

The Obama Administration

During the 2008 campaign, President Obama repeatedly denounced the Bush administration's treatment of detainees. Candidate Obama promised to close Guantánamo, and to "reject torture — without exception or equivocation." In 2007, he wrote in Foreign Affairs magazine that his administration would end

the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands without charge or trial, of maintaining a network of secret prisons to jail people beyond the reach of the law.

In February 2008, Obama criticized the decision to try the six detainees accused of plotting the September 11 attacks before a military commission:

These trials will need to be above reproach. ... These trials are too important to be held in a flawed military commission system that has failed to convict anyone of a terrorist act since the 9/11 attacks and that has been embroiled in legal challenges.

Obama argued that in order to "demonstrate our commitment to the rule of law," the co-conspirators should instead be tried in civilian court or court-martialed.

Obama was more circumspect in statements regarding the possibility of criminal prosecutions for detainee abuse. In response to one reporter's question, he said he would "have my Justice Department and my Attorney General immediately review the information that's already there and to find out are there inquiries that need to be pursued.... [I]f crimes have been committed, they should be investigated." He added, though, that "I would not want my first term consumed by what was perceived on the part of Republicans as a partisan witch hunt because I think we've got too many problems we've got to solve."

Obama criticized the previous administration for excessive secrecy, including the repeated invocation of the state-secrets privilege to get civil lawsuits thrown out of court. In a 2007 speech at DePaul University, he said he would lead "a new era of openness":

I'll turn the page on a growing empire of classified information, and restore the balance we've lost between the necessarily secret and the necessity of openness in a

democratic society by creating a new National Declassification Center. We'll protect sources and methods, but we won't use sources and methods as pretexts to hide the truth.

The Obama administration has fulfilled some of these promises, and conspicuously failed to fulfill others — in some cases because Congress has blocked them, but in other cases for reasons of their own.

The CIA is now prohibited by executive order from using “enhanced interrogation techniques,” or any technique not included in the Army Field Manual. The secret prisons have been closed, and access by the International Committee of the Red Cross to detainees has dramatically improved. But Guantánamo remains open, and releases and transfers of detainees have declined sharply due to congressional opposition. In 2011 and 2012, nearly as many detainees have died in Guantánamo (three total, two in suspected suicides) as been transferred (five). After a failed effort to bring them to the United States for civilian trial, the alleged September 11 co-conspirators are being tried in a military commission that still has critics who say it will not provide a fair trial, despite some modifications to the Military Commissions Act in 2009. The Justice Department opened a criminal investigation into two detainee homicides, but closed it without charging anyone. The administration asserts it retains the right to render detainees to foreign custody in reliance on “diplomatic assurances” that they will not be tortured, with some increased safeguards to ensure detainees’ humane treatment, but it is not clear if any renditions have occurred. And there has been no apparent lessening of official secrecy.

The First Year

Early Executive Orders

Two days after taking office, President Obama signed several major executive orders related to detainee treatment.

The first, Executive Order 13491,¹ ordered the CIA to close any detention facilities under its operational control “as expeditiously as possible,” and not to open any such future facilities. It prohibited officials from subjecting any detainee under effective U.S. control to any interrogation technique not listed in the current Army Field Manual on interrogation, Army Field Manual 2-22.3. Executive Order 13491 also re-affirmed the U.S. Supreme Court’s holding in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions provided the minimum standards for treatment of detainees in U.S. custody, while preventing the executive branch from relying on the Bush-era Office of Legal Counsel’s interpretations of Common Article 3 or the rest of the Geneva Conventions, the Convention Against Torture (CAT), and the federal criminal prohibitions on war crimes and torture. It required “all departments and agencies of the Federal Government [to] provide the International Committee of the Red Cross (ICRC) with notification of, and timely access to, any individual detained in any armed conflict.” Finally, the order established an interagency task force to examine interrogation and transfer policies, with representatives from the military, CIA, and the departments of Justice (DOJ), State (DOS), Defense (DOD), and Homeland Security (DHS). According to a DOJ press release, the task force completed its report and issued recommendations to the president on August 24, 2009. The Obama administration has not, however, made the report or recommendations public.

Executive Order 13492² called for the closing of detention facilities at Guantánamo “as soon as practicable,” and specifically “no later than 1 year,” and for the “immediate” review of the status of all Guantánamo detainees, including “a thorough review of the factual and legal bases for [their] continued detention.” A second task force was placed in charge of the review. Pending its completion, the executive order halted all proceedings in military commissions.

A third executive order, E.O. 13493,³ created an Inter-Agency Task Force on Detention Policy Options, whose membership overlapped with the task force on interrogation and transfer.

A majority of the public supported these steps, though not by a particularly wide margin. The day President Obama signed those orders, ABC News and *The Washington Post* released the results of a poll on detainee issues. Fifty-eight percent of those surveyed agreed with Obama’s position that the United States should never use torture, while 40 percent said that there were cases where “the United States should consider torture against terrorism suspects.” Forty-two percent favored continuing to hold terrorism suspects at Guantánamo, while 53 percent supported closing the prison. Fifty percent favored an Obama administration investigation into “whether any laws were broken in the way terrorism suspects were treated under the Bush administration,” while 47 percent opposed such an investigation.⁴

“In most cases, though, detainees could not be tried because the relevant criminal statutes ‘didn’t apply extraterritorially at the time of the conduct’ for non-U.S. persons.”

The Debate over the Uighurs

In an interview with Task Force staff, former White House Counsel Greg Craig said he also did not encounter much congressional opposition when he initially briefed several relevant committees about the executive orders. At the time, Craig said, “[n]o one seemed to have any problems” with the proposals.⁵ Craig noted that President George W. Bush had also expressed support for closing Guantánamo, and said the White House “thought it was not going to be an issue. It wasn’t an issue in the campaign.”⁶ Craig did remember Democratic Sen. Sheldon Whitehouse telling him “as a friend” that based on conversations among members of the Intelligence Committee, the administration might have underestimated the difficulty in transferring detainees from Guantánamo to the United States.⁷ Whitehouse’s concerns proved to be prescient.

Seventeen of the inmates at Guantánamo when Obama took office were Uighurs, Turkic-speaking Muslim dissidents from Xinjiang province in northwest China. The U.S. government has long condemned the Chinese government’s repression of the Uighur minority in Xinjiang. One prominent critic of China’s actions in Xinjiang is Republican Rep. Frank Wolf, who represents the 10th District of Virginia and is co-chair of the U.S. Congress Tom Lantos Human Rights Commission. In 2008, after a trip to China, Wolf noted that “[t]he Chinese government has a long record of criminalizing any form of political dissent expressed by Uyghurs,” and that Uighurs had been harassed, beaten and jailed for practicing their religion.⁸

The Uighurs at Guantánamo had fled China, in some cases simply to escape, in others to receive military training to fight the Chinese government. Several had received basic weapons training at a camp in Afghanistan before fleeing the United States’ airstrikes; others said they had not done so. They eventually walked over the border to Pakistan, where they allege that bounty hunters sold them to the United States military. By 2003, most of them had been cleared for release from Guantánamo; several recounted being told by their interrogators that they would soon be released. But the Uighurs could not safely be repatriated to China because they were at risk of torture and execution. Five Uighur detainees were resettled in Albania in 2006, but both the Bush and Obama administrations had difficulty convincing any other countries to offer them asylum, despite a court order for their release.

In the early days, Craig thought that resettling some Guantánamo detainees in the United States would greatly increase other countries’ willingness to accept other detainees. The administration decided that two of the Uighurs would be especially good test candidates.

There had been agreement among a group of officials working at the very highest levels of government that ... eight be brought, eight Uighurs of the seventeen, and that we start with two. And then, if it goes well, and there’s no security concerns, than we can bring the rest.⁹

According to press reports, that decision was reached in a meeting on April 14, 2009, chaired by White House Chief of Staff Rahm Emanuel.¹⁰ CIA Director Leon Panetta, Attorney General Eric Holder, FBI Director Robert Mueller, DHS Secretary Janet Napolitano, and intelligence advisors Dennis Blair and John Brennan were also present.¹¹

The administration did not, however, notify Congress of the proposed transfer — including

Wolf, in whose district the Uighurs were likely to be resettled due to the large Uighur community there. On April 22, Wolf met with Matthew Olsen, the chair of the Guantánamo Review Task Force. Wolf asked Olsen about reports that had leaked to him about resettling the Uighurs in his district; Olsen replied that nothing had been finalized and he was not authorized to discuss specifics about the Uighurs or any other individual detainees.¹² According to journalist Daniel Klaidman, Wolf responded that the detainees were “terrorists,” and were never coming into his district or anywhere in the United States.¹³

Craig said that Olsen “got his head handed to him” by Wolf, and this surprised him because of Wolf’s record of concern about Chinese human rights violations:

I was surprised to see that Frank Wolf didn’t understand that these Uighurs that were coming into his jurisdiction reinforced everything that he stood for in terms of being critical of the Chinese human rights records. Well, I don’t know if anybody had talked with him about that, or pointed that out to him. I don’t know if anybody in the Uighur community had been brought to him, saying, “We want these people to come, we want to be part of solving the War on Terrorism, these are not terrorists, Bush doesn’t believe they’re terrorists, they were never enemy combatants, they do not threaten the United States.” I don’t know if anybody ever had that conversation with him.¹⁴

Wolf and Senate Minority Leader Mitch McConnell publicly objected to the Uighurs’ transfer. On the House floor, Wolf characterized the Uighurs as “terrorists” who were “more dangerous than the public has been led to believe,” and denounced the administration for refusing to provide him with information about the potential transfer:

After learning that this decision was imminent, I requested briefings from a number of relevant agencies, but all the agencies have told me that our Department of Justice is now preventing them from speaking to me directly on this issue. So much for being open. So much for disclosure.¹⁵

In the face of Wolf’s opposition, the plan to transfer the Uighurs was quickly shelved. According to *The Washington Post*, Emanuel made the decision.¹⁶

The White House’s reversal on the Uighurs did not lessen congressional opposition to its plans for Guantánamo. Instead, facing a united Republican caucus and hearing little from the White House, Democratic congressional support for closing the prison evaporated. On May 20, 2009, the Senate voted by a 90–6 margin to strip \$80 million of funding for closing Guantánamo out of a Defense Department appropriations bill, and to bar any funds being used to transfer detainees to the United States.¹⁷ The Guantánamo closing funds had already been removed from the corresponding House bill the week before. Some Democratic senators and members of Congress said that they were open to funding closure if the administration provided detailed plans for it, but as discussed further below, over time Congress has only increased the legal hurdles to closing the prison.

All but three of the Uighur detainees have now left Guantánamo, and have been resettled in Bermuda, Palau, Switzerland, El Salvador and Albania.¹⁸ But the refusal of the United States

“The Bush administration had in fact frequently tried and convicted terrorism suspects in civilian court after September 11 ...”

to allow any detainees into the country increased European allies' resistance to accepting detainees. A State Department cable from January 2009, for example, stated that France would consider accepting Guantánamo detainees but “first, the U.S. must agree to resettle some of these same low-risk DETAINEES in the U.S.”¹⁹ In an interview with Task Force staff, Harold Hongju Koh, then DOS's legal advisor, said that bringing the Uighurs to the United States would have made a major difference in other countries' willingness to help resettle detainees and close the prison at Guantánamo.²⁰

Disclosure of the Torture Memos, Nondisclosure of Abuse Photographs

At approximately the same time as the controversy over the Uighurs, the Obama administration similarly reversed its position on public disclosure of evidence of detainee abuse.

On April 16, 2009, President Obama ordered the disclosure of several Office of Legal Counsel (OLC) memoranda that described the CIA's “enhanced interrogation techniques” in detail. He did so over the objections of several current and former intelligence officials.

In releasing the OLC memos, Obama reassured the intelligence community that “this is a time for reflection, not retribution,” and assured “those who carried out their duties relying in good faith upon legal advice from the Department of Justice (DOJ) that they will not be subject to prosecution” — statements that were strongly criticized by human rights activists and civil libertarians.²¹ He nonetheless argued that the release of the “Torture Memos” was “required by the rule of law,” for three reasons:

First, the interrogation techniques described in these memos have already been widely reported. Second, the previous Administration publicly acknowledged portions of the program — and some of the practices — associated with these memos. Third, I have already ended the techniques described in the memos through an Executive Order. Therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time. This could contribute to an inaccurate accounting of the past.²²

The OLC memos were disclosed, in part, because of Freedom of Information Act (FOIA) litigation by the ACLU. In the same lawsuit, the ACLU also sought disclosure of previously unreleased photographs of detainee abuse in Iraq and Afghanistan, and won a court order calling for the photos' release. On April 23, 2009, DOJ notified the court that it would release the images by May 28.²³

But on May 13, the administration reversed its position and informed the U.S. Court of Appeals for the Second Circuit that upon “further reflection at the highest levels of government,” it would instead appeal to the Supreme Court to prevent release of the photos.²⁴ Multiple press reports said that Obama had changed his mind after receiving personal pleas from General Ray Odierno and General David McKiernan, the top military commanders in Iraq and Afghanistan, that releasing the photos would endanger U.S. troops.²⁵ Obama said:

The publication of these photos would not add any additional benefit to our understanding of what was carried out in the past by a small number of

individuals. ... [T]he most direct consequence of releasing them, I believe, would be to further inflame anti-American opinion and to put our troops in danger.²⁶

The DOJ had made similar arguments against releasing the photographs during the Bush administration. The Second Circuit had rejected them in 2008, writing that “the public interest in disclosure of these photographs is strong” despite previously released written evidence of the same misconduct. The court held that to justify withholding the documents the government had to demonstrate danger to at least one named individual rather than “some unspecified member of a group so vast as to encompass all United States troops, coalition forces and civilians in Iraq and Afghanistan.”²⁷

But in October 2009, Congress passed and Obama signed legislation to override FOIA and permit the Defense Secretary to withhold photographs if he determined that their disclosure would endanger U.S. citizens or members of the Armed Forces. The Supreme Court vacated the lower court’s ruling ordering release of the photos,²⁸ and they have never been disclosed.

The amendment to FOIA only applied to the photographs, but the Obama administration’s reversal on public disclosure of past abuses did not. As discussed further below, the release of the OLC memos with minimal redaction was a high-water mark for the disclosure of evidence that the CIA or military wanted to remain secret. Other important evidence was released after more delays, with more redactions — and a great deal has never been released.

Military Commissions, Civilian Courts and Detention Without Trial

On May 15, 2009, two days after the reversal on detainee abuse photos, President Obama announced that his administration would continue to prosecute detainees in military commissions, albeit ones that he said would provide greater protections for the accused.²⁹ Obama outlined his rationale for the decision in a speech at the National Archives on May 21. Obama said that “whenever feasible, we will try those who have violated American criminal laws in federal courts.” But he also stated that some would be

best tried through military commissions. Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.³⁰

Obama promised that his administration would bring

our commissions in line with the rule of law. We will no longer permit the use of evidence — as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay. And we will give detainees greater latitude in selecting their own counsel, and more protections if they refuse to testify.³¹

The administration proposed these changes — genuine improvements that still fell short of the

standards in federal criminal trials — in the 2009 Military Commissions Act, which became law that October.

In his May 2009 National Archives speech, in addition to restoring military commissions Obama announced that there was another category of detainees who would be held without being tried in any forum:

[T]here may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. ... We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.³²

When the administration's Guantánamo Review Task Force issued its final report in January 2010, it stated that there were 48 detainees who could neither be tried nor safely released. The task force reported:

While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee's guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee's conduct does not constitute a chargeable offense in either a federal court or military commission.³³

The Guantánamo Review Task Force did not give the names of individual detainees in this category, or specify the reasons why they could not be tried. In an interview with Task Force staff, Harold Hongju Koh, the DOS legal advisor at the time, stated that the review had been an “incredibly fact based and elaborate process,” where all of the government's available information on a detainee across agencies was gathered and reviewed.³⁴

A government official who participated in the review said that the Guantánamo review included information obtained under duress, but the fact that information was coerced was given “appropriate weight.” The official said that in some cases detainees could not be tried in part because the evidence against them was tainted by coercion. In most cases, though, detainees could not be tried because the relevant criminal statutes “didn't apply extraterritorially at the time of the conduct” for non-U.S. persons.³⁵

The Obama administration never articulated a clear basis for which cases would be brought in civilian courts and which in military commissions. Military commissions are only authorized to try detainees for war crimes. But even after the 2009 amendments, the Military Commissions Act included several offenses — such as conspiracy and material support to a terrorist organization — that violate the U.S. criminal code but are not internationally recognized war crimes.³⁶

On November 13, 2009, Attorney General Eric Holder announced that Khalid Sheikh Mohammed (KSM) and four alleged co-conspirators would be tried in federal court in New York City for the September 11 attacks. The same day, Secretary of Defense Robert Gates announced that Omar Khadr would be tried by military commission. Khadr, a Canadian citizen whose family has multiple connections to Al Qaeda, was 15 years old at the time of his capture. He was accused of killing

U.S. Army combat medic Sergeant Christopher Speer by throwing a grenade at him in a firefight, in which Khadr himself was also wounded. Although Khadr eventually pleaded guilty, many experts have argued that killing a soldier in battle was not a war crime.³⁷ In contrast, deliberate massacres of civilians such as the September 11 attacks clearly do violate the laws of war.

Holder's decision to try the September 11 suspects in Manhattan sparked intense opposition from the start — from White House Chief of Staff Rahm Emanuel, as well as from congressional Republicans and even some Democrats.³⁸ In an interview with Task Force staff, Sen. Lindsey Graham said he “objected to the high heavens” to trying KSM in federal court because: “[i]f he's not an enemy combatant, who would be? If the guy who planned the attacks on our country doesn't fall into that category, who would be?”³⁹ New York City Mayor Michael Bloomberg was initially supportive, stating that it was “fitting that 9/11 suspects face justice near the World Trade Center site where so many New Yorkers were murdered.”⁴⁰

But Bloomberg and many others changed their mind after an attempted terrorist attack on Christmas Day in 2009. Umar Farouk Abdulmutallab, a Nigerian-born operative for Al Qaeda in the Arabian Peninsula, attempted to ignite a bomb concealed in his underwear on board a plane to Detroit. The attack was unsuccessful and the plane landed safely, but the intelligence community had missed several warning signals about Abdulmutallab — including a warning from Abdulmutallab's own father to the U.S. embassy in Nigeria. Republican leaders criticized these lapses, and the decision to read Abdulmutallab his Miranda rights shortly after his capture and try him in civilian court. Former Vice President Dick Cheney accused Obama of “trying to pretend that we are not at war. ... He seems to think that if we give terrorists the rights of Americans, let them lawyer up, and read them their Miranda rights, we won't be at war.”⁴¹

The Bush administration had in fact frequently tried and convicted terrorism suspects in civilian court after September 11 — including Richard Reid, who in December 2001 had attempted to bring down a plane by detonating explosives in his shoe. Reid is currently serving a life sentence at ADX Florence, the federal “supermax” prison in Colorado.

Despite being read his rights, Abdulmutallab would later provide a great deal of useful intelligence about both his plot and Al Qaeda in the Arabian Peninsula, including the role of U.S. citizen Anwar al-Awlaki in that organization.⁴² But the criticism took its toll, and led to changes from the administration. On January 5, 2010, President Obama announced that the United States would suspend transfers of Yemeni detainees — the largest group of prisoners in Guantánamo — to their home country.⁴³ They have never been resumed. Near the end of January 2010, Bloomberg reversed his position on the September 11 trial, and Sen. Charles E. Schumer, Democrat of New York, quickly followed suit. The White House asked Holder to look into other locations for the trial, which was eventually transferred back to the Guantánamo military commissions system.

Guantánamo, of course, remains open today. Congress has imposed restrictions forbidding not only detainees' release in the United States, but also their prosecution in federal court. It has forbidden overseas transfers unless the secretary of defense makes a series of certifications that the detainee cannot possibly constitute a future threat. President Obama has repeatedly

“The United States denied that the CIA was running a secret prison in Somalia, but acknowledged providing ‘support to the [Somali government] during debriefings of terror detainees’ on rare occasions.”

objected to these restrictions, but has also regularly signed into law defense bills that include the provisions — most recently on January 2, 2013.⁴⁴ This has slowed transfers from Guantánamo sharply. Since the restrictions on overseas transfers first became law on January 7, 2011, four detainees have been transferred from Guantánamo — two of whom had won their *habeas* cases, and two of whom were transferred to fulfill a military commission plea agreement.⁴⁵

Detainee Transfers and Proxy Detention

President Obama's early executive orders closed the CIA's "black sites," but their effect on the CIA's rendition of detainees to foreign custody was less clear. Executive Order 13491 required a task force to "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices ... do not result in the transfer of individuals to other nations to face torture."

In his confirmation hearings for the post of CIA director, Leon Panetta said that President Obama had prohibited "extraordinary rendition — when we send someone for the purpose of torture or actions by another country that violate our human values." But Panetta said "renditions where we return individuals to another country where they prosecute them under their laws" were "an appropriate use of rendition."⁴⁶ Rendition for the purpose of torture has always been formally forbidden, though. All renditions under President Bill Clinton and many renditions under President George W. Bush were ostensibly for the purpose of prosecution (rather than solely for interrogation); many nonetheless resulted in torture.

On August 24, 2009, the Special Task Force on Interrogations and Transfer Policies issued a press release outlining its transfer recommendations.⁴⁷ Despite the history of renditions resulting in torture, the task force announced that the United States could continue to transfer individuals based on "assurances" from the receiving country that they would not be tortured. They recommended "that the State Department be involved in evaluating assurances in all cases," and that the inspectors general from DOS, DOD and DHS "prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances."⁴⁸ They also recommended

that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government.⁴⁹

It is not clear whether these recommendations have been fully implemented. The interrogations and transfer task force's recommendations as to transfers by the CIA remain classified, and its full recommendations and report have never been released.

The Obama administration has not abandoned the Bush administration's argument that Article 3 of the CAT — which prohibits refoulement of prisoners to countries where they are in serious danger of torture — is not legally binding for transfers occurring entirely outside the United States. The Department of Defense and the CIA have never publicly adopted implementing regulations for Article 3 of CAT.

In an interview with Task Force staff, Harold Hongju Koh said the process of obtaining diplomatic assurances regarding detainee treatment is overseen by DOS, and that the CIA no

longer had the authority to transfer suspects to foreign intelligence services without DOS's approval. Koh noted that some of the most controversial renditions under the Bush administration occurred without DOS involvement.⁵⁰

Within DOS, both the Legal Advisor's Office and the Bureau of Democracy, Human Rights, and Labor now must approve any transfers that require diplomatic assurances. Koh said that he and Michael Posner, head of the Bureau of Democracy, Human Rights, and Labor, were scrupulous about evaluating assurances:

The day the Obama administration transfers someone to a condition where they will be tortured, without adequate assurances, is the day I leave the administration. ... I'm saying unequivocally it has not happened since I've been here, and that's three years. It's not going to happen while I'm here. It's not going to happen while Posner is here. I believe you can have confidence in that.⁵¹

Under the Obama administration, there have been no public allegations of suspects being tortured after the United States transferred them across an international boundary. (This excludes transfers within Afghanistan, discussed below.) But there have been credible reports of the United States providing intelligence and assisting in transfers and interrogations carried out by allies.

In 2011, *The Nation* reporter Jeremy Scahill wrote that the CIA was interrogating Al Qaeda-affiliated prisoners in

a secret prison buried in the basement of Somalia's National Security Agency (NSA) headquarters, where prisoners suspected of being Shabab members or of having links to the group are held. Some of the prisoners have been snatched off the streets of Kenya and rendered by plane to Mogadishu. While the underground prison is officially run by the Somali NSA, US intelligence personnel pay the salaries of intelligence agents and also directly interrogate prisoners.⁵²

Former detainees did not allege that they were beaten or physically tortured, but did describe being held for extended periods without counsel, in squalid conditions.

Somali intelligence officials and former detainees told Scahill that Americans conducted interrogations at the prison. One detainee, Kenyan citizen Ahmed Abdullahi Hassan, told fellow detainees that he had been rendered "Guantánamo style" on a plane from Nairobi to Mogadishu. A U.S. intelligence official told Scahill that the United States "provided information which helped get Hassan — a dangerous terrorist — off the street" but did not carry out the rendition itself.⁵³ The United States denied that the CIA was running a secret prison in Somalia, but acknowledged providing "support to the [Somali government] during debriefings of terror detainees" on "rare occasions."⁵⁴

An American teenager, Gulet Mohamed, was detained, interrogated, and allegedly beaten and deprived of sleep by Kuwaiti authorities in late 2010 after being placed on the United States' no-fly list. Mohamed and his family alleged that he had been interrogated by FBI agents in

"Of 28 former detainees at Department 124, 26 told UNAMA they had been tortured by methods such as 'beating, suspension, and twisting and wrenching of genitals.' Seventeen of those 26 had been captured by coalition forces. Five of the 26 were children."

Kuwait even after attempting to assert his right to counsel, and claimed that he was being detained at the United States' behest. A State Department official denied this. Mohamed was eventually allowed to return to the United States after suing the United States, when it appeared that a federal judge would shortly order his return. Another American citizen, Sharif Mobley, has made similar allegations about a threatening interrogation by U.S. officials in Yemen.⁵⁵

Another case of proxy detention involves a Yemeni journalist, Abdulelah Haider Shaye. Shaye, who had reported on civilian deaths resulting from U.S. targeted killings in Abyan province and interviewed Anwar al-Awlaki, was convicted of terrorism charges by a Yemeni state security court in January 2011, after a trial criticized by some human rights groups. His attorneys alleged that he had been kept in solitary confinement and tortured in prison. It is unknown whether the United States had any role in his initial arrest, but in February 2011 President Obama intervened to prevent the Yemeni president from pardoning Shaye.⁵⁶

Even more troubling than those cases is the evidence that Afghan detainees have been tortured after U.S. forces turned them over to the Afghan National Directorate of Security (NDS). An October 2011 report from the U.N. Assistance Mission in Afghanistan (UNAMA) found

compelling evidence that 125 detainees (46 percent) of the 273 detainees interviewed who had been in NDS detention experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in a number of NDS detention facilities throughout Afghanistan.⁵⁷

The U.N. reported that coalition forces were involved in the capture or transfer of 19 individuals who were subsequently tortured in NDS custody.⁵⁸ (Coalition forces transferred approximately 2,000 individuals to Afghan security in 2009 and 2010, most of whom the U.N. team did not interview.)

Torture was especially pervasive in Department 124, the NDS's facility for "high-value detainees" in Kabul. Of 28 former detainees at Department 124, 26 told UNAMA they had been tortured by methods such as "beating, suspension, and twisting and wrenching of genitals." Seventeen of those 26 had been captured by coalition forces. Five of the 26 were children.⁵⁹

According to *The Washington Post*, Department 124 is across the street from the United States' military headquarters in Kabul, and was built with U.S. funds.⁶⁰ Afghan and U.S. officials said that CIA officials met with Department 124's leadership once a week, and reviewed their interrogation reports.⁶¹ In contrast, the International Committee of the Red Cross (ICRC), the United Nations, and Afghanistan's Independent Human Rights Commission (AIHRC) had no access to the facility, and the ICRC had warned the United States about reports of torture there. Several Afghan intelligence officials told the *Post* that the CIA knew of detainees' mistreatment, though they disapproved of it.⁶²

The CIA's relationship with the NDS is long-standing. Leaked government documents show that it was only in 2008 that the government of Afghanistan, rather than the CIA, began supplying the agency's budget. Allegations of the NDS's torture of prisoners are equally long-standing, and were included in several of DOS's annual human rights reports on Afghanistan. For example, the 2010 report relayed an allegation from Human Rights Watch that in December 2009, a detainee named Abdul Basir

died as a result of abuse in a National Directorate of Security (NDS) detention facility. Although NDS authorities claimed that Basir committed suicide, small dark circles on his forehead, cuts on his back, bruising in several places, and a large cut on the shin were found on Basir's body.⁶³

In an interview with Task Force staff, a former U.S. official who served in Afghanistan said that "everyone has always had concerns about NDS."⁶⁴ Canadian Diplomat Richard Colvin put it more bluntly in 2009 testimony to the Canadian parliament: "[T]he NDS tortures people, that's what they do. And if we don't want our detainees tortured, we shouldn't send them to the NDS."⁶⁵

Despite having the strongest ties to NDS, the United States was slower than its allies to respond to allegations of torture. In September 2007, the United States, Canada, the United Kingdom, Norway, the Netherlands and Denmark exchanged letters with the Afghan government stating that coalition forces could access NDS facilities to monitor the treatment of detainees they transferred.⁶⁶ At the time, the Netherlands, the U.K. and Canada already had bilateral agreements with Afghanistan for monitoring detainees' treatment after a transfer. By February 2010, according to a DOS cable, the United States had the "dubious distinction" of being "the only detaining nation in Afghanistan that does not have a monitoring program" for detainees transferred to Afghan custody.⁶⁷ President Obama's task force on interrogation and transfers recommended that the U.S. embassy in Kabul "develop a plan to physically monitor the status of detainees transferred by U.S. forces,"⁶⁸ but as of spring 2012 that recommendation had not been fully implemented.⁶⁹

In an interview with Task Force staff, the former U.S. official said that there was "ample reason why the U.S. government should've had a monitoring program in place" before it did, and that "[t]here's no doubt in my mind that more torture took place in Afghanistan due to the [government's] failure to put in place, at a sooner date, a monitoring program."⁷⁰ But until the 2011 U.N. report, there was very little public or press outcry about allegations that U.S. forces had transferred detainees to be tortured by the NDS. This was in contrast to several allies, particularly Canada. On December 30, 2009, Canadian Prime Minister Stephen Harper suspended Parliament until March, a move the opposition denounced as "almost despotic," in an attempt to evade a parliamentary investigation into Canadian complicity in abuse by the NDS.⁷¹

The United States' allies in Afghanistan consider themselves to have a binding legal obligation under CAT Article 3 not to transfer a detainee to a country where he will be at serious risk of torture. To enforce this prohibition, a Canadian court ordered a halt to transfers to certain NDS facilities in 2008, and a British court did the same in 2010.⁷² By contrast, the United States executive branch takes the position that Article 3 of CAT is not legally binding overseas, and so its prohibition on refoulement is a matter of policy rather than a legal requirement.⁷³ The former official said that the United States would likely have acted on reports of the NDS torturing detainees "long before it did" if the government applied Article 3 of CAT as a matter of law.⁷⁴

The United States eventually did respond to the allegations of torture by NDS. In mid-July 2011, it banned transfers to the NDS facility in Kandahar.⁷⁵ Before the UNAMA report was published, the mission's human rights chief briefed U.S. officials on its findings. After that briefing, the former official said, "it took the military only a few days" to suspend transfers to the NDS, and only a few more weeks

"[t]here's no doubt in my mind that more torture took place in Afghanistan due to the [government's] failure to put in place, at a sooner date, a monitoring program."

In order for transfers to an NDS facility to resume, the United States would interview detainees about whether they or fellow prisoners had been abused, making every possible effort to protect the detainees' identities and prevent retaliation for reporting torture. The guards and interrogators had to attend a human rights training course. If a second round of detainee interviews also revealed no indications of abuse, transfers could resume subject to ongoing monitoring by the United States and/or the AIHRC. Having left Afghanistan, the former official did not know the details of the monitoring program's implementation, but thought the military personnel who designed it "were doing a good job. ... I wish the State Department could've moved at the speed the military did."⁷⁷

Despite these steps, a March 2012 report by the AIHRC and the Open Society Institute (OSI) identified several gaps in the United States' monitoring of detainee transfers. First, the post-transfer monitoring program only applied to U.S. forces under the command of the International Security Assistance Force (ISAF) for Afghanistan, not to Special Forces troops assigned to counterterrorism missions. The State Department had not yet created a monitoring program for transfers by non-ISAF U.S. military forces, and the AIHRC was not informed of non-ISAF detainees' transfers to NDS custody.⁷⁸

Second, there was evidence that the military's restrictions on transfers were not being applied to transfers by the CIA. Eleven detainees told AIHRC researchers that they had been detained by U.S. personnel and transferred to the NDS detention facility in Kandahar, despite a July 2011 ban on U.S. military transfers to that prison.⁷⁹ Four of the detainees told AIHRC that they were subsequently tortured by the NDS in Kandahar:

According to one detainee, "I was severely beaten by cable in the head and neck. I was shackled and they connected the shackles to an electrical current and shocked me until I was unconscious. They also beat me on the back and waist very hard. As a result, my left hand is still hurting and even my tongue is severely damaged from the electric shock." Three other transferred detainees also alleged that they were abused in NDS Kandahar, including being subjected to beatings with cables.⁸⁰

AIHRC and OSI found these allegations credible.⁸¹

U.S. military officials told OSI that the prohibition on transfers to NDS-Kandahar remained in effect and was binding on special forces as well as the regular military. But this left open the possibility that it was not binding on the CIA, and that the CIA was continuing to transfer detainees to the NDS facilities where there was a high likelihood of torture.⁸² Notably, several of the detainees who were transferred to NDS-Kandahar told AIHRC that before they were transferred they were taken to "Mullah Omar's House." According to OSI, "Mullah Omar's House" is a local nickname for Firebase Maholic, a facility that the press has reported the CIA used as a base for operations in Kandahar.⁸³ OSI reported that an unidentified but credible source confirmed in December 2011 that U.S. intelligence and Special Forces personnel continued to operate out of the facility, as does a U.S.-trained paramilitary force.⁸⁴

None of the above reports suggest that the United States transferred detainees to the NDS for the purpose of torture. But there is strong evidence of transfers occurring when the United States knew or should have known that torture was a likely outcome. That is a violation of

Article 3 of CAT, regardless of which U.S. forces are responsible for the transfer, and regardless of whether it begins on U.S. soil or takes place entirely overseas.

A former U.S. official argued that the United States' responsibility should not arise only from "putting the handcuffs on someone."⁸⁵ Rather, "[i]f the U.S. is going to put its reputation and resources on the line working hand in glove with another country's security forces, they need to have a clear understanding regarding what's acceptable treatment of detainees."⁸⁶ This meant a detailed, independent assessment of the intelligence services' human rights records — the source pointed out that the U.S. government is in a far better position than NGOs or journalists to conduct such an evaluation given the secret nature of these services — ongoing oversight, and a willingness to "step back" when serious violations occur.⁸⁷

These steps are especially important given serious allegations that Asadullah Khalid, who became head of the NDS in late 2012, has personally taken part in detainee abuse. The Canadian diplomat Richard Colvin alleged in testimony in 2009 that Khalid was

an unusually bad actor on human rights issues. He was known to have had a dungeon in Ghazni, his previous province, where he used to detain people for money, and some of them disappeared. ... [I]n Kandahar we found out that he had indeed set up a similar dungeon under his guest house. He acknowledged this. When asked, he had sort of justifications for it, but he was known to personally torture people in that dungeon.⁸⁸

Khalid has denied these allegations, stating "this is just propaganda about me,"⁸⁹ but human rights groups believe they are credible.⁹⁰

A June 2012 document released by the British Ministry of Defence reported that according to the director of the UNAMA's Human Rights Unit, there was "systematic abuse taking place in Kandahar ... of many times the magnitude of the problem elsewhere" and Khalid was one of the "principal culprits."⁹¹ Based in part on this evidence, the British High Court ruled in November 2012 that the Ministry of Defence could not resume transfers to the NDS.⁹²

Most recently, in January 2013 the United Nations released a follow-up report on treatment of detainees in Afghan custody, which found that torture continues to be a serious problem. Of the prisoners it interviewed, UNAMA found that "178 out of 514 detainees held in NDS facilities, or 34 percent, experienced torture or ill-treatment, down 12 percent from the previous year."⁹³ The rate of torture by Afghan National Police or Afghan Border Police actually increased, from 35 percent to 43 percent.⁹⁴

Abuse was more systematic in Kandahar than in any other location. Half of the detainees the U.N. interviewed in Kandahar provided graphic, detailed descriptions of torture.⁹⁵ There were also credible reports of the enforced disappearance of 81 detainees in Kandahar.⁹⁶ Five detainees in Kandahar alleged that they were tortured at "Mullah Omar's House" by being repeatedly beaten with a pipe or stick on the soles of their feet.⁹⁷ (The U.N. report did not address the AIHRC/OSI report that "Mullah Omar's house" is a local nickname for a base also used by U.S. intelligence forces.)

UNAMA found that despite NATO coalition members' efforts at monitoring and preventing

abuse, there was “reliable and credible evidence that 25 of the 79 (31 percent) detainees transferred by international forces experienced torture” — an increase from 2011.⁹⁸ According to the U.N. report, restrictions on transfers better monitoring by international forces had led to “early improvement in some NDS facilities with a decrease in allegations of torture. ... However, after ISAF resumed transfers to these facilities and reduced its monitoring, UNAMA observed an increase and resumption in incidents of torture.”⁹⁹

Some detainees were tortured after international forces sent them to prisons where the U.S. and allied militaries had not lifted the prohibition on transfers. According to the U.N. report,

following investigations into the cases referred ... ISAF maintained in all instances that international military forces, including U.S. Special Forces, had not been involved in the capture or transfer of the detainees in question. ISAF recommended that UNAMA attempt to confirm the allegations of capture and transfer with an “other government agency.”¹⁰⁰

“Other government agency” is a commonly used government euphemism for the CIA. The U.N. report and OSI and AIHRC’s reporting suggest that the CIA continues to transfer detainees to Afghan prisons where torture is known to be widespread, in violation of the Convention Against Torture. Detainees likely have also been transferred to torture prisons by the military, despite genuine efforts to prevent this from occurring.

The CIA has not publicly commented in response to the new U.N. report. The U.S. military has once again halted transfers to the facilities where the U. N. alleges that torture has occurred, and has asked Afghanistan to investigate allegations of torture by U.S.-trained units.¹⁰¹ Past requests for investigation have had little effect, though. According to press reports, General John Allen, the commander of U.S. forces in Afghanistan, said his staff had requested that Afghanistan investigate 80 specific allegations of detainee abuse. “To date, Afghan officials have acted in only one instance,” Allen said, and the official responsible was transferred rather than fired.¹⁰²

As of January 2013, Asadullah Khalid was receiving medical treatment in the United States after an assassination attempt in December. President Obama and Defense Secretary Leon Panetta both visited him in the hospital. In response to human rights groups’ criticism of the visit, White House spokesman Tommy Vietor said it was “appropriate” given that “Mr. Khalid and the team he oversees work closely with the United States to protect Afghan citizens and American civilians and military service members in Afghanistan.”¹⁰³

Red Cross Access and “Separation” of Detainees

Under the first executive order issued by President Obama on January 22, 2009, U.S. forces cannot use any interrogation technique not listed in the 2006 Army Field Manual. But the Field Manual may leave the door open for certain inhumane practices.

First, the 2006 Field Manual deleted language from the 1992 version specifically prohibiting the use of sleep deprivation and stress positions. The 1992 manual listed “forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time” as a form of physical torture, and “abnormal sleep deprivation” as an example of “mental torture.”¹⁰⁴ Both of these references were

deleted from the 2006 version. Second, a new section of the manual, Appendix M, describes the “restricted interrogation technique” of separation. The rationale given for separation is

to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; decreasing the detainee’s resistance to interrogation.¹⁰⁵

Separation is also meant to “[p]rolong the shock of capture ... and foster a feeling of futility.”¹⁰⁶

Appendix M also authorizes sleep deprivation as part of the separation regime, without explaining the rationale for doing so. It says that separation “must not preclude the detainee getting four hours of continuous sleep every 24 hours.”¹⁰⁷ Human rights groups and former interrogators have pointed out that this

could be interpreted to permit interrogators to bookend the detainee’s rest around a 40-hour interrogation period. And there is no prohibition against stringing these 40-hour sessions along indefinitely — for a period of months or even years — as long as it is approved by the combat commander every 30 days.¹⁰⁸

Appendix M forbids “sensory deprivation,” which it warns “may result in extreme anxiety, hallucinations, bizarre thoughts, depression, and anti-social behavior.”¹⁰⁹ But in the next paragraph, it permits field interrogators to use “goggles or blindfolds and earmuffs ... to generate a perception of separation” for up to 12 hours. Blindfolds, earmuffs and goggles may also be used for longer periods for security purposes.¹¹⁰

Because it can be used in combination with blindfolding and extended periods of sleep deprivation, the Field Manual states that separation can be approved only for “unlawful enemy combatants,” not prisoners of war. Interrogators are required to draft written plans for its use, which must be approved by the first general officer in their chain of command.¹¹¹ The Field Manual does allow “segregation” (as opposed to separation) of detainees from one another without these restrictions, but a Department of Defense directive states that segregation may only be used for

purposes unrelated to interrogation, including administrative, health, safety, or security reasons or law enforcement questioning. ... [S]egregation may not be requested or conducted for the purpose of facilitating interrogation.¹¹²

In an interview with Task Force staff, veteran Army interrogator Colonel Stuart Herrington said the restrictions on separating detainees from one another were “ridiculous.”¹¹³ He said Appendix M would have outlawed the humane, successful interrogation centers he ran in Panama during the 1989 U.S. military operation there and Iraq during the First Gulf War.¹¹⁴ Herrington has said:

In all interrogation centers I have worked in or commanded, we separated the guests from one another. Most welcomed this. A prisoner might cooperate if decently and cleverly treated, but only if we could provide a discreet environment where he could feel comfortable spending long hours talking with us. That meant each “guest” had to have a private room, and could not be exposed to any other detainee (encounters in the hallways, for example). This was critical. Housing high-value detainees communally is fatal to successful interrogation.¹¹⁵

Herrington said that there was a “huge difference” between giving detainees individual cells and “throwing you in a dark room to punish you. ... And unfortunately, that difference has been obfuscated a bit” in Appendix M.¹¹⁶

There is very limited public evidence about how U.S. interrogators have employed “separation” in practice under the Obama administration. Conditions of detention at the U.S. prisons in Bagram and Guantánamo have improved, but most interrogation likely occurs at other sites, closer to the point of capture.

To its credit, the administration has improved procedures for ICRC notification and access to detainees, a crucial safeguard against abusive implementation of the “separation” technique. *The New York Times* reported in August 2009 that according to three military officials, “the military for the first time is notifying the International Committee of the Red Cross of the identities of militants who were being held in secret at a camp in Iraq and another in Afghanistan run by United States Special Operations forces.”¹¹⁷ The *Times* said:

Under Pentagon rules, detainees at the Special Operations camps can be held for up to two weeks. Formerly, the military at that point had to release a detainee; transfer him to a long-term prison in Iraq or Afghanistan, to which the Red Cross has broad access; or seek one-week renewable extensions from Defense Secretary Robert M. Gates or his representative.

Under the new policy, the military must notify the Red Cross of the detainees’ names and identification numbers within two weeks of capture, a notification that before happened only after a detainee was transferred to a long-term prison. The option to seek custody extensions has been eliminated, a senior Pentagon official said.¹¹⁸

In May 2010, a Red Cross representative confirmed this policy change to the BBC, stating:

The ICRC is being notified by the US authorities of detained people within 14 days of their arrest. ... This has been routine practice since August 2009 and is a development welcomed by the ICRC.¹¹⁹

Despite these safeguards, a number of former detainees have alleged mistreatment at a facility they called the “Black Jail” or “Tor Jail,” located at Bagram Air Base but separate from the main prison there. On November 28, 2009, *The Washington Post* reported allegations from two Afghan juveniles, Issa Mohammed and Abdul Rashid, that they were “beaten by American guards, photographed naked, deprived of sleep and held in solitary confinement in concrete cells for at least two weeks while undergoing daily interrogation.” The nakedness was reportedly part of a medical examination, but Rashid said that it occurred in front of about six soldiers who “took pictures, and they were laughing and laughing.”¹²⁰

On the same day, *The New York Times* published an article about the prison, based on interviews with three other detainees. The men the *Times* interviewed did not allege beatings but did say they were held incommunicado for up to 35 or 40 days, denied contact with anyone but their interrogators, and deprived of sleep. The detainees had been held at Tor Jail before the August policy change regarding ICRC notification, but the *Times* said that the military still did not allow the Red Cross “face-to-face access to the detainees” at the classified facility.¹²¹

The Atlantic reported in May 2010 that the facility was operated by the DIA's Defense Counterintelligence and Human Intelligence Center (DCHC), which was performing interrogations "for a sub-unit of Task Force 714, an elite counter-terrorism brigade."¹²² Other reports have stated that Task Force 714 was commanded by Admiral William McRaven, the head of Joint Special Operations Command from 2008 to 2011 and now the commander of the U.S. Special Operations Command.¹²³

“Ninety-nine other cases of alleged detainee abuse were closed without proceeding to a full investigation.”

In October 2010, the OSI published a report based on interviews with 18 former detainees at Tor Jail, nine of whom said they were detained there in 2009 or 2010. OSI reported that the detainees “repeatedly and consistently described” being exposed to cold temperatures, which some said made it impossible to sleep for a few hours a night. Detainees also described being kept in constantly lighted isolation cells with no exposure to natural light, which made it impossible to pray or track the passage of time. Detainees had no contact with the Red Cross or each other, and were blindfolded and ear-muffled when taken to interrogation rooms or to the bathroom.¹²⁴

In response to the OSI report, a Pentagon spokesperson told reporters that “the Department of Defense does not operate any ‘secret prisons,’ ” but acknowledged that it operates classified “temporary screening detention facilities.” The spokesperson said that the ICRC knew about the sites, and conditions there complied with the Geneva Conventions and the Army Field Manual.¹²⁵

In April 2011, the Associated Press reported that the maximum amount of time any detainee had spent at the temporary detention center was approximately nine weeks:

After the first two weeks in temporary detention, the first possible extension is for three weeks, for reasons including “producing good tactical intel” to “too sick to move,” according to a U.S. official familiar with the procedure. The next extension is for an additional month, adding up to a total of roughly nine weeks.¹²⁶

An intelligence official told the Associated Press that further extensions would require an appeal to either the secretary of defense or the president, and the military had never requested one.¹²⁷ An ICRC spokesman, Simon Schorno, would not comment on conditions at the detention facilities but said the Red Cross “has a transparent relationship with the Department of Defense and is satisfied with progress made as regards access to detention facilities.”¹²⁸

In addition to facilities in Afghanistan, “separation” has likely been used in interrogations of suspects aboard naval vessels. Admiral McRaven testified to the Senate Armed Services Committee on June 28, 2011, that when U.S. forces captured a suspect in Yemen, Somalia or other locations besides Afghanistan, “[i]n many cases, we will put them on a naval vessel, and we will hold them until we can either get a case to prosecute them in a U.S. court,” transfer them to foreign custody or release them.¹²⁹

The only confirmed case of U.S. detention and interrogation aboard a naval ship involves Ahmed Abdulkadir Warsame, a terrorism suspect accused of involvement with Al Qaeda in the Arabian Peninsula, and the Somali terrorist group Al Shabab. U.S. forces captured Warsame in international waters in the Gulf of Aden on April 19, 2011, and interrogated him for two months

aboard a naval ship. *The Los Angeles Times* reported that his initial interrogation was conducted by a High-Value Interrogation Group, which includes FBI, CIA and DOD personnel.¹³⁰

According to *The New York Times*, at some point, the United States notified the Red Cross of Warsame's capture. After about two months of interrogation a Red Cross representative was permitted to meet with him aboard ship. The visit occurred during a four-day break between Warsame's questioning by the High-Value Interrogation Group and his questioning by the FBI. FBI agents gave him a Miranda warning before resuming questioning, but Warsame waived his rights and continued to speak to the FBI.¹³¹

In early July 2011, Warsame was indicted on terrorism charges and flown to New York. Court documents contain no information about his treatment in custody.¹³² *The New York Times* reported in May 2012 that a court filing in another terrorism case, against Eritrean suspect Mohamed Ibrahim Ahmed, cited a former Shabab commander who matched Warsame's description as a cooperating witness. Both the prosecution and defense declined to comment on the witness's identity, and Ahmed pleaded guilty before his case went to trial.¹³³

Secrecy and Accountability

Despite the president's opposition to "looking backwards" regarding torture allegations, on August 24, 2009, Attorney General Holder announced he would open "a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations" by the CIA. Holder appointed U.S. Attorney John Durham, who was already investigating the CIA's destruction of videotapes of interrogations at black sites, to conduct the review.

In November 2010, Durham concluded that he would not pursue charges in connection with the destruction of the tapes.¹³⁴ The Justice Department did not specify the reason for declining prosecution, but made the announcement the same week that the statute of limitations on the relevant criminal charges expired.

In June 2011, DOJ announced the results of Durham's preliminary review of the CIA's treatment of detainees. It opened full criminal investigations into the deaths of two detainees in CIA custody — Gul Rahman, an Afghan killed at the Salt Pit in November 2002, and Manadel al-Jamadi, the Iraqi detainee whose corpse is shown in several of the Abu Ghraib photographs. Ninety-nine other cases of alleged detainee abuse were closed without proceeding to a full investigation.¹³⁵

Holder announced on August 30, 2012, that no charges would be brought for al-Jamadi's or Rahman's deaths because "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."¹³⁶ The Justice Department declined to elaborate further, or respond to questions. There had been previous press reports of grand juries being convened to hear evidence about both cases, but it is unknown whether prosecutors ever presented indictments.

The U.N. special rapporteur on torture, Juan Mendez, has denounced the closure of Durham's investigations without charges as violating the obligation under CAT to hold perpetrators of torture accountable:

I have to say that the decision not to investigate, prosecute and punish what happened when those torture memos were in effect is a refusal to accept an obligation in international law that the United States has. Unfortunately, there has been no serious investigation and recently the only investigation that was still going on, by Special Prosecutor [John] Durham, was completely terminated with a decision not to prosecute even cases in which the torture victims had died. ... It is a very disappointing position because you can imagine how hard it is for the Special Rapporteur on Torture to go around the world saying you have to investigate, prosecute and punish when the first reaction is, “If the United States doesn’t do it, why should we?”¹³⁷

“Without CIA approval, classified information about the circumstances of a detainee’s death could not be discussed while interviewing witnesses, or presented to the grand jury.”

Without being in a position to examine the evidence or the reasons prosecution was declined, it is difficult to dismiss Durham’s investigations as not “serious,” or comment on prosecutors’ disposition of any individual case. But there is no question that many acts of torture or complicity in torture have resulted in no prosecution, no conviction, or a disproportionately low sentence — even in cases where U.S. personnel went beyond the techniques that were legally authorized.¹³⁸

One potential reason for the lack of prosecutions is the ongoing level of secrecy that surrounds the CIA program, despite the substantial public disclosures that have occurred. The Justice Department’s rules for cases involving classified information greatly restrict prosecutors’ ability to act without the approval of the original classifying agency. Without CIA approval, classified information about the circumstances of a detainee’s death could not be discussed while interviewing witnesses, or presented to the grand jury. This may have been a formidable obstacle to prosecutions for detainee deaths in CIA custody, though it is impossible to know if it was decisive without public disclosure of the reasons DOJ declined to prosecute.

Manadel al-Jamadi’s death, for example, was the subject of a 98-page report by the CIA’s Office of the Inspector General (OIG), dated November 3, 2005. In 2011, the CIA informed the ACLU that the entire report was being withheld under the Freedom of Information Act because: (1) it was properly classified and its disclosure would harm national security, and (2) it would reveal intelligence sources and methods protected under the 1947 National Security Act. The CIA said it made this decision after it

conducted a line-by-line review of this document to determine whether meaningful, reasonably segregable, non-exempt portions of the document could be released.

This document is withheld in full because there is no meaningful non-exempt information that can reasonably be segregated from any exempt information.¹³⁹

The CIA withheld 10 other OIG reports relevant to detainees’ treatment on the same basis, including one — a December 13, 2005, Investigation on the Nonregistration of Detainees — that may have been relevant to al-Jamadi’s death.¹⁴⁰ The U.S. District Court for the District of Columbia has upheld CIA’s authority to keep that information secret.¹⁴¹

It is quite possible that there are considerations unrelated to official secrecy that led to the closure of various CIA investigations without charges: the inability to locate eyewitnesses overseas in war zones for events that occurred almost a decade ago; destruction of evidence; expiration of statutes of limitations for offenses other than homicide; or some degree of legal

authorization for the fatal techniques. But because of the ongoing classification of the CIA's treatment of prisoners, it is also difficult to see how prosecutors could investigate intelligence officers without either the cooperation of the CIA, or the president's willingness to override the CIA on classification decisions.

In a number of other civil and criminal cases, the Obama administration has robustly defended the CIA's prerogative to keep information about its treatment of detainees secret. Obama's Department of Justice successfully argued for the dismissal of *Mohamed v. Jeppesen Dataplan, Inc.*,¹⁴² a suit by five rendition victims against a Boeing subsidiary that allegedly participated in flying them to torture overseas, on the basis of the state-secrets privilege. It also successfully opposed Supreme Court review of another rendition victim's suit, *Arar v. Ashcroft*.¹⁴³

The Obama administration has also criminally prosecuted more individuals under the Espionage Act for providing classified information to the press than all other presidential administrations combined. From its passage in 1917 until 2009, the Espionage Act was used in three criminal prosecutions. It has been used six times under the Obama administration, most recently to prosecute CIA officer John Kiriakou for unauthorized disclosures to journalists about the identities of CIA personnel involved in the interrogation and torture of Abu Zubaydah. Kiriakou was sentenced to 30 months in prison for these revelations.

The DOJ has repeatedly and successfully argued against requiring disclosure of evidence regarding CIA rendition and torture in FOIA litigation. The government's position is that while the OLC memos released in 2009 revealed a great deal of information about the CIA's "enhanced interrogation techniques" (EITs):

The recently declassified OLC memoranda are legal analyses by Department of Justice (DOJ) attorneys. Although they discuss the legality of specific proposed intelligence activities, they do not reveal the type of information in the operational documents at issue: details of actual intelligence activities, sources, and methods. Even if the EITs are never used again, the CIA will continue to be involved in questioning terrorists under legally approved guidelines. The information in these documents would provide future terrorists with a guidebook on how to evade such questioning. ...

Additionally, disclosure of explicit details of specific interrogations where EITs were applied would provide al-Qa'ida with propaganda it could use to recruit and raise funds. Al-Qa'ida has a very effective propaganda operation. When the abuse of Iraqi detainees at the Abu Ghraib prison was disclosed, al-Qa'ida made very effective use of that information. ... Information concerning the details of EITs being applied would provide ready-made ammunition for al-Qa'ida propaganda. The resultant damage to national security would likely be exceptionally grave.¹⁴⁴

The government has made the same argument to justify wide restrictions on what information former CIA detainees and their attorneys may publicly disclose in *habeas corpus* and military commissions proceedings.

Detainees' statements are presumptively classified until a security officer clears them for release. Joseph Margulies, one of the first attorneys to represent Guantánamo detainees and currently

counsel for Abu Zubaydah, said that “I don’t really mind the logistical obstacles” to public disclosure of detainee statements, but for former CIA detainees, it had become impossible to get “even the most trivial stuff declassified.”¹⁴⁵ Margulies said the current restrictions were “preposterous ... just ridiculous,” and that it was more difficult for counsel to get approval to disclose detainees’ statements than it had been under the Bush administration.¹⁴⁶ In January 2005, for example, Margulies had gotten permission to publicly file a declaration recounting his client Mamdouh Habib’s allegations of rendition to torture in Egypt. This had ultimately resulted in Habib’s release from Guantánamo, but Margulies said “my declaration of what happened to Habib never would have been cleared now.”¹⁴⁷ Without jeopardizing his security clearance, though, he could not give specific examples of information that he was forbidden to disclose today.¹⁴⁸

“To characterize our clients as having been participants in the CIA program would be like characterizing an assassination victim as a participant in the assassination program.”

The attorneys representing the September 11 defendants before military commissions have argued that the “presumptive classification” regime has interfered with their relationship with their clients, and made a full factual investigation of the case “virtually impossible.”¹⁴⁹

In response, the government slightly modified its proposed protective order so that only certain categories of information from the defendants would be presumptively classified — but this still included all statements from the detainees about their capture (other than the date and location), the countries where they were held, the people who detained and interrogated them, and

[t]he enhanced interrogation techniques that were applied to the Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and ... [d]escriptions of the conditions of confinement of the Accused from on or around the aforementioned capture dates through 6 September 2006.¹⁵⁰

Defense counsel are also explicitly prohibited from revealing their clients’ “observations and experiences” about their treatment in CIA custody. The ACLU has called this last restriction

a chillingly Orwellian claim: because a defendant was “detained and interrogated in the CIA program” of secret detention, torture, and abuse, he was “exposed to classified sources, methods, and activities” and must be gagged lest he reveal his knowledge of what the government did to him.¹⁵¹

At a military commission hearing on October 17, 2012, Lieutenant Commander Kevin Bogucki, military defense counsel for Ramzi bin al Shibh argued that

to characterize our clients as having been participants in the CIA program would be like characterizing an assassination victim as a participant in the assassination program. It is ridiculous to suggest that somehow they’ve been afforded access to classified information and that therefore their memories need to be treated as classified information.¹⁵²

At the same hearing, defense counsel argued that classifying their clients’ memories made it

impossible to locate and interview witnesses who might be able to corroborate their client's statements.¹⁵³ Despite these arguments, the court adopted the government's proposed protective order on December 6, 2012.

Defense attorneys and human rights groups have also raised the possibility that the commissions' rules allowing the admission of hearsay, when combined with the ongoing classification of the CIA's treatment of detainees and the use of summaries in lieu of classified evidence, might make it impossible for the defense to prevent the introduction of evidence obtained through coercion.¹⁵⁴

It is difficult to fully evaluate whether this is a realistic possibility, because the government's full "Classification Guidance for Rendition, Detention and Interrogation Program Information" is itself a classified document, as are many of the court papers detailing discovery disputes. According to James Connell, a defense attorney for September 11 defendant Ammar al-Baluchi, "[t]he government has not yet provided any discovery or information about our clients' treatment at the black sites. ... If the trial were tomorrow, I would have no way of introducing it."¹⁵⁵

Can It Happen Again?

The Obama administration has ended the most inhumane treatment of detainees, though some troubling questions about current policies remain unanswered. But it is unclear whether it has taken sufficient steps to prevent a future administration from resorting to torture or cruel treatment, particularly if terrorists succeed again in conducting horrific crimes against Americans as they did on September 11.

Legally, the major barriers to torture are much the same as they were under the latter part of the Bush administration. Obama's executive orders, while binding on the executive branch, could be rescinded on the first day of any new president's term — and this could be done without public notice.

The Convention Against Torture and the Geneva Conventions clearly outlaw torture, but those prohibitions were also in place in 2001. The Supreme Court's decision in *Hamdan v. Rumsfeld* removes any doubt that the Geneva Conventions apply to the United States conflict with Al Qaeda, and that Common Article 3 is the minimum standard for treatment of detainees.¹⁵⁶ Common Article 3 prohibits not only "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," but also "outrages upon personal dignity, in particular humiliating and degrading treatment." The breadth of the prohibition led Congress to narrow the scope of War Crimes Act after *Hamdan* to apply only to certain narrowly defined "grave breaches" of Common Article 3. The revised statute explicitly says, though, that the amendment was "intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that article."¹⁵⁷

In July 2007, the Office of Legal Counsel nevertheless found that several of the CIA's "enhanced interrogation techniques" — including slaps to the face and body, and sleep deprivation by means of shackling diapered detainees to the ceiling of their cells for up to 96 consecutive hours — complied with Common Article 3.¹⁵⁸

Those memos, and all of the OLC memos finding that torturous and cruel interrogation techniques were lawful, have been suspended. But there is no institutional barrier to future

OLC attorneys adopting their legal reasoning. The author of the 2007 memo on Common Article 3, Steven Bradbury, was a member of Republican presidential nominee Mitt Romney's national security law subcommittee. In September of 2012, *The New York Times* published a draft policy paper by members of the national security law subcommittee recommending that Romney "commit his Administration to authorizing (classified) enhanced interrogation techniques against high-value detainees" analogous to those listed in the 2007 memo.¹⁵⁹

There have been no professional sanctions against legal, medical or mental health personnel who participated in or authorized cruel treatment and torture. The criminal laws against torture have not been enforced against any CIA employee, even in cases of homicide and where the public evidence very strongly suggests that interrogators went beyond OLC's and their headquarters' authorization. The Uniform Code of Military Justice also retains its clear prohibitions on mistreating prisoners, but the track record of prosecutions in the military is mixed at best, with many serious cases leading to no jail time or no conviction at all.¹⁶⁰ As stated above, without access to the case files or any classified information, the Task Force is not in a position to evaluate prosecutorial decisions in individual cases. But taken as a whole, the lack of successful prosecutions demonstrate major gaps in enforcement of the laws against torture and war crimes, which likely reduces their deterrent effect.

Even without the risk of prosecution, the risk of public disclosure and disapproval might deter a future administration from authorizing torture. But public opposition to torturing terrorism suspects under any circumstances has fallen since President Obama took office. A recent poll commissioned by Stanford Professor Amy Zegart and run by the polling firm YouGov found that 41 percent of Americans said the United States should use torture on terrorism suspects, and only 34 percent said it should not.¹⁶¹

Zegart's poll also asked the exact same questions as a January 2005 *USA Today / Gallup / CNN* poll about specific abusive techniques, and found that public support had increased for almost all of them. In Zegart's words,

Respondents in 2012 are more pro-waterboarding, pro-threatening prisoners with dogs, pro-religious humiliation, and pro-forcing-prisoners-to-remain-naked-and-chained-in-uncomfortable-positions-in-cold-rooms. In 2005, 18 percent said they believed the naked chaining approach was OK, while 79 percent thought it was wrong. In 2012, 30 percent of Americans thought this technique was right, an increase of 12 points, while just 51 percent thought it was wrong, a drop of 28 points. In 2005, only 16 percent approved of waterboarding suspected terrorists, while an overwhelming majority (82 percent) thought it was wrong to strap people on boards and force their heads underwater to simulate drowning. Now, 25 percent of Americans believe in waterboarding terrorists, and only 55 percent think it's wrong.¹⁶²

Zegart thought the most likely explanation for this change was the glamorized pop-culture depiction of torture in shows like "24": "Before the 9/11 attacks, torture was almost always depicted in television and movies as something that bad guys did. That's not true anymore."¹⁶³ If so, the portrayal of waterboarding as essential to finding Osama bin Laden in the recent

"Obama's executive orders, while binding on the executive branch, could be rescinded on the first day of any new president's term — and this could be done without public notice."

film *Zero Dark Thirty* — which unlike “24” purports to be a “journalistic” study of events — will unfortunately likely add to the public’s support.

It is also possible that the robust public defenses of the CIA program from Dick Cheney, Jose Rodriguez, former CIA Director Michael Hayden, and former Attorney General Michael Mukasey have convinced many people that the CIA program was carefully limited, unconnected from abuses by low-level troops in Iraq and Afghanistan, and saved lives. As discussed above, much of the evidence that might definitively contradict these sanitized portrayals of torture remains classified. Since 2009, there have been no trials, civil or criminal, and no official commission of inquiry. The unclassified evidence is scattered across hundreds of unofficial media and NGO reports, and hundreds of thousands of pages of government documents.



The strongest barrier to a return to torture and cruel treatment may be the military’s and intelligence community’s reluctance to engage in it again. Hayden and Mukasey have predicted that disavowing the OLC memos would also deter CIA personnel:

Even with a seemingly binding opinion in hand, which future CIA operations personnel would take the risk? There would be no wink, no nod, no handshake that would convince them that legal guidance is durable.¹⁶⁴

In an interview with Task Force staff, former CIA General Counsel John Rizzo agreed:

I thought I had done everything, to cauterize and get all the legal and policy authority necessary to protect the agency and protect the people who were carrying out the program, but it wasn’t enough.¹⁶⁵

Rizzo said investigations of the CIA were “a corrosive experience,” and that many agency personnel believed they were “being persecuted for political purposes.”¹⁶⁶ Retired Colonel Stuart Herrington, whose disagreements with Rizzo about the CIA program are discussed in Chapter 7, also thought the CIA’s experience since September 11 would reinforce its historical risk aversion about interrogation.¹⁶⁷

Ali Soufan said that some CIA personnel had objected to the use of torture long before any DOJ investigation, and credited them with ending the use of the most brutal techniques in 2005. Soufan said that the CIA’s Office of Inspector General’s investigation into the program had started because of CIA personnel “who came and complained about the program to the IG. And that’s why the IG initiated an investigation and that’s why the program was shelved.”¹⁶⁸

Retired Colonel Steven Kleinman was less confident than the others. He said it was quite plausible that soldiers were using cruel techniques on detainees in a field site “somewhere right now in Afghanistan. So yes it is a danger to come back.”¹⁶⁹