
- 256 *Id.*
- 257 *Id.*
- 258 *Id.*
- 259 Senate Comm. on Homeland Sec. & Gov't Aff., Testimony of Michael Chertoff (Feb. 2, 2005), *available at* <http://www.hsgac.senate.gov/hearings/2005/02/02/nomination-hearing>
- 260 ACLU Index, *supra* note 164, at 8.
- 261 Fax to John C. Yoo (Deputy Ass't Att'y Gen., OLC) from unknown (July 24, 2002) [hereinafter Yoo Psychological Assessment Fax], *available at* <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc4.pdf>
- 262 *Id.*
- 263 *Id.*
- 264 *Id.*
- 265 *See* Parry, *supra* note 139.
- 266 OPR Report, *supra* note 136, at 43.
- 267 *Id.*; *but see id.* at 63, where Patrick Philbin expressed his view about how time pressure had existed and had played a role in OLC's process.
- 268 Bybee Testimony, *supra* note 132, at 150.
- 269 OPR Report, *supra* note 136, at 43.
- 270 *Id.* at 46.
- 271 *Id.*
- 272 Bybee Testimony, *supra* note 132, at 125.
- 273 Memorandum from Jay S. Bybee (Ass't Att'y Gen., OLC) to Alberto Gonzales (Counsel to the President), *Standards for Conduct for Interrogation Under 18 U.S.C. §§ 2340 – 2340A* (Aug. 1, 2002), *available at* <http://www.torturingdemocracy.org/documents/20020801-1.pdf>
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- 276 *Id.*
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- 278 *Id.* at 51.
- 279 *Id.*
- 280 *Id.*
- 281 Addington Testimony, *supra* note 141, at 38.
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- 285 *Id.*
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- 290 *Id.*
- 291 *Id.* at 54.
- 292 Bybee Aug. 1 Interrogation Methods Memo, *supra* note 288.
- 293 *Id.*
- 294 *Id.*
- 295 *See* Yoo Psychological Assessment Fax, *supra* note 261, as the source of OLC's discussion here of Zubaydah's psychological assessment.
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- 297 OPR Report, *supra* note 136, at 101.
- 298 *Id.* at 104.
- 299 Memorandum from John C. Yoo (Deputy Ass't Att'y Gen., OLC) to William J. Haynes II (Gen. Counsel, DOD), *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003), *available at* <http://www.torturingdemocracy.org/documents/20030314.pdf>

300 *Id.*

301 CIA, Office of Inspector Gen., *Special Review: Counterterrorism Detention and Interrogation Activities* 101 (May 7, 2004) [hereinafter IG Report], *available at* <http://documents.nytimes.com/c-i-a-reports-on-interrogation-methods>; *but see* Letter from Jack L. Goldsmith III (Ass't Att'y Gen., OLC) to George Tenet (Director, CIA) (June 18, 2004) (in which Goldsmith relayed DOJ's concern that the CIA IG report "contains some ambiguous statements concerning the Attorney General's remarks ... that mistakenly characterize the extent of advice provided by the Department."), *available at* <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc36.pdf>

302 OPR Report, *supra* note 136, at 27.

303 *Id.* at 36.

304 *Id.* at 110.; *see also* Parry, *supra* note 139.

305 *Id.*

306 OPR Report, *supra* note 136, at 110.

307 *Id.*; *see also* Bybee Testimony, *supra* note 132, at 29.

308 OPR Report, *supra* note 136, at 27.

309 ACLU Index, *supra* note 164, at 12.

310 OPR Report, *supra* note 136, at 111.

311 JACK GOLDSMITH III, *THE TERROR PRESIDENCY* 151 (2007).

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313 *Id.* at 155.

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316 *Id.*

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318 Senate Judiciary Comm., Testimony of James Comey (May 15, 2007), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051501043.html>

319 *Id.*

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321 *Id.*

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- 323 ACLU Index, *supra* note 164, at 13.
- 324 OPR Report, *supra* note 136, at 113.
- 325 *Id.*
- 326 *Id.*
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- 328 *Id.*
- 329 Memorandum from Jack Goldsmith, III (Ass't Att'y Gen., OLC) to Alberto Gonzales (Counsel to the President), "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), available at <http://www.justice.gov/olc/2004/gc4mar18.pdf>
- 330 *Id.* at 3.
- 331 *Id.* at 23.
- 332 GOLDSMITH, *supra* note 311, at 41.
- 333 *Id.*
- 334 *Id.*
- 335 TORTURE PAPERS, *supra* note 173, at 366.
- 336 *Id.* at 367.
- 337 *Id.* at 368.
- 338 *Id.* at 380.
- 339 ACLU Index, *supra* note 164, at 14.
- 340 *Id.*
- 341 OPR Report, *supra* note 136, at 113.
- 342 ACLU Index, *supra* note 164, at 14.
- 343 IG Report, *supra* note 301; *see also* Bybee Testimony, *supra* note 132, at 115, in which Bybee suggested the CIA had exceeded or deviated from the legal counsel provided by OLC in its application of certain interrogation methods.
- 344 IG Report, *supra* note 301, at 102.
- 345 *Id.* at 101.
- 346 *Id.*
- 347 *Id.*
- 348 Letter from Jack L. Goldsmith III (Ass't Att'y Gen., OLC) to John L. Helgerson, Inspector

Gen., CIA) (May 25, 2004), *available at* <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc26.pdf>

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355 Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), *available at* <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>

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359 *Id.* at 160.

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365 OPR Report, *supra* note 136, at 124.

366 *Id.* at 28.

367 *Id.*

368 *Id.*

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370 *Id.*

- 371 *Id.*
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**CHAPTER 5 ENDNOTES**

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78 *Diplomatic Assurances*, *supra* note 34; Task Force staff interview with Harold Koh, Legal Advisor to Secretary of State (Feb. 6, 2012) [hereinafter Koh Interview].

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80 Task Force staff interview with Juan Mendez (Sept. 21, 2011). See also Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture* 16, CRS Report RL32890 16 (Sept. 8, 2009), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf> (“the express language of CAT-implementing legislation, the United States cannot ‘expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.’ It may be argued that this express statutory language prohibits renditions from outside the United States.”).

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82 See Application, Al-Nashiri v. Poland, Eur. Ct. H.R. (2011), available at <http://www.soros.org/sites/default/files/echr-al-nashiri-application-20110506.pdf>; Appeal Prosecution Office in Warsaw V'th Department for Combating Organized Crime and Corruption, Abu Zubaydah, AP V Ds. 37/09 (2010) [hereinafter Abu Zubaydah Application], available at <http://www.interights.org/userfiles/Documents/20101216AbuZubaydahApplicationforVictimStatusinPolishArticle231InvestigationEnglishTranslation.pdf>; Application, El-Masri v. Macedonia, Eur. Cr. H.R. (2009), available at <http://www.soros.org/sites/default/files/Application-Public-Version-20090921.pdf>



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- 85 "Protected Person" Status in Occupied Iraq under the Fourth Geneva Convention, 28 Op. Off. Legal Counsel (2004), available at <http://www.justice.gov/olc/2004/gc4mar18.pdf>.
- 86 Kevin Jon Heller, *British Court of Appeal Implicitly Repudiates Goldsmith Memo*, Opinion Juris (Dec. 19, 2011), available at <http://opiniojuris.org/2011/12/19/british-court-implicitly-repudiates-goldsmith-memo>; Eric L. Lewis, *Britain Shouldn't Aid a Lawless America*, N.Y. TIMES (Feb. 13, 2012), available at <http://www.nytimes.com/2012/02/13/opinion/prisoners-are-not-pawns.html>; Priest, *supra* note 83.
- 87 *Egypt "Has Proof" US Questioned Suspects in Romania*, AGENCE FRANCE PRESSE (Nov. 15, 2005), available at <http://www.flickr.com/photos/majikthise/474580686/sizes/o/>; Scott Horton, *Swiss Intelligence Confirms CIA Blacksites in Romania, Poland, Ukraine, Kosovo, Macedonia and Bulgaria*, HARPER'S (Apr. 28, 2007). See also U.S. DEP'T OF STATE, Doc. No. 200706444 (June 22, 2009), at <http://www.state.gov/documents/organization/134973.pdf>
- 88 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, 1949, 75 U.N.T.S. 287, available at <http://www.icrc.org/ihl.nsf/WebART/380-600056>
- 89 Memorandum from Jack L. Goldsmith, *supra* note 83.
- 90 As many as 39 countries have been implicated, including: Albania (Mayer, *supra* note 7; *Disappearing Act*, *supra* note 33; Austria (European Parliament Report, *supra* note 28); Belgium (European Parliament Report, *supra* note 28); Bosnia-Herzegovina (Amnesty Int'l, *Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention* (2010) [hereinafter Open Secret], available at <http://www.amnesty.org/en/library/asset/EUR01/023/2010/en/3a3fdac5-08da-4dfc-9f94-afa8b83c6848/eur010232010en.pdf>; U.N. Report, *supra* note 37; Canada (Report of the Events Relating to Maher Arar, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006) [hereinafter Report of the Events Relating to Maher Arar], available at [http://www.sirc-csars.gc.ca/pdfs/cm\\_arar\\_rec-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf); Abushka Asthana, *Domestic Detainee From 9/11 Released*, WASH. POST (July 21, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/20/AR2006072002007.html>); Denmark (Danish Government Avoids Parliamentary Inquiry on CIA Flights (Feb. 7, 2008), available at <http://www.cablegatesearch.net/cable.php?id=08COPENHAGEN50&q=rendition>; Danish FM Moeller Asks for Help on Overflights and Interrogation Issues (June 10, 2008), available at <http://www.cablegatesearch.net/cable.58php?id=08COPENHAGEN332&q=rendition>; Egypt (Jane Perlez & Raymond Bonner, *An Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. TIMES (Jan. 5, 2009), available at <http://www.nytimes.com/2009/01/06/world/asia/06iqbal.html?pagewanted=all>; Dana Priest & Dan Eggen, *Terror Suspect Alleges Torture*, WASH. POST (Jan. 6, 2005); Finland (Charge's Meeting With Finish Prime Minister (Dec. 8, 2005), available at <http://www.cablegatesearch.net/cable.php?id=05HELSINKI1267&q=rendition>; Finland U.N. Rapporteur Welcomes the Secretary's Remarks on Rendition (Dec. 15, 2005), available at <http://www.cablegatesearch.net/cable.php?id=05HELSINKI1290&q=rendition>); The Gambia (*The Guantánamo Docket: Jamil El Banna*, N.Y. TIMES, available at <http://projects.nytimes.com/guantanamo/detainees/905-jamil-el-banna>; *Extraordinary Rendition: Extended Interviews Bisher al-Rawi*, PBS Frontline (Oct. 8, 2007), available at <http://www.pbs.org/frontlineworld/stories/rendition701/interviews/bisher.html>); Germany ((June 7, 2007), *Council of Europe: Secret CIA Prisons Confirmed*, Human Rights Watch available at <http://www.hrw.org/en/news/2007/06/07/council-europe-secret-cia-prisons-confirmed>; European Parliament Report, *supra* note 28); Indonesia (Dana Priest, *Foreign Network at Front of CIA's Terror Fight*, WASH. POST (Nov. 18, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/>

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- 98 Most of the former CIA detainees declined to attend their CSRTs.
- 99 Transcript of Combatant Status Review Tribunal Hearing for Abd al-Rahim al-Nashiri (2007), *available at* [http://www.aclu.org/pdfs/safefree/csrt\\_alnashiri.pdf](http://www.aclu.org/pdfs/safefree/csrt_alnashiri.pdf)
- 100 Transcript of Combatant Status Review Tribunal Hearing for Majid Khan (2007), *available at* [http://www.aclu.org/pdfs/safefree/csrt\\_majidkhan.pdf](http://www.aclu.org/pdfs/safefree/csrt_majidkhan.pdf)
- 101 A partial exception to this is Ahmed Ghailani, who was tried and convicted in federal court for his role in the 1998 attacks on U.S. embassies in Kenya and Tanzania. A psychologist hired by the defense asserted that Ghailani had suffered from PTSD as a result of his treatment in CIA custody, but his symptoms had “partially remitted.” A psychiatrist appointed by the court described Ghailani as becoming tearful and unable to speak about certain incidents in captivity (the details of which were redacted) and had “some anxiety-related symptoms that could be consistent with Post Traumatic Stress Disorder,” but concluded that overall, “I do not feel that Mr. Ghailani meets the criteria for a current diagnosis” of PTSD. The court accepted the psychiatrist’s conclusion. *See Order, United States v. Ghailani*, Crim. No. 98-1023 (S.D.N.Y. July 2, 2010), *available at* <http://www.nylj.com/nylawyer/adgifs/decisions/070210kaplan.pdf>; Forensic Psychiatric Evaluation by Gregory B. Saathoff, M.D. (redacted version), *United States v. Ghailani*, Crim. No. 98-1023 (S.D.N.Y. July 7, 2010).
- 102 James Mitchell and Bruce Jessen are known to have formed a company called Mitchell, Jessen and Associates that contracted with the CIA and had 120 employees in 2007. Their contracts were not fully terminated until 2009. It is unclear precisely what role their employees had in the interrogation program, however. Eban, *supra* note 9.
- 103 The studies on the medical and psychological impacts of these techniques is summarized in PHYSICIANS FOR HUM. RTS. & HUM. RTS. FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY (2007), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/07801-ctn-leave-no-marks.pdf>; K. Alexa Koenig, Eric Stover & Laurel E. Fletcher, *The Cumulative Effect: A Medico-Legal Approach to United States Torture Law and Policy*, 6 ESSEX H.R. REV. 145 (2009), *available at* <http://www.law.berkeley.edu/HRCweb/pdfs/KoenigStoverFletcher.pdf>
- 104 Albert D. Biderman, *Communist Attempts to Elicit False Confessions from Air Force Prisoners of War*, 33 BULL. N.Y. ACAD. MED. 616, 620 (1957), *available at* [http://graphics8.nytimes.com/packages/pdf/national/20080702\\_1957.pdf](http://graphics8.nytimes.com/packages/pdf/national/20080702_1957.pdf)
- 105 *Id.*
- 106 HAROLD WOLFF & LAWRENCE HINKLE, COMMUNIST CONTROL TECHNIQUES 26 (1956), *available at* <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/19560400.pdf>
- 107 *Id.* at 36.
- 108 *Id.* at 37.
- 109 Levin Report, *supra* note 9, at 38–39. Major Leso’s name is redacted from the Levin report but he has been identified as the psychologist on the initial JTF-170 BSCT team. Sheri Fink, *Tortured*

*Profession: Psychologists Warned of Abusive Interrogations, Then Helped Craft Them*, PROPUBLICA (May 5, 2009), available at <http://www.propublica.org/article/tortured-profession-psychologists-warned-of-abusive-interrogations-505>

110 Fink, *supra* note 109.

111 PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 125 (2008).

112 Task Force staff interview with Dr. Michael Gelles (Mar. 15, 2012) [hereinafter Gelles Interview]; see also SANDS, *supra* note 111.

113 Gelles Interview, *supra* note 112; SANDS, *supra* note 111.

114 Gelles Interview, *supra* note 112.

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116 Memorandum from Brig. Gen. R.A. Huck to U.S. Southern Command (Aug. 6, 2002), available at <http://www1.umn.edu/humanrts/OathBetrayed/Huck%208-2-02.pdf>

117 Gelles Interview, *supra* note 112.

118 DOD Memorandum, *BSCIT Standard Operating Procedures* (Nov. 11, 2002), available at [http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/bsct\\_sop\\_2002.pdf](http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/bsct_sop_2002.pdf)

119 Levin Report, *supra* note 9, at 43–48.

120 *Id.* at 47.

121 Fink, *supra* note 109.

122 Levin Report, *supra* note 9, at 38–39, 43–47, 51–53.

123 *Id.* at 51–52.

124 *Id.* at 52.

125 *Id.* at 50.

126 BLOCHE, *supra* note 8, at 154.

127 Levin Report, *supra* note 9, at 215.

128 *Id.* at 60.

129 Letter from T.J. Harrington (Deputy Ass't Dir., Counterterrorism, FBI) to Maj. Gen. Donald J. Ryder (Army Criminal Investigation Command), *Suspected Mistreatment of Detainees* (July 14, 2004), available at [http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87\\_001914%20to%20001916\\_DOJFBI001914.pdf](http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87_001914%20to%20001916_DOJFBI001914.pdf)

130 DOD Interrogation Log, Detainee 063 (Nov. 23, 2002 to Jan. 11, 2003), available at <http://www.time.com/time/2006/log/log.pdf>

- 131 *Id.* at 27.
- 132 *Id.* at 35.
- 133 *Id.* at 34, 37, 41.
- 134 *Id.* at 6, 9–11, 14, 18, 22, 24–25, 27–28, 30, 33, 35, 41, 45, 47, 58
- 135 *Id.* at 3, 6, 8, 9, 24, 29–31, 33, 37, 41, 46, 47, 53–55, 57, 64–65, 69, 76, 83.
- 136 *Id.* at 29, 31.
- 137 *Id.* at 1, 12, 20, 31, 59.
- 138 Sworn Statement by [Redacted] (Jan. 11, 2005), *available at* [http://www.dod.mil/pubs/foi/operation\\_and\\_plans/Detainee/Exhibit\\_63\\_to\\_AR15\\_6GTMO\\_Investigation.pdf](http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/Exhibit_63_to_AR15_6GTMO_Investigation.pdf)
- 139 *Id.*
- 140 *Id.*
- 141 Memorandum from Alberto Mora (Navy Gen. Counsel) for Navy Inspector Gen., *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (July 7, 2004), *available at* [http://www.aclu.org/pdfs/safefree/mora\\_memo\\_july\\_2004.pdf](http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf)
- 142 LARRY C. JAMES, *FIXING HELL* 28–29 (2008).
- 143 *Id.* at 30.
- 144 *Id.* at 57.
- 145 This phrasing seems to leave open the policy that abusive techniques might be approved for detainees not assessed to be too ill or fragile to bear them.
- 146 JAMES, *supra* note 142, at 59, 181.
- 147 Gelles Interview, *supra* note 112.
- 148 Levin Report, *supra* note 9, 137–38.
- 149 Lt. Gen. Randall Schmidt & Brig. Gen. John Furlow, *Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* 24–25 (Apr. 1, 2005), *available at* <http://www.defense.gov/news/Jul2005/d20050714report.pdf> [“Schmidt-Furlow Report”]
- 150 Levin Report, *supra* note 9, 140–41.
- 151 *Id.* at 140–41.
- 152 *Id.* at 141; Jess Bravin, *The Conscience of the Colonel*, WALL STREET J. (Mar. 31, 2007).
- 153 David J.R. Frakt, *Mohammad Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367, 1402 (2011).
- 154 *E.g.*, Justine Sharrock, *First, Do Harm*, MOTHER JONES (July–Aug. 2009), *available at* <http://www.motherjones.com/politics/2009/07/first-do-harm>



- 155 DOD Inspector Gen., *Investigation of Allegations of the Use of Mind-Altering Drugs to Facilitate Interrogations of Detainees* (Sept. 23, 2009).
- 156 Summary, June 04 ICRC Medical Visit to Guantánamo (June 2004) [on file with The Constitution Project].
- 157 *Id.*
- 158 Task Force staff interview with Dr. Steven Sharfstein (Mar. 15, 2012) [hereinafter Sharfstein Interview].
- 159 JAMES, *supra* note 142, at 70. *See also id.* at 242 (asserting that “there were no psychologists at Abu Ghraib during the abuses.”).
- 160 Maj. Gen. Geoffrey Miller, Assessment of DOD Counterterrorism Interrogation and Detention Operations in Iraq 5 (2003) [“Miller Report”], available at <http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%2020.pdf>
- 161 BLOCHE, *supra* note 8, at 119–22. *See also* JIDC organizational chart (Jan. 23, 2004) (available at <http://detainee-taskforce.org>).
- 162 BLOCHE, *supra* note 8, at 120.
- 163 Testimony of Col. Thomas Pappas to Maj. Gen. Antonio Taguba (Feb. 11, 2004), available at <http://www.aclu.org/torturefoia/released/a46.pdf>
- 164 Terrence Russell, *Trip Report*, at 2–7 (Sept. 1–24, 2003), available at <https://www.documentcloud.org/documents/404703-jpra-10-11.html>
- 165 U.S. Army Criminal Investigative Command, *Memorandum re: CID Report of Investigation-Final Referred-0117-04-CID259-80188-5C1Q2/5Y2E* (May 31, 2004), available at [http://www.aclu.org/torturefoia/released/030705/9117\\_9134.pdf](http://www.aclu.org/torturefoia/released/030705/9117_9134.pdf)
- 166 Albert T. Church III, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* 355 (Mar. 7, 2005), available at [http://www.aclu.org/files/pdfs/safefree/church\\_353365\\_20080430.pdf](http://www.aclu.org/files/pdfs/safefree/church_353365_20080430.pdf). This may have been a matter of lax administration more than an attempt to allow interrogators to exploit medical files. With one exception, the clinicians interviewed for the Church Report denied interrogators ever making use of medical information or attempting to influence treatment.
- 167 *Id.* at 354.
- 168 U.S. Army Surgeon Gen., *Assessment of Detainee Medical Operations for OEF, GTMO, and OIF 1-5, 17-1* (Apr. 13, 2005), available at <http://www1.umn.edu/humanrts/OathBetrayed/Army%20Surgeon%20General%20Report.pdf> (hereinafter Surgeon Gen. Report).
- 169 *Id.* at 1–5.
- 170 *Id.* at 14-1, 14-2.
- 171 *Id.* at 14-1.
- 172 *Id.* at 14-2.
- 173 *E.g.*, JANE MAYER, *THE DARK SIDE* 203–04 (2008) . It is unclear how many of the personnel interviewed by the surgeon general were deployed at precisely the same time as the FBI observations,

however.

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175 *Id.* at 16-2.

176 Maj. Gen. George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 47, 78–80, 136 (2004) [“Fay Report”].

177 STEVEN H. MILES, *OATH BETRAYED* 119–26 (2006).

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181 *Id.* at 84.

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186 *Id.*

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188 *Id.* ¶ 15.

189 Supp. Declaration of Stephen G. Hooker, ¶ 5, *el-Adahi v. Bush*, Civ. No. 05-280 (D.D.C. Mar. 13, 2006) [hereinafter Mar. 13, 2006 Hooker Declaration].

190 *Id.* ¶ 5.

191 *Id.* ¶ 8.

192 *Id.* ¶ 8.

193 <http://www.restraintchair.com>

194 Report by Dr. Emily Keram at 10, *Zuhair v. Obama*, Civ. No. 08-864 (D.D.C. Aug. 24, 2009)

[hereinafter Keram Evaluation of Zuhair].

195 Mar. 13, 2006 Hooker Declaration, *supra* note 189, at ¶¶ 8, 11–12, 14.

196 Decl. of Maj. Gen. Jay W. Hood ¶ 12, *el-Adahi v. Bush*, Civ. No. 05-280 (D.D.C. Mar. 13, 2006).

197 Keram Evaluation of Zuhair, *supra* note 194, at 3, 5, 12; Declaration of Dr. Emily Keram ¶¶ 8, 10, 14–16, *Al-Oshan v. Obama*, Civ. No. 05-520, (D.D.C. Oct. 13, 2009 [hereinafter Keram Evaluation of Shalabi]).

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199 Keram Evaluation of Shalabi, *supra* note 197, at ¶¶ 11–18.

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232 *Id.* at 28–29.

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242 *Id.* at 4.

243 *Id.*

244 Am. Psychological Ass'n Presidential Task Force on Psychological Ethics and National Security, *2003 Members' Biographical Statements*, available at <http://www.clarku.edu/peacepsychology/tfpens.html>; Email from Michael Gelles, Aug. 22, 2005, Email Messages from the Listserv of the American Psychological Association's Presidential Task Force on Psychological Ethics and National Security 169 [hereinafter PENS Emails], available at [http://s3.amazonaws.com/propublica/assets/docs/pens\\_listserv.pdf](http://s3.amazonaws.com/propublica/assets/docs/pens_listserv.pdf); Mark Benjamin, *Psychological Warfare*, SALON (July 26, 2006), available at [http://www.salon.com/2006/07/26/interrogation\\_3/](http://www.salon.com/2006/07/26/interrogation_3/); Amy Goodman & Juan Gonzalez, *Dissident Voices: Ex-Task Force Member Dr. Michael Wessells Speaks Out on Psychologists and Torture*, Democracy Now! (Aug. 20, 2007), available at [http://www.democracynow.org/2007/8/20/dissident\\_voices\\_ex\\_task\\_force\\_member](http://www.democracynow.org/2007/8/20/dissident_voices_ex_task_force_member)

245 Several are mentioned above: Michael Gelles, the NCIS psychologist who opposed abusive techniques at Guantánamo; Larry James, the former BSC/T at Guantánamo and Abu Ghraib; Morgan Banks, the chief SERE and JSOC psychologist; and Scott Shumate, who reportedly left Abu Zubaydah's interrogation because he objected to the techniques being used. Others were Robert Fein, a forensic psychologist who consulted for the Department of Defense, and Bryce Lefever, a SERE psychologist who advised interrogators in Afghanistan in 2002–2003, and has since publicly defended James Mitchell and Bruce Jessen.

246 Goodman & Gonzalez, *Dissident Voices*, *supra* note 244.

247 Jean Maria Arrigo, *A Counterintelligence Perspective on APA PENS Task Force Process*, Aug. 17, 2007, available at <http://www.ethicalpsychology.org/materials/Arrigo--PENS%20Process%20APA07.pdf>

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249 Email from Col. Larry C. James, May 23, 2005, PENS Emails, *supra* note 244, at 47.

250 *Id.*

251 Task Force staff interview with Stephen Soldz (Mar. 14, 2012) [hereinafter Soldz Interview].

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## CHAPTER 9 ENDNOTES

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- 3 George W. Bush, Speech on Terrorism, N.Y. TIMES (Sept. 6, 2006), available at [http://www.nytimes.com/2006/09/06/washington/06bush\\_transcript.html?pagewanted=all](http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all). See also Mark Denbeaux, *The Meaning of “Battlefield”: An Analysis of the Government’s Representations of “Battlefield” Capture and “Recidivism” of the Guantánamo Detainees*, WASH. POST (2007), available at <http://www.washingtonpost.com/wp-srv/politics/documents/BattlefieldAnalysis121007.pdf>
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- 9 *The Meaning of “Battlefield,” supra* note 3, at 2.
- 10 *Id.*
- 11 JANE MAYER, *THE DARK SIDE* (2008); Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES (Oct. 25, 2004), available at <http://www.nytimes.com/2004/10/25/international/worldspecial/25gitmo.html?pagewanted=all&position=> (“[He] was told after his arrival there in February 2002 that as many as half of the initial detainees were thought to be of little or no intelligence value.”). See also Lawrence B. Wilkerson, *Some Truths About Guantánamo Bay*, WASH. NOTE (Mar. 17, 2009), available at [http://washingtonnote.com/some\\_truths\\_abo/](http://washingtonnote.com/some_truths_abo/) (“[S]everal in the U.S. leadership became aware of this lack of proper vetting very early on and, thus, of the reality that many of the detainees were innocent of any substantial wrongdoing, had little intelligence value, and should be immediately released.”).
- 12 MAYER, *supra* note 11.
- 13 Defense Intelligence Agency, *Transnational: Guantánamo Bay Detainees Returning to Terrorism Update I* (July 10, 2006), available at <http://www.dia.mil/public-affairs/foia/pdf/TRANSNATIONAL%20GUANTANAMO%20BAY%20DETAINEES%20RETURNING%20TO%20TERRORIS.pdf>

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- 15 Defense Intelligence Agency, *Defense Analysis Report—Terrorism: Transnational: Former GTMO Detainee Terrorism Trends—Update* (Dec. 4, 2007), available at [http://www.dia.mil/public-affairs/foia/pdf/TRANSNATIONAL%20FORMER%20GTMO%20DETAINEE%20TERRORISM%20TRENDS-UPDATE\\_4.pdf](http://www.dia.mil/public-affairs/foia/pdf/TRANSNATIONAL%20FORMER%20GTMO%20DETAINEE%20TERRORISM%20TRENDS-UPDATE_4.pdf)
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- 17 Defense Intelligence Agency, *Defense Analysis Report—Terrorism: Former Guantánamo Detainee Terrorism Trends* (Jan. 7, 2009).
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- 22 *Id.*
- 23 *Id.*
- 24 *See* Defense Intelligence Agency, *Transnational: Guantánamo Bay Detainees*, *supra* note 13.
- 25 *See* Director of National Intelligence, *Summary of the Reengagement of Detainee*, *supra* note 4.
- 26 *See* FOIA Letter, *supra* note 6.
- 27 *See* Defense Intelligence Agency, *Defense Analysis Report—Terrorism*, *supra* note 15.
- 28 *See* Director of National Intelligence, *Summary of the Reengagement of Detainees*, *supra* note 20.
- 29 *See* Defense Intelligence Agency, *Transnational: Guantánamo Bay Detainees*, *supra* note 13, at 2.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.* at 3.

- 33 *Id.* at 2.
- 34 *See* Defense Intelligence Agency, *Defense Analysis Report — Terrorism*, *supra* note 15, at 1.
- 35 *Id.* at 2.
- 36 *See* Defense Intelligence Agency, *Defense Analysis Report — Terrorism*, *supra* note 16, at 2.
- 37 *Id.* at 1.
- 38 *See* *Leaving Guantánamo*, *supra* note 1.
- 39 *Id.* at 7–9.
- 40 *Id.* at 61 (“It is possible that the precise deadline for the apparent impending closure of the facility and a mandate that transfers or releases were to be prioritized over other options, could have colored EOTF disposition considerations.”)
- 41 *Id.* at 67 (“The majority is well aware that most of the relevant material is classified and politically sensitive.”)
- 42 *Id.*
- 43 *Id.* at 72.
- 44 *Id.* at 72–73 (“In addition, only 66 persons have been transferred from GTMO by the current Administration, with only 2 confirmed as re-engagers, a figure of about 3.3%.”).
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- 47 *Guantánamo: Who Really “Returned to the Battlefield?”*, *supra* note 45, at 2–6.
- 48 *Revisionist Recidivism*, *supra* note 46, at 4–5.
- 49 *Id.* at 5 (while not reported as either killed or captured).
- 50 *Id.* at 6 (the use of names rather the more accurate Interment Serial Number (ISN) used to identify the individuals re-engaged in terrorism is one of the reasons for such inaccuracies and led to Professor Denbeaux raising the question of why ISN numbers are not used). *See also* *The Meaning of “Battlefield,” supra* note 3, at 8.
- 51 Mark Denbeaux, *National Security Deserves Better: “Odd” Recidivism Numbers Under the Guantánamo Policy Debate*, Seton Hall Univ. Sch. of Law, Ctr. for Policy & Research 15 (Mar. 23, 2012), *available at* <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/loader.cfm?csModule=security/getfile&pageid=285565>

- 52 See Director of National Intelligence, *Summary of the Reengagement of Detainees*, *supra* note 20.
- 53 *The Meaning of “Battlefield,” supra* note 3, at 9–10 (presumably the claim by Professor Denbeaux of no actual military conduct on behalf of these individuals is based on based available public information and may be contradicted by classified intelligence). See also Denbeaux, *National Security Deserves Better*, *supra* note 51 (highlights the 2007 DOD press release that identified five Uighurs as examples of recidivists; while these individuals had been transferred to Albania and held there at a refugee camp with not incident, one of the Uighur men wrote an opinion piece for the *New York Times* on habeas corpus in the United States).
- 54 See *Guantánamo: Who Really “Returned to the Battlefield?” supra* note 45; see also Andy Worthington, *Guantánamo and Recidivism: The Media’s Ongoing Failure to Question Official Statistics*, PUB. RECORD (Mar. 15, 2012), available at <http://pubrecord.org/politics/10213/guantanamo-recidivism-medias> (“Pentagon spokesman Lt. Col. Todd Bressa... explained, ‘Someone on the “suspected” list could very possibly not be engaged in activities that are counter to our national security interests.’”).
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- 56 Peter Bergen & Katherine Tiedemann, *Inflating the Guantánamo Threat*, N.Y. TIMES (May 28, 2009), available at [http://www.nytimes.com/2009/05/29/opinion/29bergen.html?\\_r=1](http://www.nytimes.com/2009/05/29/opinion/29bergen.html?_r=1) (“[N]early half of the men on the new list — 14 of the 29 — are listed as being ‘suspected’ of terrorist activities, which makes ‘recidivist’ a fairly vague definition. Next, the acts that at least nine of the 29 are either known or suspected of having been involved with were not directed at America or at our immediate allies in our current wars, the governments of Iraq, Afghanistan and Pakistan.”).
- 57 See generally *Boumediene v. Bush*, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting) (“The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. ... In the long term, then, the Court’s decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantánamo Bay have returned to the battlefield.”).
- 58 Director of National Intelligence, *Summary of the Reengagement of Detainees*, *supra* note 20.
- 59 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (“Material support meant to ‘promot[e] peaceable, lawful conduct,’ Brief for Plaintiffs 51, can further terrorism by foreign groups in multiple ways. ‘Material support’ is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks.”).
- 60 When there are references to multiple DIA reports there is seldom if ever additional information since last reported. The multiple reports are a summarization and restatement of previously reported cases of reengagement.
- 61 *National Security Deserves Better*, *supra* note 51, at 15 (“In the July 2007 DoD news release, the five Uighurs relocated to Albania were listed as examples of recidivists activity. ... Since their release — following three years of incarceration at GTMO — the five men have lived at the same refugee camp in Tirana, Albania.”) (The press release was removed by the DOD and is no longer available online, the copy is reproduced in the cited report).

## CHAPTER 10 ENDNOTES

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- 3 Exec. Order No. 13,493, *Review of Detention Policy Options* (Jan. 22, 2009), 74 Fed. Reg. 4901 (2009).
- 4 Washington Post–ABC News Poll (Jan. 13–16, 2009), available at <http://www.washingtonpost.com/wp-srv/politics/documents/postpoll011709.html>. Another survey released during approximately the same period showed a similar margin of support for closing Guantánamo, but a far lower percentage of the public rejecting torture in all circumstances. Pew Research Center for People & the Press, *Obama Faces Familiar Divisions Over Anti-Terror Policies* (Feb. 18, 2009), available at <http://www.people-press.org/2009/02/18/obama-faces-familiar-divisions-over-anti-terror-policies/>
- 5 Task Force staff interview with Greg Craig (Sept. 13, 2012) [hereinafter Craig Interview].
- 6 *Id.*
- 7 *Id.*
- 8 Rep. Frank Wolf & Rep. Chris Smith, *China Trip Report* (July 2008), available at <http://wolf.house.gov/uploads/China2008TripReport-Enews.pdf>
- 9 Craig Interview, *supra* note 5.
- 10 Peter Finn & Anne E. Kornblut, *Guantánamo Bay: How the White House Lost the Fight to Close It*, WASH. POST (Apr. 23, 2011), available at [http://www.washingtonpost.com/world/Guantanamo-bay-how-the-white-house-lost-the-fight-to-close-it/2011/04/14/AFTxR5XE\\_story.html](http://www.washingtonpost.com/world/Guantanamo-bay-how-the-white-house-lost-the-fight-to-close-it/2011/04/14/AFTxR5XE_story.html). See also DANIEL KLAIDMAN, KILL OR CAPTURE 101–03 (2012).
- 11 KLAIDMAN, *supra* note 10, at 102.
- 12 *Id.* at 105–06.
- 13 *Id.* at 106.
- 14 Craig Interview, *supra* note 5.
- 15 155 CONG. REC. H5065–68 (daily ed. May 4, 2009) (statement of Rep. Wolf), available at <http://www.gpo.gov/fdsys/pkg/CREC-2009-05-04/pdf/CREC-2009-05-04.pdf>
- 16 Finn & Kornblut, *supra* note 10.
- 17 U.S. Senate Roll Call Votes, S. Amend. 1133 to H.R. 2346, 111th Cong., 1st Sess. (May 20, 2009), available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=0016](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=0016)
- 18 Six others had been resettled in Albania under the Bush Administration. The remaining three detainees have rejected resettlement offers from Palau, El Salvador, and the Maldives.
- 19 Carol Rosenberg, *How Congress Helped Thwart Obama's Plan to Close Guantánamo*, McCLATCHY (Jan. 22, 2011), available at <http://www.mcclatchydc.com/2011/01/22/107255/how-congress-helped-thwart-obamas.html>

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- 25 *E.g.*, Gordon Lubold, *Iraq General Swayed Obama on Detainee Photos*, CHRISTIAN SCI. MONITOR (May 13, 2009), available at <http://www.csmonitor.com/USA/Politics/2009/0513/iraq-general-swayed-obama-on-detainee-photos>; Scott Wilson, *Obama Reverses Pledge to Release Photos of Detainee Abuse*, WASH. POST (May 14, 2009), available at [http://articles.washingtonpost.com/2009-05-14/politics/36781768\\_1\\_abuse-photos-prisoner-abuse-court-ordered-release](http://articles.washingtonpost.com/2009-05-14/politics/36781768_1_abuse-photos-prisoner-abuse-court-ordered-release); KLAIDMAN, *supra* note 10, at 48.
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- 29 White House Press Release, *Statement of President Barack Obama on Military Commissions* (May 15, 2009), available at <http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-military-commissions>
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- 31 *Id.*
- 32 *Id.*
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32 Task Force staff interview with Tom Daschle (Aug. 21, 2012).

33 Scott Shane & Mark Mazzetti, *Report Blames Rumsfeld for Detainee Abuses*, N.Y. TIMES (Dec. 11, 2008), available at <http://www.nytimes.com/2008/12/12/washington/12detainee.html>; Brian Knowlton, *Report Gives New Detail on Approval of Brutal Techniques*, N.Y. TIMES (Apr. 21, 2009), available at <http://www.nytimes.com/2009/04/22/us/politics/22report.html>; Senate Armed Servs. Comm. (110th Cong.), *Report on Inquiry into the Treatment of Detainees in U.S. Custody* 6–7 (Nov. 20, 2008), available at [http://www.fas.org/irp/congress/2009\\_rpt/detainees.pdf](http://www.fas.org/irp/congress/2009_rpt/detainees.pdf)

34 Paul Kramer, *The Water Cure*, NEW YORKER (Feb. 25, 2008), available at [http://www.newyorker.com/reporting/2008/02/25/080225fa\\_fact\\_kramer](http://www.newyorker.com/reporting/2008/02/25/080225fa_fact_kramer)

35 Richard E. Welch, Jr., *American Atrocities in the Philippines: The Indictment and the Response*, 43(2) PAC. HIST. REV. 234 (May 1974).

36 *Id.* at 235.

37 *Id.* at 234.

38 Kramer, *supra* note 34.

39 RICHARD E. WELCH, JR., RESPONSE TO IMPERIALISM: THE UNITED STATES AND THE PHILIPPINE-AMERICAN WAR 1899–1902 137 (1979).

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- 44 *The Water Cure Described: Discharged Soldier Tells Senate Committee How and Why the Torture Was Inflicted*, N.Y. TIMES (May 4, 1902), available at <http://query.nytimes.com/mem/archive-free/pdf?res=9F07E3D61130E132A25757C0A9639C946397D6CF>; *The Philippine Inquiry: Soldiers Testify Regarding the Administration of the Water Cure — Prisoners Were Treated Well*, N.Y. TIMES (May 9, 1902), available at <http://query.nytimes.com/mem/archive-free/pdf?res=F20F16FF385412738DDDA00894DD405B828CF1D3>; *One “Water Cure” Victim: Witness Tells of the Case Before Senate Committee*, N.Y. TIMES (May 11, 1902), available at <http://query.nytimes.com/mem/archive-free/pdf?res=F30F11F73B591B728DDDA80994DD405B828CF1D3>; *Making Filipinos Talk: Returning Soldier Says Rattans, Bastinados, and Lighted Matches Were Used on Insurgents*, N.Y. TIMES (May 19, 1902), available at <http://query.nytimes.com/mem/archive-free/pdf?res=FB0B14FF3A5F12738DDDA00994DD405B828CF1D3>; *Tell of “Water Cure” Cases: Witnesses Give Further Testimony Before the Senate Committee on the Philippines Regarding Filipinos’ Treatment*, N.Y. TIMES (June 13, 1902), available at <http://query.nytimes.com/mem/archive-free/pdf?res=F40E17FB385412738DDDA0994DE405B828CF1D3>
- 45 Welch, *supra* note 35. See also Kramer, *supra* note 34.
- 46 Task Force staff email correspondence with Paul Kramer (Sept. 13, 2012).
- 47 WELCH, *supra* note 39, at 145.
- 48 Correspondence with Kramer, *supra* note 46.
- 49 A concise summary and critique of the proceedings can be found in Fred I. Borch III, *The “Malmedy Massacre” Trial: The Military Government Proceedings and the Controversial Legal Aftermath*, ARMY LAWYER (Jan. 2011).
- 50 *Id.*; *German Churches Enter Malmedy Case*, CHI. TRIB. (Sept. 8, 1949).
- 51 *Plea for 12 of Malmedy; Anti-War Group Cables Clay to Spare German Soldiers*, N.Y. TIMES (Mar. 6, 1949); William R. Conklin, *Protests Increase on Malmedy Trial*, N.Y. TIMES (Mar. 2, 1949); *War Crimes: Clemency*, TIME (Jan. 17, 1949).
- 52 Borch, *supra* note 49, at 7; Senate Armed Servs. Comm. (81st Cong.), *Report on Malmedy Massacre Investigation* 1–2 (Oct. 13, 1949) [hereinafter *Malmedy Massacre Investigation*], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Malmedy\\_report.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Malmedy_report.pdf)
- 53 Malmedy Massacre Investigation, *supra* note 52, at 35.
- 54 U.S. Marine Corps, Oral History Transcript, Col. Justice M. Chambers 75–77 (1988).
- 55 Malmedy Massacre Investigation, *supra* note 52, at 7–23.
- 56 John Fisher, *Senate Unit Clears Army in War Trial: Report Challenged by McCarthy*, CHI. TRIB. (Oct. 15, 1949).
- 57 Borch, *supra* note 49, at 8.
- 58 Task Force staff email correspondence with Fred L. Borch III (Sept. 25, 2012).

## APPENDIX 1

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<sup>1</sup> Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 41 (2002) (“[T]he actions of individual human rights violators, such as murder, rape, assault, and torture, are prohibited by almost every domestic criminal justice system”); *see also* *Nuru v. Gonzales*, 404 F.3d 1207, 1222 n.11 (9th Cir. 2005) (listing various constitutional and penal prohibitions against torture from around the world). For a comprehensive database of global anti-torture legislation, *see* the Compilation of Torture Laws at the Association for the Prevention of Torture, <http://www.ap.t.ch/en/compilation-of-torture-laws>

<sup>2</sup> *Id.*

<sup>3</sup> *See* 1863 Lieber Code, Gen. Orders No. 100, § I, art. 16 (Apr. 24, 1863), reprinted in RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 48 (1983).

<sup>4</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), *quoting* *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). *See also* *Nuru*, 404 F.3d at 1222, n.11 (“torture is illegal under the law of virtually every country in the world”).

<sup>5</sup> 18 U.S.C. §§ 2340–2340A.

<sup>6</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85 [hereinafter CAT] at art. 2(2)–(3), *available at* <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> (stating that “no exceptional circumstance for torture whatsoever, whether a state of war or a threat of war, political instability or any other public emergency, may be invoked as a justification of torture”). *See also* Universal Declaration on Human Rights [hereinafter Universal Declaration], G.A. Res. 217A (III), U.N. Doc A/810 at art. 5 (1948) (prohibiting torture, and cruel, inhuman or degrading treatment); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967) [hereinafter ICCPR] at art. 7 (banning torture, and cruel, inhuman or degrading treatment); Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998); 2187 UNTS 90 at arts. 7–8.

<sup>7</sup> *E.g.* Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII] at art. 3(1), art. 17, art. 87, art. 130 (prohibiting torture and defining it as a “grave breach”); Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 Aug. 1959, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter GCIV] at art. 3(1), art. 32, art. 147 (same).

<sup>8</sup> 18 U.S.C. §§ 2340–2340A; CAT, *supra* note 6, art. 2(2)–(3); GCIV, *supra* note 7, art. 3(1).

<sup>9</sup> Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969); 63 A.J.I.L. 875 (1969) at art. 53 (defining a *jus cogens* norm as one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”). *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81 (Fall 2001).

<sup>9</sup> *Id.*

<sup>10</sup> *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, *available at* <http://www.unhcr.org/refworld/docid/47c6882e2.html>

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<sup>11</sup> American Convention on Human Rights Art. 27(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. at 123.

<sup>12</sup> *Id.*

<sup>13</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 144 (Dec. 10, 1998).

<sup>14</sup> Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994) at art. 3(f) (defining torture as a “crime against humanity”).

<sup>15</sup> 18 U.S.C. §§ 2340–2340A [Torture Act]; 28 U.S.C. § 1350 [Torture Victims Protection Act] [hereinafter TVPA]; 18 U.S.C. § 2441 [War Crimes Act] [hereinafter WCA]; 18 U.S.C. §§ 1801–1807 [Military Commissions Act of 2009] [hereinafter MCA].

<sup>16</sup> CAT, *supra* note 6, art. 1. CAT was adopted by the U.N. General Assembly on December 10, 1984, and took force on June 26, 1987. DOS, Initial Report of the United States of America to the U.N. Committee Against Torture (Oct. 15, 1999), *available at* <http://www.state.gov/documents/organization/100296.pdf>. CAT was ratified by the U.S. Senate on October 20, 1994, and took effect as U.S. law on November 20, 1994. *Id.* The U.S. Senate ratified CAT subject to a list of reservations, understandings, and declarations. *U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990) [hereinafter *U.S. CAT Reservations*], *available at* <http://www1.umn.edu/humanrts/usdocs/tortres.html>

<sup>17</sup> *Id.* art II(1)–(5). In international law, these are referred to as understandings, declarations and reservations; they alter the binding nature of an international treaty such that the country making such reservations is bound only to the extent of those reservations.

<sup>18</sup> 18 U.S.C. §§ 2340–2340A.

<sup>19</sup> *Id.* § 2340(1).

<sup>20</sup> *Id.* § 2340(2).

<sup>21</sup> *Id.* § 2340(1).

<sup>22</sup> *See* discussion below which reviews the relevant cases.

<sup>23</sup> *E.g.*, *Nuru*, 404 F.3d at 1218.

<sup>24</sup> MCA, 18 U.S.C. § 950t(11)(A) (2009).

<sup>25</sup> WCA, 18 U.S.C. § 2441(d)(1)(A).

<sup>26</sup> TVPA, 28 U.S.C. § (3)(b)(1).

<sup>27</sup> MCA 18 U.S.C. § 950t(11)(A) (2009); WCA, 18 U.S.C. § 2441(d)(1)(A); TVPA, 28 U.S.C. § (3)(b)(1). It is not clear that this additional language narrows the definition of torture in practice. Two circuits have held that this language is meant merely “to illustrate the common motivations that cause individuals to engage in torture ... [and to] ensure[ ] that, whatever its specific goal, torture can occur ... only when the production of pain is purposive, not merely haphazard.” *United States v. Belfast*, 611 F.3d 783, 807 (11th Cir. 2010), *citing* *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)

<sup>28</sup> CAT, *supra* note 6, art. 1.

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<sup>29</sup> Torture Act, 18 U.S.C. §§ 2340(1).

<sup>30</sup> *Auguste v. Ridge*, 395 F.3d 123, 125, 145–46 (3d Cir. 2005). *See also* *Villegas v. Mukasey*, 523 F.3d 983 (9th Cir. 2008); *Pierre v. Gonzales*, 502 F.3d 109, 117 (2nd Cir. 2007); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004); *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002). *Contra* *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (“Although the regulations require that severe pain or suffering be ‘intentionally inflicted,’ we do not interpret this as a ‘specific intent requirement.’”) (internal citations omitted). The *Auguste* court dismissed this as *dicta*. *Auguste*, 395 F.3d at 148.

<sup>31</sup> *Pierre*, 502 F.3d at 117.

<sup>32</sup> *Auguste*, 395 F.3d at 146.

<sup>33</sup> *E.g.*, CAT, *supra* note 6, at art. 16; ICCPR, *supra* note 6, at art. 7; Universal Declaration, *supra* note 6, art. 5; GCIII, *supra* note 7, art. 3, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S 143 at art. 5(2), African Charter on Human and People’s Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982) at art. 5.

<sup>34</sup> MCA, 18 U.S.C. § 948r(a).

<sup>35</sup> Detainee Treatment Act [DTA], 42 U.S.C. §1003(d). The definition is also tied to the “United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.”

<sup>36</sup> *U.S. CAT Reservations*, *supra* note 16. (“[T]he United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”)

<sup>37</sup> 18 U.S.C. § 2441(B).

<sup>38</sup> Memorandum from Jay S. Bybee (Ass’t Att’y Gen., OLC) to Alberto Gonzales (Counsel to the President), *Standards for Conduct for Interrogation Under 18 U.S.C. 2340 – 2340A* at 2 (Aug. 1, 2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

<sup>39</sup> *Id.* at 46.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY* 145 (2007).

<sup>42</sup> *Id.*

<sup>43</sup> Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, WASH. POST (Aug. 5, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A41189-2004Aug4.html>

<sup>44</sup> Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, FINANCIAL TIMES (June 10, 2004).

<sup>45</sup> Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES (June 25, 2004), at A14, available at <http://www.nytimes.com/2004/06/25/world/the-reach-of-war-penal-law-legal-scholars-criticize-memos-on-torture.html>

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<sup>46</sup> Kathleen Clark & Julie Mertus, *Torturing Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST (June 20, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A54025-2004Jun19.html>; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, WASH. POST (July 4, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A26431-2004Jul3.html>

<sup>47</sup> DOJ Office of Prof'l Resp. Report, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 3 (June 29, 2009) [hereinafter OPR Report], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>; Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST (June 9, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html>

<sup>48</sup> Memorandum from Daniel B. Levin (Acting Ass't Att'y Gen., OLC) to Att'y Gen. & Deputy Att'y Gen., DOJ, *Status of Interrogation Advice* 1 (Sept. 2004), available at <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc89.pdf>

<sup>49</sup> Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES (Feb. 19, 2010), available at <http://www.nytimes.com/2010/02/20/us/politics/20justice.html>. See OPR Report, *supra* note 47.

<sup>50</sup> Memorandum from David Margolis (Associate Att'y Gen., DOJ) to Att'y Gen. and Deputy Att'y Gen., DOJ, *Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (Jan. 5, 2010), available at <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf>

<sup>51</sup> Memorandum from Jay S. Bybee (Ass't Att'y Gen., OLC) to John Rizzo (Acting Gen. Counsel, CIA), *Interrogation of Al Qaeda Operative 2* (Aug. 1, 2002) [hereinafter Bybee Techniques Memo], available at [http://media.luxmedia.com/aclu/olc\\_08012002\\_bybee.pdf](http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf).

<sup>52</sup> CIA Office of the Inspector Gen., *Special Review: Counterterrorism Detention and Interrogation Activities (Sept. 2001 – Oct. 2003)* (May 7, 2004) [hereinafter CIA OIG Report], available at [http://media.washingtonpost.com/wp-srv/nation/documents/cia\\_oig\\_report.pdf](http://media.washingtonpost.com/wp-srv/nation/documents/cia_oig_report.pdf)

<sup>53</sup> Bybee Techniques Memo, *supra* note 51, at 5.

<sup>54</sup> See CIA, *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* (May 2004) [hereinafter OMS Guidelines May 2004], available at <http://www.aclu.org/torturefoia/released/103009/cia-olc/2.pdf>; Memorandum from Steven G. Bradbury (Principal Deputy Att'y Gen., OLC) to John A. Rizzo (Senior Deputy Gen. Counsel, CIA), *Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value Al Qaeda Detainee* (May 10, 2005 [No. 13]) [hereinafter Bradbury May 10 Memo Re: Individual Techniques], available at [http://media.luxmedia.com/aclu/olc\\_05102005\\_bradbury46pg.pdf](http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf); Memorandum from Steven G. Bradbury (Principal Deputy Ass't Att'y Gen., OLC) to John A. Rizzo (Senior Deputy Gen. Counsel, CIA), *Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value Al Qaeda Detainee* (May 10, 2005 [No. 12]) [hereinafter Bradbury May 10 Memo Re: Combined Techniques], available at [http://media.luxmedia.com/aclu/olc\\_05102005\\_bradbury\\_20pg.pdf](http://media.luxmedia.com/aclu/olc_05102005_bradbury_20pg.pdf); Memorandum from Steven

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G. Bradbury (Principal Deputy Ass't Att'y Gen.) to John A Rizzo (Senior Deputy Gen. Counsel, CIA), *Application of U.S. Obligations Under Article 16 of CAT to Certain Techniques that May Be Used in Interrogation of High Value Al Qaeda Detainees* (May 30, 2005) [hereinafter Bradbury May 30 Memo], available at [http://media.luxmedia.com/aclu/olc\\_05302005\\_bradbury.pdf](http://media.luxmedia.com/aclu/olc_05302005_bradbury.pdf)

<sup>55</sup> Bradbury May 10 Memo Re: Individual Techniques, *supra* note 54 at 9–10.

<sup>56</sup> *Id.* at 28.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 12.

<sup>60</sup> Bradbury May 30 Memo, *supra* note 54, at 13.

<sup>61</sup> OMS Guidelines May 2004, *supra* note 54, at 7, 23.

<sup>62</sup> Bradbury May 30 Memo, *supra* note 54, at 13.

<sup>63</sup> *Id.*

<sup>64</sup> CIA, *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention* 17–18 (Dec. 2004), available at [http://dspace.wrhc.org/doc/bitstream/2041/72435/02793\\_041200display.pdf](http://dspace.wrhc.org/doc/bitstream/2041/72435/02793_041200display.pdf)

<sup>65</sup> *Id.* at 19.

<sup>66</sup> Bradbury May 10 Memo Re: Individual Techniques, *supra* note 54, at 13–15.

<sup>67</sup> Bradbury May 10 Memo Re: Individual Techniques, *supra* note 54, at 5.

<sup>68</sup> *Id.* at n. 31.

<sup>69</sup> *Id.* at 45.

<sup>70</sup> Bradbury May 10 Memo Re: Combined Techniques, *supra* note 54.

<sup>71</sup> Bradbury May 30 Memo, *supra* note 54.

<sup>72</sup> Am. Med. Ass'n, *Ethics Opinion 2.068 — Physician Participation in Interrogation* (Nov. 2006), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2068.page>

<sup>73</sup> Am. Psychiatric Ass'n, *Position Statement: Psychiatric Participation in Interrogation of Detainees* (May 2006), available at [http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2006\\_Interrogation.pdf](http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2006_Interrogation.pdf)

<sup>74</sup> Am. Psychological Ass'n, *Letter from Carol T. Goodheart to the Texas State Board of Examiners of Psychologists Re: Complaint Filed by Dr. Jim L.H. Cox Regarding Dr. James Elmer Mitchell* (June 30, 2010) (APA Mitchell Letter), available at <http://www.apa.org/news/press/statements/texas-mitchell-letter.pdf>

<sup>75</sup> Am. Psychological Ass'n, *Reaffirmation of the American Psychological Association Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Its Application to Individuals Defined in the United States Code as*

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“*Enemy Combatants*” (Aug. 19, 2007), available at <http://www.apa.org/about/governance/council/torture-amend.aspx>

<sup>76</sup> See *U.S. CAT Reservations*, *supra* note 16 (“That the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”); *U.S. Reservations, Declarations, And Understandings, International Covenant on Civil and Political Rights I(3)*, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992) (“That the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.”); see also *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001).

<sup>77</sup> See *Price*, 294 F.3d at 93 (stating that the court needed to know the frequency, duration, and affected parts of plaintiff’s body in order to assess severity for the purposes of determining torture).

<sup>78</sup> *Id.* (“The more intense, lasting, or heinous the agony, the more likely it is to be torture.”).

<sup>79</sup> *Id.*

<sup>80</sup> See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d. 1322, 1359 (N.D. Ga. 2002) (“Plaintiffs continue to suffer from their ordeals both physically and emotionally. ... [A]ll have lasting physical scars and injuries, and continue to experience pain from injuries they have experienced as a result of torture.”); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d. 62, 65 (D.D.C. 1998) (noting the permanent physical scarring and hearing loss suffered by plaintiffs when finding that they were tortured).

<sup>81</sup> *Mehinovic*, 198 F. Supp. at 1336 (noting that plaintiff suffered “eight broken ribs ... [and] a broken nose and finger”).

<sup>82</sup> *Id.* (noting permanent damage to plaintiff’s kidneys); *Cicippio*, 18 F. Supp. 2d. at 65 (noting that plaintiff suffers from permanent hearing loss as a result of his treatment).

<sup>83</sup> *Mehinovic*, 198 F. Supp. at 1337 (noting that plaintiff has a permanent crescent scar on his forehead that was carved by the defendant).

<sup>84</sup> *United States v. Belfast*, 611 F.3d 783, 799 (11th Cir. 2010) (noting victim’s disfigured genitals).

<sup>85</sup> *Mehinovic*, 198 F. Supp. at 1359 (noting lasting mental effects such as “nightmares, difficulty sleeping, flashbacks, anxiety”).

<sup>86</sup> *Doe v. Qi*, 349 F. Supp. 2d 1258, 1317 (N.D. Cal. 2004).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1318.

<sup>89</sup> *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995).

<sup>90</sup> *Id.*

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<sup>91</sup> *Id.*

<sup>92</sup> *Nuru*, 404 F.3d at 1213.

<sup>93</sup> *Belfast*, 611 F.3d at 783–828.

<sup>94</sup> *Al-Safer v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001).

<sup>95</sup> *Kang v. Atty. Gen. of United States*, 611 F.3d 157, 161 (3d Cir. 2010).

<sup>96</sup> Paul Kramer, *The Water Cure*, NEW YORKER (Feb. 25, 2008), available at [http://www.newyorker.com/reporting/2008/02/25/080225fa\\_fact\\_kramer](http://www.newyorker.com/reporting/2008/02/25/080225fa_fact_kramer).

<sup>97</sup> JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 1059 (1948) (“Among these tortures were the water treatment. . . . The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.”)

<sup>98</sup> Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST (Oct. 5, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>. Defenders of the legality of waterboarding have argued that the “water cure” practiced in many of these prior cases was distinct from the method that the CIA used, either because the “water cure” was accompanied by other forms of torture or used a higher volume of water. But the CIA also did not use waterboarding in isolation, and the precedents need not be factually identical in every respect to be relevant.

<sup>99</sup> *White v. State*, 129 Miss. 182 (1922); see also *Fisher v. State*, 145 Miss. 116 (1926) (“There can be no kind of doubt that this confession [by water cure] was unlawfully secured”).

<sup>100</sup> *White*, 129 Miss. at 187.

<sup>101</sup> *Id.* at 187; 189.

<sup>102</sup> *Cavazos v. State*, 143 Tex. Crim. 564 (1942) (The court did not describe how the water cure was administered. In addition to the water cure, officers made defendant “stand for hours on tin cans with his feet bare and with his arms extended above his head” and “slapped and kicked” him and shocked him “with an iron rod charged with electricity.” *Id.* at 566.)

<sup>103</sup> *Id.* at 567. An intermediate appellate court in Texas rejected an appeal of a conviction based a confession allegedly coerced using waterboarding in *Morris v. State* but the issue there was on the credibility of the allegations and not on the severity of the alleged behavior. 697 S.W.2d 687 (Tex. App. 1985).

<sup>104</sup> *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984).

<sup>105</sup> *Two Witnesses Describe Torture by Texas Sheriff*, N.Y. TIMES (Sept. 2, 1983), available at <http://www.nytimes.com/1983/09/02/us/around-the-nation-two-witnesses-describers00.2torture-by-texas-sheriff.html>

<sup>106</sup> *Lee*, 744 F.2d at 1126. The issue on appeal was whether the district court should have severed the appellant’s trial from the other defendants.



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<sup>107</sup> *Marcos Human Rights Litigation*, 910 F. Supp. at 1463 (describing the practice as “where a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation”).

<sup>108</sup> *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) (“[A]ll of the abuses alleged ... constituted either torture or prolonged arbitrary detention.”).

<sup>109</sup> *See, e.g., Sarei v. Rio Tinto*, 2011 U.S. App. LEXIS 21515, at \*48, 58, 77 (9th Cir. 2011) (*en banc*) (citing several international tribunals, including the ICTY and ICTR, when considering the elements of genocide); *Doe I v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (citing decisions by ICTY and ICTR regarding persecution and command responsibility in suit against Chinese officials by followers of Falun Gong and definition of genocide); *Mehinovic*, 198 F. Supp. 2d at 1346 (stating that opinions by the ICTY and ICTR are “particularly relevant” to U.S. courts determining contemporary norms in CIL and noting that the U.S. has “explicitly endorsed” the approach of the ICTY Statute); *see also Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (citing case law from the ICTY and Supreme Court of Israel that crimes such as torture and genocide are subject to universal jurisdiction).

<sup>110</sup> *E.g.* ICTY Statute at arts. 2(a)&5(f); ICTR Statute at arts. 3(f)&4(a); Rome Statute at arts. 7(1)(f)&(2)(e), 8(2)(a)(ii)&(c)(i).

<sup>111</sup> *See, e.g. Prosecutor v. Kvočka*, IT-98-30/1-A, Appeals Judgment, ¶289 (Feb. 28, 2005); *Prosecutor v. Ntagerura*, ICTR-99-46-T, Trial Judgment, ¶ 703 (Feb. 25, 2004).

<sup>112</sup> *Prosecutor v. Limaj*, IT-03-66-T, Trial Judgment, ¶ 237 (Nov. 2, 2001).

<sup>113</sup> *Case of Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 241 (July 26, 2010).

<sup>114</sup> *Id.* at ¶ 360.

<sup>115</sup> *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, at ¶¶ 96, 167.

<sup>116</sup> *Id.* (stating that torture implies “a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”).

<sup>117</sup> Hum. Rts. Watch, *Getting Away with Torture* 4 (July 2011) (stating that detainees in U.S. run facilities experienced exposure to loud noises, stress positions, and deprivation of food, water and sleep, among other interrogation techniques); Senate Armed Servs. Comm. (110th Cong.), *Inquiry into the Treatment of Detainees in U.S. Custody* xxiii-xxiv, 54 (Nov. 20, 2008) (Levin Report), available at [http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf). (describing the use of stress positions, sleep deprivation, loud noise, food deprivation among other interrogation techniques); DOD, *Working Group Report on Detainee Interrogations in the Global War on Terrorism* 64–65, 70 (2003) (approving and recommending the use of hooding, forced standing, and sleep deprivation for interrogations).

<sup>118</sup> *Aksoy v. Turkey*, (Eur. Ct. of Hum. Rts. 1996), available at <http://www.unhcr.org/refworld/docid/3ae6b67518.html>

<sup>119</sup> *Id.* at ¶¶ 14–15.

<sup>120</sup> *Id.* at ¶ 64.

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<sup>121</sup> El-Masri v. Macedonia, Judgment No. 39630/09 (Eur. Ct. of Hum. Rts. Dec. 13, 2012) ¶¶ 205–211, *available at* [http://www.opensocietyfoundations.org/sites/default/files/CASE\\_OF\\_EL-MASRI\\_v\\_\\_THE\\_FORMER\\_YUGOSLAV\\_REPUBLIC\\_OF\\_MACEDONIA.pdf](http://www.opensocietyfoundations.org/sites/default/files/CASE_OF_EL-MASRI_v__THE_FORMER_YUGOSLAV_REPUBLIC_OF_MACEDONIA.pdf)

<sup>122</sup> *Id.* at ¶¶ 24–30.

<sup>123</sup> U.S. Army, *Field Manual 34-52: Intelligence Interrogation* 1–8 (1992), *available at* <https://www.fas.org/irp/doddir/army/fm34-52.pdf>

<sup>124</sup> *Id.*

<sup>125</sup> U.S. Army, *Field Manual 2-22.3/34-52: Human Intelligence Collector Operations* (2006), *available at* <https://www.fas.org/irp/doddir/army/fm2-22-3.pdf>

<sup>126</sup> *Id.*

<sup>127</sup> CIA OIG Report, *supra* note 52, at 91.

<sup>128</sup> DOS, *Human Rights Reports* (1999 – present), *available at* <http://www.state.gov/g/drl/rls/hrrpt/>

<sup>129</sup> Bob Woodward, *Guantánamo Detainee was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>

<sup>130</sup> *Id.*

<sup>131</sup> Memorandum from Alberto J. Mora (Navy Gen. Counsel) for Navy Inspector Gen., , *Statement for the Record: Office of General Counsel Involvement in Interrogation Techniques at 7* (July 7, 2004), *available at* [http://dspace.wrhc.org/doc/bitstream/2041/70985/02368\\_040707\\_001display.pdf](http://dspace.wrhc.org/doc/bitstream/2041/70985/02368_040707_001display.pdf)

<sup>132</sup> Alberto J. Mora, Op-Ed., *An Affront to American Values*, WASH. POST (May 27, 2006), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601548.html>

<sup>133</sup> Lawrence B. Wilkerson, Op-Ed., *No Torture. No Exceptions.*, WASH. MONTHLY (2008), *available at* <http://www.washingtonmonthly.com/features/2008/0801.wilkerson.html>

<sup>134</sup> Shushannah Walshe, *Former Powell Chief of Staff Col. Larry Wilkerson: Cheney “Fears Being Tried as a War Criminal,”* ABC News (Aug. 30, 2011), *available at* <http://abcnews.go.com/Politics/powell-chief-staff-col-larry-wilkerson-cheney-fears/story?id=14414226>

<sup>135</sup> PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAW, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT* viii (Preface by Antonio Taguba) (June 2008), *available at* [http://brokenlives.info/?page\\_id=23](http://brokenlives.info/?page_id=23)

<sup>136</sup> ICRC, *Report on the Treatment of Fourteen “High-Value Detainees” in CIA Custody* 5 (Feb. 2007) [hereinafter 2007 ICRC Report], *available at* [http://dspace.wrhc.org/doc/bitstream/2041/71001/03083\\_070214\\_001display.pdf](http://dspace.wrhc.org/doc/bitstream/2041/71001/03083_070214_001display.pdf)

<sup>137</sup> ICRC, *Report on the Treatment by Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation* 23 (Feb. 2004) [hereinafter 2004 ICRC Report], *available at* <http://cryptome.org/icrc-report.htm>

<sup>138</sup> *Id.*

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<sup>139</sup> 2007 ICRC Report, *supra* note 136.

<sup>140</sup> 2004 ICRC Report, *supra* note 137, at 3.

<sup>141</sup> *Id.* at 23 (stating that “high value” detainees were kept in strict solitary confinement for 23 hours a day in small concrete cells devoid of daylight, “an internment regime which does not comply with the provisions of the Third and Fourth Geneva Conventions”)

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 8.

<sup>144</sup> *Id.* at 3.

<sup>145</sup> *Id.* at 4.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 10.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 8.

<sup>150</sup> *Id.* at 12.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 10.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 11.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 15.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 16.

<sup>161</sup> Neil A. Lewis, *Red Cross Finds Detainee Abuse at Guantánamo*, N.Y. TIMES (Nov. 30, 2004), available at <http://www.nytimes.com/2004/11/30/politics/30gitmo.html>

<sup>162</sup> 2007 ICRC Report, *supra* note 136, at 26.

<sup>163</sup> *Id.* at 24.

<sup>164</sup> *Id.* at 8.

<sup>165</sup> *Id.* at 7.

<sup>166</sup> *Id.* at 7.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 7–8.

<sup>169</sup> *Id.* at 24.

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<sup>170</sup> *Id.* at 16.

<sup>171</sup> *Id.* at 8–19. The list of these “ill-treatment” techniques is listed on pp. 8–9.

<sup>172</sup> *Id.* at 19.

<sup>173</sup> *Id.* at 11–12.

<sup>174</sup> *E.g., id.* at 9 (“each specific method was in fact applied in combination with other methods, either simultaneously, or in succession.”); *id.* at 35 (“The beatings were combined with the use of cold water...”); *id.* at 15 (“Sleep was deprived in various ways, and therefore overlaps with some of the other forms of ill-treatment described in this section, from the use of loud repetitive noise or music to long interrogation sessions to prolonged stress standing to spraying with cold water.”).

<sup>175</sup> *Id.* at 14.

<sup>176</sup> *Id.* at 19.

<sup>177</sup> *Id.* at 26.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 5.

<sup>180</sup> 743 F. Supp. 2d 261, 264 (S.D.N.Y. 2010).

<sup>181</sup> *Id.* at 288.

<sup>182</sup> *Id.* at 267.

<sup>183</sup> 613 F. Supp. 2d 51, 57–58, 61–64 (D.D.C. 2009).

<sup>184</sup> *Id.* at 58.

<sup>185</sup> *Id.* at 63.

<sup>186</sup> *Id.* at 58.

<sup>187</sup> *Id.* at 61.

<sup>188</sup> *Id.*

<sup>189</sup> Order (re: Mohammed Jawad) at 1, *Saki Bacha v. Obama*, Civ. No. 05-2385 (D.D.C. July 17, 2009).

<sup>190</sup> Order at 1, *Saki Bacha v. Obama*, No. 05-2385 (D.D.C. July 30, 2009).

<sup>191</sup> 689 F. Supp. 2d 38, 54, 64 (D.D.C. 2009).

<sup>192</sup> *Id.* at 57.

<sup>193</sup> The court states at 65 that “even though the identity of the individual interrogators changed ... there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States.”

<sup>194</sup> *Id.* at 57–60.

<sup>195</sup> *Id.* (Improvements included being able to bathe weekly, as opposed to never, being kept in the dark for 12 hours a day versus 23, and being given 5 minutes per week to spend outdoors versus none.)

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<sup>196</sup> *Id.* at 62.

<sup>197</sup> 696 F. Supp. 2d 1 (D.D.C. 2010) (re: Musa'ab Omar Al Madhwani).

<sup>198</sup> *Id.* at 3.

<sup>199</sup> *Id.* at 6.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 3. The court noted that a medical report indicated that the petitioner — who is five feet five inches tall and weighed 104 pounds six days before he was transferred to Guantánamo — had a diastolic blood pressure of 36, a sign of severe dehydration that ordinarily requires hospitalization. *Id.* at 18.

<sup>202</sup> *Id.* at 8.

<sup>203</sup> *Id.*

<sup>204</sup> 677 F. Supp. 2d 1 (D.D.C. 2009).

<sup>205</sup> *Id.* at 12.

<sup>206</sup> *Id.* at 11.

<sup>207</sup> *Id.* at 10.

<sup>208</sup> *Id.* at 12.

<sup>209</sup> The circuit court vacated and remanded the district court's decision because subsequent circuit court decisions were "inconsistent with several of the district court's legal premises." *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. 2011). The circuit court's decision, however, did not discuss the district court's factual determinations.

<sup>210</sup> 708 F. Supp. 2d 9, 14 (D.D.C. 2010) (re: Uthman Abdul Rahim Mohammed Uthman).

<sup>211</sup> *Id.* at 15

<sup>212</sup> *Id.* The district court's memorandum opinion was reversed and remanded by the circuit court with instructions to deny petitioner's writ of *habeas corpus*. *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011). The circuit court's opinion discussed only whether the government's evidence, based on a functional approach, indicated that petitioner more likely than not was part of Al Qaeda. *Id.* at 402, 407. The circuit court did not disturb the district court's findings that statements from certain witnesses were unreliable because they were the product of torture. *See id.* at 404 n.5.

<sup>213</sup> 709 F. Supp. 2d 25, 28 (D.D.C. 2010) (re: Yasein Khasem Mohammad Esmail).

<sup>214</sup> *Salahi v. Obama*, 710 F. Supp. 2d 1, 6 (D.D.C. 2010).

<sup>215</sup> *Id.* at 7

<sup>216</sup> *Id.* at 7, 16. The district court's grant of *habeas* grant was later overturned by the D.C. Circuit, but its factual conclusions were not.

## APPENDIX 2

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<sup>1</sup> Interview, Dick Cheney, *Meet the Press* (Sept. 16, 2001), available at <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html>

<sup>2</sup> Interview, Cofer Black, *Frontline* (Mar. 7, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/bushswar/interviews/black.html>

<sup>3</sup> [Presidential] Military Order, *Detention Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (Nov. 13, 2001), 66 Fed. Reg. 57,831 (Nov. 16, 2001), available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>

<sup>4</sup> Memorandum from Patrick F. Philbin (Deputy Ass't Att'y Gen., OLC) & John C. Yoo (Deputy Ass't Att'y Gen., OLC) to William J. Haynes II (Gen. Counsel, DOD), *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba* (Dec. 28, 2001), available at <http://www.torturingdemocracy.org/documents/20011228.pdf>

<sup>5</sup> Memorandum from President George W. Bush to Vice President *et al.*, *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), available at [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf)

<sup>6</sup> James R. Schlesinger, *Final Report of the Independent Panel to Review DOD Detention Operations* 80 (Aug. 2004) (Schlesinger Report), available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>

<sup>7</sup> Memorandum from Donald Rumsfeld (Secretary of Defense) to Chairman of the Joint Chiefs of Staff, *Status of Taliban and Al Qaeda* (Jan. 19, 2002), available at <http://www.torturingdemocracy.org/documents/20020119.pdf>

<sup>8</sup> PHILIPPE SANDS, *TORTURE TEAM: DECEPTION, CRUELTY, AND THE PROMISE OF LAW* 39 (2008); Transcript of interview with Thomas Romig (Nov. 19, 2007), available at [http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/thomas\\_romig.html](http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/thomas_romig.html)

<sup>9</sup> Memorandum from William H. Taft IV (Legal Adviser, DOS) to John C. Yoo (Deputy Ass't Att'y Gen., OLC), *Your Draft Memorandum of January 9* (Jan. 11, 2002), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020111.pdf>

<sup>10</sup> Memorandum from Alberto R. Gonzales (White House Counsel) to President George W. Bush, *Decision re Application of the Geneva Convention* (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>

<sup>11</sup> *Id.*

<sup>12</sup> Notes by William H. Taft IV (Legal Adviser, DOS) (Feb. 2, 2002), reproduced in KAREN GREENBERG & JOSHUA DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005).

<sup>13</sup> Scott Shane, *2 U.S. Architects of Harsh Tactics in 9/11's Wake*, N.Y. TIMES (Aug. 11, 2009), available at <http://www.nytimes.com/2009/08/12/us/12psychs.html>; Katherine Eban, *Rorshach and Awe*, VANITY FAIR (July 17, 2007), available at <http://www.vanityfair.com/politics/features/2007/07/torture200707>; Jody Warrick & Peter Finn, *Interviews Offer Look at Roles of CIA Contractors During Interrogation*, WASH. POST (July 19, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/18/AR2009071802065.html>; Senate Armed Servs. Comm. (110th Cong.), *Inquiry into the Treatment of Detainees in U.S. Custody* 6–7 (Nov. 20, 2008) [hereinafter Levin Report], available at [http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf)

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<sup>14</sup> ALI SOUFAN, *THE BLACK BANNERS* 393–95 (2011) (Soufan refers to the CIA contract psychologist as “Boris” but multiple, credible press accounts have confirmed that it is Mitchell, e.g., Warrick & Finn, *supra* note 13).

<sup>15</sup> Michael Isikoff, “*We Could Have Done This the Right Way*,” *NEWSWEEK* (Apr. 24, 2009), available at <http://www.thedailybeast.com/newsweek/2009/04/24/we-could-have-done-this-the-right-way.html>; Senate Judiciary Comm., Testimony of Ali Soufan (May 13, 2009), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14945e6&wit\\_id=e655f9e2809e5476862f735da14945e6-1-2](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14945e6&wit_id=e655f9e2809e5476862f735da14945e6-1-2)

<sup>16</sup> SOUFAN, *supra* note 14, at 422–23 (FBI agent Steve Gaudin remained slightly longer, but his superiors eventually ordered him not to return); DOJ, Office of the Inspector Gen., *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq* (2009), available at <http://www.justice.gov/oig/special/s0910.pdf>

<sup>17</sup> Rodriguez does not identify Soufan by name in his book, but comparing his description to other sources makes clear that Soufan is the FBI agent in question.

<sup>18</sup> JOSE RODRIGUEZ & BILL HARLOW, *HARD MEASURES* 77–78 (2012).

<sup>19</sup> *Id.* at 70.

<sup>20</sup> GEORGE W. BUSH, *DECISION POINTS* 169 (2010).

<sup>21</sup> Memorandum from Jay S. Bybee (Ass’t Att’y Gen., OLC) to John Rizzo (Acting Gen. Counsel, CIA), *Interrogation of Al Qaeda Operative* (Aug. 1, 2002) [hereinafter Bybee Aug. 1 Interrogation Methods Memo], available at [http://media.luxmedia.com/aclu/olc\\_08012002\\_bybee.pdf](http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf)

<sup>22</sup> ICRC, *Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* 29–30 (Feb. 2007), available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>

<sup>23</sup> *Id.* at 11, 15.

<sup>24</sup> Senate Intelligence Comm., *Testimony of Michael Hayden* (Mar. 5, 2008).

<sup>25</sup> Memorandum from Steven G. Bradbury (Principal Deputy Ass’t Att’y Gen.) to John A. Rizzo (Senior Deputy Gen. Counsel, CIA), *Application of U.S. Obligations Under Article 16 of CAT to Certain Techniques that May Be Used in Interrogation of High Value Al Qaeda Detainees* (May 30, 2005), available at [http://media.luxmedia.com/aclu/olc\\_05302005\\_bradbury.pdf](http://media.luxmedia.com/aclu/olc_05302005_bradbury.pdf)

<sup>26</sup> Adam Goldman & Kathy Gannon, *Salt Pit Death: Gul Rahman, CIA Prisoner, Died of Hypothermia in Secret Afghanistan Prison*, *HUFFINGTON POST* (AP) (Mar. 28, 2010), available at [http://www.huffingtonpost.com/2010/03/28/salt-pit-death-gul-rahman\\_n\\_516559.html](http://www.huffingtonpost.com/2010/03/28/salt-pit-death-gul-rahman_n_516559.html); Adam Goldman & Kathy Gannon, *CIA Victim Said to Have Rescued Future Afghan President*, *Fox News* (AP) (April 7, 2010), available at <http://www.foxnews.com/world/2010/04/06/cia-victim-said-rescued-future-afghan-pres>; Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, *WASH. POST* (March 3, 2005), available at <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>

<sup>27</sup> Adam Goldman & Matt Apuzzo, *At CIA, Grave Mistakes, Then Promotions*, *WASH. TIMES* (AP) (Feb. 9, 2011), available at <http://www.washingtontimes.com/news/2011/feb/9/ap-cia-grave-mistakes-then-promotions>

<sup>28</sup> U.N. Hum. Rts. Council, *Joint Study On Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* 59–68 (Feb. 19, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>

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<sup>29</sup> 696 F. Supp. 2d 1, 6 (D.D.C. 2010), *aff'd sub nom.* Al-Madhwani v. Obama, 642 F.2d 1071 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012)

<sup>30</sup> *Id.*

<sup>31</sup> 613 F. Supp. 2d 51, 58 (D.D.C. 2009).

<sup>32</sup> 689 F. Supp. 2d 38, 60 (D.D.C. 2009).

<sup>33</sup> Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST (Dec. 4, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html>; Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, N.Y. TIMES (July 7, 2006), available at <http://www.nytimes.com/2006/07/07/world/africa/07algeria.html>

<sup>34</sup> Task Force staff interview with Khalid al-Sharif (Sept. 2, 2012).

<sup>35</sup> HUM. RTS. WATCH, DELIVERED INTO ENEMY HANDS 48–50 (Sept. 2012), available at [http://www.hrw.org/sites/default/files/reports/libya0912webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf)

<sup>36</sup> *Id.* at 4.

<sup>37</sup> Declaration of Mohamed Farag Ahmed Bashmilah (Mohamed v. Jeppesen Dataplan) (Dec. 5, 2007), available at <http://chrgj.org/wp-content/uploads/2012/07/declarationofbashmilah.pdf>

<sup>38</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST (Dec. 26, 2002), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html>

<sup>39</sup> Raymond Bonner, Don Van Natta Jr. & Amy Waldman, *Threats and Responses: Interrogations; Questioning Terror Suspects In a Dark and Surreal World*, N.Y. TIMES (Mar. 3, 2003), available at <http://www.nytimes.com/2003/03/09/world/threats-responses-interrogations-questioning-terror-suspects-dark-surreal-world.html>

<sup>40</sup> RICARDO S. SANCHEZ WITH DONALD T. PHILLIPS, WISER IN BATTLE 149–50 (2008).

<sup>41</sup> Task Force staff interview with Rear Admiral James McPherson (Dec. 13, 2011).

<sup>42</sup> *Id.*

<sup>43</sup> KAREN GREENBERG, THE LEAST WORST PLACE: GUANTÁNAMO'S FIRST 100 DAYS 55–59, 62–63 (2009).

<sup>44</sup> Task Force staff interview with Colonel Terry Carrico (May 19, 2011).

<sup>45</sup> Gerry G. Gilmore, *Rumsfeld Visits, Thanks Troops at Camp X-Ray in Cuba*, AM. FORCES PRESS SERV. (Jan. 27, 2002), available at <http://www.defense.gov/news/newsarticle.aspx?id=43817>

<sup>46</sup> SANDS, *supra* note 8, at 51.

<sup>47</sup> Levin Report, *supra* note 13, at 38–39, 43–47, 51–53.

<sup>48</sup> *Id.* at 61–62, 65.

<sup>49</sup> *Id.* at 62.

<sup>50</sup> Julian Borger, “Soft” Guantánamo Chief Ousted, GUARDIAN (UK) (Oct. 16, 2002), available at <http://www.guardian.co.uk/world/2002/oct/16/usa.afghanistan>



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- <sup>51</sup> Memorandum from Lt. Col. Diane Beaver to Gen. James T. Hill, *Legal Review of Aggressive Interrogation Techniques* (Oct. 11, 2002), available at <http://www.defense.gov/news/Jun2004/d20040622doc3.pdf>
- <sup>52</sup> *Id.*
- <sup>53</sup> SANDS, *supra* note 8, at 77.
- <sup>54</sup> Levin Report, *supra* note 13, at 66–70.
- <sup>55</sup> *Id.* at 70. Beaver has stated that she asked requested Dalton’s assistance for her own review, but did not receive any. SANDS, *supra* note 8, at 77.
- <sup>56</sup> Levin Report, *supra* note 13, at 71.
- <sup>57</sup> Memorandum from William J. Haynes II (Gen. Counsel, DOD) to Donald Rumsfeld (Secretary of Defense), *Counter-Resistance Techniques* (Nov. 27, 2002), signed with handwritten note by Rumsfeld on Dec. 2, 2002, available at <http://www.defense.gov/news/Jun2004/d20040622doc5.pdf>
- <sup>58</sup> Levin Report, *supra* note 13, at 96.
- <sup>59</sup> *Id.* at 60.
- <sup>60</sup> Letter from T.J. Harrington (Deputy Ass’t Dir., FBI Counterterrorism Div.) to Major General Donald J. Ryder (Army CID), *Suspected Mistreatment of Detainees* (July 14, 2004), available at [http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87\\_001914%20to%20001916\\_DOJFBI001914.pdf](http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87_001914%20to%20001916_DOJFBI001914.pdf)
- <sup>61</sup> DOD, *Interrogation Log, Detainee 063* (Nov. 23, 2002 to Jan. 11, 2003), available at <http://www.time.com/time/2006/log/log.pdf>
- <sup>62</sup> *Id.* at 27.
- <sup>63</sup> Randall Schmidt and John Furlow, *Army Regulation 15-6: Final Report: Investigation Into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba, Detention Facility* (Apr. 2005) [hereinafter Schmidt-Furlow Report], available at <http://www.defense.gov/news/Jul2005/d20050714report.pdf>; Levin Report, *supra* note 13, at 73–90.
- <sup>64</sup> Schmidt-Furlow Report, *supra* note 63, at 1, 20.
- <sup>65</sup> Bob Woodward, *Guantánamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST, (Jan. 14, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>
- <sup>66</sup> Memorandum from Alberto Mora (Navy Gen. Counsel) for Navy Inspector General, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (July 7, 2004) [hereinafter Mora Statement for the Record], available at [http://www.aclu.org/pdfs/safefree/mora\\_memo\\_july\\_2004.pdf](http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf)
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.*
- <sup>69</sup> *Id.* at 7–8.
- <sup>70</sup> *Id.* at 4–15.
- <sup>71</sup> Levin Report, *supra* note 13, at 120–21.

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<sup>72</sup> DOD, *Working Group Report on Detainee Interrogations in the Global War on Terrorism* 86–87 (Apr. 4, 2003), available at <http://www.au.af.mil/au/awc/awcgate/dod/d20040622doc8.pdf>

<sup>73</sup> Levin Report, *supra* note 13, at 131

<sup>74</sup> Memorandum from Donald Rumsfeld (Secretary of Defense) to Commander, U.S. Southern Command, *Counter-Resistance Techniques in the War on Terrorism* (Apr. 16, 2004), available at <http://www.torturingdemocracy.org/documents/20030416.pdf>

<sup>75</sup> *Id.*

<sup>76</sup> Levin Report, *supra* note 13, at 137–38.

<sup>77</sup> Schmidt-Furlow Report, *supra* note 63, at 24–25.

<sup>78</sup> Levin Report, *supra* note 13, at 139–40.

<sup>79</sup> *Id.* at 140–41.

<sup>80</sup> Levin Report, *supra* note 13, at 141; Jess Bravin, *The Conscience of the Colonel*, WALL STREET J. (Mar. 31, 2007).

<sup>81</sup> Levin Report, *supra* note 13, at 143–46.

<sup>82</sup> Email from [Redacted] to Valerie Caproni (FBI Office of Gen. Counsel) (forwarding email from [redacted] to [redacted]), *GITMO* (Aug. 2, 2004), available at <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>

<sup>83</sup> Interview with Operations Officer (Mar. 7, 2005), Annex to the Schmidt-Furlow Report, at 84, available at [http://humanrights.ucdavis.edu/resources/library/documents-and-reports/schmidt\\_furlow\\_enclosures\\_1.pdf](http://humanrights.ucdavis.edu/resources/library/documents-and-reports/schmidt_furlow_enclosures_1.pdf)

<sup>84</sup> Neil A. Lewis, *Red Cross Finds Detainee Abuse at Guantánamo*, N.Y. TIMES (Nov. 30, 2004), available at <http://www.nytimes.com/2004/11/30/politics/30gitmo.html>

<sup>85</sup> Office of the Armed Forces Med. Examiner, *Final Report of Postmortem Examination* (Dec. 8, 2003) (Habibullah autopsy), available at <http://www.thetorturedatabase.org/document/autopsy-report-mullah-habibullah-bagram-collection-point-afghanistan-homicide-0134-02>

<sup>86</sup> Task Force staff interview with Angela Birt (July 20, 2011) [hereinafter Birt Interview].

<sup>87</sup> Tim Golden, *In U.S. Report, Brutal Details of 2 Inmates, Deaths*, N.Y. TIMES (May 20, 2005), available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>

<sup>88</sup> U.S. Army Crim. Investigative Div., File No. 0134-02-CID369-23 (sworn statement of Ali Mohammad Baryalai (Dec. 18, 2002) [hereinafter Bagram CID file], available at <http://www.mcclatchydc.com/2008/06/15/v-print/40737/documents-from-mcclatchys-investigation.html>

<sup>89</sup> Task Force staff interview with Joshua Claus (July 13, 2011).

<sup>90</sup> Birt Interview, *supra* note 86.

<sup>91</sup> Timothy Golden, *Years After 2 Afghans Died, Abuse Case Falts*, N.Y. TIMES (Feb. 13, 2006), available at <http://www.nytimes.com/2006/02/13/national/13bagram.html>

<sup>92</sup> Bagram CID file, Sworn Statement of Betty J. Jones (Feb. 1, 2004).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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<sup>95</sup> Transcript from *United States v. Brand* at 87–88 (Testimony of Marianne Plummer), available at [http://media.mcclatchydc.com/smedia/2008/06/04/14/Brand-9a.source.prod\\_affiliate.91.pdf](http://media.mcclatchydc.com/smedia/2008/06/04/14/Brand-9a.source.prod_affiliate.91.pdf)

<sup>96</sup> *Id.* at 91.

<sup>97</sup> Bagram CID file, Sworn Statement of Maj. Jeff A. Bovarnick, at 9 (May 26, 2004).

<sup>98</sup> *Id.* at 9–15.

<sup>99</sup> TAXI TO THE DARK SIDE (2007).

<sup>100</sup> Bagram CID file, Sworn Statement of Col. David L. Hayden, 16 (June 18, 2004).

<sup>101</sup> Levin Report, *supra* note 13, at 115.

<sup>102</sup> Bagram CID file, Sworn Statement, Sgt. Jennifer N. Higginbotham, 28 (Aug. 1, 2004), *but see id.* at 12.

<sup>103</sup> Senate Armed Servs. Comm., *Testimony of Donald Rumsfeld* (May 7, 2004).

<sup>104</sup> HUM. RTS. WATCH, NO BLOOD, NO FOUL: SOLDIERS' ACCOUNTS OF DETAINEE ABUSE IN IRAQ 7 (July 2006), available at <http://www.hrw.org/sites/default/files/reports/us0706web.pdf>

<sup>105</sup> *Id.* at 13.

<sup>106</sup> Levin Report, *supra* note 13, at 159–61.

<sup>107</sup> *Id.* at xiv, 170.

<sup>108</sup> *Id.* at 176–78.

<sup>109</sup> *Id.* at 179.

<sup>110</sup> Senate Armed Servs. Comm., *Testimony of Steve Kleinman* at 189 (Sept. 25, 2008).

<sup>111</sup> JANE MAYER, THE DARK SIDE 247 (2008); Levin Report, *supra* note 13, at 186.

<sup>112</sup> Levin Report, *supra* note 13, at 193–94.

<sup>113</sup> Stuart Herrington, *Report of CI/HUMINT Evaluation Visit* (Dec. 12, 2003) [hereinafter Herrington Report] [on file with The Constitution Project].

<sup>114</sup> Levin Report, *supra* note 13, at 163.

<sup>115</sup> U.S. Army Office of Inspector Gen., *Interview of Col. Stuart Herrington* at 5 (Nov. 3, 2004) [hereinafter Herrington Army OIG Interview].

<sup>116</sup> Herrington Report, *supra* note 113, at 7.

<sup>117</sup> Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse*, N.Y. TIMES (Mar. 19, 2006), available at <http://www.nytimes.com/2006/03/19/international/middleeast/19abuse.html>

<sup>118</sup> Herrington Report, *supra* note 113, at 7.

<sup>119</sup> Herrington Army OIG Interview, *supra* note 115, at 9–10.

<sup>120</sup> NO BLOOD, NO FOUL, *supra* note 104, at 14–15.

<sup>121</sup> *Id.* at 15–16.

<sup>122</sup> Birt Interview, *supra* note 86.

<sup>123</sup> Schmitt & Marshall, *supra* note 117.

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<sup>124</sup> Memorandum from Vice Adm. Lowell E. Jacoby (Director, DIA) to Stephen Cambone (Undersecretary of Defense for Intelligence), *Alleged Detainee Abuse by TF 6-26 Personnel* (June 25, 2004), available at [http://www.aclu.org/torturefoia/released/t2596\\_0297.pdf](http://www.aclu.org/torturefoia/released/t2596_0297.pdf)

<sup>125</sup> Memorandum from Stephen Cambone to William Boykin (June 26, 2004), available at [http://www.nytimes.com/imagepages/2006/03/19/international/19abuse\\_CA0ready.html](http://www.nytimes.com/imagepages/2006/03/19/international/19abuse_CA0ready.html)

<sup>126</sup> DOD Office of Inspector Gen., *Review of DOD-Directed Investigations of Detainee Abuse* 16 (Aug. 25, 2006).

<sup>127</sup> John McChesney, *Documents Shed Light on Abu Ghraib Death*, Nat'l Pub. Radio (Oct. 28, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4979183>; Jane Mayer, *A Deadly Interrogation*, NEW YORKER (Nov. 14, 2005), available at [http://www.newyorker.com/archive/2005/11/14/051114fa\\_fact](http://www.newyorker.com/archive/2005/11/14/051114fa_fact)

<sup>128</sup> U.S. Army Crim. Investigative Div., File No. 0237-03-CID259-61219 at 47–48 [hereinafter Jamadi CID file], available at <http://www.aclu.org/files/projects/foiasearch/pdf/DODDOACID009482.pdf>; Mayer, *A Deadly Interrogation*, *supra* note 127.

<sup>129</sup> *Id.*

<sup>130</sup> McChesney, *supra* note 127.

<sup>131</sup> *Id.*

<sup>132</sup> Mayer, *A Deadly Interrogation*, *supra* note 127.

<sup>133</sup> McChesney, *supra* note 127.

<sup>134</sup> Mayer, *A Deadly Interrogation*, *supra* note 127.

<sup>135</sup> *Id.*

<sup>136</sup> Adam Goldman & Matt Apuzzo, *Steve Stormoen, Former CIA Official, Under Scrutiny in Abu Ghraib Prisoner Death*, HUFFINGTON POST (AP) (July 13, 2011), available at [http://www.huffingtonpost.com/2011/07/13/steve-stormoen-former-cia-officer-abu-ghraib-death-\\_n\\_896810.html](http://www.huffingtonpost.com/2011/07/13/steve-stormoen-former-cia-officer-abu-ghraib-death-_n_896810.html)

<sup>137</sup> DOJ Press Release, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>

<sup>138</sup> U.S. Army Crim. Investigative Div., Interview of Charles Graner, at 247 [on file with The Constitution Project].

<sup>139</sup> *Id.* at 273–74.

<sup>140</sup> Abu Ghraib MP logbook at 23 [on file with The Constitution Project]; Graner interview, *supra* note 138, at 272–73.

<sup>141</sup> Abu Ghraib MP logbook, *supra* note 140, at 16.

<sup>142</sup> *Id.* at 24.

<sup>143</sup> Mayer, *A Deadly Interrogation*, *supra* note 127.

<sup>144</sup> Antonio Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade 27* (May 2004) (Taguba Report), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf)

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<sup>145</sup> George Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade* 44–45 (Aug. 2004) [hereinafter Fay Report], available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>

<sup>146</sup> Jamadi CID file, *supra* note 128, at 96.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST (Aug. 3, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080201941.html>

<sup>150</sup> *Id.*

<sup>151</sup> Jon Sarche & Dan Elliott, *CIA Role Remains a Mystery at Army Court Martial*, ASSOCIATED PRESS (Jan. 22, 2006), available at <http://www.commondreams.org/headlines06/0122-08.htm>; Court-Martial Record, *United States v. Welshofer*, 118–21 (Testimony of unidentified witness).

<sup>152</sup> Court-Martial Record, *United States v. Welshofer*, *supra* note 151.

<sup>153</sup> *Id.* at 134–36 (Testimony of Jerry Loper).

<sup>154</sup> *Id.* at 53–54 (Testimony of Jefferson Williams).

<sup>155</sup> *Id.* at 101–02 (Testimony of Todd Sonnek).

<sup>156</sup> *Id.* at 177 (Testimony of Lewis Welshofer).

<sup>157</sup> GEORGE TENET & BILL HARLOW, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 388 (2007).

<sup>158</sup> Court-Martial Record, *United States v. Welshofer*, *supra* note 151.

<sup>159</sup> Office of the Armed Forces Med. Examiner, Autopsy Report No. ME03-571 (Dec. 18, 2003) (Abed Hamed Mowhoush Autopsy), available at <http://www.thetorturedatabase.org/document/autopsy-report-56-year-old-iraqi-male-al-qaim-iraqi-homicide-death-certificate-included>

<sup>160</sup> Court-Martial Record, *United States v. Welshofer*, *supra* note 151, at 52–54, 64–66, 69–74, 104–05.

<sup>161</sup> Record of Article 32 Investigation, *United States v. Williams, Sommer, and Loper* at 51–52, available at [http://dspace.wrhc.org/doc/bitstream/2041/84994/02795\\_041202\\_001.pdf](http://dspace.wrhc.org/doc/bitstream/2041/84994/02795_041202_001.pdf)

<sup>162</sup> Court-Martial Record, *United States v. Welshofer*, *supra* note 151, at 93.

<sup>163</sup> *Death of a General*, CBS News (Feb. 11, 2009), available at [http://www.cbsnews.com/8301-18560\\_162-1476781.html?pageNum=3](http://www.cbsnews.com/8301-18560_162-1476781.html?pageNum=3)

<sup>164</sup> Office of the Armed Forces Med. Examiner, Autopsy Report No. ME04-14 (Apr. 30, 2004) (Abdul Jameel autopsy), available at <http://www.thetorturedatabase.org/document/autopsy-report-47-year-old-male-al-asad-iraqi-homicide-0009-04-cid679-83486-death>

<sup>165</sup> Detainee Autopsy Summary (Sept. 23, 2004), available at [http://dspace.wrhc.org/doc/get/2041/78954/02668\\_040923\\_002.pdf](http://dspace.wrhc.org/doc/get/2041/78954/02668_040923_002.pdf). “OGA,” an abbreviation for “Other Government Agency,” usually refers to the CIA. In this case, though, the CID

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investigation into Abdul Jameel's death shows that he was interrogated by Operational Detachment Alpha (ODA) 525, of the 5th Special Forces Groups, and "OGA" may be a mistaken transcription of "ODA". However, there is a press report of possible CIA involvement in Jameel's death, and several pages of the CID file are absent as they are "civilian agency records." U.S. Army Crim. Investigative Div., File No. 009-04-CID679-83486 at 392 [hereinafter Jameel CID file], available at <http://www.thetorturedatabase.org/document/cid-report-death-009-04-cid679-83486>

<sup>166</sup> The hyoid bone is located in the neck, and is frequently fractured in homicides caused by strangulation.

<sup>167</sup> Jameel CID file, *supra* note 165, at 119.

<sup>168</sup> *Id.* at 59, 67.

<sup>169</sup> *Id.* at 99 (medical examiners stated that detainee had an unhealthy heart), at 101 (witness believed detainee to be "at least seventy years old and emotionally unsound"), at 123 (description of detainee as an "old man"), at 301 (detainee told medical screeners that he was diabetic and had high blood pressure).

<sup>170</sup> *Id.* at 202, 358

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 5, 9.

<sup>173</sup> *Id.* at 326.

<sup>174</sup> *Id.* at 9.

<sup>175</sup> *Id.* at 95.

<sup>176</sup> U.S. Army CID Press Release, *Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Iraqi Freedom, Operation Enduring Freedom* (Mar. 25, 2005), available at <http://www.cid.army.mil/Documents/OIF-OEF%20Homicides.pdf>.

<sup>177</sup> Richard Formica, *Article 15-6 Investigation of CJSOTF-AP and 5th SF Group Detention Operations* 46–48 (Nov. 2004) [hereinafter Formica Report], available at [http://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/dod054971.pdf](http://www.thetorturedatabase.org/files/foia_subsite/pdfs/dod054971.pdf)

<sup>178</sup> *Id.*

<sup>179</sup> Bybee Aug. 1 Interrogation Methods Memo, *supra* note 21.

<sup>180</sup> Formica Report, *supra* note 177, at 48–49, 72–73.

<sup>181</sup> Interview with detainees (conducted by Task Force staff member Katherine Hawkins and co-counsel in Istanbul, Turkey, July 2007) [interview notes on file with The Constitution Project].

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Joshua E.S. Phillips & Michael Montgomery, *What Killed Sergeant Gray*, Am. Radio Works (Jan. 2010), available at <http://americanradioworks.publicradio.org/features/vets/transcriptb.html>

<sup>186</sup> Levin Report, *supra* note 13, at 166–67.

<sup>187</sup> *Id.* at 169–70.

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<sup>188</sup> *Id.* at 191–97.

<sup>189</sup> SANCHEZ, *supra* note 40, at 266.

<sup>190</sup> Senate Armed Servs. Comm., *Testimony of Col. Marc Warren* (May 19, 2004).

<sup>191</sup> Douglas Jehl & Neil A. Lewis, *U.S. Military Disputed Protected Status of Prisoners Held in Iraq*, N.Y. TIMES (May 23, 2004), available at <http://www.nytimes.com/2004/05/23/world/reach-war-prisoners-us-military-disputed-protected-status-prisoners-held-iraq.html>

<sup>192</sup> Levin Report, *supra* note 13, at 203–04.

<sup>193</sup> *Id.* at 204–05.

<sup>194</sup> DICK CHENEY, IN MY TIME 420 (2011).

<sup>195</sup> JOHN YOO, WAR BY OTHER MEANS 195 (2006).

<sup>196</sup> CHRISTOPHER GRAVELINE & MICHAEL CLEMENS, THE SECRETS OF ABU GHRAIB REVEALED: AMERICAN SOLDIERS ON TRIAL 283 (2010).

<sup>197</sup> *Id.* at 121–22.

<sup>198</sup> PHILIP GOUREVITCH & ERROL MORRIS, STANDARD OPERATING PROCEDURE (2008).

<sup>199</sup> TAXI TO THE DARK SIDE, *supra* note 99.

<sup>200</sup> Fay Report *supra* note 145, at 89.

<sup>201</sup> ICRC, *Report on the Treatment by Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation* 13 (Feb. 2004), available at <http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf>

<sup>202</sup> *Id.* Detainees' psychological problems may not have resulted solely from abuse. The MPs have consistently reported that some hard site detainees were mentally disturbed, and were sent to Tier 1B from less secure areas of the prison as a disciplinary measure. *See, e.g.*, GOUREVITCH & MORRIS, *supra* note 198, at 144–45.

<sup>203</sup> For additional accounts of Forward Operating Base Tiger, *see* NO BLOOD, NO FOUL, *supra* note 104, at 25–37.

<sup>204</sup> *Id.* at 38–45. *See also* Peter Graff, *British Lawyer: U.S. Torture in Iraq Spread to Mosul*, REUTERS (Sept. 14, 2004), available at <http://www.commondreams.org/headlines04/0914-20.htm>; TONY LAGOURANIS & ALLEN MIKAELAN, FEAR UP HARSH 78–80 (2007).

<sup>205</sup> Ian Fishback, *A Matter of Honor*, WASH. POST (Sept. 28, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/27/AR2005092701527.html>; Hum. Rts. Watch, *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division* (Sept. 2005), available at <http://www.hrw.org/reports/2005/09/22/leadership-failure>

<sup>206</sup> *See generally* JOSHUA E.S. PHILLIPS, NONE OF US WERE LIKE THIS BEFORE (2011).

<sup>207</sup> Phillips & Montgomery, *supra* note 185.

<sup>208</sup> *Id.*

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<sup>209</sup> Thomas E. Ricks & Ann Scott Tyson, *Troops at Odds With Ethics Standards*, WASH. POST (May 5, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402151.html>

<sup>210</sup> General Charles C. Krulak & General Joseph P. Hoar, *It's Our Cage, Too*, WASH. POST (May 17, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602395.html>



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# Guide to Acronyms

ACP — American College of Physicians

ACR — Armored Cavalry Regiment

ACS — Afghan Corrections System

ADX — United States Penitentiary, Administrative Maximum Facility (Supermax) (Florence)

AIHRC — Afghanistan’s Independent Human Rights Commission

ANSF — Afghan National Security Forces

APA — American Psychological Association

APPG — All-Party Parliamentary Group on Extraordinary Rendition

AQ — Al Qaeda

AUMF — Authorization for Use of Military Force

AZ — Abu Zubaydah

BCP — Bagram Collection Point

BHA — Brigade Holding Area

BIFS — Brigade Internment Facilities

BOP — Bureau of Prisons (DOJ)

BSCT — Behavioral Science Consultation Team (“Biscuit”)

BTIF — Bagram Theater Internment Facility

CAT — U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CID — (1) Cruel, Inhuman or Degrading [Treatment or Punishment])

(2) U.S. Army Criminal Investigation Command

CIL — Customary International Law

CITF — Guantánamo Criminal Investigative Task Force

CJIATF-435 — Combined Joint Interagency Task Force-435

CJTTF-180 — Combined Joint Task Force-180 (or -7, etc)

CNSD — Committee on National Security and Defense (Lithuania)

COIN — Counter-Insurgent Strategy

CPT — European Committee for the Prevention of Torture

CRS — Congressional Research Service

CSRT — Combatant Status Review Tribunal

DCHC — Defense Counterintelligence and Human Intelligence Center (DIA)

DFIP — Detention Facility in Parwan

DHS — Department of Homeland Security

DIA — Defense Intelligence Agency (DOD)

DIFs — Division Internment Facilities

DOD — Department of Defense

DOJ — Department of Justice

DOS — Department of State

DRB — Detainee Review Board

DTA — Detainee Treatment Act

DUC — Detained Unlawful Combatant

ECCC — Extraordinary Chambers in the Courts of Cambodia

ECHR — European Court of Human Rights

ECRB — Enemy Combatant Review Board

EITs — Enhanced Interrogation Techniques

EO — Executive Order

FISA — Foreign Intelligence Surveillance Act

FM — Army Field Manual

FOIA — Freedom of Information Act

GAO — Government Accountability Office

GCI — First Geneva Convention

GCII — Second Geneva Convention

GCIII — Third Geneva Convention

GCIV — Fourth Geneva Convention

GIRoA — Government of the Islamic Republic of Afghanistan

GTMO — Guantánamo Bay Detention Camp

GWOT — Global War on Terrorism

HIG — High-Value Detainee Interrogation Group

HUMINT — Human Intelligence

HVD — High-Value Detainee

ICC — International Criminal Court

ICCPR — International Covenant on Civil and Political Rights

ICE — Guantánamo’s Interrogation and Control Element

ICRC — International Committee of the Red Cross

ICTR — International Criminal Tribunal for Rwanda

ICTY — International Criminal Tribunal for the Former Yugoslavia

IED — Improvised Explosive Device

IG — Inspector General (various agencies)

IHL — International Humanitarian Law

ISAF — International Security Assistance Force

ISG — Iraq Survey Group

ISN — Internment Serial Number

JAG — Judge Advocate General

JIDC — Joint Interrogation and Debriefing Center

JPra — Joint Personnel Recovery Agency

JSOC — Joint Special Operations Command

JTF-GTMO — Joint Task Force Guantánamo

KFOR — Kosovo Force (NATO)

KSM — Khalid Sheikh Mohammed

LIFG — Libyan Islamic Fighting Group

LLEC — Low Level Enemy Combatants

LOAC — Law of Armed Conflict

LTTE — Liberation Tigers of Tamil Eelam

MCA — Military Commissions Act

MEP — Member of the European Parliament

MI — Military Intelligence

MOU — Memorandum of Understanding

MP — Military Police

MRE — Meal, Ready to Eat

NCIS — Naval Criminal Investigative Service

NCO — Noncommissioned Officer

NDS — National Directorate of Security (Afghanistan)

NGO — Nongovernmental Organization

NSA — National Security Agency

NSC — National Security Council

NSD-77 — National Security Directive 77

ODA — Operational Detachment Alpha

OEF — Operation Enduring Freedom

OGA — Other Government Agency (the CIA, as referred to by the military)

OGC — Office of General Counsel (various agencies)

OIG — Office of Inspector General (various agencies)

OLC — Office of Legal Counsel (DOJ)

OMS — Office of Medical Services (CIA)

OPR — Office of Professional Responsibility (DOJ)

ORNISS — National Registry Office for Classified Information (Romania)

OSCE — Organization for Security and Cooperation in Europe

OSI — Open Society Institute

OTSG — Office of the Surgeon General

PENS — APA Presidential Task Force on Psychological Ethics and National Security

PFT — Pouring, Flicking or Tossing (Water)

PHR — Physicians for Human Rights

POW — Prisoner of War

PR — Personal Representative

PRB — Privilege Review Board

PKK — Partiya Karkerên Kurdistan

PTSD — Post-Traumatic Stress Disorder

PUC — Person Under Control

SAP — Special Access Program

SCIF — Sensitive Compartmented Information Facility

SERE — Survival, Evasion, Resistance and Escape

SOP — Standard Operating Procedure

SSCI — Senate Select Committee on Intelligence

SSD — State Security Department (Lithuania)

TCP — The Constitution Project

TF — Task Force

TJAG — The Judge Advocate General

(U) — unclassified

UCMJ — Uniform Code of Military Justice

UDHR — Universal Declaration of Human Rights

UECRB — Unlawful Enemy Combatant Review Board

UNAMA — United Nations Assistance Mission in Afghanistan

USFOR-A — U.S. Forces, Afghanistan

WCA — War Crimes Act

WMA — World Medical Association

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