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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.