

# Detention at Guantánamo

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Profile: Albert Shimkus**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Afghanistan: The Gateway to Guantánamo

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

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

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

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

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

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

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

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

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

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

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

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

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

## Guantánamo as the Only Option

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

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

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

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

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

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

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

## Evolution of the Interrogation Techniques

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## The Battle Within the Pentagon Over Interrogation Techniques

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Guantánamo Today

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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