

- 1 *Guantánamo Remarks Cost Policy Chief His Job*, CNN (Feb. 2, 2007), available at <http://www.cnn.com/2007/US/02/02/gitmo.resignation> (“When corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms.”).
- 2 Task Force staff interview with Moazzam Begg, Omar Deghayes, Bisher al-Rawi (Apr. 17, 2012) [hereinafter Begg, Deghayes, al-Rawi Interview].
- 3 Neil A. Lewis, *U.S. Military Eroding Trust of Detainees, Lawyers Say*, N.Y. TIMES (Mar. 9, 2005), available at <http://www.nytimes.com/2005/03/08/world/americas/08iht-gitmo.html> (“Another lawyer, Marc Falkoff of New York, whose firm represents several Yemenis at the naval base in Cuba, said some of his clients had told him that a person who said he was a lawyer and had civilian clothes had conferred several times with some detainees. That person, Falkoff said his clients had told him, later appeared at the detention center in uniform, leading the inmates to distrust anyone claiming to be a lawyer and acting in their interest.”). See also Neil A. Lewis, *Detainee’s Lawyer Says Captors Foment Mistrust*, N.Y. TIMES (Dec. 7, 2005), available at <http://www.nytimes.com/2005/12/07/international/07hamdan.html> (“The Guantánamo authorities violated a court order by moving a prisoner from the general population there and placing him in close contact with a hard-core operative for Al Qaeda known for urging detainees to refuse to cooperate with their lawyers, according to papers filed with the United States District Court here by Lt. Cmdr. Charles D. Swift.”).
- 4 Lewis, *U.S. Military Eroding Trust*, *supra* note 3.
- 5 Begg, Deghayes, al-Rawi Interview, *supra* note 2.
- 6 Task Force staff interview with Clive Stafford Smith (Apr. 16, 2012); William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES (May 5, 2007), available at <http://www.nytimes.com/2007/05/05/us/05gitmo.html> (“‘Some people don’t have full trust in attorneys,’ Mr. Khussrof said, according to Mr. Remes’s notes. ‘They think you work for government.’”).
- 7 Begg, Deghayes, al-Rawi Interview, *supra* note 2.
- 8 Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES (Oct. 17, 2004), available at <http://www.nytimes.com/2004/10/17/politics/17gitmo.html> (“They were also occasionally given milkshakes and hamburgers from the McDonald’s on the base”).
- 9 Neil A. Lewis, *Report Discredits F.B.I. Claims of Abuse at Guantánamo Bay*, N.Y. TIMES (July 14, 2005), available at <http://www.nytimes.com/2005/07/14/politics/14gitmo.html>
- 10 Senate Armed Servs. Comm. (110th Cong.), *Inquiry into the Treatment of Detainees in U.S. Custody* 19 (Nov. 20, 2008) [hereinafter Levin Report], available at http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf. See also Jane Mayer, *Thoughts on the Levin Report*, NEW YORKER (Apr. 21, 2009), available at <http://www.newyorker.com/online/blogs/newsdesk/2009/04/levin-torture-interrogation-senate-report.html>
- 11 Levin Report, *supra* note 10, at 19.
- 12 See Michael Elliott, *Welcome to Camp X-Ray*, TIME (Jan. 20, 2002), available at <http://www.time.com/time/magazine/article/0,9171,195299,00.html>; Sgt. Jim Greenhill, *Outdated Images of Detention Center, Mission Frustrate Guantánamo Troopers*, AM. FORCES PRESS SERV. (Dec. 1, 2006), available at <http://www.defense.gov/news/newsarticle.aspx?id=2272>
- 13 Task Force staff interview with Col. (Ret.) Terry Carrico (Nov. 2, 2011) [hereinafter Carrico

Interview]. All the detainees had been transferred to Camp Delta by April 29, 2002.

14 Greg Miller, *Many Held at Guantánamo Not Likely Terrorists*, L.A. TIMES (Dec. 22, 2002), available at <http://articles.latimes.com/2002/dec/22/nation/na-gitmo22>

15 *Id.*

16 *Id.* See also Ted Conover, *In the Land of Guantánamo*, N.Y. TIMES (June 29, 2003), available at <http://www.nytimes.com/2003/06/29/magazine/29GUANTANAMO.html>

17 Mike Allen, *Lawmaker Tours Become Part of Guantánamo Life*, WASH. POST (Aug. 6, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/05/AR2005080501568.html>; Lewis, *supra* note 8; Josh White, *U.N. Inspectors Are Invited to Guantánamo Bay*, WASH. POST (Oct. 29, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102802043.html>

18 Vikram Dodd, *American Military Bans BBC Crew from Guantánamo Bay for Talking to Inmates*, GUARDIAN (UK) (June 21, 2003), available at <http://www.guardian.co.uk/media/2003/jun/21/cuba.usnews>; Ben Wedeman, *CNN Tours Gitmo Prison Camp*, CNN (Jul. 7, 2005), available at <http://edition.cnn.com/2005/US/07/06/gitmo.tour/index.html>

19 Conover, *supra* note 16.

20 U.S. Army Sgt. Sara Wood, *GITMO Photos*, DOD Website (Oct. 1, 2012), available at <http://www.defense.gov/home/features/gitmo/facilities.html>

21 Greenhill, *supra* note 12.

22 Kathleen T. Rhem, *Guantánamo Detainees Receiving “First-Rate” Medical Care*, AM. FORCES PRESS SERV. (Feb. 18, 2005), available at <http://www.defense.gov/news/newsarticle.aspx?id=25852>

23 Task Force staff interview with Albert Shimkus (July 26, 2012) [hereinafter Shimkus Interview].

24 *Id.*

25 *Id.*

26 The next most impressive element of the public relations tour was a talk visitors had with the camp's Muslim chaplain, Capt. James Yee, a Chinese-American graduate of West Point and a convert to Islam. Capt. Yee proudly explained how he played the Muslim call to prayer over the camp's loudspeaker system several times a day as required. He also told visitors how he insured that the food was halal, religiously appropriate for consumption by Muslims. He was later arrested on suspicion of espionage by base commanders and held in harsh conditions for several months. He eventually underwent a preliminary court-martial. He was acquitted of anything connected to espionage — it became evident that investigators had a hair-trigger on their suspicions and misfired completely. Some other Muslims in the military were also wrongly suspected of nefarious activities on behalf of Al Qaeda. In Capt. Yee's case, he was discovered in the course of the investigation to have had an extramarital affair at Guantánamo for which he was also charged. He was humiliated publicly when military prosecutors, finding their espionage case empty, enthusiastically presented details of Capt. Yee's relationship with a female Navy reservist from California, as well as his internet pornography habits. It led to the end of his military career. See Tim Golden, *Loyalties and Suspicions: The Muslim Servicemen; How Dubious Evidence Spurred Relentless Guantánamo Spy Hunt*, N.Y. TIMES (Dec. 19, 2004), available at <http://query.nytimes.com/gst/fullpage.html?res=9A04EEDC1230F93AA25751C1A9629C8B63>

27 Shimkus Interview, *supra* note 23.

- 28 See Faculty Profile, Albert J. Shimkus, U.S. Naval War College, <http://www.usnwc.edu/Academics/Faculty/Albert-Shimkus.aspx>
- 29 Shimkus Interview, *supra* note 23.
- 30 *Id.*
- 31 Begg, Deghayes, al-Rawi Interview, *supra* note 2.
- 32 Shimkus Interview, *supra* note 23.
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 Mark Denbeaux, *Drug Abuse, An Exploration of the Government's Use of Mefloquine at Guantánamo*, Seton Hall Univ. Sch. of Law, Ctr. for Pol'y & Res., Paper, No. 2010-33 (2011), available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/drug-abuse-exploration-government-use-mefloquine-gunatanamo.pdf>; Jason Leopold & Jeffrey Kaye, *Ex-Guantánamo Official Was Told Not to Discuss Policy Surrounding Antimalarial Drug Used on Detainees*, Truthout (Dec. 20, 2010), available at <http://truth-out.org/news/item/254:exGuantánamo-official-was-told-not-to-discuss-policy-surrounding-antimalarial-drug-used-on-detainees>; Carol Rosenberg, *U.S., Cuba Talk About Malaria*, MIAMI HERALD (Feb. 22, 2002), available at <http://www.cubanet.org/CNews/y02/feb02/22e3.htm>
- 37 Shimkus Interview, *supra* note 23.
- 38 Rosenberg, *supra* note 36.
- 39 Leo Shane III, *Experts: DOD Malaria Policy for Detainees is Malpractice*, STARS & STRIPES, Jan. 23, 2011, available at <http://www.stripes.com/experts-dod-malaria-drug-policy-for-detainees-is-malpractice-1.132623>
- 40 *Bush Delivers Ultimatum*, CNN (Sept. 20, 2001), available at http://articles.cnn.com/2001-09-20/world/ret.afghan.bush_1_senior-taliban-official-terrorist-ringleader-osama-bin-mullah-mohammed-omar
- 41 See David Firestone, *A Nation Challenged: The Reaction; Sunday of Muted Cheers and Renewed Fears*, N.Y. TIMES (Oct. 8, 2001), available at <http://www.nytimes.com/2001/10/08/us/a-nation-challenged-the-reaction-sunday-of-muted-cheers-and-renewed-fears.html>; Patrick Wintour, Kamal Ahmed, Ed Vulliamy & Ian Traynor, *It's Time for War, Bush and Blair Tell Taliban*, GUARDIAN (UK) (Oct. 7, 2001), available at <http://www.guardian.co.uk/world/2001/oct/07/politics.september11>
- 42 See ANGELO RASANAYAGAM, *AFGHANISTAN: A MODERN HISTORY* (2007); AMIN SAIKAL, A.G. RAVAN FARHADI & KIRILL NOURZHANOV, *MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL* (2006); United Nations, *Afghanistan & the United Nations*, available at <http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml>
- 43 *Celebrations, Confusion as Kandahar Falls*, CNN (Dec. 7, 2001), available at <http://archives.cnn.com/2001/WORLD/asiapcf/central/12/07/ret.kandahar.surrender>; *Taliban Surrender in Kandahar*, GUARDIAN (UK) (Dec. 7, 2011), available at <http://www.guardian.co.uk/world/2001/dec/07/afghanistan1>
- 44 *A Nation Challenged; Air Campaign So Far*, N.Y. TIMES (Oct. 13, 2001), available at <http://www.nytimes.com/2001/10/13/us/a-nation-challenged-air-campaign-so-far.html>; Dexter Filkins, *A Nation Challenged; The Prisoners; Taliban Arab, Like Many, Longs for Home but Faces a Doubtful Fate*, N.Y. TIMES (Dec. 2, 2001),

available at <http://www.nytimes.com/2001/12/02/world/nation-challenged-prisoners-taliban-arab-like-many-longs-for-home-but-faces.html>; Carlotta Gall, *A Nation Challenged: Mazar-i-Sharif; U.S. Bomb Wounds G.I.'s as Battle Rages at Fort*, N.Y. TIMES (Nov. 27, 2001), available at <http://www.nytimes.com/2001/11/27/world/a-nation-challenged-mazar-i-sharif-us-bomb-wounds-gi-s-as-battle-rages-at-fort.html>; Michael R. Gordon, *A Nation Challenged: Military; Tora Bora Attack Advances Slowly in Tough Fighting*, N.Y. TIMES (Dec. 16, 2001), available at <http://www.nytimes.com/2001/12/16/world/a-nation-challenged-military-tora-bora-attack-advances-slowly-in-tough-fighting.html>

45 Task Force staff interview with anonymous source.

46 Chief Warrant Officer 3 Sharon Curcio, *Generational Differences in Waging Jihad*, MIL. REV. 84 (2005) (“The recruiters used visual displays of persecuted Muslims, and routinely exposed recruits to films that featured suffering women and children in refugee camps in Chechnya or Palestine.”).

47 *Id.*

48 *Id.*

49 *Id.* at 85.

50 *Id.* at 85–86.

51 *Id.* at 86 (“But why did the older men not expect retaliation after the 9/11 attack? Because there had been no significant retaliation after the terrorist attacks on the Khobar Towers housing complex in Dhahran, Saudi Arabia, and the USS *Cole* in Port Aden, Yemen. It was reasonable to assume the United States would, once again, do little. Al-Qaeda also did not want to alert the young recruits that a larger, more dangerous game might have just begun.”).

52 *Id.* at 87 (“Arab recruits were told to exit Afghanistan as soon as possible because a price was on their heads. Many recruits sought cover in the Tora Bora Mountains but were caught in the bombing and suffered shrapnel wounds or lost limbs after stepping on landmines. . . . Quite a few hired Afghan guides to get them out of the mountains and spent many days on foot trying to get to the border. . . . Some recalled being rounded up and betrayed by Pakistanis who sold them to the Northern Alliance.”).

53 Neil A. Lewis, *Fate of Prisoners from Afghan War Remains Uncertain*, N.Y. TIMES, Apr. 24, 2003, available at <http://www.nytimes.com/2003/04/24/international/worldspecial/24GITM.ht>

54 *Id.*

55 ANDY WORTHINGTON, *THE GUANTÁNAMO FILES* 33–34 (2007); see also *The Guantánamo Docket—Tariq Mahmoud Ahmed al Sawah*, N.Y. TIMES, at <http://projects.nytimes.com/guantanamo/detainees/535-tariq-mahmoud-ahmed-al-sawah/documents/4> (last visited June 13, 2012) (“Massoud and Dostum were our enemies before. They are fighting Muslims. There are no rules in the United States to prevent it if you want to fight for religion. There are no rules to direct me not to defend people. . . . If Massoud and Dostum are American allies, they were not an alliance before September 11th, were they? I think they were not American allies.”).

56 Celestine Bohlen, *A Nation Challenged—An Overview: Dec. 6, 2001; Fall of Kandahar, Debating a Surrender and Firefighters’ Suspicions*, N.Y. TIMES (Dec. 7, 2001), available at <http://www.nytimes.com/2001/12/07/world/nation-challenged-overview-dec-6-2001-fall-kandahar-debating-surrender.html>; see also *THE GUANTÁNAMO FILES*, *supra* note 55.

57 Mil. Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57831 (Nov. 13, 2001), available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>

58 Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES (May 20, 2005), available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>; see also *The Guantánamo Docket*, N.Y. TIMES, available at <http://projects.nytimes.com/guantanamo>

59 Some of the detainees, in a case that has puzzled observers, included former prisoners of the Taliban. The Taliban had considered them spies, but the arrival of Western forces was no help to them, as they were not freed, but were then taken in as U.S. detainees, held in Kandahar, and later Guantánamo. They were Jamal al-Harith, Abdul Rahim Al Ginco, Airat Vakhitov, Saddiq Ahmad Turkistani, and Abdul Hakim Bukhary. Their journey from Taliban prisoners to U.S. detention in Afghanistan to Guantánamo was obviously one of the most ironic and incomprehensible. See THE GUANTÁNAMO FILES, *supra* note 55, at 114; Tim Golden, *Expecting U.S. Help, Sent to Guantánamo*, N.Y. TIMES (Oct. 15, 2006), available at <http://www.nytimes.com/2006/10/15/us/15gitmo.html>

60 Cullen Murphy, Todd S. Purdum, David Rose & Phillippe Sands, *Guantánamo: An Oral History*, VANITY FAIR (Jan. 11, 2012) (“Maybe they had been picked up on the battlefield, and maybe they were involved in low-level insurgency. That would’ve been the worst of it with a large portion of these characters. The majority of the ones that I saw—really, we just didn’t have anything on them.”), available at <http://www.vanityfair.com/politics/2012/01/guantanamo-bay-oral-history-201201>

61 CHRIS MACKEY AND GREG MILLER, THE INTERROGATORS 174 (2004) [hereinafter THE INTERROGATORS].

62 Mark Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall Univ. Sch. of Law Report (2006).

63 *Id.* at 12 (“The detainee participated in military operations against the United States and its coalition partners. 1. The detainee *fled*, along with others, when the United States forces bombed their camp. 2. The detainee was captured in Pakistan, along with other Uighur fighters.”).

64 *Id.* at 14.

65 THE GUANTÁNAMO FILES, *supra* note 55, at 34; *The Guantánamo Docket*, *supra* note 58.

66 THE INTERROGATORS, *supra* note 61, at 221.

67 *Id.* at 217.

68 Task Force staff interview with Richard Shiffirin (Mar. 9, 2012).

69 *Id.*

70 Eyewitness observation by Neil A. Lewis, Task Force staff Director.

71 Task Force staff interview with Pierre-Richard Prosper (Apr. 10, 2012).

72 *Final Report of the Independent Panel to Review DoD Detention Operations* 80 (Aug. 2004) (“Schlesinger Report”), available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>

73 Tony Perry, *Marine Officer Who Set Up Guantánamo Prison Expresses Dismay at What It Has Become*, L.A. TIMES (Sept. 25, 2009), available at <http://articles.latimes.com/2009/sep/25/world/fg-marine-gitmo25>

74 KAREN GREENBERG, THE LEAST WORST PLACE: GUANTÁNAMO’S FIRST 100 DAYS 55–59, 62–63 (2009).

75 *Id.* at 57.

- 76 Task force staff interview with William H. Taft IV (Sept. 27, 2011).
- 77 Carrico Interview, *supra* note 13.
- 78 Press Briefing, DOD Secretary Rumsfeld & Gen. Myers (Jan. 11, 2002), *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>
- 79 Carrico Interview, *supra* note 13.
- 80 *Id.*
- 81 Aram Roston, *Terry Carrico, Ex-Guantánamo Prison Commander, Says Facility Should Close*, DAILY BEAST (Jan. 6, 2012), *available at* <http://www.thedailybeast.com/articles/2012/01/06/terry-carrico-ex-guantanamo-prison-commander-says-facility-should-close.html>
- 82 *Id.*
- 83 Carrico Interview, *supra* note 13.
- 84 Gerry G. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, AM. FORCES PRESS SERV. (Jan. 27, 2002), *available at* <http://www.defense.gov/news/newsarticle.aspx?id=43817>
- 85 PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 51 (2008).
- 86 Levin Report, *supra* note 10, at 38-39, 43-47, 51-53.
- 87 *Guantánamo Bay 10-Year Anniversary: Timeline*, TELEGRAPH (UK) (Jan. 11, 2012), *available at* <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9006682/Guantanamo-Bay-10-year-anniversary-timeline.html>; Eli Clifton, *By the Numbers: 10 Years At Guantánamo Bay*, Think Progress (Jan. 11, 2012), *available at* <http://thinkprogress.org/security/2012/01/11/402586/ten-years-at-Guantánamo-bay-by-the-numbers>
- 88 *Levin Report, Supra note 10*, at 61–62, 65.
- 89 *Id.* at 62.
- 90 Julian Borger, *“Soft” Guantánamo Chief Ousted*, GUARDIAN (UK) (Oct. 16, 2002), *available at* <http://www.guardian.co.uk/world/2002/oct/16/usa.afghanistan>
- 91 Diane Beaver, Memorandum for Commander, JTF GTMO, *Legal Review of Aggressive Interrogation Techniques* (Oct. 11, 2002), *available at* <http://www.defense.gov/news/Jun2004/d20040622doc3.pdf>
- 92 KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 229–36 (2005).
- 93 SANDS, *supra* note 85, at 77.
- 94 Levin Report, *supra* note 10, at 66-70.
- 95 *Id.* at 70. Beaver has stated that she asked requested Dalton's assistance for her own review, but did not receive any. SANDS, *supra* note 85, at 77.
- 96 Levin Report, *supra* note 10, at 71.

- 97 GREENBERG & DRATEL, *supra* note 92, at 237.
- 98 Levin Report, *supra* note 10, at 96.
- 99 *Id.* at 60.
- 100 Letter from T.J. Harrington, FBI Dep. Ass't Dir., Counterterrorism Div., to Maj. Gen. Donald J. Ryder, Army Criminal Investigation Command, Re: Suspected Mistreatment of Detainees (July 14, 2004), available at http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87_001914%20to%20001916_DOJFBI001914.pdf
- 101 DOD, *Interrogation Log, Detainee 063* (23 Nov. 2002 to 11 Jan. 2003) [hereinafter Detainee 063 Interrogation Log], available at <http://www.time.com/time/2006/log/log.pdf>
- 102 *Id.* at 27.
- 103 Maj. Gen. Geoffrey Miller, *Assessment of DOD Counterterrorism Interrogation and Detention Operations in Iraq* (2003) ["Miller Report"], available at <http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%2020.pdf>
- 104 *Id.*
- 105 Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* 9, 18 (May 2004) ["Taguba Report"] at 20, available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>
- 106 Dexter Filkins, *General Says Less Coercion of Captives Yields Better Data*, N.Y. TIMES (Sept. 7, 2004), available at <http://www.nytimes.com/2004/09/07/international/middleeast/07detain.html>; Dexter Filkins, *The Struggle for Iraq: The Warden; General Will Trim Inmate Numbers at Iraq Prison*, N.Y. TIMES (May 5, 2004), available at <http://www.nytimes.com/2004/05/05/world/the-struggle-for-iraq-the-warden-general-will-trim-inmate-numbers-at-iraq-prison.html>
- 107 Lt. Gen. Randall Schmidt & Brig. Gen. John Furlow, *Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* 1, 20 (Apr. 1, 2005), available at <http://www.defense.gov/news/Jul2005/d20050714report.pdf>
- 108 *Id.*
- 109 Bob Woodward, *Guantánamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>
- 110 Task Force staff interview with Sherif El-Mashad (Aug. 13, 2012) ("As Muslims we don't like to take off our clothes in front of men or women. They make you do it knowing the sensitivity of the issue.").
- 111 Task Force staff interview with Sami al-Hajj (Oct. 6, 2011) [hereinafter al-Hajj Interview].
- 112 *Id.* ("Every 30 minutes, they come and say for you to move, move. They do this for 2 days, continuously.").
- 113 *Id.*
- 114 Task Force staff interview with Sean Baker (Nov. 30, 2011) [hereinafter Baker Interview].
- 115 Amended Complaint, Baker v. United States, No. 05-221 (E.D. Ky. May 31, 2005); Decl. of

Anthony Adolph, *Baker v. United States*, No. 05-221 (E.D. Ky. Aug. 16, 2005).

116 Baker Interview, *supra* note 114.

117 Task Force staff interview with Alberto Mora (Apr. 24, 2012) [hereinafter Mora Interview].

118 Bill Dedman, *Gitmo Interrogations Spark Battle Over Tactics*, MSNBC (Oct. 23, 2006) available at http://www.msnbc.msn.com/id/15361458/ns/world_news-terrorism/t/gitmo-interrogations-spark-battle-over-tactics

119 Detainee 063 Interrogation Log, *supra* note 101.

120 Mora Interview, *supra* note 117.

121 *Id.*

122 Memorandum from Alberto Mora (Navy Gen. Counsel) for Navy Inspector Gen., *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues 2-4* (July 7, 2004), available at http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf

123 Mora Interview, *supra* note 117.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 KURT EICHENWALD, *500 DAYS: SECRETS AND LIES IN THE TERROR WARS* 446 (2012).

132 Mora Interview, *supra* note 117.

133 *Id.*

134 *Id.*

135 *Id.*; *See also* EICHENWALD, *supra* note 131, at 453.

136 EICHENWALD, *supra* note 131, at 455.

137 Task Force staff interview with Lt. Gen. (Ret.) Jack L. Rives (Nov. 30, 2012) [hereinafter Rives Interview].

138 *Id.*

139 *Id.*

140 *Id.*

141 Philippe Sands, *The Green Light*, VANITY FAIR (May 2008) available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>

142 Rives Interview, *supra* note 137.

143 *Id.*

144 See Memoranda from JAGs (Feb.-March 2003), available at <http://www.torturingdemocracy.org/documents/20030205.pdf>

145 *Id.*

146 Mora Interview, *supra* note 117.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 DOD Working Group Report, *Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operation Considerations* (Apr. 4, 2003) available at <http://www.torturingdemocracy.org/documents/20030404.pdf>

152 *Id.*

153 Donald Rumsfeld, Memorandum for the Commander, U.S. Southern Command, *Counter-Resistance Techniques in the War on Terrorism*, (Apr. 16, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>

154 *Id.*

155 Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER (Feb. 27, 2006), available at http://www.newyorker.com/archive/2006/02/27/060227fa_fact

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158 542 U.S. 466 (2004)

159 Mark Denbeaux and Joshua Denbeaux, *No-Hearing Hearings*, Seton Hall School of Law Report (2006); see also *Boumediene v. Bush*, 553 U.S. 723, 783–85 (2008)

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- 171 *Id.* at 19–20 (“The panel of three officers also had the responsibility of dividing the detainees into separate categories: High Level Enemy Combatant (HLEC); Low Level Enemy Combatant (LLEC); and Threat only. Those who were to be released were categorized as No Longer Enemy Combatant (NLEC). As the UECRB worked its way through the [sic] hundred detainees in the BTIF, the files of all detainees assessed as LLECs were transferred to the DAB. The DAB, comprised of military intelligence analysts and military criminal investigators, assessed the detainee files for potential transfer to Afghan authorities for prosecution. To support the Rule of Law mission, the DAB would only recommend transfer of cases for prosecution if there was solid evidence. Those detainees not recommended for transfer remained interned until their next review in six months.”).
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178 Hum. Rts. First, *Detained and Denied in Afghanistan 2* (May 2011) [hereinafter *Detained and Denied*], available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf> (“Former detainees we interviewed repeatedly emphasized that they believed they were wrongly imprisoned based on false information provided to U.S. forces by personal, family or tribal enemies, a view that they took back to their villages after their eventual release. Afghan lawyers and human rights workers confirmed that this is a big problem in Afghanistan, as have recent news reports.”).

179 *Id.* at 3.

180 Bovarnick, *supra* note 153, at 35 (“During roughly the same period — 6 March to 18 June 2010 — a total of 581 DRBs were conducted. In the 404 cases where no witnesses appeared, the board recommended continued interment in 55% of the cases. In the 177 cases, which involved either live or telephonic witnesses, the continued interment rates were considerably lower: 43% and 48% respectively.”).

181 *Id.* (“In large part, that is because the detainees are not represented by legal counsel in these proceedings, known as Detainee Review Boards. The detainees’ ‘personal representatives’ are uniformed U.S. soldiers with no legal background or training in the culture or language of the detainees they represent. Moreover, with only 15 such representatives assigned to Bagram at the time of this report, each representative is responsible for the defense of more than 100 detainees.”).

182 *Id.* (“Moreover, while most forensic evidence, which is more likely to be reliable, is not classified, evidence provided by informants, which is far more difficult to verify, is classified. These informants are never tested. It is also impossible to know if the classified evidence includes statements elicited from the detainee or from witnesses by coercion, torture, or cruel, inhuman or degrading treatment, despite the military’s rule excluding tortured evidence. Such evidentiary rules can only be enforced if the evidence can be tested in a truly adversarial system.”); Hum. Rts. First, *Undue Process: An Examination of Detention and Trials of Bagram Detainees in April 2009* (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Undue-Process-Afghanistan-web.pdf>

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- 270 *Id.*
- 271 *Id.*
- 272 Task force staff interviews with Saad Rahim Abdelalratha (Sept. 1, 2012); Mohammed Abdlwarida (Aug. 25, 2012); Nuri Nejem Abdullah (Aug. 27, 2012); Tay Rahm Addularida (Aug. 27, 2012); Tamer Abdullah Abass al-Ameri (Aug. 28, 2012); Ali Omar Ibrahim al-Mohammed al-Amin (Aug. 25, 2012); Saddam Rahm (Aug. 28, 2012). There are troubling reports made by some Iraqis in interviews with Task Force staff that U.S. forces who came to their homes to make arrests also pilfered valuables. The accounts of Iraqi detainees as to what they claim was taken are specific and explicit, although there is no feasible way to properly evaluate what are only uncorroborated allegations. Of the more than two dozen Iraqis interviewed about their detention experiences, about a third reported that during the raids that led to their arrests, some soldiers took cash or gold, which Iraqis typically keep in their homes. One man said that at the time of his arrest, soldiers took cash, gold and a locked safe. He said he saw the safe later at the detention center to which he had been taken and that it had been broken open. He said that all the money and gold that had been in the safe was returned to him later but not the money and gold taken during the raid. Lt. Col. Todd Bresseale, a Defense Department spokesman said in response to a

request for comment that, "Allegations of this sort became a kind of cottage industry for a minority of those affected and are not only absolutely baseless but simply do not withstand meaningful, intellectual rigor." The Task Force emphasizes that it takes no position on the veracity of these uncorroborated allegations. Nonetheless, the Task Force thought it appropriate to note the existence of these reports for several reasons. They would be criminal violations of the Uniform Code of Military Justice and cannot be dismissed as implausible on their face. And, to whatever extent any of the accounts might be true, it would signify a lack of proper supervision and a failure of command discipline, which comports with documented and lamentable failures in the military command structure that the Task Force believes contributed to many of the verifiable incidents of physical abuse and torture that occurred.

273 Task force staff interview with Saddam Rahm (Aug. 28, 2012).

274 Task force staff interview with Tay Rahm Addularida (Aug. 27, 2012).

CHAPTER 4 ENDNOTES

- 1 MICHAEL R. GORDON & BERNARD E. TRAINOR, *THE GENERALS' WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF* (1995).
- 2 U.S. CONST. amend. V.
- 3 *Id.* amend. XIV.
- 4 *Id.* amend. VIII.
- 5 *Rochin v. Calif.*, 342 U.S. 165, 172 (1952). *See also* Michael John Garcia, *Interrogation of Detainees: Overview of the McCain Amendment*, CRS Report RS22312 (Jan. 24, 2006), available at <http://www.au.af.mil/au/awc/awcgate/crs/rs22312.pdf>
- 6 The Geneva Conventions were ratified by the United States in 1955. The four Conventions include: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted 1864, last revision in 1949) [hereinafter GCI]; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949, successor of the 1907 Hague Convention X) [hereinafter GCII]; Third Geneva Convention Relative to the Treatment of Prisoners of War (first adopted in 1929, last revision 1949) [hereinafter GCIII]; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (first adopted in 1949) [hereinafter GCIV]. The two Conventions applicable to detainees are the Third and Fourth Geneva Conventions.
- 7 The law of war is referred to as “international humanitarian law” (IHL) and the law of armed conflict (LOAC). Those terms are used interchangeably in this report.
- 8 *See ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties*, available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_reaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_reaties/$File/IHL_and_other_related_Treaties.pdf)
- 9 The Geneva Conventions were adopted on August 12, 1949, and ratified by the United States in February 1955.
- 10 Jennifer Elsea, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, CRS Report RL32567, 18 (Sept. 8, 2004), available at <http://www.fas.org/irp/crs/RL32567.pdf> (citing the ICRC Commentary to the Geneva Conventions III, at 140).
- 11 ICRC, *Commentary on the Geneva Conventions of 12 Aug. 1949, Vol IV: Geneva Convention Relative to the Protection of Civilian Persons in the Time of War* 51 (Jean de Pictet ed., 1960) [hereinafter *Commentary to GCIV*].
- 12 *See supra* note 6.
- 13 ICRC, *U.S. Ratification Statement and Reservations* (Feb. 8, 1955), available at <http://www.icrc.org/ihl.nsf/NORM/D6B53F5B5D14F35AC1256402003F9920>
- 14 Senate Foreign Rel. Comm. (84th Cong.) *Hearing on Geneva Conventions for the Protection of War Victims* 3–4 (1955) (statement of Robert Murphy). *See also* Josef Kunz, *The Chaotic Status of the Law of War and the Urgent Necessity for their Revision*, 45 AM. J. INT'L L. 37, 57–60 (1951) (stating that the U.S. “actively supported” the initiative of the International Red Cross in revising the Geneva Conventions following WWII).
- 15 At a speech commemorating the Geneva Conventions’ 60th anniversary at the Library of Congress, Susan Rice, U.S. ambassador to the U.N., noted: “We embrace the Geneva Conventions because it is the right thing to do. ... We embrace them because hard experiences have taught us that

we are safer and stronger when we do. The United States will support and advance international humanitarian law, both as a matter of national policy and as a basic precept for the entire international community.” Kimberly Rieken, *Honoring the Geneva Conventions* (Jan.–Feb. 2010), available at <http://www.loc.gov/loc/lcib/10012/conference.html>

16 See Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(2) (1997); Dep’t of the Army, Field Manual No. 27-10, The Law of Land Warfare, ch. 3, § I, ¶ 71 (1956) (adopting art. 5 verbatim).

17 James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, MIL. REV. 44, 50 (Jan.–Feb. 2005) (quoting U.S. Army Field Manual, 1976 ed.).

18 See, e.g., 18 U.S.C. § 2441 (1996).

19 GCI, GCII, GCIII, GCIV art. 3.

20 *Id.*

21 *Id.* art. 3(1).

22 *Id.* art. 3(1)(a)–(d).

23 *Id.* art. 3(1).

24 GCIII.

25 GCIV.

26 Commentary to GCIII art. 3 ¶ 1(1)(A).

27 *Id.*

28 GCIII art. 2.

29 *Id.* art. 3 (Note that no statuses apply here in the only provision addressing noninternational armed conflict).

30 GCIV.

31 GCI, GCII, GCIII, GCIV art. 3.

32 Customary international law (CIL), which emerges from a general and consistent practice of states followed out of a sense of legal obligation, is binding on all states irrespective of implementing domestic legislation or treaty ratification. CIL is considered binding international law within the United States. See *Corfu Channel Case* (U.K. v. Alb.) 1949 I.C.J. 4, 22 (Apr. 9, 1949); *Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that “International Law is part of our law.”).

33 *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006) (quoting the ICRC’s own interpretation of Common Art. 3); *Military and Paramilitary Activities* (Nicaragua v. U.S.), 1986 I.C.J. 14, 523 (June 27). The same conclusion was reached by the international criminal tribunals for the former Yugoslavia and for Rwanda. See International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995); International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 608 (Sept. 2, 1998).

34 GCI, GCII, GCIII, GCIV art. 3(1)(a)–(d) (emphasis added). Common Article 3 also prohibits hostage taking and requires care for the wounded and sick. These provisions are not quoted since they have lesser application to detainees.

35 *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion on Jurisdiction, ¶¶ 65-74 (August 10, 1995) (finding that Common Art. 3 applied to the conflict in the former Yugoslavia whether or not that conflict was characterized as international or internal in scope. And, stating that Common Art. 3 sets forth “the most fundamental requirements of the law of war”); Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, 113-14 (June 27) (stating that “[t]here is no doubt that, in the event of international armed conflicts, [the provisions of Article 3] constitute a minimum yardstick. ... Because the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether [the actions alleged to be in violation of Common Art. 3] must be looked at in the context of the rules which operate for one or for the other category of conflict.”).

36 *Hamdan*, 548 U.S. 557.

37 GCIII arts. 17, 87, 130 (designating torture as a “grave breach” of the Geneva Conventions); GCIV arts. 32, 147 (same as Article 130 from GCIII); U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85 [hereinafter CAT], art. 4, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>; 18 U.S.C. §§ 2340–2340A; 18 U.S.C. § 2441(d)(1)(A).

38 *See, e.g.*, CAT, *supra* note 37, art. 7; GCI, GCII, GCIII, GCIV art. 3(1)(c); 18 U.S.C. § 2441(d)(b).

39 In subsequent laws these concepts are generally stated together as a ban on “Cruel, Inhuman or Degrading treatment.” For purposes of brevity this report will shorthand this as “CID.” *See, e.g.*, 18 U.S.C. § 2441(d)(1)(B); CAT, *supra* note 37, art. 16.

40 CAT, *supra* note 37, arts. 5, 7.

41 GCI, GCII, GCIII, GCIV art. 3(1)(d).

42 ICRC, 1 CUSTOMARY INT’L HUMANITARIAN L. 355 (2005).

43 *Hamdan*, 548 U.S. at 632–33 (stating that the definition of “regularly constituted” is specific to the U.S., and in the U.S., courts-martial, not military commissions, are the “regularly constituted” courts. As such, the latter can be used only if there is a practical need for their deviation from that which is “regularly constituted.” In *Hamdan*, the Supreme Court in 2006 held that the government failed to show such a practical need.)

44 GCIII art. 3.

45 *Id.* art. 4.

46 *Id.* art. 5.

47 *Id.* arts. 2–78.

48 *Id.* art. 4.

49 *Id.* art. 4(A)(1).

50 *Id.* art. 4(A)(2)(a)–(d).

51 *Id.* art. 5.

52 *Id.*

53 *Id.* art. 13.

54 *Id.* art. 17.

55 *Id.*, e.g., arts. 21–32, 34–38, 82–107.

56 Civilians are defined, in Art. 50(1) Additional Protocol I of 1977, as individuals not belonging to one of the categories of persons referred to in Art. 4(A)(1),(2),(3), and (6) of GCIII as well as in Art. 43 of the Protocol. *See* Protocol I (1977): Protocol to the Geneva Conventions of Aug. 12, 1949, relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, available at <http://www.icrc.org/ihl.nsf/full/470>

57 *Commentary to GCIV*, *supra* note 11, art. 42 ¶ 1 (stating that “[t]he Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions,” and that such measures are “exceptional” in character).

58 GCIV art. 5.

59 *Id.*

60 *Id.*

61 *Id.* art. 78; see also Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. OF RED CROSS 375, 381 (2005), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf

62 GCIV art. 78.

63 *Id.*

64 *Id.* art. 147.

65 *Id.* art. 132.

66 *Id.* art. 27.

67 *Id.* art. 43.

68 CAT, *supra* note 37. The Convention was adopted by the U.N. General Assembly on Dec. 10, 1984, and took force on June 26, 1987. DOS, *Initial Report of the United States of America to the U.N. Committee Against Torture* (Oct. 15, 1999), available at <http://www.state.gov/documents/organization/100296.pdf> [hereinafter *U.S. Initial Report*]). CAT was ratified by the U.S. Senate on Oct. 20, 1994, and took effect as U.S. law on Nov. 20, 1994. *Id.* The U.S. Senate ratified CAT subject to a list of reservations, understandings, and declarations that limited the Convention.

69 The codified prohibition against torture goes back at least to the American Civil War, when it was absolutely banned in the 1863 Lieber Code. See Gen. Orders No. 100, § I, art. 16 (Apr. 24, 1863), reprinted in RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 48 (1983).

70 CAT, *supra* note 37, art. 16.

71 *Id.* arts. 17–22. To date, the United States has presented two periodic reports to the Committee Against Torture.

72 *Id.* art. 2.

73 *Id.* arts. 3, 15.

74 *Id.* arts. 4–14.

75 *U.S. Initial Report*, *supra* note 68.

76 *Id.* DOS observed that the U.S. took note of torture elsewhere, stating that “[t]he U.S. government pursues allegations of torture by other governments as an integral part of its overall human rights policy.” *Id.*

77 Ronald Reagan, Message to Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment (May 20, 1988), *available at* <http://www.presidency.ucsb.edu/ws/?pid=35858>

78 *Id.*

79 According to the Vienna Convention on the Law of Treaties, which governs the interpretation and binding force of treaties, a reservation is “a unilateral statement ... whereby [a State] purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties, art. 1(d), May 23, 1969, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. By contrast, understandings are statements interpreting the treaty language, and declarations are statements of purpose or position regarding the subject matter of the treaty. While reservations modify a state’s obligations under a treaty, understandings and declarations do not. *See also* U.S. Senate, *Treaties*, *available at* <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>

80 The text of the provision defining torture is:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

CAT, *supra* note 37, art. 1(1).

81 There were further understandings and declarations made with regard to Art. 1, but here we address only those that pertain to detainee treatment.

82 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *available at* <http://www1.umn.edu/humanrts/usdocs/tortres.html> [hereinafter U.S. Reservations].

83 Senate Foreign Rel. Comm., *Report on Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. No. 101-30, at 9 (1990).

84 U.S. Reservations, *supra* note 82.

85 *Id.*

86 CAT, *supra* note 37, art. 16(1).

87 U.S. Reservations, *supra* note 82.

88 *U.S. Initial Report*, *supra* note 68.

89 CAT, *supra* note 37, art. 16.

90 CAT, *General Comment No. 2*, (Jan. 24, 2008) available at <http://www.unhcr.org/refworld/publisher,CAT,GENERAL,,47ac78ce2,0.html>. Although General Comments by U.N. treaty bodies are not legally binding, they provide authoritative guidance regarding the object and purpose of the treaty.

91 CAT, *supra* note 37, art. 2(1). Here as in other instances, U.S. law involved the interplay of international and domestic law. The Senate consented to ratification of CAT after a domestic torture statute (18 U.S.C. §§ 2340-2340A) had been adopted, as required to fulfill this requirement to enact domestic legislation.

92 *Id.* art. 2(4).

93 *Id.* arts. 2(2), 2(3).

94 U.S. Reservations, *supra* note 82.

95 CAT, *supra* note 37, art. 10.

96 *Id.*

97 *Id.* art. 12.

98 *Id.* art. 16(2).

99 CAT, *supra* note 37, art. 15 (emphasis added).

100 *Id.*

101 18 U.S.C. § 2340–2340A.

102 *Id.*

103 *Id.*

104 Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Report RL32438 (Jan. 26, 2009), available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf>

105 18 U.S.C. § 2340A(b).

106 CAT, *supra* note 37, art. 7.

107 18 U.S.C. §§ 2340–2340A.

108 *Id.* § 2441.

109 *Id.*

110 *Id.*

111 *Id.* Under the Conventions, “grave breaches” in international conflicts are willful killing, torture or inhuman treatment, biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of a hostile power, or willfully depriving a prisoner of war of the rights of fair and regular trial. GCIII art. 129.

112 *Id.*; Michael John Garcia, *The War Crimes Act: Current Issues* 1, CRS Report RL33662 (Jan. 22, 2009), available at <http://www.fas.org/sgp/crs/intel/RL33662.pdf>

113 Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 5, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

114 *Id.* (Art. 3 establishes that “[e]veryone has the right to life, liberty and the security of person.” Art. 9 holds that “no one shall be subjected to arbitrary arrest, detention or exile.” Art. 10 establishes the right to “a fair and public hearing by an independent and impartial tribunal ... to any criminal charges against him,” and Art. 11(1) confirms the “right to be presumed innocent until proven guilty according to law in a public trial in which he has had all the guarantees for his defence.”)

115 UDHR, *supra* note 113, G.A. Res. 217A, at 71. Torture and CID are banned under Art. 7 of the International Covenant on Civil and Political Rights, and arbitrary detention, under Art. 9. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

116 *See* International Covenant on Civil and Political Rights, *Declarations and Reservations* (Apr. 26, 2011), available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

117 *See* Senate Foreign Rel. Comm., *International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 23, at 1(1992).

118 David P. Stewart, *The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1187–88 (1993). The ICCPR is similar in some respects to the U.S. Bill of Rights, as it recognizes freedom of thought, conscience, and religion (Art. 18(1)); freedom of opinion and expression (Art. 19(1)–(2)); freedom of association (Art. 22); the right of peaceful assembly (Art. 21); the right to vote (Art. 25(b)); equal protection of the law (Art. 14(1)); the right to liberty (Art. 9(1)); the right to a fair trial, including the presumption of innocence (Art. 14(1)–(2)).

119 Proclamation No. 7463, *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 66 Fed. Reg. 48,199 (Sept. 18, 2001), available at <http://www.torturingdemocracy.org/documents/20010914.pdf>

120 Authorization for Use of Military Force Against Terrorists, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001).

121 *Id.*

122 PETER BERGEN, MANHUNT 25 (2012).

123 *Id.*

124 *Id.*

125 *Id.*

- 126 See 28 C.F.R. § 0.25; see also *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004) [hereinafter *OLC Guide*], available at http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf
- 127 *OLC Guide*, *supra* note 126
- 128 FY 2013 Budget Request for the Office of Legal Counsel (OLC), available at <http://www.justice.gov/jmd/2013summary/pdf/fy13-olc-bud-summary.pdf>
- 129 *Id.*
- 130 Senate Judiciary Comm. (107th Cong.), *Hearing on the Nomination of Jay S. Bybee to be Assistant Attorney General* (Oct. 4, 2001), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg80915/html/CHRG-107shrg80915.htm>
- 131 147 Cong. Rec. S10905 (Oct. 23, 2001) (Confirmation of Jay S. Bybee of Nevada to be Assistant Attorney General), available at <http://www.gpo.gov/fdsys/pkg/CREC-2001-10-23/pdf/CREC-2001-10-23-pt1-PgS10905-5.pdf>
- 132 JOHN YOO, *WAR BY OTHER MEANS* 20 (2006); see also House Judiciary Comm., Testimony of Judge Jay S. Bybee 18 (May 26, 2010) [hereinafter Bybee Testimony], available at <http://judiciary.house.gov/hearings/pdf/BTranscript.pdf>
- 133 See, e.g., John Yoo, *U.N. Wars U.S. Powers*, 1 CHI. J. INT'L L. 355 (Fall 2000); John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (Fall 1999); John Yoo, *Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (Dec. 1999); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (Mar. 1996).
- 134 Yoo, *U.N. Wars*, *supra* note 133, at 364.
- 135 JANE MAYER, *THE DARK SIDE* 66 (2008).
- 136 DOJ Office of Prof'l Resp. Report, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 39 (July 29, 2009) [hereinafter OPR Report], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.
- 137 Jon Ward, *Cheney Defends War on Terror's Morality*, WASH. TIMES (Dec. 10, 2008), available at <http://www.washingtontimes.com/news/2008/dec/18/cheney-defends-morality-of-war-on-terror/print>
- 138 Transcript of Interview with Vice President Dick Cheney, ABC's This Week at 9 (Feb. 14, 2010), available at <http://abcnews.go.com/ThisWeek/week-transcript-vice-president-dick-cheney/story?id=9818034&page=9>
- 139 Robert Parry, *Bush/Cheney Pulled Torture Strings*, Consortium for Indep. Journalism (Mar. 4, 2010), available at <http://consortiumnews.com/2010/030410.html>
- 140 OPR Report, *supra* note 136, at 51.
- 141 House Judiciary Comm., Subcomm. on Const., Civ. Rts., & Civ. Liberties (110th Cong.), Testimony of David Addington 38, 42 (June 26, 2008) [hereinafter Addington Testimony], available at <http://judiciary.house.gov/hearings/printers/110th/43152.PDF>
- 142 Memorandum from John C. Yoo (Deputy Ass't Att'y Gen., OLC) to David Kris (Assoc. Deputy

Att’y Gen., DOJ), *Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the “Purpose” Standard for Searches* (Sept. 25, 2001), available at <http://documents.nytimes.com/bush-administration-terrorism-memos#p=1>

143 *Id.* at 12.

144 Memorandum from John C. Yoo (Deputy Ass’t Att’y Gen., OLC) & Robert J. Delahunty (Special Counsel) to Alberto R. Gonzales (Counsel to the President) & William J. Haynes II (Gen. Counsel, DOD), *Authority for Use of Military Force to Combat Terrorist Activities* (Oct. 23, 2001) [hereinafter Oct. 2001 Military Authority Memo], available at <http://documents.nytimes.com/bush-administration-terrorism-memos#p=14>

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* In citing a number of Supreme Court decisions for the proposition that First Amendment liberties could be curtailed (including *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931), which had recognized the government’s ability to resist divulging information on the movement of troops) the memo, at page 24, posited “The current campaign against terrorism may require even broader exercises of federal power domestically.”

149 Memorandum from John C. Yoo (Deputy Ass’t Att’y Gen., OLC) to the Deputy Counsel to the President, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>

150 *Id.*

151 *Id.*(emphasis added).

152 *Id.*

153 *Id.*

154 *Id.*

155 Memorandum from John C. Yoo (Deputy Ass’t Att’y Gen., OLC) & Robert J. Delahunty (Special Counsel) to John Bellinger III (Senior Assoc. Counsel to the President and Legal Adviser to NSC), *Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001), available at <http://documents.nytimes.com/bush-administration-terrorism-memos#p=51>

156 *Id.*

157 James R. Schlesinger, *Final Report of the Independent Panel to Review DOD Detention Operations* (Aug. 2004) [“Schlesinger Report”] 80, available at <http://www.defense.gov/news/aug2004/d20040824finalreport.pdf>

158 Memorandum from Patrick F. Philbin (Deputy Ass’t Att’y Gen., OLC) to the Counsel for the President, *Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 8.

163 Mil. Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001), available at <http://www.torturingdemocracy.org/documents/20011113.pdf>

164 ACLU, *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance* 3 [hereinafter ACLU Index], available at http://www.aclu.org/files/assets/olcmemos_chart.pdf

165 Memorandum from Patrick F. Philbin (Deputy Ass't Att'y Gen., OLC) & John C. Yoo (Deputy Ass't Att'y Gen., OLC) to William J. Haynes II (Gen. Counsel, DOD), *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba* (Dec. 28, 2001), available at <http://www.torturingdemocracy.org/documents/20011228.pdf>

166 *Id.*

167 *Id.*

168 *But see* *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir.), cert. denied, 132 S. Ct. 2741 (2012). Critics of the Supreme Court argue the Supreme Court has failed to back up its decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and has allowed the U.S. Court of Appeals for the D.C. Circuit to effectively void *Boumediene*. See Libby Lewis, *Lawyer for Gitmo Detainees: "Less Hope Now Than Ever"* CNN (June 24, 2012), available at <http://www.cnn.com/2012/06/24/justice/guantanamo-lawyer-supreme-court>

169 ACLU Index, *supra* note 164.

170 *Id.*

171 *Id.*

172 The first time at least that is publicly known.

173 KAREN GREENBERG & JOSHUA DRATEL, *THE TORTURE PAPERS* 38 (2005) [hereinafter *TORTURE PAPERS*].

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CHAPTER 5 ENDNOTES

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- 58 *CIA Guidelines on Conditions of Confinement*, *supra* note 57, at 2.
- 59 *CIA Guidelines on Interrogations*, *supra* note 57, at 1–3.
- 60 *Id.*
- 61 *Id.* at 2.
- 62 CIA Off. of Med. Servs., *Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention* (Dec. 2004) [hereinafter OMS Guidelines Dec. 2004], available at http://dspace.wrlc.org/doc/bitstream/2041/72435/02793_041200display.pdf; CIA Off. of Med. Servs., *Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention* (May 17, 2004) [hereinafter OMS Guidelines May 2004], available at <http://www.aclu.org/torturefoia/released/103009/cia-olc/2.pdf>; CIA Off. of Med. Servs., *Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention* (Sept. 4, 2003) [hereinafter OMS Guidelines Sept. 2003], available at http://media.washingtonpost.com/wp-srv/nation/documents/cia_oig_report.pdf (Appendix F)
- 63 OMS Guidelines Dec. 2004, *supra* note 62, at 8.
- 64 OMS Guidelines Sept. 2003, *supra* note 62, at 1.
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- 68 OMS Guidelines Dec. 2004, *supra* note 62, at 12–13.
- 69 OMS Guidelines Sept. 2003, *supra* note 62, at 5–6.
- 70 *Id.* at 7.
- 71 OMS Guidelines Dec. 2004, *supra* note 62, at 14.
- 72 Memorandum from Steven G. Bradbury (Acting Ass’t Att’y Gen., OLC) to John A. Rizzo (Senior Deputy Gen. Counsel, CIA), *Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used*

in the Interrogation of a High Value Al Qaeda Detainee (May 10, 2005) [hereinafter Bradbury May 10 Memo], available at http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf

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77 Bradbury May 30 Memo, *supra* note 75, at 13.

78 *Id.*

79 OMS Guidelines Dec. 2004, *supra* note 62, at 17–18.

80 *Id.* at 19.

81 Bradbury May 10 Memo, *supra* note 72, at 14–15.

82 *Id.* at 7.

83 *Id.* at n. 31.

84 *Id.* at 47.

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86 Bradbury May 30 Memo, *supra* note 75.

87 In the case of waterboarding, they were largely moot except insofar as they accurately described past practices, as Khalid Sheikh Mohammed was reportedly the last detainee subjected to that technique.

88 OPR Report, *supra* note 45, at 243.

89 ICRC HVD REPORT, *supra* note 53, at 22.

90 *Id.* at 11, 22.

91 *Id.* at 10.

92 *Id.* at 11–12, 15, 31–33.

93 *Id.* at 21–23, 33. See also Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, N.Y. TIMES (July 7, 2006), available at <http://www.nytimes.com/2006/07/07/world/africa/07algeria.html>

- 94 ICRC HVD REPORT, *supra* note 53, at 13, 28–30.
- 95 *Id.* at 23.
- 96 *Id.* at 21.
- 97 *Id.* at 14–17.
- 98 Most of the former CIA detainees declined to attend their CSRTs.
- 99 Transcript of Combatant Status Review Tribunal Hearing for Abd al-Rahim al-Nashiri (2007), *available at* http://www.aclu.org/pdfs/safefree/csrt_alnashiri.pdf
- 100 Transcript of Combatant Status Review Tribunal Hearing for Majid Khan (2007), *available at* http://www.aclu.org/pdfs/safefree/csrt_majidkhan.pdf
- 101 A partial exception to this is Ahmed Ghailani, who was tried and convicted in federal court for his role in the 1998 attacks on U.S. embassies in Kenya and Tanzania. A psychologist hired by the defense asserted that Ghailani had suffered from PTSD as a result of his treatment in CIA custody, but his symptoms had “partially remitted.” A psychiatrist appointed by the court described Ghailani as becoming tearful and unable to speak about certain incidents in captivity (the details of which were redacted) and had “some anxiety-related symptoms that could be consistent with Post Traumatic Stress Disorder,” but concluded that overall, “I do not feel that Mr. Ghailani meets the criteria for a current diagnosis” of PTSD. The court accepted the psychiatrist’s conclusion. *See Order, United States v. Ghailani*, Crim. No. 98-1023 (S.D.N.Y. July 2, 2010), *available at* <http://www.nylj.com/nylawyer/adgifs/decisions/070210kaplan.pdf>; Forensic Psychiatric Evaluation by Gregory B. Saathoff, M.D. (redacted version), *United States v. Ghailani*, Crim. No. 98-1023 (S.D.N.Y. July 7, 2010).
- 102 James Mitchell and Bruce Jessen are known to have formed a company called Mitchell, Jessen and Associates that contracted with the CIA and had 120 employees in 2007. Their contracts were not fully terminated until 2009. It is unclear precisely what role their employees had in the interrogation program, however. Eban, *supra* note 9.
- 103 The studies on the medical and psychological impacts of these techniques is summarized in PHYSICIANS FOR HUM. RTS. & HUM. RTS. FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY (2007), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/07801-ctn-leave-no-marks.pdf>; K. Alexa Koenig, Eric Stover & Laurel E. Fletcher, *The Cumulative Effect: A Medico-Legal Approach to United States Torture Law and Policy*, 6 ESSEX H.R. REV. 145 (2009), *available at* <http://www.law.berkeley.edu/HRCweb/pdfs/KoenigStoverFletcher.pdf>
- 104 Albert D. Biderman, *Communist Attempts to Elicit False Confessions from Air Force Prisoners of War*, 33 BULL. N.Y. ACAD. MED. 616, 620 (1957), *available at* http://graphics8.nytimes.com/packages/pdf/national/20080702_1957.pdf
- 105 *Id.*
- 106 HAROLD WOLFF & LAWRENCE HINKLE, COMMUNIST CONTROL TECHNIQUES 26 (1956), *available at* <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/19560400.pdf>
- 107 *Id.* at 36.
- 108 *Id.* at 37.
- 109 Levin Report, *supra* note 9, at 38–39. Major Leso’s name is redacted from the Levin report but he has been identified as the psychologist on the initial JTF-170 BSCT team. Sheri Fink, *Tortured*

Profession: Psychologists Warned of Abusive Interrogations, Then Helped Craft Them, PROPUBLICA (May 5, 2009), available at <http://www.propublica.org/article/tortured-profession-psychologists-warned-of-abusive-interrogations-505>

110 Fink, *supra* note 109.

111 PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 125 (2008).

112 Task Force staff interview with Dr. Michael Gelles (Mar. 15, 2012) [hereinafter Gelles Interview]; see also SANDS, *supra* note 111.

113 Gelles Interview, *supra* note 112; SANDS, *supra* note 111.

114 Gelles Interview, *supra* note 112.

115 Levin Report, *supra* note 9, at 39.

116 Memorandum from Brig. Gen. R.A. Huck to U.S. Southern Command (Aug. 6, 2002), available at <http://www1.umn.edu/humanrts/OathBetrayed/Huck%208-2-02.pdf>

117 Gelles Interview, *supra* note 112.

118 DOD Memorandum, *BSCIT Standard Operating Procedures* (Nov. 11, 2002), available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/bsct_sop_2002.pdf

119 Levin Report, *supra* note 9, at 43–48.

120 *Id.* at 47.

121 Fink, *supra* note 109.

122 Levin Report, *supra* note 9, at 38–39, 43–47, 51–53.

123 *Id.* at 51–52.

124 *Id.* at 52.

125 *Id.* at 50.

126 BLOCHE, *supra* note 8, at 154.

127 Levin Report, *supra* note 9, at 215.

128 *Id.* at 60.

129 Letter from T.J. Harrington (Deputy Ass't Dir., Counterterrorism, FBI) to Maj. Gen. Donald J. Ryder (Army Criminal Investigation Command), *Suspected Mistreatment of Detainees* (July 14, 2004), available at http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87_001914%20to%20001916_DOJFBI001914.pdf

130 DOD Interrogation Log, Detainee 063 (Nov. 23, 2002 to Jan. 11, 2003), available at <http://www.time.com/time/2006/log/log.pdf>

- 131 *Id.* at 27.
- 132 *Id.* at 35.
- 133 *Id.* at 34, 37, 41.
- 134 *Id.* at 6, 9–11, 14, 18, 22, 24–25, 27–28, 30, 33, 35, 41, 45, 47, 58
- 135 *Id.* at 3, 6, 8, 9, 24, 29–31, 33, 37, 41, 46, 47, 53–55, 57, 64–65, 69, 76, 83.
- 136 *Id.* at 29, 31.
- 137 *Id.* at 1, 12, 20, 31, 59.
- 138 Sworn Statement by [Redacted] (Jan. 11, 2005), *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/Exhibit_63_to_AR15_6GTMO_Investigation.pdf
- 139 *Id.*
- 140 *Id.*
- 141 Memorandum from Alberto Mora (Navy Gen. Counsel) for Navy Inspector Gen., *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (July 7, 2004), *available at* http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf
- 142 LARRY C. JAMES, *FIXING HELL* 28–29 (2008).
- 143 *Id.* at 30.
- 144 *Id.* at 57.
- 145 This phrasing seems to leave open the policy that abusive techniques might be approved for detainees not assessed to be too ill or fragile to bear them.
- 146 JAMES, *supra* note 142, at 59, 181.
- 147 Gelles Interview, *supra* note 112.
- 148 Levin Report, *supra* note 9, 137–38.
- 149 Lt. Gen. Randall Schmidt & Brig. Gen. John Furlow, *Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* 24–25 (Apr. 1, 2005), *available at* <http://www.defense.gov/news/Jul2005/d20050714report.pdf> [“Schmidt-Furlow Report”]
- 150 Levin Report, *supra* note 9, 140–41.
- 151 *Id.* at 140–41.
- 152 *Id.* at 141; Jess Bravin, *The Conscience of the Colonel*, WALL STREET J. (Mar. 31, 2007).
- 153 David J.R. Frakt, *Mohammad Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367, 1402 (2011).
- 154 *E.g.*, Justine Sharrock, *First, Do Harm*, MOTHER JONES (July–Aug. 2009), *available at* <http://www.motherjones.com/politics/2009/07/first-do-harm>

- 155 DOD Inspector Gen., *Investigation of Allegations of the Use of Mind-Altering Drugs to Facilitate Interrogations of Detainees* (Sept. 23, 2009).
- 156 Summary, June 04 ICRC Medical Visit to Guantánamo (June 2004) [on file with The Constitution Project].
- 157 *Id.*
- 158 Task Force staff interview with Dr. Steven Sharfstein (Mar. 15, 2012) [hereinafter Sharfstein Interview].
- 159 JAMES, *supra* note 142, at 70. *See also id.* at 242 (asserting that “there were no psychologists at Abu Ghraib during the abuses.”).
- 160 Maj. Gen. Geoffrey Miller, Assessment of DOD Counterterrorism Interrogation and Detention Operations in Iraq 5 (2003) [“Miller Report”], available at <http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%2020.pdf>
- 161 BLOCHE, *supra* note 8, at 119–22. *See also* JIDC organizational chart (Jan. 23, 2004) (available at <http://detainee-taskforce.org>).
- 162 BLOCHE, *supra* note 8, at 120.
- 163 Testimony of Col. Thomas Pappas to Maj. Gen. Antonio Taguba (Feb. 11, 2004), available at <http://www.aclu.org/torturefoia/released/a46.pdf>
- 164 Terrence Russell, *Trip Report*, at 2–7 (Sept. 1–24, 2003), available at <https://www.documentcloud.org/documents/404703-jpra-10-11.html>
- 165 U.S. Army Criminal Investigative Command, *Memorandum re: CID Report of Investigation-Final Referred-0117-04-CID259-80188-5C1Q2/5Y2E* (May 31, 2004), available at http://www.aclu.org/torturefoia/released/030705/9117_9134.pdf
- 166 Albert T. Church III, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* 355 (Mar. 7, 2005), available at http://www.aclu.org/files/pdfs/safefree/church_353365_20080430.pdf. This may have been a matter of lax administration more than an attempt to allow interrogators to exploit medical files. With one exception, the clinicians interviewed for the Church Report denied interrogators ever making use of medical information or attempting to influence treatment.
- 167 *Id.* at 354.
- 168 U.S. Army Surgeon Gen., *Assessment of Detainee Medical Operations for OEF, GTMO, and OIF 1-5, 17-1* (Apr. 13, 2005), available at <http://www1.umn.edu/humanrts/OathBetrayed/Army%20Surgeon%20General%20Report.pdf> (hereinafter Surgeon Gen. Report).
- 169 *Id.* at 1–5.
- 170 *Id.* at 14-1, 14-2.
- 171 *Id.* at 14-1.
- 172 *Id.* at 14-2.
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188 *Id.* ¶ 15.

189 Supp. Declaration of Stephen G. Hooker, ¶ 5, *el-Adahi v. Bush*, Civ. No. 05-280 (D.D.C. Mar. 13, 2006) [hereinafter Mar. 13, 2006 Hooker Declaration].

190 *Id.* ¶ 5.

191 *Id.* ¶ 8.

192 *Id.* ¶ 8.

193 <http://www.restraintchair.com>

194 Report by Dr. Emily Keram at 10, *Zuhair v. Obama*, Civ. No. 08-864 (D.D.C. Aug. 24, 2009)

[hereinafter Keram Evaluation of Zuhair].

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196 Decl. of Maj. Gen. Jay W. Hood ¶ 12, *el-Adahi v. Bush*, Civ. No. 05-280 (D.D.C. Mar. 13, 2006).

197 Keram Evaluation of Zuhair, *supra* note 194, at 3, 5, 12; Declaration of Dr. Emily Keram ¶¶ 8, 10, 14–16, *Al-Oshan v. Obama*, Civ. No. 05-520, (D.D.C. Oct. 13, 2009 [hereinafter Keram Evaluation of Shalabi]).

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- 26 *See* FOIA Letter, *supra* note 6.
- 27 *See* Defense Intelligence Agency, *Defense Analysis Report—Terrorism*, *supra* note 15.
- 28 *See* Director of National Intelligence, *Summary of the Reengagement of Detainees*, *supra* note 20.
- 29 *See* Defense Intelligence Agency, *Transnational: Guantánamo Bay Detainees*, *supra* note 13, at 2.
- 30 *Id.*
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- 36 *See* Defense Intelligence Agency, *Defense Analysis Report — Terrorism*, *supra* note 16, at 2.
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- 38 *See* *Leaving Guantánamo*, *supra* note 1.
- 39 *Id.* at 7–9.
- 40 *Id.* at 61 (“It is possible that the precise deadline for the apparent impending closure of the facility and a mandate that transfers or releases were to be prioritized over other options, could have colored EOTF disposition considerations.”)
- 41 *Id.* at 67 (“The majority is well aware that most of the relevant material is classified and politically sensitive.”)
- 42 *Id.*
- 43 *Id.* at 72.
- 44 *Id.* at 72–73 (“In addition, only 66 persons have been transferred from GTMO by the current Administration, with only 2 confirmed as re-engagers, a figure of about 3.3%.”).
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- 48 *Revisionist Recidivism*, *supra* note 46, at 4–5.
- 49 *Id.* at 5 (while not reported as either killed or captured).
- 50 *Id.* at 6 (the use of names rather the more accurate Interment Serial Number (ISN) used to identify the individuals re-engaged in terrorism is one of the reasons for such inaccuracies and led to Professor Denbeaux raising the question of why ISN numbers are not used). *See also* *The Meaning of “Battlefield,” supra* note 3, at 8.
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52 See Director of National Intelligence, *Summary of the Reengagement of Detainees*, *supra* note 20.

53 *The Meaning of “Battlefield,” supra* note 3, at 9–10 (presumably the claim by Professor Denbeaux of no actual military conduct on behalf of these individuals is based on based available public information and may be contradicted by classified intelligence). See also Denbeaux, *National Security Deserves Better*, *supra* note 51 (highlights the 2007 DOD press release that identified five Uighurs as examples of recidivists; while these individuals had been transferred to Albania and held there at a refugee camp with not incident, one of the Uighur men wrote an opinion piece for the *New York Times* on habeas corpus in the United States).

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57 See generally *Boumediene v. Bush*, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting) (“The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. ... In the long term, then, the Court’s decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantánamo Bay have returned to the battlefield.”).

58 Director of National Intelligence, *Summary of the Reengagement of Detainees*, *supra* note 20.

59 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (“Material support meant to ‘promot[e] peaceable, lawful conduct,’ Brief for Plaintiffs 51, can further terrorism by foreign groups in multiple ways. ‘Material support’ is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks.”).

60 When there are references to multiple DIA reports there is seldom if ever additional information since last reported. The multiple reports are a summarization and restatement of previously reported cases of reengagement.

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CHAPTER 10 ENDNOTES

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