

Detention at Guantánamo Afghanistan Iraq The  
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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

Abridged Version

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

*Abridged Version*

THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

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# Contents

Preface ..... 2

Members of The Constitution Project’s Task Force on Detainee Treatment ..... 4

Statement of the Task Force ..... 9

  

**Chapter Summaries**

Detention at Guantánamo ..... 17

Afghanistan ..... 21

Iraq ..... 23

The Legal Process of the Federal Government After September 11 ..... 25

Rendition and the “Black Sites” ..... 28

The Role of Medical Professionals in Detention  
and Interrogation Operations ..... 30

True and False Confessions:  
The Efficacy of Torture and Brutal Interrogations ..... 32

Effects and Consequences of U.S. Policies ..... 34

Recidivism ..... 36

The Obama Administration ..... 37

The Role of Congress ..... 39

  

Findings and Recommendations ..... 40

Abridged Version Endnotes ..... 56

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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, Briemann 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.detaineeataskforce.org](http://www.detaineeataskforce.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.

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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

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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)*

# 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,

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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

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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.

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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

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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.

# Chapter Summaries

## 1. 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),

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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, 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

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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>

## 2. 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

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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.

## 3. 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

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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 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.

## 4. The Legal Process of the Federal Government After September 11

“The Generals’ War”<sup>1</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

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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.

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## 5. 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.

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## 6. 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.]

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# 7. 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 Qaeda 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.

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## 8. 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.

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 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.

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## 9. 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>

## 10. 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

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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.

## 11. 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.

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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

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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.*

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

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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.**

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## **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**

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**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

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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**

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**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 Bresseale 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.

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## 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.

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## Abridged Version Endnotes

### Chapter 1

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. 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.

## Chapter 2

None

## Chapter 3

None

## Chapter 4

1 Michael R. Gordon & Bernard E. Trainor, *The Generals' War: The Inside Story of the Conflict in the Gulf* (1995).

## Chapter 5

None

## Chapter 6

1 Captain Shimkus's current views, as expressed in an interview with Task Force staff, are discussed in Chapter 1.

## Chapter 7

1 Peter Baker, *Banned Techniques Yielded "High Value Information," Memo Says*, N.Y. Times (Apr. 21, 2009), available at <http://www.nytimes.com/2009/04/22/us/politics/22blair.html>

2 Jane Mayer, *Counterfactual: A Curious History of the CIA's Secret Interrogation Program*, New Yorker (Mar. 29, 2010), available at [http://www.newyorker.com/arts/critics/books/2010/03/29/100329crbo\\_books\\_mayer?currentPage=all](http://www.newyorker.com/arts/critics/books/2010/03/29/100329crbo_books_mayer?currentPage=all)

3 *Id.*

4 *Id.*

## Chapter 8

83 Gay Gardner, *Portugal's Bold Initiative Highlights U.S. Hypocrisy on Guantanamo*, Amnesty Int'l "Human Rights Now" Blog (Dec. 15, 2008), <http://blog.amnestyusa.org/europe/portugals-bold-initiative-highlights-us-hypocrisy-on-guantanamo>; Lawrence B. Wilkerson, *Some Truths about Guantanamo Bay*, Wash. Note (Mar. 17, 2009), available at [http://washingtonnote.com/some\\_truths\\_abo/](http://washingtonnote.com/some_truths_abo/)

84 The Council of Europe is a transnational organization with 47 member states that primarily develops legal guidelines for the enforcement and promotion of the European Convention on Human Rights; see <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>

85 Council of Eur. Parliamentary Assembly, Comm. on Legal Affairs & Hum. Rts., *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* (Draft Report — Part II) 23 (June 7, 2006), available at [http://assembly.coe.int/committeedocs/2006/20060606\\_ejdoc162006partii-final.pdf](http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf)

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## Chapter 9

1 House Armed Servs. Comm., Print No. 112-4, *Leaving Guantánamo: Policies, Pressures, and Detainees Returning to the Fight* (Jan. 2012) at 19.

2 *Id.* at 10. See also *The Guantánamo Docket*, N.Y. Times, available at <http://projects.nytimes.com/guantanamo>; *Military Identifies Guantánamo Detainee Who Died*, N.Y. Times (Sept. 11, 2012), available at <http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html>

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>

4 Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantánamo Bay, Cuba* (Dec. 7, 2010), available at <http://www.dni.gov/index.php/newsroom/reports-and-publications/93-reports-publications-2012/712-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay>

5 Department of Defense, *Former Guantánamo Detainees Who Have Returned to the Fight* (July 12, 2007), available at <http://web.archive.org/web/20070816051212/http://www.defenselink.mil/news/d20070712formergtmo.pdf>

6 See DOJ Letter Regarding Freedom of Information Act Litigation — *Roderick MacArthur Justice Center v. Defense Intelligence Agency*, Civ. Action No. 09:02101 (CKK), (D.D.C. Aug. 26, 2010) [hereafter FOIA Letter].

7 Task Force staff correspondence with Gary Berntsen (Mar. 15, 2012). Gary Berntsen served in the CIA as part of the Directorate and as a station chief between 1982 and 2005.

8 Benjamin Wittes, *Andy Worthington on Guantánamo Recidivism*, Lawfare (Mar. 19, 2012), available at <http://www.lawfareblog.com/2012/03/andy-worthington-on-Guantanamo-recidivism/>

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.

## Chapter 10

None

## Chapter 11

None

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