Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees

Policy Isssue Resources

Download the full report

Descargar resumen y recomendaciones en espaol

Download the summary and recommendations in Arabic

Tlcharger le rsum et les recommandations en franais

Download the full report

Descargar resumen y recomendaciones en espaol

Download the summary and recommendations in Arabic

Tlcharger le rsum et les recommandations en franais

The Bush Administration and Mistreatment of Detainees

George W. Bush 2004 AP Images

Should former US President George W. Bush be investigated for authorizing waterboarding and other abuses against detainees that the United States and scores of other countries have long recognized as torture? Should high-ranking US officials who authorized enforced disappearances of detainees and the transfer of others to countries where they were likely to be tortured be held accountable for their actions?

In 2005, Human Rights Watchs *Getting Away with Torture*? presented substantial evidence warranting criminal investigations of then-Defense Secretary Donald Rumsfeld and Central Intelligence Agency (CIA) Director George Tenet, as well as Lt. Gen. Ricardo Sanchez, formerly the top US commander in Iraq, and Gen. Geoffrey Miller, former commander of the US military detention facility at Guantanamo Bay, Cuba.

This report builds on our prior work by summarizing information that has since been made public about the role played by US government officials most responsible for setting interrogation and detention policies following the September 11, 2001 attacks on the United States, and analyzes them under US and international law. Based on this evidence, Human Rights Watch believes there is sufficient basis for the US government to order a broad criminal investigation into alleged crimes committed in connection with the torture and ill-treatment of detainees, the CIA secret detention program, and the rendition of detainees to torture. Such an investigation would necessarily focus on alleged criminal conduct by the following four senior officialsformer President George W. Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, and CIA Director George Tenet.

Such an investigation should also include examination of the roles played by National Security Advisor Condoleezza Rice and Attorney General John Ashcroft**,** as well as the lawyers who crafted the legal justifications for torture, including Alberto Gonzales (counsel to the president and later attorney general), Jay Bybee (head of the Justice Department's Office of Legal Counsel (OLC)), John Rizzo (acting CIA general counsel), David Addington (counsel to the vice president), William J. Haynes II (Department of Defense general counsel), and John Yoo (deputy assistant attorney general in the OLC).

Much important information remains secret. For example, many internal government documents on detention and interrogation policies and practices are still classified, and unavailable to the public. According to the American Civil Liberties Union (ACLU), which has secured the release of thousands of documents under the Freedom of Information Act (FOIA), among the dozens of key documents still withheld are the presidential directive of September 2001 authorizing CIA "black sites"or secret prisonsas well as CIA inspector general records.[3] Moreover, many documents that have ostensibly been released, including the CIA inspector generals report and Department of Justice and Senate committee reports, contain heavily redacted sections that obscure key events and decisions.

Human Rights Watch believes that many of these documents may contain incriminating information, strengthening the cases for criminal investigation detailed in this report. It also believes there is enough strong evidence from the information made public over the past five years to not only suggest these officials authorized and oversaw widespread and serious violations of US and international law, but that they failed to act to stop mistreatment, or punish those responsible after they became aware of serious abuses. Moreover, while Bush administration officials have claimed that detention and interrogation operations were only authorized *after* extensive discussion and legal review by Department of Justice attorneys, there is now substantial evidence that civilian leaders *requested* that politically appointed government lawyers create legal justifications to support abusive interrogation techniques, in the face of opposition from career legal officers.

Thorough, impartial, and genuinely independent investigation is needed into the programs of illegal detention, coerced interrogation, and rendition to tortureand the role of top government officials. Those who authorized, ordered, and oversaw torture and other serious violations of international law, as well as those implicated as a matter of command responsibility, should be investigated and prosecuted if evidence warrants.

Taking such action and addressing the issues raised in this report is crucial to the USs global standing, and needs to be undertaken if the United States hopes to wipe away the stain of Abu Ghraib and Guantanamo and reaffirm the primacy of the rule of law.

Human Rights Watch expresses no opinion about the ultimate guilt or innocence of any officials under US law, nor does it purport to offer a comprehensive account of the possible culpability of these officials or a legal brief. Rather it presents two main sections: one providing a narrative summarizing Bush administration policies and practices on detention and interrogation, and another detailing the case for individual criminal responsibility of several key administration officials.

The road to the violations detailed here began within days of the September 11, 2001 attacks by al Qaeda on New York and Washington, DC, when the Bush administration began crafting a new set of policies, procedures, and practices for detainees captured in military and counterterrorism operations outside the United States. Many of these violated the laws of war, international human rights law, and US federal criminal law. Moreover, the coercive methods that senior US officials approved include tactics that the US has repeatedly condemned as torture or ill-treatment when practiced by others.

For example, the Bush administration authorized coercive interrogation practices by the CIA and the military that amounted to torture, and instituted an illegal secret CIA detention program in which detainees were held in undisclosed locations without notifying their families, allowing access to the International Committee of the Red Cross, or providing for oversight of their treatment. Detainees were also unlawfully rendered (transferred) to countries such as Syria, Egypt, and Jordan, where they were likely to be tortured. Indeed, many were, including Canadian national Maher Arar who described repeated beatings with cables and electrical cords during the 10 months he was held in Syria, where the US sent him in 2002. Evidence suggests that torture in such cases was not a regrettable consequence of rendition; it may have been the purpose.

At the same time, politically appointed administration lawyers drafted legal memoranda that sought to provide legal cover for administration policies on detention and interrogation.

As a direct result of Bush administration decisions, detainees in US custody were beaten, thrown into walls, forced into small boxes, and waterboardedsubjected to mock executions in which they endured the sensation of drowning. Two alleged senior al Qaeda prisoners, Khalid Sheikh Mohammed and Abu Zubaydah, were waterboarded 183 and 83 times respectively.

Detainees in US-run facilities in Afghanistan, Iraq, and Guantanamo Bay endured prolonged mistreatment, sometimes for weeks and even months. This included painful stress positions; prolonged nudity; sleep, food, and water deprivation; exposure to extreme cold or heat; and total darkness with loud music blaring for weeks at a time. Other abuses in Iraq included beatings, near suffocation, sexual abuse, and mock executions. At Guantanamo Bay, some detainees were forced to sit in their own excrement, and some were sexually humiliated by female interrogators. In Afghanistan, prisoners were chained to walls and shackled in a manner that made it impossible to lie down or sleep, with restraints that caused their hands and wrists to swell up or bruise.

These abuses across several continents did not result from the acts of individual soldiers or intelligence agents who broke the rules: they resulted from decisions of senior US leaders to bend, ignore, or cast rules aside. Furthermore, as explained in this report, it is now known that Bush administration officials developed and expanded their initial decisions and authorizations on detainee operations even in the face of internal and external dissent, including warnings that many of their actions violated international and domestic law. And when illegal interrogation techniques on detainees spread broadly beyond what had been explicitly authorized, these officials turned a blind eye, making no effort to stop the practices.

The US governments disregard for human rights in fighting terrorism in the years following the September 11, 2001 attacks diminished the US moral standing, set a negative example for other governments, and undermined US government efforts to reduce anti-American militancy around the world.

In particular, the CIAs use of torture, enforced disappearance, and secret prisons was illegal, immoral, and counterproductive. These practices tainted the US governments reputation and standing in combating terrorism, negatively affected foreign intelligence cooperation, and sparked anger and resentment among Muslim communities, whose assistance is crucial to uncovering and preventing future global terrorist threats.

President Barack Obama took important steps toward setting a new course when he abolished secret CIA prisons and banned the use of torture upon taking office in January 2009. But other measures have yet to be taken, such as ending the practice of indefinite detention without trial, closing the military detention facility at Guantanamo Bay and ending rendition of detainees to countries that practice torture. Most crucially, the US commitment to human rights in combating terrorism will remain suspect unless and until the current administration confronts the past. Only by fully and forthrightly dealing with those responsible for systematic violations of human rights after September 11 will the US government be seen to have surmounted them.

Without real accountability for these crimes, those who commit abuses in the name of counterterrorism will point to the US mistreatment of detainees to deflect criticism of their own conduct. Indeed, when a government as dominant and influential as that of the United States openly defies laws prohibiting torture, a bedrock principle of human rights, it virtually invites others to do the same. The US governments much-needed credibility as

a proponent of human rights was damaged by the torture revelations and continues to be damaged by the complete impunity for the policymakers implicated in criminal offenses.

As in countries that have previously come to grips with torture and other serious crimes by national leaders, there are countervailing political pressures within the United States. Commentators assert that any effort to address past abuses would be politically divisive, and might hinder the Obama administrations ability to achieve pressing policy objectives.

This position ignores the high cost of inaction. Any failure to carry out an investigation into torture will be understood globally as purposeful toleration of illegal activity, and as a way to leave the door open to future abuses.[4] The US cannot convincingly claim to have rejected these egregious human rights violations until they are treated as crimes rather than as policy options.

In contrast, the benefits of conducting a credible and impartial criminal investigation are numerous. For example, the US government would send the clearest possible signal that it is committed to repudiating the use of torture. Accountability would boost US moral authority on human rights in counterterrorism in a more concrete and persuasive way than any initiative to date; set a compelling example for governments that the US has criticized for committing human rights abuses and for the populations that suffer from such abuses; and might reveal legal and institutional failings that led to the use of torture, pointing to ways to improve the governments effectiveness in fighting terrorism. It would also sharply reduce the likelihood of foreign investigations and prosecutions of US officialswhich have already begun in Spainbased on the principle of universal jurisdiction, since those prosecutions are generally predicated on the responsible governments failure to act.

The Bush administrations response to the revelations of detainee abuse, including the Abu Ghraib abuse scandal, which broke in 2004, was one of damage control rather than a search for truth and accountability. The majority of administration investigations undertaken from 2004 forward lacked the independence or breadth necessary to fully explore the prisoner-abuse issue. Almost all involved the military or CIA investigating itself, and focused on only one element of the treatment of detainees. None looked at the issue of rendition to torture, and none examined the role of civilian leaders who may have had authority over detainee treatment policy.

The US record on criminal accountability for detainee abuse has been abysmal. In 2007, Human Rights Watch collected information on some 350 cases of alleged abuse involving more than 600 US personnel. Despite numerous and systematic abuses, few military personnel had been punished and not a single CIA official held accountable. The highest-ranking officer prosecuted for the abuse of prisoners was a lieutenant colonel, Steven Jordan, court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007.

When Barack Obama, untainted by the detainee abuse scandal, became president in 2009, the outlook for accountability appeared to improve. As a presidential candidate, Obama spoke of the need for a thorough investigation of detainee mistreatment.[5] After his election, he said there should be prosecutions if somebody has blatantly broken the law, but suggested otherwise when he expressed his belief that we need to look forward as opposed to looking backwards.[6]

On August 24, 2009, as the CIA inspector general's long-suppressed report on interrogation practices was released in heavily redacted form with new revelations about unlawful practices, US Attorney General Eric Holder announced he had appointed Assistant United States Attorney John Durham to conduct a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations. Holder added, however, that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel (OLC) regarding the interrogation of detainees.[7]

Holders statement was in line with that made by President Obama when he released a series of Bush-era memos: In releasing these memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution.[8] These statements themselves follow the Detainee Treatment Act of 2005, which provides a defense to criminal charges if the official,

The problem is that the legal advice in questioncontained in memoranda drafted by the OLC, which provides authoritative legal advice to the president and all executive branch agenciesitself authorized torture and other ill-treatment. It purported to give legal sanction to practices like waterboarding, as well as long-term sleep deprivation, violent slamming of prisoners into walls, forced nudity, and confinement of prisoners into small, dark boxes. Notably, all of the memoranda were later withdrawn by subsequent OLC officials during later periods in the Bush administration.

While US officials who act in good faith reliance upon official statements of the law generally have a defense under US law against criminal prosecution, this does not mean that the Justice Department should embrace the sweeping view that all officials responsible for methods of torture explicitly contemplated under OLC memoranda are protected from criminal investigation. Indeed, for the Justice Department to take such a position would risk validating a legal strategy that seeks to negate criminal liability for wrongdoing by preemptively constructing a legal defense. If such a strategy is seen to have worked, future administrations contemplating illegal actions will also be more likely to employ it.

In assessing the good faith of those who purported to rely on OLC guidance, the Justice Department should critically inquire, on a case-by-case basis, whether a reasonable person at the time these decisions were made would be convinced that such practices were lawful. It seems doubtful that cases of the most serious abuses would pass this test. It is especially unlikely that senior officials who were responsible for authorizing torture will be protected under this calculus, particularly if they were instrumental in pressing for legal cover from the OLC, or if they influenced the drafting of the memoranda that they now claim protect them.

For the Justice Department to look primarily into the actions of low-level interrogators would also be a mistake: it would reflect a fundamental misunderstanding of how and why abuses took place. Whether it was the coercive interrogation methods approved by the Defense Department or the CIAs secret detention program, these were top-down enterprises that involved senior US officials who were responsible for formulating, authorizing, and supervising abusive practices.

Over the past several years, more evidence has been placed on the public record regarding the development of illegal detention policies and the torture and ill-treatment of detainees in US custody. Thanks in particular to FOIA lawsuits brought by the ACLU and the Center for Constitutional Rights, which have yielded over 100,000 pages of government documents concerning the treatment of detainees, the public record now includes most of a report by the CIAs inspector general into detention practices, as well as CIA background papers, other government reports, and the infamous "torture memos" that provided the administrations legal justification for abusive interrogation techniques.[10] An extensive amount of information was also uncovered in an investigation by the Senate Armed Services Committee, which released a report on detainee abuse in 2008 that was declassified in 2009.[11] The Department of Justice inspector general issued a report about FBI involvement in detention abuse in 2008,[12] and the departments Office of Professional Responsibility issued a report on the role of department lawyers in crafting legal memoranda which justified abusive interrogations.[13] Areport by the International Committee of the Red Cross, leaked by an unknown source, also describes the treatment of high-value detainees in CIA custody.[14] In addition, former detainees and whistleblowers have come forward to tell their stories, and many of the principals have spoken about their roles. As described in this report, however, there is also much key evidencebeginning with President Bushs directive authorizing CIA "black sites"that remains secret.

In this report, our conclusion, which we believe is compelled by the evidence, is that a criminal investigation is warranted with respect to each of the following:[15]

President George W. Bush: had the ultimate authority over detainee operations and authorized the CIA secret detention program, which forcibly disappeared individuals in long-term incommunicado detention. He authorized the CIA renditions program, which he knew or should have known would result in torture. And he has publicly admitted that he approved CIA use of torture, specifically the waterboarding of two detainees. Bush never exerted his authority to stop the ill-treatment or punish those responsible.

Vice President Dick Cheney: was the driving force behind the establishment of illegal detention policies and the formulation of legal justifications for those policies. He chaired or attended numerous meetings at which specific CIA operations were discussed, beginning with the waterboarding of detainee Abu Zubaydah in 2002. He was a member of the National Security Council (NSC) Principals Committee, which approved and later reauthorized the use of waterboarding and other forms of torture and ill-treatment in the CIA interrogation program. Cheney has publicly admitted that he was aware of the use of waterboarding.

Defense Secretary Donald Rumsfeld: approved illegal interrogation methods that facilitated the use of torture and ill-treatment by US military personnel in Afghanistan and Iraq. Rumsfeld closely followed the interrogation of Guantanamo detainee Mohamed al-Qahtani who was subjected to a six-week regime of coercive interrogation that cumulatively amounted to torture. He was a member of the NSC Principals Committee, which approved the use of torture for CIA detainees. Rumsfeld never exerted his authority to stop the torture and ill-treatment of detainees even after he became aware of evidence of abuse over a three-year period beginning in early 2002.

CIA DirectorGeorge Tenet: authorized and oversaw the CIAs use of waterboarding, near suffocation, stress positions, light and noise bombardment, sleep deprivation, and other forms of torture and ill-treatment. He was a member of the NSC Principals Committee that approved the use of torture in the CIA interrogation program. Under Tenet's direction, the CIA also disappeared detainees by holding them in long-term incommunicado detention in secret locations, and rendered (transferred) detainees to countries in which they were likely to be tortured and were tortured.

In addition, there should be criminal investigations into the drafting of legal memorandums seeking to justify torture, which were the basis for authorizing the CIA secret detention program. The government lawyers involved included **Alberto Gonzales,** counsel to the president and later attorney general; **Jay Bybee,** assistant attorney general in the Justice Departments Office of Legal Counsel (OLC); **John Rizzo,** acting CIA general counsel; **David Addington,** counsel to the vice president; **William J. Haynes II,** Defense Department general counsel; and **John Yoo**, deputy assistant attorney general in OLC.

The US and global public deserve a full and public accounting of the scale of abuses following the September 11 attacks, including why and how they occurred. Prosecutions, which focus on individual criminal liability, would not bring the full range of information to light. An independent, nonpartisan commission, along the lines of the 9-11 Commission, should therefore be established to examine the actions of the executive branch, the CIA, the military, and Congress, and to make recommendations to ensure that such widespread and systematic abuses are not repeated.[16]

The investigations that the US government has conducted either have been limited in scopesuch as looking at violations by military personnel at a particular place in a restricted timeframeor have lacked independence, with the military investigating itself. Congressional investigations have been limited to looking at a single agency or department. Individuals who planned or participated in the programs have yet to speak on the record.

Many of the key documents relating to the use of abusive techniques remain secret. Many of the proverbial dots remain unconnected. An independent, nonpartisan commission could provide a fuller picture of the systematic reasons behind the abuses, as well as the human, legal, and political consequences of the governments unlawful policies.

On September 11, 2001, four commercial airliners commandeered by al Qaeda militants crashed into the World Trade Center in New York City and the Pentagon in Washington, DC, killing nearly 3,000 people. Three days after the attacks, President Bush sought and obtained a resolution from Congress authorizing him to use all necessary and appropriate force against those responsible for the attacks.[17] Within weeks, the US began military operations against the al Qaeda-backed Taliban government in Afghanistan. Concurrently, senior Bush administration officials publicly endorsed and privately undertook policies in the proclaimed global war on terror permitting the US to circumvent its international legal obligations.

On September 16, 2001, Vice President Dick Cheney said in a television interview on NBCs *Meet the Press*:

In prepared testimony to Congress in September 2002, Cofer Black, director of the CIAs counterterrorism unit, said, [T]here was before 9/11 and after 9/11. After 9/11 the gloves come off.[19]

During a National Security Council War Cabinet on September 15, CIA Director George Tenet presented options for covert CIA operations including apprehending terrorism suspects abroad and transferring them to third counties, as well as other operations.[20] Two days later, on September 17, President Bush signed a stillclassified memorandum authorizing the CIA to detain and interrogate suspected al Qaeda members and others believed to be involved in the attacks.[21]

Led by Vice President Cheneys legal counsel, David Addington, senior administration lawyersincluding then-White House counsel, and later attorney general, Alberto Gonzalesdrafted a series of legal memoranda to build the legal framework for circumventing international law restraints on the interrogation of prisoners.[22] These memos essentially argued that the Geneva Conventions of 1949, the foundation treaties of war-time conduct, did not apply to individuals detained in connection to the armed conflict in Afghanistan.

A January 9, 2002 draft memo by John Yoo, deputy assistant attorney general in the OLC, advised the Defense Department that the Geneva Conventions did not apply to members of al Qaeda because it was not a state and thus not a party to the conventions. The memo said they also did not apply to the Taliban, as it could not be considered a government because Afghanistan was a failed state. The memo also argued that the president could suspend operation of the Geneva Conventions and that customary laws of war did not bind the US because they did not constitute federal law.[23]

William H. Taft, IV, the State Department's legal adviser, warned the argument that the president could suspend the Geneva Conventions was legally flawed and the memos reasoning was incorrect as well as incomplete. The argument that Afghanistan as a failed state was no longer a party to the Geneva Conventions was, he said, contrary to the official position of the United States, the United Nations and all other states that have considered the issue.[24]

In a key memo dated January 25, 2002, Gonzales urged the president to declare Taliban forces in Afghanistan and al Qaeda outside the coverage of the Geneva Conventions. This, he wrote, would preserve US flexibility in the war against terrorism, which in my judgment renders obsolete Genevas strict limitations on questioning of enemy prisoners. Gonzales also warned that US officials involved in harsh interrogation techniques could potentially be prosecuted for war crimes under US law if the conventions applied.[25]

Gonzales wrote it was difficult to predict with confidence how US prosecutors might apply the Geneva Conventions strictures against outrages against personal dignity and inhuman treatment. He argued that declaring that Taliban and al Qaeda fighters did not have protection afforded by the Geneva Conventions substantially reduces the threat of domestic criminal prosecution. Gonzales expressed to President Bush the concern of military leaders that these policies might undermine US military culture which emphasizes maintaining the highest standards of conduct in combat and could introduce an element of uncertainty in the status of adversaries.[26] Those concerns were ignored, but proved justified.

Secretary of State Colin Powell met twice with Bush to discuss his concerns about the Yoo memo. Gen. Richard Myers, the chairman of the Joint Chiefs of Staff, and other military leaders voiced similar concerns.[27] Powell argued that declaring the conventions inapplicable would reverse over a century of US policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.[28]

In response to the objections of Powell and others, Bush slightly modified the proposed order, but did so in a manner that effectively denied protection to the detainees: on February 7, 2002, Bush announced that while the US government would apply the principles of the Geneva Conventions to captured members of the Taliban, it would not consider any of them to be prisoners of war (POWs) because the US did not believe they met the conventions requirements of an armed force as they had no military hierarchy, did not wear uniforms, did not carry arms openly, and did not conduct operations in accordance with the laws and customs of war.He said the US government considered the Geneva Conventions inapplicable to captured members of al Qaeda, though as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.[29]

These decisions essentially reinterpreted the Geneva Conventions to suit the administrations purposes. Most importantly, they downgraded existing international law, which must be followed, to the level of principles, which only should be followed. All persons detained in connection with an armed conflict, whether or not they are entitled to POW status,[30] are still legally entitled to basic protections under international law.[31] For instance, the fundamental guarantees described in article 75 of Protocol Additional of 1977 to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I), which the United States has long considered reflective of customary international law (a widely supported state practice accepted as law), protects all detainees from murder, torture of all kinds, whether physical or mental, corporal punishment, and outrages upon personal dignity, in particular humiliating and degrading treatment, and any form of indecent assault.[32]

On September 15, 2001, CIA Director George Tenet presented the National Security Council (NSC) with options for covert CIA operations involving the abduction of terrorism suspects abroad.[33] Two days later, on September 17, President Bush signed a directive authorizing the CIA to kill, capture, detain, and interrogate suspected al Qaeda-linked terrorists.[34]

On September 26, Tenet reportedly briefed Bush and the NSC on CIA renditions operations in which suspects were transferred into the custody of third countries such as Jordan and Egypt for detention and interrogation.[35]

Meanwhile, CIA and US military personnel in Afghanistan began to interrogate detainees apprehended there, or in Pakistan and handed over to US forces in Afghanistan. At the Qali Jangi fort in northern Afghanistan, CIA and military Special Forces personnel had begun questioning individuals.[36] Detainees also began arriving at a newly created US base near Kandahar in southern Afghanistan in November 2001 and at the Bagram air base outside Kabul in December 2001. Within weeks, media reports began to surface alleging mistreatment of detainees at Qali Jangi and at the Kandahar base.[37]

Allegations of abuse against detainees by US personnel in Afghanistan continued in 2002. According to US Army documents released in 2004 and 2005, four Special Forces personnel murdered an Afghan in custody in August 2002.[38] In September 2002, an unnamed detainee died while in CIA custody near Kabul, reportedly of hypothermia.[39] In December 2002, two detainees at Bagram air base were beaten to death by US military guards detailed to work with military intelligence personnel on interrogations.[40] A December 2008 investigation by the Senate Armed Services Committee showed that many of the abusive techniques being considered for formal approval at Guantanamo in October 2002 were in fact already in use in Afghanistan by that time.[41] A 2004 Department of Defense report by former Secretary of Defense James R. Schlesinger acknowledged that aggressive interrogations were underway in Afghanistan from late 2001 through 2002, beyond what was approved in the relevant US army field manual on interrogation.[42]

Pursuant to President Bushs September 17, 2001, order, the CIA began to set up secret detention facilities. Although much remains to be learned about the operation of these black sites, whose locations have never been acknowledged by the United States, there is strong evidence that the US established secret detention sites for interrogation or transfer in Afghanistan, Guantanamo, Iraq, Lithuania, Morocco, Pakistan, Poland, Romania, and Thailand.[43] The CIA's prisons, which are thought to have held some 100 detainees since 2002,[44] were the site of some of the most egregious human rights violations, many of which are described below.

The International Committee of the Red Cross (ICRC), which interviewed 14 of the former CIA black site detainees after their transfer to Guantanamo, gave the following description of their detention regime:

After news of the sites became public, Bush in September 2006 officially acknowledged the existence of the secret CIA sites, saying:

He ordered what he said were the remaining 14 detainees in CIA custody transferred to Guantanamo Bay.[47]

On January 22, 2009, his second full day in office, President Obama issued an executive order to close the CIAs secret detention program.[48]

In late March 2002, the CIA in Faisalabad, Pakistan, apprehended Zayn al Abidin Muhammad Husayn, more commonly known as Abu Zubaydah. Zubaydah was shot during his arrest and taken to a hospital in Lahore, Pakistan, before being transferred to a secret CIA facility, apparently in Bangkok, Thailand.[49]

Zubaydah was originally believed to be a top al Qaeda operative, and his interrogation became a test case for the CIAs evolving new role in detention and interrogation under Bushs September 17, 2001 directive.

A 2009 Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program, released by the Senate Select Committee on Intelligence in 2009 describes in detail the NSC approval process of the CIA interrogation policy regarding Abu Zubaydah:

The SERE techniques had been used by the Defense Departments Joint Personnel Recovery Agency (JPRA) to train US Special Forces to withstand interrogation methods used by enemies who did not abide by the Geneva Conventions.[51] These SERE techniques were described in a 2008 Senate Armed Services Committee report (Levin Report or SASC Report) asincluding:

The CIA and NSC, in essence, were advising that CIA interrogators use techniques modeled on interrogations conducted by past enemies of the US that did not abide by the Geneva Conventions.

In his memoirs, Bush describes approving the waterboarding of Abu Zubaydah:

The SSCI Narrative Report continues:

The two August 1 OLC memos, signed by Assistant Attorney General Jay Bybee and largely written by Deputy Assistant Attorney General John Yoo, included what has become known as the First Bybee Memo or Torture Memo. It found that torturing al Qaeda detainees in captivity abroad may be justified, and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the circumstances of the current war. The memo added that the doctrines of "necessity and self-defense could provide justifications that would eliminate any criminal liability" on the part of officials who tortured al Qaeda detainees.[55]

The memo also took an extremely narrow view of which acts might constitute torture. It referred to seven practices that US courts have ruled constitute torture: severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person. It then advised that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law. The memo asserted that physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. The memo also suggested that "mental torture" only included acts that resulted in "significant psychological harm of significant duration, e.g., lasting for months or even years."[56]

A second Bybee memo, declassified in 2009, addressed the legality of 10 specific interrogation tactics, including waterboarding, against Abu Zubaydah (who was incorrectly described in the memo as one of the highest ranking members of the al Qaeda terrorist organization). The opinion described in great detail how the techniques should be used, including placing the detainee in a cramped confinement box with an insect as he appears to have a fear of insects as well as waterboarding, which the Bybee memo concluded did not constitute torture because it did not result in prolonged mental harm.[57]

With these approvals, CIA officials began using more abusive interrogation methods on Zubaydah. According to *The New York Times*, At times, Mr. Zubaydah, still weak from his wounds, was stripped and placed in a cell without a bunk or blankets. He stood or lay on the bare floor, sometimes with air-conditioning adjusted so that, one official said, Mr. Zubaydah seemed to turn blue. At other times, the interrogators piped in deafening blasts of music by groups like the Red Hot Chili Peppers.[58]According to the ICRC report, Zubaydah claimed he was slammed directly against a hard concrete wall. Zubaydah was waterboarded 83 times.[59]

Zubaydah later told the ICRC that while being waterboarded he struggled against the straps, causing pain in his wounds, and that he usually vomited after each suffocation:

In 2007, Zubaydah told a tribunal at Guantanamo Bay that much information he provided to interrogators while he was subjected to what he called torture were not true.[61]

The CIA videotaped Zubaydahs interrogations. In 2005, however, the agency destroyed 90 videotapes of Zubaydah's interrogations, which resulted in a criminal investigation of officials. In November 2010, Justice Department officials confirmed that no charges would be filed in connection with the destruction of the tapes.[62]

As of this writing, Zubaydah remains in Guantanamo. He has not been charged with any offense. Although Bush had described Zubaydah as one of al Qaedas top operatives plotting and planning death and destruction on the United States,[63] in 2009 the Justice Department recognized that Zubaydah did not have any direct role in or advance knowledge of the terrorist attacks of September 11, 2001[64] While there is much debate over the value of the information he provided, the *Washington Post* concluded that, not a single significant plot was foiled as a result of Abu Zubaida's tortured confessions according to former senior government officials who closely followed the interrogations.[65]

Many of the same interrogation methods used on Zubaydah were later used on other detainees in CIA custody, including Abd al-Rahim al-Naishiri, who was apprehended in the United Arab Emirates in August 2002; Ramzi Bin al Shibh, apprehended in Pakistan in September 2002; Khalid Sheikh Mohammad, apprehended in Pakistan in March 2003; and Riduan Isamuddin, also known as Hambali, apprehended in Bangkok in August 2003.

In February 2008, CIA Director Michael Hayden and OLC head Stephen Bradbury confirmed that waterboarding was used on CIA detainees; Hayden mentioned waterboarding being used on al-Nashiri, Zubaydah, and Khalid Sheikh Mohammed specifically.[66]The ICRC interviewed the 14 high-value detainees after they had been moved to Guantanamo and found that three had allegedly been waterboarded, among other unlawful methods.[67]According to its report:

The CIA inspector generals report, finally released in heavily redacted form in 2009, details incidents including mock executions, waterboarding, execution threats using an unloaded semi-automatic handgun, smoke inhalation to provoke vomiting, threatening a naked and hooded detainee with a revving power drill, death threats and threats against family members, and pressing on pressure points to provoke repeated fainting.[69]

The expansion of the CIA program was later discussed and authorized, after the fact, in a meeting at the White House in early 2003. As the 2009 SSCI narrative states:

The report adds that on September 16, 2003, pursuant to a request from the National Security Adviser [Rice], the Director of Central Intelligence [Tenet] subsequently briefed the Secretary of State [Powell] and the Secretary of Defense [Rumsfeld] on the CIAs interrogation techniques.[72]

The CIA detention and interrogation program appears to have been scaled back temporarily in 2004, after the Abu Ghraib scandal and a critical report by the CIA inspector general that was sent to the White House in May 2004.

There had been significant controversy within the CIA about the program, leading to an investigation by the CIA Office of Inspector General which took place through 2003 and into 2004. On May 7, 2004, only a few

weeks after news of the abuse of detainees at Abu Ghraib broke, the CIAs Inspector General John Helgerson, despite being reprimanded by a reportedly furious Vice President Cheney,[73] issued a classified report, a copy of which was sent to the highest levels of the White House, the CIA, and to the committee chairman and vice chairman and senior staff of the Senate Select Committee on Intelligence.[74]

The CIA inspector generals report appears to have caused considerable anxiety within the White House. According to the SSCI narrative, CIA General Counsel John Rizzo attended a meeting in May 2004 with Alberto Gonzales, David Addington, John Bellinger, and several senior Department of Justice officials to discuss the CIAs program and the Inspector Generals report.[75] The new OLC head, Jack Goldsmith, apparently also raised concerns with the legal analysis in earlier OLC memos, and in June 2004 Goldsmith withdrew the OLCs unclassified August 1, 2002 opinion on the federal torture statute.[76] For reasons that are unclear, the OLC did not withdraw the classified August 1, 2002 opinion on the Zubaydah interrogation.

However, in May 2005, the new OLC head, Stephen Bradbury, issued three memoranda to the CIA embracing many of the earlier arguments in the Bybee memorandum applicable to Abu Zubaydah, andyears after the factformally authorizing the expansion of the techniques originally approved in 2002 to other detainees.[77] The Bradbury memoranda were declassified in 2009 along with the Second Bybee Memo.

After the Bradbury memoranda were approved, the NSC Principals Committee met on May 31, 2005. The Principals Committee, now chaired by Stephen Hadley and including Alberto Gonzales, Condoleezza Rice, and David Addington, among others, approved all of the techniques discussed in the May 2005 memoranda, presumably recommending to the president that he reauthorize the program, which he did.[78]

President Bush revealed the existence of the CIA detention and interrogation program a year later, in a public speech at the White House on September 6, 2006, acknowledging that suspects had been held secretly outside the United States. [A] reason the terrorists have not succeeded, he stated while introducing his justifications for the CIA program, is because our government has changed its policies and given our military, intelligence and law enforcement personnel the tools they need to fight this enemy and protect our people and preserve our freedoms.[79] Bush reauthorized the program in July 2007.[80]

The CIA has regularly transferred detainees to countries known to routinely practice torture, a practice often referred to as extraordinary rendition.

While the US practice of rendering terrorist suspects abroad predates the September 11 attacks, the CIAs rendition practices changed after they occurred. Rather than returning people to their home or third countries to face justice (albeit justice that often included torture and grossly unfair trials), the CIA began handing people over to their home or third countries, apparently to facilitate abusive interrogations.[81]

The secrecy surrounding the rendition program means that no accurate statistics exist. One study found 53 such cases, excluding those sent to Afghanistan or into US custody.[82] One such country, Jordan, was notorious for torturing security detainees, which would have been well known to US officials at the time of the transfers. Many detainees were returned to CIA custody immediately after intensive periods of abusive interrogation in Jordan.

Numerous detainees so rendered are known or believed to have been tortured. The following cases are illustrative:

Maher Arar, a Syrian-born Canadian national in transit from a family vacation through John F. Kennedy Airport in New York City was detained by US authorities acting on incorrect information from the Royal Canadian Mounted Police.[83] After holding him incommunicado for nearly two weeks, US authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities, despite his statements to US officials that he would be tortured if sent there. Indeed, he was tortured during his confinement in a Syrian prison, often with cables and electrical cords.[84] Following an extensive investigation by the Canadian government, which cleared Arar of all terror connections, Canada offered him a formal apology and compensation of 10.5 million Canadian dollars (US$10.75 million)plus legal fees for providing the unsubstantiated information to US officials.[85] In contrast, the Bush administration refused to assist the Canadian inquiry and disregarded Canadian Prime Minister Stephen Harpers request that the US acknowledge its inappropriate conduct. When Arar sued the US for denying him his civil rights, the Bush administrationand later the Obama administrationsuccessfully argued the case should never be allowed to come to trial for reasons of national security.[86]

In early October 2001, Australian citizen **Mamdouh Habib** was arrested in Pakistan. Pakistans interior minister later said that Habib was sent to Egypt on US orders and in US custody.[87] Habib says that while detained in Egypt for six months, he was suspended from hooks on the wall, rammed with an electric cattle prod, forced to stand on tiptoe in a water-filled room, and threatened by a German shepherd dog.[88] In 2002, Habib was transferred from Egypt to Bagram air base in Afghanistan, then to Guantanamo Bay. On January 28, 2005, Habib was sent home from Guantanamo to Sydney, Australia.[89] In 2010, Habib sued the Australian government, claiming Australian officials were complicit in his false imprisonment and assault in Pakistan, Egypt, and Guantanamo.[90] In January 2011, the Australian government paid Habib an undisclosed amount to absolve it of legal liability in the case.[91]

In December 2001, Swedish authorities handed two Egyptians, **Ahmed Agiza and Mohammed al-Zari**, to CIA operatives at Bromma Airport in Stockholm. The operatives stripped them, inserted suppositories into their rectums, dressed them in a diaper and overalls, blindfolded them, and placed a hood over their heads. They were then placed aboard a US government-leased plane and flown to Egypt.[92] There the two men were reportedly regularly subjected to electric shocks and other mistreatment, including in Cairos notorious Tora prison.[93]

On November 16, 2003, **Osama Moustafa Nasr**also known as Abu Omarwent missing in Milan. Sometime in 2004, he phoned his wife and friends in Milan and reportedly described being stopped in the street by Western people, forced into a car, and taken to an air force base.[94] From the airbase, Nasr was flown to Cairo via Germany and turned over to Egypt's secret police, the State Security Intelligence, at Tora prison.[95] There, Nasr alleged being tortured with electric shocks, beatings, rape threats, and genital abuse.[96] The UKs *Sunday Times* reported that Nasr claimed he had been tortured so badly by secret police in Cairo that he had lost hearing in one ear.[97] In February 2007, after four years of detention, Nasr was released by an Egyptian court, which found that his detention was unfounded.[98] Following a subsequent police investigation and indictment, on November 4, 2009, a judge in Milan convicted, in absentia, 22 CIA agents, a US Air Force colonel, and two Italian secret agents for the kidnappingthe first and only convictions anywhere in the world against people involved in the CIAs extraordinary renditions program.[99] The convictions were confirmed on appeal, and the sentences increased. Each received a sentence of between seven and nine years imprisonment, and were ordered to pay 1million (US$1.44 million) to Nasr and 500,000 (US$720,469) to Nasr's wife.[100] The Italian government has, to date, refused the prosecutors request to seek extradition of the US agents.[101]

In November 2001, **Muhammad Haydar Zammar**, a German citizen of Syrian descent,[102] was arrested in Morocco and flown to Syria.[103] Moroccan government sources have told reporters that the CIA asked them to arrest Zammar and send him to Syria,[104] and that CIA agents took part in his interrogation sessions in Morocco.[105] Zammar was taken to the same Syrian prison where Maher Arar was held.[106] On July 1, 2002, *TimeMagazine* reported:

Muhammad Saad Iqbal Madni, a Pakistani national, was arrested in Jakarta, Indonesia on January 9, 2002. Indonesian officials and diplomats told *The Washington Post* this was done at the CIAs request. Several days later, Egypt made a formal request that Indonesia extradite Madni for unspecified, terrorism-related crimes. However, according to a senior Indonesian government official [t]his was a US deal all along. Egypt just provided the formalities.[108] On January 11, the Indonesian officials said, Madni was taken onto a US registered Gulfstream V jet at a military airport, and flown to Egypt for interrogation.[109]*TheNew York Times* reported that Iqbal said he had been beaten, tightly shackled, covered with a hood and given drugs, subjected to electric shocks and, because he denied knowing Bin Laden, deprived of sleep for six months; in his own words, [t]hey make me blind and stand up for whole days.[110] On September 11, 2004, the *Times* of London reported that despite repeated inquiries by Madnis relatives, nothing has been seen or heard from him since he was taken from Jakarta.[111] However, he was later transferred to Bagram air base in Afghanistan,[112] and from there to Guantanamo Bay.[113] He later stated that he had attempted suicide.[114] Hewas ultimately repatriated in August 2008, after spending more than six years in US custody. At that time, he was reported to have difficulty walking, his left ear was infected and was operated on by a Pakistani surgeon, he was receiving physical therapy for back problems, and he was dependent on a cocktail of antibiotics and antidepressants.[115]

The NSCs approval of coercive interrogation techniques by the CIA in 2002 set the stage for approval of similar unlawful methods for military interrogators at Guantanamo Bay, Afghanistan, and Iraq.

Abusive interrogations by the military appear to have begun in Afghanistan as early as December 2001 and continued despite high-profile media accounts, and perhaps encouraged by the sidelining and disparaging of the Geneva Conventions by US officials.

Reports by civilian Federal Bureau of Investigation (FBI) agents who witnessed detainee abuse by military personnel at Guantanamoincluding forcing chained detainees to sit in their own excrementreinforced accounts by former detainees describing the use of painful stress positions, extended solitary confinement, military dogs to threaten them, threats of torture and death, and prolonged exposure to extremes of heat, cold, and noise.[116] Videotapes of military riot squads subduing suspects reportedly show the guards punching some detainees, tying one to a gurney for questioning and forcing a dozen to strip from the waist down.[117] Former detainees said they were subjected to weeks and even months in solitary confinementwhich was at times either suffocatingly hot, or cold from excessive air conditioningas punishment for not cooperating in interrogations or for violating prison rules.[118]

Many techniques used on detainees by military personnel at Abu Ghraib prison and other Iraqi locations resembled abuse seen earlier in Afghanistan and Guantanamo, including forced standing and exercise, shackling detainees in painful positions or close confinement, extensive long-term sleep deprivation, and exposure to cold.[119]

Abuse spread throughout Iraq from late 2003 and into 2004. Documented cases included beatings and suffocation,[120] sexual abuse,[121] mock executions,[122] and electro-shock torture.[123] Human Rights Watch reported in 2006 on serious abuses by military Special Mission Unit Task Force units in Iraq, including allegations of beatings, exposure to extreme cold or heat, threats of death, sleep deprivation, various forms of psychological torture or mistreatment, painful stress positions, and in one instance, giving a prisoner urine to drink.[124] These abuses received considerable internal military attention and media coverage from 2004 to 2006.[125]

While the Bush administration sought to portray the decision to allow the military to use aggressive interrogation methods as originating from Guantanamo,[126] reconstructions of the events, including those provided in a book by lawyer Philippe Sands, indicate the decision came from above, from Defense Secretary Rumsfeld, Defense General Counsel Haynes, Vice President Cheneys legal counsel David Addington, and White House Counsel Alberto Gonzales, among others.[127]

The Office of the Secretary of Defense began in December 2001 to inquire about Joint Personnel Recovery Agencys aggressive SERE techniques.[128] Not long after, JPRA personnel provided: training materials to Guantanamo interrogators in February 2002;[129] training to DIA personnel deploying to Afghanistan and Guantanamo in March 2002; at least one written Draft Exploitation Plan for possible dissemination to various military and intelligence-gathering agencies in April 2002;[130] and written materials and advice on the use of SERE mock interrogation techniques to psychologists working with interrogators in Guantanamo in June and July 2002.

The tactics used in mock SERE interrogations resembled many of the practices used immediately afterwards in Afghanistan and Guantanamo. These included stripping detainees naked for degradation purposes, exploiting cultural or religious taboos, and use of forced standing, exposure to cold, and prolonged sleep deprivation.

In July 2002, as the Bybee memos were being drafted to permit abusive techniques on Abu Zubaydah, Defense Deputy General Counsel Richard Shiffrin, on behalf of General Counsel Haynes, requested SERE instructor lesson plans, a list of the mock interrogation techniques used in SERE training, and a memorandum describing the long-term psychological effects of SERE training on students, and in particular the effects of waterboarding, a document which was also given to the CIA and OLC when they were drafting the August 1, 2002 Abu Zubaydah memorandum.[131] The SASC Report explains:

In mid-September 2002, JPRA staff trained Guantanamo personnel, using abusive techniques used in SERE schools.[133]

A week later, on September 25, 2002, a delegation of senior officials visited Guantanamo to discuss interrogations there.[134] The group included Defense General Counsel Haynes, CIA General Counsel Rizzo, Chief of the Criminal Division of the Department of Justice Michael Chertoff, the Vice Presidents counsel Addington (the guy in charge according to the military lawyer present),[135] and Gonzales, counsel to the president. According to the SASC Report, Guantanamo commander Maj. Gen. Michael Dunlavey briefed the group on a number of issues including policy constraints affecting interrogations. Gen. Dunlavey told Philippe Sands that the group discussed the interrogation of Mohamed al-Qahtani, a detainee suspected of direct involvement in the September 11 attacks. They wanted to know what we were doing to get to this guy and Addington was interested in how we were managing it. Lt. Col. Diane Beaver, Gen. Dunlaveys senior counsel, confirmed Dunlaveys account, telling Sands the group had essentially delivered the message to do whatever needed to be done.[136]

By October 11, 2002, Dunlavey sent a memo and an attached legal opinion by Lt. Col. Beaver to Gen. James Hill of Southern Command requesting authority to use aggressive interrogation techniques.[137] They included techniques aimed at humiliation and sensory deprivation including use of stress positions, forced standing, isolation for up to 30 days, deprivation of light and sound, 20-hour interrogations, removal of religious items, removal of clothing, forcible grooming such as the shaving of facial hair, and exploiting individual phobias such as fear of dogs. A higher category of techniques included the use of mild, non-injurious physical contact, described as grabbing, poking, and light pushing; use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family; exposure to cold weather or water; and, notably, waterboarding.

In late October 2002, the documents were sent from Gen. Hill to Gen. Richard Meyers, the chairman of the Joint Chiefs of Staff, with recommendations that the secretary of defense authorize the techniques listed.

On November 14, 2002, Col. Britt Mallow, a senior commander at the Criminal Investigation Task Force (CITF) at Guantanamo who had already raised concerns about abusive interrogations with senior Pentagon officials, together with others expressed his legal concerns to Guantanamo commander Gen. Geoffrey Miller and Defense General Counsel Haynes.[138]

One FBI agent, Jim Clemente, an attorney and former prosecutor, warned that the proposed interrogation plans violated the federal torture statute and that interrogations could lead to prosecution, [139] concerns that were shared with FBI Director Robert Mueller, and senior attorneys in the Defense Departments General Counsels office.[140] At the same time, the FBI reported already ongoing abuses to the Defense Department General Counsels office.[141]

Nevertheless, General Counsel Haynes submitted the techniques to Defense Secretary Rumsfeld for approval in late November 2002, with a one-page cover letter recommending he approve most of the methodsbut not waterboarding.[142] Rumsfeld approved the recommended techniques, including:

Rumsfeld appended a handwritten note to his authorization of these techniques: I stand for 8-10 hours a day. Why is standing limited to 4 hours?[144]

Those captured or otherwise taken into custody during the international armed conflict in Iraq and Afghanistan should have been presumptively classified as POWs, and afforded the protections due to POWs under the Third Geneva Convention.[145] In any case, the coercive interrogation methods used were in violation of the protections afforded to all detainees under article 3 common to the four Geneva Conventions of 1949 (Common Article 3) and other prohibitions on inhuman treatment found in customary international law.[146] And individuals responsible for carrying out or ordering torture or other inhuman treatment of detainees, whether or not they have POW status, may be prosecuted for war crimes.

Within weeks, JPRA SERE school personnel were again training Guantanamo interrogators.[147] But controversy continued to brew after Rumsfelds order.

Navy General Counsel Alberto Mora took his concerns to the secretary of the Navy, Gordon England, and with Englands approval spoke with Defenses Haynes three times to warn him about the potential criminal liability associated with the al-Qahtani interrogation and Rumsfelds December 2, 2002 memorandum. Moras concerns were also put before Deputy Secretary of Defense Paul Wolfowitz, Jane Dalton, the general counsel to the Joint Chiefs, and Rumsfeld himself.[148] On January 9, 2003, Mora warned Haynes that the interrogation policies could threaten Secretary Rumsfelds tenure and could even damage the presidency. [149] Mora also left a memorandum with Haynes written by Navy JAG Corps Commander Stephen Gallotta, stating that some of the techniques authorized by Rumsfeld in his December 2, 2002 order, taken alone and especially when taken together, could amount to torture; that some constituted assault; and that most of the techniques, absent lawful purpose, were *per se* unlawful.[150]

On January 15, 2003, Mora sent Haynes a draft memo that he planned to sign concluding that the techniques were illegal and triggered criminal liability, and stated that he would sign the document, unless Rumsfelds December 2, 2002 authorization was rescinded. Haynes told Mora that he raised Moras concern with Rumsfeld, and that Rumsfeld in fact rescinded his December 2, 2002 authorization that same day, January 15, 2003, and created a working group review of the interrogation policy.[151] After the OLC provided a draft legal interpretation and a March 2003 memorandum reusing many of the arguments in the 2002 memoranda for the CIA, Rumsfeld issued a new memorandum on April 16, 2003, which, while more restrictive than the December 2002 rules, still allowed techniques that went beyond what the Geneva Conventions permitted for POWs or detained civilians.[152] Indeed, the defense secretary's memo itself states in relation to several techniquesincluding isolation and removing privileges from detaineesthat those nations that believe detainees are subject to POW protections may find the techniques violate those protections.

Despite Rumsfelds January 15, 2003 rescission of authority the SASC report implies that, [Rumsfelds] initial approval six weeks earlier continued to influence interrogation policies..[153]

The Defense Department investigation chaired by James R. Schlesinger found that the augmented techniques [approved by Rumsfeld] for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.[154]

Contrary to the attention given interrogation techniques at Guantanamo, there was no prescribed interrogation regime for prisoners in Afghanistan. According to the review of Defense Department interrogation operations conducted by Vice Adm. Albert T. Church, III, the US military command in Afghanistan in January 2003 submitted, as requested, a list of interrogation techniques to the military's Joint Staff and Central Command.[155] The list included techniques similar to those approved by Rumsfeld for Guantanamo, but were said by Church to have been reached locally. When the command in Afghanistan didnt hear complaints, it interpreted this silence to mean that the techniques were unobjectionable to higher headquarters, and therefore could be considered approved policy.[156]

A 2006 Defense Department Inspector General report on detainee abuse explained how the techniques put in place in late 2002 and re-crafted in early 2003 cross-fertilized with abuses occurring in Afghanistan and migrated to Iraq.[157] The 2008 SASC Report details how Special Mission Unit Task Force (SMU TF) officials from Afghanistan visited Guantanamo in late 2002, compared notes on techniques from JPRA, and started drawing up a more formal list of techniques to be specifically authorized. Officials in Afghanistan appear to have begun drawing up a set of policies based both on the techniques they were already utilizing and others they had learned from their trip to Guantanamo.

A large portion of the SMU TF policies were based on Rumsfelds December 2, 2002 authorization of techniques for Guantanamo, and the overarching legal reasoning contained in President Bushs February 7, 2002 decision to reject the application of the Geneva Conventions to al Qaeda and Taliban detaineeseven though the detainees in Iraq were a different and distinct set of combatants. Curiously, the techniques from Rumsfelds December 2002 Guantanamo authorization appear in January 2003 SMU TF policy documents even though the original authorization was rescinded.

The abuses involving the SMU TF in Iraq, discussed above, appeared to be based on SMU TF policies from Afghanistan.[158] The 2006 Defense Department inspector generals report and 2008 SASC report specifically found that the SMU TF in Iraq had based its first interrogation policies on the Standard Operating Procedure(SOP) used by SMU TF in Afghanistan.[159]

Other military intelligence personnel in Iraq also based their interrogation policies on the Afghanistan-Iraq SMU TF policies. Capt. Carolyn Wood, who had helped develop interrogation policies for non-special forces in Afghanistan in late 2002and who was implicated in the beating deaths of two detainees there in December 2002was stationed in Iraq and put in command of Abu Ghraib interrogation operations in mid-2003, under the new Combined Joint Task Force 7 (CJTF-7). In July 2003, Capt. Wood drafted a proposed interrogation policy, based on the Afghanistan and Iraq SMU TF guidelines, including proposed use of sleep deprivation and vary comfort positions (sitting, standing, kneeling, prone); presence of military working dogs; 20-hour interrogations; isolation, and yelling, loud music, and light control.[160] Wood admitted that, even when she began, interrogators were already using stress positions on detainees.[161] CJTF-7 appears to have also sought input from other intelligence personnel for a wish list of interrogation techniques.[162] On August 27, 2003, Wood resubmitted her list of techniques, adding sensory deprivation to the list.[163]

The overall military commander for Iraq, Gen. Ricardo Sanchez, approved Woods proposed policy, which was promulgated on September 14, 2003. The abusive techniques approved, along with the techniques used by SMU TF units, were among those being used at Abu Ghraib through the beginning of 2004.[164]

The acts and abuses discussed in this report violate various provisions of US federal law, including the Crimes and Criminal Procedure Statute, Chapter 18 of the US Code (U.S.C.), which prohibits: torture (section 2340A(a)); assault (section 113); sexual abuse (sections 2241-2246); kidnapping (section 1201); homicide (sections 1111-1112 and section 2332); acts against rights (for example, sections 241-242, prohibiting conspiracies to deprive persons of their legal rights); war crimes (section 2441); conspiracy and solicitation of violent crimes (sections 371 and 373); and conspiracy to commit torture (section 2340A(c)).

The War Crimes Act of 1996 provides criminal punishment for whomever, inside or outside the United States, commits a war crime, if either the perpetrator or the victim is a member of the US Armed Forces or a national of the United States. A war crime is defined as any grave breach of the 1949 Geneva Conventions or acts that violate Common Article 3 of the four Geneva Conventions. Grave breaches include willful killing, torture or inhuman treatment of prisoners of war and of civilians qualified as protected persons. Common Article 3 prohibits murder, mutilation, cruel treatment and torture, and outrages upon personal dignity, in particular humiliating and degrading treatment.[165]

The 2006 Military Commissions Act revised the War Crimes Act and limited the definition of war crimes, with retroactive effect. As a result, humiliating and degrading treatment of detainees in US counterterrorism operations following the September 11 attacks can no longer be charged as war crimes under the statute. However, this does not change liability for murder and torture.

The Anti-Torture Act (18 U.S.C. section 2340A) provides criminal penalties for acts of tortureincluding attempts to commit torture and conspiracy to commit an act of tortureoccurring *outside* the territorial jurisdiction of the United States regardless of the citizenship of the perpetrator or victim.[166]

The Anti-Torture Act defines torture as an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.[167]

Some of the crimes listed above are subject to a statute of limitations. Under federal law, charges for the crimes of assault, kidnapping, and acts against rights must ordinarily be brought within five years of the date of the commission of the offense.[168] Where evidence of a crime is located in another country, which may be the case for some or all of the possible crimes described above, the limitations period may be extended for an additional three years, meaning eight years from the time the crime was committed.[169]

For the crime of torture, the statute of limitations is at least eight years,[170] and arguably does not exist at all.[171]

Homicide, sexual abuse, and war crimes resulting in death are not subject to a limitation period.

Conspiracy: In addition to the substantive offenses listed above, there is sufficient evidence to open a criminal investigation into whether senior Bush administration officials engaged in a criminal conspiracy to commit offenses such as torture and war crimes. This conspiracy would include, at a minimum, the top officials listed in this report as well as the lawyers who drafted legal memoranda seeking to justify torture.

A conspiracy to commit a federal crime may fall under the general federal conspiracy statute (18 U.S.C. section 371),[172] as well as specific statutes for particular substantive offenses, the most relevant of which would be conspiracy to commit torture (18 U.S.C. section 2340A(c)).[173]

The essential elements required to bring a charge of conspiracy under 18 U.S.C. section 371 include:

Among the overt acts in furtherance of the conspiracy, in addition to the mistreatment itself, would be the preparation and adoption of the various legal memos, Executive Orders, and formal and informal approvals.[175]

Specific intent is an essential element of criminal conspiracy.[176] It is necessary to demonstrate that the conspirator intended to agree to commit elements of the underlying offense.[177] While some officials might argue that authorization of their conduct by the Justice Department's Office of Legal Counsel negates the specific intent requirement, that argument would almost certainly fail if prosecutors could demonstrate that the OLCs own work was itself an act within the conspiracy or if, as explained below, those officials were instrumental in pressing for legal cover from the OLC or influenced the drafting of the memoranda that they now claim protects them. In addition, it is not necessary for conspirators to have known or intended for the conspiracy to violate federal law *per se*. As the Supreme Court has said:

While conspiracy is subject to a five-year statute of limitations, it is a continuing crime that does not end until the last co-conspirator commits the last overt act of the conspiracy.[179]

At a minimum, President Bushs reauthorization of the CIA detention program in July 2007[180] would be considered an overt act, pushing the statute of limitations to July 2012. There is no immunity from prosecution in US courts for the acts described in this report.[181]

Senior US officials did not physically commit acts of abuse. However, civilian superiors and military commanders can be held criminally liable as principals if they order, induce, instigate, aid, or abet in the commission of a crime. This is a principle recognized both in US[182] and international law.[183]

In addition, the doctrine of command responsibility or superior responsibility holds that individuals who are in civilian or military authority may under certain circumstances be criminally liable for the crimes of those under their command or authority. Three elements are needed to establish such liability:

1) There must be a superior-subordinate relationship;

2) The superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and

3) The superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator.

The US armed forces have long recognized the principle of command responsibility.[184]The first and most significant US case involving command responsibility was that of Gen. Tomoyuki Yamashita, commander of the Japanese forces in the Philippines in World War II, whose troops committed brutal atrocities against the civilian population and prisoners of war. General Yamashita, who had lost almost all command, control, and communications over his troops, was nevertheless convicted by the International Military Tribunal in Tokyo based on the doctrine of command responsibility. The US Supreme Court affirmed the decision, holding that Yamashita was, by virtue of his position as commander of the Japanese forces in the Philippines, under an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.[185]

Waterboarding is a relatively recent name for a form of water torture that dates at least to the Spanish Inquisition, when it was called the *tormenta de toca*.[186] It has been used by some of the cruelest dictatorships in modern times, including the Khmer Rouge in Cambodia and became known as the *submarino* when it was practiced by the military dictatorships in Latin America in the 1970s and 1980s.[187] While often referred to as simulated drowning, experts have taken issue with this label as failing to convey the genuine harm done to the victim who actually *is* drowning.[188] As approved for CIA use, it was designed to produce the perception of suffocation and incipient panic.[189] In April 2006, more than 100 US law professors stated in a letter to Attorney General Alberto Gonzalez that waterboarding is torture, and is a criminal felony punishable under the US federal criminal code.[190] As director of the US Defense Intelligence Agency, Lt. Gen. Michael D. Maples in 2008 gave testimony that, in his view, waterboarding violated the laws of war.[191] Waterboarding has been denounced as a torture method by the US State Department,[192] the UN High Commissioner for Human Rights,[193] the Committee against Torture,[194] the UN special rapporteur on torture,[195] and the UN special rapporteur on protecting human rights while countering terrorism,[196] among others.

Courts in the US and other tribunals have repeatedly found that waterboarding, or variations of it, constitute torture and is a war crime:[197]

In December 2002, Defense Secretary Rumsfeld authorized a number of interrogation and detention techniques, including stress positions, hooding during questioning, deprivation of light and auditory stimuli, and use of detainees individual phobias (such as fear of dogs) to induce stress.[206]

These methods violate the protections afforded to all persons in custodywhether combatants or civiliansunder the laws of armed conflict and can amount to torture or inhuman treatment. For detainees who should be considered POWs or were entitled to a presumption of POW status, mistreatment by these methods would be a grave breach of the Geneva Conventions. Serious violations of the laws of war committed with criminal intent, including grave breaches of the Geneva Conventions, are war crimes.

The Army Field Manual on intelligence interrogation in effect when Rumsfeld authorized the various interrogation methods, FM 34-52, cites as an example of torture forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time. Mental torture includes abnormal sleep deprivation, which may or may not have resulted from the authorization of light control and loud music. The field manual also prohibits forms of coercion including threats. Perhaps most importantly, the field manual instructs soldiers, when in doubt, to ask themselves: If your contemplated actions were perpetrated by the enemy against US POWs, you would believe such actions violate international or US law.[207]

The UN Committee Against Torture has considered techniques such as these to constitute torture.[208] It specifically called on the US to rescind any interrogation technique, including methods involving sexual humiliation, waterboarding, short shackling, and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.[209]

In his 2004 report to the UN General Assembly, the UN special rapporteur on torture specified that such interrogation techniques violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

The US government has itself denounced as torture these same methods when practiced by other countries, including Burma (being forced to squat or remain in uncomfortable periods for long periods of time), Egypt (stripping and blindfolding of prisoners), Eritrea (tying of hands and feet for extended periods of time), Iran (sleep deprivation and suspension for long periods in contorted positions), Iraq (food and water deprivation), Jordan (sleep deprivation and solitary confinement), Pakistan (prolonged isolation and denial of food or sleep), Saudi Arabia (sleep deprivation), Tunisia (food and sleep deprivation), and Turkey (prolonged standing, isolation).[211] The State Department human rights reports also criticized Egypt for stripping and blindfolding detainees and pouring cold water on them; Tunisia, Iran, and Libya for using sleep deprivation; Libya for threatening chained detainees with dogs; and North Korea for forcing detainees to stand up and sit down to the point of collapse.[212]

Of Rumsfelds methods, fear of dogs to induce stress deserves special attention. Threatening a prisoner with torture to make him talk is considered to be a form of torture or cruel, inhuman or degrading treatment.[213] Threatening a prisoner with a ferocious guard dog is no different as a matter of law from pointing a gun at a prisoners head. And, of course, many of the pictures from Abu Ghraib show unmuzzled dogs being used to intimidate detainees, sometimes while they are cowering, naked. As General Fay noted in his report on Abu Ghraib When dogs are used to threaten and terrify detainees, there is a clear violation of applicable laws and regulations.[214]

The CIAs secret detention program, entailing prolonged incommunicado detention without trial, violated international legal prohibitions against enforced disappearances. Disappearances violate or threaten to violate a range of rules of international human rights and humanitarian law, including arbitrary deprivation of liberty, torture, and the right to life.

US law places limits on the treatment of detained terrorist suspects. The US Supreme Court ruled in 2004 that the Authorization for Use of Military Force, which Congress passed after the September 11, 2001 attacks and authorizes presidential action against al Qaeda and allied forces, gave the president power to detain enemy belligerents. However, Justice Sandra Day OConnor, speaking for the plurality of the court, said, Certainly, we agree that indefinite detention for the purposes of interrogation is not authorized.[215]

US foreign relations law has long recognized that prolonged detention without charges and trial, and causing the disappearance of persons by the abduction and clandestine detention of those persons constitute gross violations of internationally recognized human rights.[216]

The prolonged, unacknowledged, incommunicado detention of persons in secret CIA facilities constitutes enforced disappearances under international law. The International Convention for the Protection of All Persons from Enforced Disappearance (Convention against Enforced Disappearance) defines an enforced disappearance as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty *or by concealment of the fate or whereabouts of the disappeared person*, which place such a person outside the protection of the law.[217]

The Convention against Enforced Disappearance states that No one shall be held in secret detention[218] The UN Declaration on the Protection of All Persons from Enforced Disappearances, which was adopted by the UN General Assembly in 1992, provides that all detainees shall be held in an officially recognized place of detention, and that accurate information on detainees and their place of detention shall be made promptly available to family members, counsel, and any others having a legitimate interest in the information.[219]

The UN General Assembly and UN Commission on Human Rights have both declared that detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and that it can in itself constitute a form of such treatment.[220] The UN Working Group on Enforced or Involuntary Disappearances has decried extraordinary rendition [that] has been used to transport terrorist suspects to other states for aggressive interrogation. Information continues to reach the Working Group on the existence of secret detention centres where terrorist suspects are held in complete isolation from the outside world. In [this situation], people disappear. As is well documented, disappearance is often a precursor to torture and even to extrajudicial execution.[221]

With respect to the laws of armed conflict, the 25th International Conference of the Red Cross in 1986 condemned any act leading to the forced or involuntary disappearance of individuals or groups of individuals.[222] The 27th International Conference of the Red Cross and Red Crescent, in its Plan of Action for 2000-2003, requested that all parties to an armed conflict take effective measures to ensure that strict orders are given to prevent all serious violations of international humanitarian law, including enforced disappearances.[223]

A confidential report of the International Committee of the Red Cross (ICRC) that was leaked to media in 2010 stated that the secret detention regime used by the CIA itself constitutes a form of ill-treatment.[224] The ICRC found that the circumstances in which the detainees were held by the CIA amounted to enforced disappearance.[225]

The string of legal opinions and memoranda by Bush administration lawyers on detainee issues since September 11, 2001, appear to have been intended to shield US officials from potential liability.These opinions were largely written by the Department of Justices Office of Legal Counsel. Pursuant to DOJ regulations, the OLC is tasked with preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President[226]

In the January 25, 2002 draft memorandum for President Bush, White House counsel Alberto Gonzales advised against application of the Geneva Conventions to al Qaeda and Taliban detainees, stating that a positive reason for denying Geneva Convention protections to these detainees was to [s]ubstantially reduce[] the threat of domestic criminal prosecution under the War Crimes Act.

Gonzales then explained to the president that "it is difficult to predict the motives of prosecutors and independent counsels who may in future decide to pursue unwarranted charges based on Section 2441 [the War Crimes Act]. Your determination [that the Geneva Conventions do not apply] would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution."[227]

Bush and others have asserted that they approved the detention and interrogation techniques described above only after legal review by Department of Justice attorneys. For instance, in a television interview after he left office, Bush explained his approval of waterboarding: We had legal opinions that enabled us to do it.[228]

International law does not provide for mistake of law or government authority defenses to the crime of torture.[229]

Under US law, an accused cannot generally invoke an advice-of-counsel defense.[230] As Judge Richard Posner has noted, If unreasonable advice of counsel could automatically excuse criminal behavior, criminals would have a straight and sure path to immunity.[231]

At the same time, due process concerns would seem to bar conviction when a defendant engages in conduct in reasonable reliance on an official interpretation of the law. The Model Penal Code provides that belief that ones conduct is lawful is a defense when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in an official interpretation of the public officer or body charged by law with responsibility for the interpretation ... of the law defining the offense.[232]

There is thus an exception to the mistake of law doctrine in circumstances where the mistake results from the defendant's reasonable reliance upon an officialbut mistaken or later overruledstatement of the law. [T]he doctrine may in some circumstances protect a defendant's reasonable reliance on official advisory opinions, such as an Attorney General's opinion.[233]

Under section 1004(a) of the Detainee Treatment Act of 2005, written after the Abu Ghraib revelations and the release of the torture memos, officials prosecuted as a result of detention and interrogation operations may raise as a defense that they: did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.[234]

Under these statutes and precedents, then, the question of whether reliance on OLC guidance was reasonable and in good faith will depend on the facts, including the nature of the acts and of course whether potential defendants were involved in the preparation of the guidance.[235]

As the *American Journal of International Law* editorialized:

In the context of practices such as waterboarding, prolonged stress positions and long-term incommunicado detention, it stretches credulity to argue that a person of ordinary sense and understanding would not know the practices were illegal.

In addition, there is now substantial evidence that the initiative for abusive interrogation techniques came largely from civilian leaders, and that politically appointed administration lawyers created legal justifications in the face of opposition from career government legal officers. As political commentator Anthony Lewis has written, [t]he memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison. Avoiding prosecution is literally a theme of the memoranda.[237] Journalist Jane Mayer concluded in her book *The Dark Side* that Bush and Cheney turned the Justice Department Office of Legal Counsel into a

political instrument.[238] One unnamed former administration official, described as a conservative lawyer, told Mayer: They didnt care if the opinions would withstand scrutiny. They just wanted to check a box saying, OLC says its legal. They wanted lawyers who would tell them that whatever they wanted to do was okay.[239] Indeed, after two OLC headsJack Goldsmith and then Dan Levinhad given Bush and Cheney difficulty over the torture issue, Steven Bradbury in 2005 was given the OLC job on probation until he completed his opinion that gave waterboarding legal approval. Reportedly, the following day, Bush sent his name forward for formal nomination.[240]

Shortly before leaving office, Cheney acknowledged that, [w]e spent a great deal of time and effort getting legal advice, legal opinion out of the Office of Legal Counsel, which is where you go for those kinds of opinions, from the Department of Justice as to where the red lines were out there in terms of this you can do, this you can't do.[241]

Moreover, the record now shows that even *before* administration officials requested OLC opinions on interrogation techniques, the CIA approached the chief of the Department of Justice Criminal Division, Michael Chertoff, to request an advance declination of prosecution for acts associated with the interrogation of detaineesa binding notice from the *criminal* division of the Justice Department that it would not prosecute officials involved in interrogations. Chertoff refused to provide such a declination.[242]

The Justice Departments Office of Professional Responsibility (OPR), which investigated the conduct of Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo in drafting the August 2002 memoranda, found that Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice. Bybee, it said, acted in reckless disregard of his obligations to provide independent legal analysis.[243]

Yoo had briefed White House counsel Gonzales several times on the August 1, 2002 memorandum during its drafting, as well as Attorney General Ashcroft, Cheneys counsel David Addington, Defense Department counsel William Haynes, CIA counsel John Rizzo, and NSC legal advisor John Bellinger.[244] Bellinger, who became the State Department's legal adviser in 2007, told OPR that he concluded that Yoo was under pretty significant pressure to determine that the interrogation program was legal.[245] According to the OPR report, Justice Department attorney Patrick Philbin said that when he raised concerns about a section of the memo claiming sweeping presidential power to decide what is legal, Yoo told him, They want it in there, later explaining that the CIA may have suggested it, a claim that then-acting CIA General Counsel John Rizzo denied.[246]

Jack Goldsmith, who headed OLC from 2003 to 2004, told OLC that Yoos August 2002 memo was riddled with error and a one sided effort to eliminate any hurdles posed by the torture law.[247]

The same pressure may have been exerted in 2005 for the re-approval memos issued by Steven Bradbury, when head of the OLC Bellinger told OPR that Bradbury's conclusions were so contrary to the commonly held understanding of the treaty [Convention against Torture] that ... the memorandum had been written backwards to accommodate a desired result.[248] Daniel Levin, who as acting head of the OLC drafted the memos that replaced Yoo's, reported that the White House pressed him to reiterate the office's legal support for the CIA's interrogation methods.[249] Deputy Attorney General James Comey wrote in a 2005 email that Attorney General Gonzales told him he had been pressured by Cheney to produce opinions that would rebut congressional concerns about the CIA program:

Under international law, states are obligated to investigate credible allegations of war crimes and serious violations of human rights committed by their nationals and members of their armed forces, or over which they have jurisdiction, and appropriately prosecute those responsible.[251]

War crimes are serious violations of international humanitarian law committed willfullythat is, deliberately or recklesslyand give rise to individual criminal responsibility.[252] Individuals may be held criminally responsible for directly committing war crimes or for war crimes committed pursuant to their orders.[253] They may also be held criminally liable for attempting to commit war crimes, as well as planning, instigating, assisting, facilitating, and aiding or abetting them.[254]

The US also has a duty to investigate serious violations of international human rights law and punish the perpetrators.[255] As a state party to the International Covenant on Civil and Political Rights (ICCPR), the US has an obligation to ensure that any person whose rights are violated shall have an effective remedy when the violation has been committed by government officials or agents. Those seeking a remedy shall have this right determined by competent judicial, administrative, or legislative authorities. And when granted, these remedies shall be enforced by competent authorities.[256]

Civilian leaders and commanders may also be prosecuted for war crimes and violations of international human rights law as a matter of command responsibility when they knew or should have known about the commission of war crimes and took insufficient measures to prevent them or punish those responsible.[257]

However, no US federal court, including the Supreme Court, has granted judicial remedy to persons alleging torture or other ill-treatment, including rendition to torture, in post-September 11 cases. Both the Bush and the Obama administrations have argued successfully that such cases should be dismissed under the state secrets privilege in US law. The state secrets privilege allows the head of an executive department to refuse to produce evidence in a court case on the grounds that the evidence is secret information that would harm national security or foreign relations interests if disclosed.[258] In the past, the state secrets privilege has been recognized by courts as allowing the executive to argue that distinct pieces of evidence should be barred from disclosure, while permitting a case to proceed.[259] However, courts examining allegations of Bush administration abuse have relied upon a far broader interpretation of the privilege, not to bar specific evidence, but instead to require a dismissal at the very beginning stages of a case.[260] In other cases alleging torture or other ill-treatment, government attorneys have successfully argued that claims are preempted under federal law or trigger various forms of immunity.[261] The courts, in accepting these various legal defenses, including the state secrets privilege, have refused to even examine, let alone rule on, the merits of victims claims.

Investigation and referral to prosecution are required for all serious violations of human rights law, but monetary and other forms of compensation can also be provided.[262] The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture), to which the US is also party, requires that a victim of torture obtains redress and has an enforceable right to fair and adequate compensation, including rehabilitation, and compensation to dependents when a victim is deceased.[263]

One US court has suggested compensation as a way to partially mitigate some of the abuse alleged in this report.[264] In suggesting the US government look into other options to remedy plaintiffs claims that they had been tortured after rendition by the United States, the 9th Circuit Court of Appeals noted that other governments such as the United Kingdom have made similar commitments.[265] It also noted the authority of Congress to investigate alleged wrongdoing and restrain excesses of the executive branch.[266]

Based on the information presented above, Human Rights Watch believes that there is sufficient basis for the US government to order a broad criminal investigation into alleged war crimes and human rights violations committed in connection with the torture and ill-treatment of detainees, the CIA secret detention program, and the rendition of detainees to torture. Such an investigation would necessarily focus on alleged criminal conduct by the following four senior officialsGeorge W. Bush, Dick Cheney, Donald Rumsfeld, and George Tenetamong others. Human Rights Watch presents evidence now publicly available, but expresses no opinion about the ultimate guilt or innocence of these or other officials.

President Bush was commander-in-chief of the US armed forces, and the senior executive officer of the US government, exercising full control over all of its executive agencies, including the CIA. Bush often chaired NSC meetings and was briefed extensively and routinely on all national security matters.

Bush approved coercive interrogation methods, including waterboarding, ordered the CIA secret detention program, and approved the program of unlawful renditions. In addition, even after learning that serious abuses were taking place, Bush never intervened to stop them or seek to prosecute those responsible.

Bush acknowledged on several occasions that he approved waterboarding of detainees, including Khalid Sheikh Mohammed and Abu Zubaydah.

The first acknowledgment came on April 11, 2008, in an interview with Martha Raddatz of ABC News:

In his memoirs, Bush wrote that when the CIA proposed techniques including waterboarding against Abu Zubaydah,

I approved the use of the interrogation techniques.[268]

He also acknowledged in his memoirs that he approved the waterboarding of Khalid Sheikh Mohammed:

On May 19, 2009, Cheney corroborated this account to Bob Schieffer of CBSs *Face the Nation*:

In March 2008, Bush vetoed legislation containing a provision requiring that CIA interrogations comply with the US Army field manual on interrogations, which barred certain interrogation techniques, including waterboarding. Bush explained that the legislation would take away one of the most valuable tools in the war on terrorthe CIA program to detain and question key terrorist leaders and operatives. Limiting the CIA's interrogation methods to those in the Army Field Manual, he said, would be dangerous because the manual is publicly available and easily accessible.[271]

On September 17, 2001, President Bush reportedly signed a memorandum, apparently still classified, authorizing the CIA to kill, capture, detain, and interrogate al Qaeda members and others thought to be involved in the September 11 attacks. It is not known whether Bush approved a separate finding for secret detentions or whether this was covered in the September 17 memo.[272]

In his memoir, Bush explained that the decision was taken to move Abu Zubaydah to a secure location in another country where the Agency [CIA] would have total control over his environment.[273] In his speech of September 6, 2006, acknowledging the CIA detention program, Bush recognized that suspects had been held secretly outside the United States.[274]

As described above, Bush was present at the NSC meeting on September 26, 2001, when CIA Director Tenet described the CIA renditions program, asking, according to Bob Woodward, At what point are we going to feel comfortable talking about these things?[275]

Bush knew or should have known that many rendered detainees would likely face torture and other ill-treatment, and took no steps to stop the program or punish those responsible. In November 2003, just days after Canadian national Maher Arar was released from Syrian custody, Bush declared that the government of Syria had left alegacy of torture, oppression, misery, and ruin.[276]

Vice President Cheney played a key role in the formulation of detainee policy. Cheney loomed over everything, one former CIA official told Jane Mayer.[277] He was a member of the NSC Principals Committee, which approved interrogation policies. Together with his chief counsel, David Addington, he was the principal political force pressing OLC lawyers to justify the use of coerced interrogation methods.[278]

Cheney has spoken publicly about the entire approval process for CIA interrogation, including his own role, for instance telling the *Washington Times*:

As described above, Cheney was among the main White House officials briefed on CIA abduction and rendition operations, and he discussed these operations with the president. Cheney, along with National Security Advisor Condoleezza Rice, also chaired NSC meetings at which CIA rendition operations were discussed. He advised the president to generally authorize CIA renditions operations and he sought formal authorization from the president, approving particular operations. VicePresident Cheney knew or should have known that renditions would lead to torture.

As one of the key chairs of NSC meetings, Cheney authorized the CIA detention program. In a July 2003 meeting of NSC Principals, Cheney and other principals reaffirmed that the CIA program was lawful and reflected administration policy.[280] This included waterboarding.

In October 2006, Cheney defended the use of waterboarding as a "no-brainer," agreeing with a radio hosts assertion that a dunk in water may yield valuable intelligence from terrorism suspects.[281] In August 2009, Cheney stated:

Defense Secretary Rumsfeld created the conditions for members of the US armed forces to commit torture and other war crimes by approving interrogation techniques that violated the Geneva Conventions and the Convention against Torture.

Rumsfeld made numerous statements indicating that the US was not bound to treat detainees in accordance with international law. While not in itself a criminal offense, it helped create the conditions in the armed forces that facilitated such abuses. It also made clear that he was unlikely to take action against military personnel that did not conform to international legal requirements.

Rumsfeld labeled the first detainees to arrive at Guantanamo from Afghanistan on January 11, 2002, as unlawful combatants, denying them possible status as POWs. Unlawful combatants do not have any rights under the

Geneva Convention [sic], he said.[283] ignoring that the conventions provide explicit protections to all persons detained in an international armed conflict, including those not entitled to POW status. He rejected formal US legal compliance with international law by saying that the government would for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.[284] After the Abu Ghraib scandal broke, he told an interviewer in May 2004 that the Geneva Conventions did not apply precisely in Iraq but were basic rules for handling prisoners.[285]

Rumsfelds attitude toward the laws of armed conflict created a climate in which respect for legal norms by US troops may have been loosened. In May 2004, for instance, a member of the 377th Military Police Company told *The New York Times* that the labeling of prisoners in Afghanistan as enemy combatants not subject to the Geneva Conventions contributed to their abuse. We were pretty much told that they were nobodies, that they were just enemy combatants, he said. I think that giving them the distinction of soldier would have changed our attitudes toward them.[286]

Similarly, speaking of the decision to apply the Geneva Conventions only where this was appropriate and consistent with military necessity, State Department legal advisor William H. Taft, IV, said this

Rumsfeld approved coercive interrogation methods, including those that amounted to torture. As described below, he also closely monitored the abusive interrogation of Mohammad al-Qahtani in 2002 and perhaps that of John Walker Lindh, the so-called American Taliban, in late 2001.

From the earliest days of the war in Afghanistan, Rumsfeld was on notice through briefings, ICRC reports, reports by human rights organizations, and media accounts that members of the US armed forces were conducting coercive interrogations, including torture. However, there is no evidence that he ever exerted his authority to stop the torture and ill-treatment of detainees or take action against those responsible.

Rumsfeld was intimately involved in the minutiae of interrogation techniques for detainees at Guantanamo Bay, Cuba. As described above, on December 2, 2002, he authorized a list of techniques for interrogation of prisoners in Guantanamo that was an unprecedented expansion of US military doctrine.[288] These included: stress positions (like standing) for a maximum of four hours; isolation .up to 30 days; hooding during questioning; Deprivation of light and auditory stimuli; Removal of all comfort items (including religious items); Forced grooming (shaving of facial hair, etc); Removal of clothing; and Using detainees individual phobias (such as fear of dogs) to induce stress.[289]

As described above, depending on how they are used, these methods likely violate the prohibition on torture or inhuman treatment of prisoners under the laws of armed conflict, regardless of whether the prisoners are entitled to POW status, and those responsible for their use could be liable for war crimes.

After objections from the Navys general counsel, Rumsfeld temporarily rescinded his blanket approval of the coercive techniques listed above on January 15, 2003. Rather than discard the techniques entirely, however, he ordered that he personally approve any use of the harsher categories of techniques, thus suggesting that he continued to view them as legitimate. He stated in a memo that: Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the use of such techniques.[290]

Rumsfeld issued a final interrogation policy for Guantanamo on April 16, 2003. These guidelines, while more restrictive than the December 2002 rules, still allowed techniques that go beyond what the Geneva Conventions permit for POWs.[291] Indeed, Rumsfelds memo itself states in relation to several techniquesincluding isolation and removing privileges from detaineesthat those nations that believe detainees are subject to POW protections may find that technique to violate those protections.[292]

In 2004, the Schlesinger report found that the augmented techniques [approved by Rumsfeld] for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.[293]

As described above, coercive interrogation methods first approved by Rumsfeld were used in Guantanamo, Iraq, and Afghanistan. The Schlesinger report found that in Afghanistan, techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7 [the command in Iraq].[294] At Abu Ghraib, of course, the techniques that Rumsfeld himself put into play, such as use of dogs, figured prominently in the war crimes committed against detainees.

The SASC concluded that Secretary of Defense Donald Rumsfeld's authorization of interrogation techniques at Guantanamo Bay was a direct cause of detainee abuse there.[295]

In late 2002, Rumsfeld took direct interest in the interrogation of Saudi detainee Mohammad al-Qahtani, suspected of being the intended 20th hijacker in the September 11 attacks had immigration officers not turned him away at Orlando airport. The December 2, 2002 memo approving the use of stress positions, isolation, hooding, and the use of dogs was directly connected to the interrogation of al-Qahtani,[296] whom Rumsfeld deemed to be a very bad person, a person who clearly had information about attacks against the United States.[297]

Even before the December 2, 2002 memo, Guantanamo commander, Maj. Gen. Geoffrey Miller, received a VOCO, or a vocal command, on November 23, 2002, to allow the aggressive interrogation of al-Qahtani to begin. While no one in the chain of command can now seem to remember who issued the VOCO, it was apparently assumed by officers in the chain of command that Rumsfeld issued it.[298] And even before the VOCO, when an FBI agent objected to the treatment of al-Qahtani, he was told that the Secretary had approved it.[299]

According to Department of Army Inspector General Lt. Gen. Randall M. Schmidt, Rumsfeld spoke weekly with General Miller about the progress of the interrogation, which employed weeks of sleep deprivation, stress positions, and sexual humiliation.[300]

Al-Qahtanis interrogation log[301] reveals that he was subjected to a regime of physical and mental mistreatment from November 2002 to early January 2003, which intensified after Rumsfelds order[302] For six weeks, al-Qahtani was intentionally deprived of sleep, forced into painful stress positions, threatened with snarling dogs, forced to perform tricks on a dog leash, and subjected to forced exercises, forced standing, and sexual and other physical humiliation. Interrogators made him stand nude, told him to bark like a dog and growl, and hung pictures of scantily clad women around his neck. After refusing water, al-Qahtani was forced to accept an intravenous drip for hydration and, on several occasions, was denied trips to a latrine causing him to urinate on himself at least twice. On one occasion was forced to undergo an enema.[303]

According to *Newsweek*, a senior FBI counterterrorism official wrote to the Defense Department complaining of highly aggressive interrogation techniques" at Guantanamo and singling out the treatment of al-Qahtani in September and October 2002even before the log beginssaying a dog was used "in an aggressive manner to intimidate Detainee #63. The FBI letter said al-Qahtani had been subjected to intense isolation for over three months and was evidencing behavior consistent with extreme psychological trauma (talking to non existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours on end).[304]

Al-Qahtanis interrogation log reveals that he was suffering serious medical conditions, including irregular blood pressure and heartbeat. At one point in the interrogation, being subjected to extended sleep deprivation, his heart rate dropped to a dangerously low level of 35 beats per minute.[305] Department of Army Inspector General Lt. Gen. Randall M. Schmidt, who had gone to Guantanamo and seen al-Qahtani, just as he was coming out of this thing, said that he looks like hell. He has got black coals for eyes.[306]

According to Gitanjali Gutierrez, an attorney with the Center for Constitutional Rights who represented al-Qahtani after his torture, his weight dropped from approximately 160 to just over 100 pounds in about four months.[307]

David Becker, a senior intelligence officer at Guantanamo involved in crafting the interrogation plan for al-Qahtani, said that Guantanamo commander Gen. Michael Dunlavey, until his departure in December 2002, was directly supervising the military intelligence team carrying out al-Qahtanis interrogation and received regular telephone calls from Rumsfelds deputy, Paul Wolfowitz, about it and other interrogations.[308]

The SASC Report also refers to regular calls from Wolfowitz to Dunlaveys successor, General Miller, and states that Wolfowitzs office occasionally called about particular detainees.[309]

General Schmidt, who along with Brig. Gen. John Furlow investigated detainee abuse at Guantanamo,[310] told the army inspector general in 2005 that it was clear to him that there was a direct communication link between Rumsfeld and his office in Washington to General Dunlavey and later General Miller, and from there directly to interrogators.[311] Schmidt placed Miller squarely between Rumsfeld and the interrogators, describing Miller as the person to be the translator between the SECDEFs [Rumsfelds] guidance because he communicated with the Secretary of Defense, the COCOM [commander of SOUTHCOM] and daily with hiswith his interrogator/detention folks.[312] Schmidt said Miller was executing what he thought was the Secretarys intent and only he would have been the right guy at that level to know into the actionthe application of the technique, and only he would have been the one who should know how it was being applied.[313]

Schmidt also portrayed the al-Qahtani interrogation as wholly contingent on Rumsfelds approval: The special interrogation plan ended because the SECDEF [Rumsfeld] rescinded his guidance from the policy level and then it shot right down to the JTF, [to] the interrogation level.[314]

Schmidt continued:

Then-SOUTHCOM commander Gen. James T. Hill also confirmed that Rumsfeld and his office regularly spoke with, and were being directly briefed by, General Miller on the al-Qahtani interrogation.[316] General Hill also stated that Miller often observed the interrogation sessions. He also stated that Rumsfeld himself called him in at some point in mid-January 2003 about the al-Qahtani interrogation. According to Hill, Rumsfeld asked about the status of the interrogation, concerned because of the impending actions of Adm. Alberto Mora, described above. (This was a few days before the interrogation was stopped because of ongoing controversy.) Hill said that he would call Miller, and then call Rumsfeld back:

In fact, the techniques being used on al-Qahtani were illegal, and Rumsfeld had been warned that they were illegal. By this point in January 2003, Admiral Mora and other military lawyers had alerted Rumsfeld that the techniques he had authorized in his December 2, 2002 order, which were at that time being used on al-Qahtani, could trigger criminal liability.[318]

Ultimately, the convening authority for the Guantanamo military commissions, the top Defense Department official overseeing prosecutions at Guantanamo, military judge Susan J. Crawford, who had served as an Army general counsel and inspector general of the Department of Defense, reached the conclusion that al-Qahtani had been tortured, and could not be prosecuted because of the mistreatment he suffered. We tortured Qahtani, Crawford told Bob Woodward: His treatment met the legal definition of torture. And thats why I did not refer the case [for prosecution].[319]

Even before his authorization of coercive interrogation methods and the al-Qahtani case, Rumsfeld appears to have provided oversight or was at least aware of the coercive interrogation of John Walker Lindh, the so-called American Taliban, who was captured in Afghanistan in 2001. Photos presented by Lindhs lawyers show Lindh after his capture on November 25, 2001, stripped naked, blindfolded, with plastic cuffs on his wrists, and bound to a stretcher with duct tape.[320] According to a motion filed in federal court, Lindh was left for days on this gurney in an unheated and unlit metal shipping container from which he was only removed during interrogations.

For over three weeks after his capture, Lindh still had a bullet in his thigh, which was said by a US physician to be seeping and malodorous.[321] He was also said to be suffering from hypothermia, malnourishment, and exposure.[322] According to the motion, A Navy physician recounted that the lead military interrogator in charge of Mr. Lindhs initial questioning told the physician that sleep deprivation, cold and hunger might be employed during Mr. Lindhs interrogations.

According to documents examined by the *Los Angeles Times*, Rumsfelds legal counsel instructed military intelligence officers to take the gloves off when interrogating Lindh.[323] In the early stages of Lindhs interrogation, his responses were reportedly cabled to Washington hourly.[324] Rumsfeld argued, in a January 2002 memo to Department of Defense General Counsel, Jim Haynes, that Lindh should be sent to Guantanamo instead of facing a civilian trial. At one point Rumsfeld remarked, I dont really care what happens to Walker at this stage.[325]

Rumsfeld appears to be responsible as a matter of command responsibility for the widespread use of torture and ill-treatment by US military personnel in Afghanistan and Iraq. He was personally notified beginning in early 2002 about the mistreatment of detainees by Secretary of State Colin Powell,[326] US Administrator in Iraq L. Paul Bremer,[327] Afghan government officials,[328] and journalists.[329] The ICRC repeatedly warned him during the same period,[330] as did the Army provost marshal, Maj. Gen. Donald Ryder,[331] and retired Col. Stuart A. Herrington in internal reports.[332] In addition, there was substantial public information about abuses against detainees, including images of John Walker Lindh being held naked and bound by duct tape to a stretcher in Afghanistan, leading articles in the *Washington Post* and the *New York Times*[333] and reports from Human Rights Watch and other nongovernmental organizations. The sheer number and widespread nature of abuses against detainees across three countries should have in any event put Rumsfeld on notice through internal channels.[334]

Yet Rumsfeld failed to intervene to prevent further commission of crimes. Even as he was being publicly and personally warned about abuses, he apparently never issued specific orders or guidelines to forbid coercive methods of interrogation, other than withdrawing his blanket approval for certain methods at Guantanamo in January 2003. Indeed, as described above, in mid-2003 pressure on interrogators in Iraq to use more aggressive methods of questioning detainees was actually increased. Had Rumsfeld exerted his authority as the civilian official in charge of the armed forces and used his position and authority to bring the mistreatment of prisoners

to a stop, many violations of international law that US forces committed could have been avoided.[335]

From late 2001 and until his resignation in 2004, CIA Director George Tenet established and oversaw the CIAs secret detention program. Under his direction, the CIA abducted and rendered persons to countries known to torture detainees; tortured and ill-treated detainees; and forcibly disappeared detainees in secret locations, often with no acknowledgement of their detention and with no oversight of their treatment.

As Tenet reportedly told a closed-door international meeting of top intelligence officials on March 10, 2002, in New Zealand:

Tenet directly oversaw the CIA rendition program, which led to the torture and ill-treatment of detainees abroad. During NSC meetings in 2001, Tenet presented options for covert CIA rendition operations, implemented orders to use renditions, and briefed the president and NSC on renditions operations. Tenet knew or should have known that detainees transferred to foreign countries faced a high risk of torture. The Middle Eastern countries to which detainees were renderedEgypt, Syria, Pakistan, Jordan, Saudi Arabia, and Moroccowere notorious for their use of torture.

Tenet designed and oversaw the CIA renditions program. According to an account by Bob Woodward, at an NSC meeting on September 26, 2001:

Michael Scheuer, head of the CIAs bin Laden desk, who ran the detainee rendition program, said he never a saw a set of operations that was more closely scrutinized by the director of central intelligence, the National Security Council and the Congressional intelligence committees. [338] According to Scheuer, each individual operation, I think went to either the Director of Central Intelligence or to the Assistant Director of Central Intelligence. So basically the number one and two men in the intelligence community are the ones who signed off.[339]

Newsweek reported a clash between the FBI and the CIA during the interrogation in Afghanistan of suspect Ibn al-Shaikh al-Libi:

With regard to al-Libi, Tenet wrote in his memoirs, however, that:

Citing congressional sources, *Newsweek* reported that at a classified briefing for senators not long after the September 11 attacks, Tenet was asked whether the US was planning to seek the transfer of suspected al Qaeda detainees from governments known for their brutality. *Newsweek* reported that Tenet suggested it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods.[342]

At the March 2002 New Zealand meeting described above, Tenets head of covert operations, James Pavitt, reportedly said, Were going to be working with intelligence agencies that are utterly unhesitant in what they will do to get captives to talk.[343]

The rendition of terror suspects following the September 11 attacks was first reported in *The Washington Post* in December 2002, which described transfers to countries including Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia, and Morocco, where they are believed to have been tortured or otherwise ill-treated. One official was quoted as saying, We dont kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.[344] After that, the *New Yorker*, theBBC, and CBSs *60 Minutes* described an organized US program of renditions to Egypt of suspects captured in places such as Afghanistan, Albania, Croatia, and Sweden, resulting in many cases of torture and enforced disappearance.[345]

Tenet was undoubtedly aware of the torture involved in these renditions even before the early media reports. The Middle Eastern countries to which detainees were transferredEgypt, Syria, Pakistan, Jordan, Saudi Arabia, and Moroccoare known to use torture.[346] The US State Department had the following to say in its 2003 reports about torture in Egypt and Syria, two of the major rendition destinations. In Egypt:

In Syria:

CIA officer Michael Scheuer confirmed that we told them [higher level and non-CIA staff] again and again and again that the detainees might be mistreated.

Former CIA counterterrorism official Vincent Cannistraro has remarked: You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary.[349]

Under Tenet, the CIA organized a program in which terrorism suspects were detained in undisclosed locations, with no access to the ICRC, no oversight of their treatment, no notification to their families, and in many cases, no acknowledgement that they were even being held. As described above, prolonged incommunicado detention in an unreported location constitutes an enforced disappearance and may violate many basic human rights, including the right to be free from torture and other ill-treatment.

The CIA interrogation program included acts that amounted to torture, ill-treatment, sexual abuse, among other offenses. As described above, Tenet proposed and sought approvals from the president on a general level, and the NSC on a specific level, for an interrogation program for high-level detainees.

In particular, under Tenet, the CIA waterboarded at least three detainees.

According to *The Washington Post*:

According to one deeply involved former Agency officer quoted by Jane Mayer, [e]very single plan was drawn up by interrogators, and then submitted for approval to the highest possible level, meaning the director of the CIA. Any change in the planeven if an extra day of a certain treatment was addedwas signed off on by the Director.[351]

Tenet participated in a NSC meeting in July 2003 in which the NSC Principals reaffirmed that the CIA program was lawful and reflected administration policy.[352] This included waterboarding.

National Security Advisor **Condoleezza Rice**, Secretary of State **Colin Powell,** and Attorney General **John Ashcroft** were also members of the Principals Committee, which discussed and approved specific details of how the CIA would interrogate high-value terrorism suspects. Their roles should therefore also be investigated.

A criminal investigation into the systematic use of torture and ill-treatment after September 11, 2001, should include an examination of the roles played by the lawyers who crafted the legal justifications for torture, including **Alberto Gonzales** (counsel to the president and later attorney general) **Jay Bybee** (head of the OLC), **John Rizzo** (acting CIA general counsel), **David Addington** (counsel to the vice president), **William J. Haynes, II,** (Department of Defense general counsel), and **John Yoo** (deputy assistant attorney general in the OLC).

The US failure to conduct criminal investigations into the role and responsibility of high-ranking civilian and military officials for alleged crimes against detainees has opened the door for national judicial systems in foreign states to pursue investigations and, if warranted, prosecutions under the doctrines of universal jurisdiction and passive personality jurisdiction.

Normally, jurisdiction over a crime depends on a link between the prosecuting state and the crime itself. This link is most often territorial but is sometimes based on the nationality of the victim or perpetrator or on harm to a state interest. Universal jurisdiction reflects the principle of international law that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of nationalities.[353] In some cases, by treaty or customary international law, states in whose territory alleged perpetrators are found have an obligation to prosecute the offender if they do not extradite him. This obligation is known as *aut dedere aut judicare*extradite or prosecute.[354]

War crimes and torture are among the crimes subject by treaty to the extradite or prosecute requirement. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishmentratified by the United States and 146 other countries[355]provides that [t]he State Party in the territory under whose jurisdiction a person alleged to have committed [torture] is found shall, ... if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[356]

Each of the four Geneva Conventions of 1949, which the United States and virtually every country have ratified, prescribe that [e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. Grave breaches of the Geneva Conventions and its first Additional Protocol include willful killing; torture or inhuman treatment; willfully causing great suffering, or serious injury to body or health; and willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial.[357]

Universal jurisdiction is a crucial tool by which victims of grave international crimes can obtain redress. It acts as a safety net when the state with the most direct jurisdiction over the crimes is unable or unwilling to conduct an effective investigation and trial, and when international courts, including the International Criminal Court, either do not have jurisdiction or would not take up a specific case.

The most well-known case of universal jurisdiction was perhaps that of former Chilean dictator Augusto Pinochet who was arrested in London in October 1998 on a warrant from a Spanish judge charging him with torture and other human rights crimes committed in Chile during his seventeen-year rule.[358] Pinochet challenged his arrest on the ground that he was entitled to immunity as a former head of state, but the Appellate Committee of the House of Lords rejected the challenge.[359]

In the past two decades, more and more states, especially in Western Europe,[360] have been willing to use their universal jurisdiction laws in practice. Cases successfully brought to trial have principally involved low and mid-level perpetrators with regards to crimes committed during the genocide in Rwanda, the wars in the Balkans, crimes committed during the dictatorships in Argentina and Chile, wars in Afghanistan and West Africa, and systematic torture in Mauritania, DR Congo, and Tunisia, among others. The United States national judicial system used the principle of universal jurisdiction to prosecute Chuckie Taylor (the son of the former Liberian dictator Charles Taylor) for torture committed in Liberia.[361]

In addition to universal jurisdiction, many countries give their courts competence to punish a crime committed abroad against one of their nationals (the passive nationality or passive personality basis of jurisdiction). Individuals of dozens of nationalities have been detained by the United States since September 11, 2011, thus possibly investing the national courts of these individuals with passive personality jurisdiction over torture and war crimes committed by US nationals.

Most countries, though not all, condition the opening of an investigation for crimes committed abroad, when there is no other link to the forum, on the presence of the accused in their territory. In cases of jurisdiction based on the victims nationality (the passive nationality basis of jurisdiction), however, many states, such as France and Italy, allow the opening of investigation even if the accused is absent.[362]

As it became clear that the US was not pursuing investigations into the role and responsibility of senior government officials linked to torture and the secret detention and rendition programs, several cases were filed abroad, one of which is ongoing.

Two criminal complaints have been filed in Germany to date against Rumsfeld and others.

Four Iraqis allegedly tortured at Abu Ghraib filed a criminal complaint in November 2004 with the German Federal Prosecutors Office in Karlsruhe, Germany, under the universal jurisdiction doctrine as incorporated in the German Code of Crimes against International Law.[363] Officials named in the complaint included Rumsfeld, Alberto Gonzales, George Tenet, Undersecretary of Defense Stephen Cambone, and several senior US military officers.[364]

The plaintiffs were represented by the Center for Constitutional Rights (CCR) and the European Center for Constitutional and Human Rights (ECCHR), which argued that Germany was a court of last resort, as it was clear that the US government is not willing to open an investigation into these allegations against these officials.[365]

Germany is one of the few states which do not require the presence of the accused on its territory to begin an investigation for war crimes, crimes against humanity, and genocide under the universal jurisdiction principle (i.e. when there is no other link with Germany). In the absence of the alleged perpetrator, however, article 153 of the German criminal procedure code gives broad discretion to the federal prosecutor as to whether to open an investigation.

Following the complaint, it was reported that Rumsfeld would skip the annual Munich Conference on Security Policy, at which he was traditionally a key speaker. The US embassy in Berlin said it was in discussions with the Germans about the case and have expressed concern because it would set a precedent for those who want to pursue politicized prosecutions.[366] When questioned about the case at a Pentagon press conference on

February 3, 2005, Rumsfeld hinted that he might not attend the Munich conference, stating [w]hether I end up there, well soon know. Itwill be a week, and well find out.[367]

On February 10, a few days before the Munich conference, German Prosecutor General Kay Nehm dismissed the complaint on the ground the US would investigate the matter in its own country. Nehm stated:

The decision did not discuss whether Rumsfeld, then secretary of defense, enjoyed immunity. The next day, Rumsfeld announced that he would attend the Munich conference.[369]

The plaintiffs filed a request to review the decision with the prosecutor as well as with the court. The Higher Regional Court (*Oberlandesgericht*) in Stuttgart declared the application for review inadmissible on September 13, 2005.[370]

In November 2006, several days after Rumsfeld resigned as defense secretary, CCR and ECCHR filed another criminal complaint with the German federal prosecutor on behalf of Guantanamo detainee Mohammed al-Qahtani, whose treatment is described in this report, and11 Iraqis who alleged they had been tortured.[371] The complaint alleged that Rumsfeld and several government attorneys[372] committed war crimes by justifying, ordering, and implementing abusive interrogation techniques in Iraq, Afghanistan, and Guantanamo.[373]

On April 5, 2007, the prosecutor general at the Federal Court of Justice announced she would not proceed with an investigation.[374] She found there were insufficient links with Germany and that any investigation would likely result in a purely symbolic prosecution that would not justify the resources that would go into complicated but ultimately unsuccessful investigations.[375]

A petition seeking review of the prosecutor's decision was dismissed by the appeals court, which stated that the question can remain open whether the acts charged were sufficiently prosecuted by other states. [376]

On October 25, 2007, when Rumsfeld was on a visit to France after his retirement, the International Federation for Human Rights (FIDH), ECCHR, CCR, and the French League for Human Rights filed a criminal complaint against Rumsfeld with the Paris district prosecutor.Thecomplaint alleged that Rumsfeld had direct and command responsibility for torture in US-run detention facilities in Iraq, Afghanistan, and Guantanamo.[377]

The Paris district prosecutor, Jean-Claude Marin, dismissed the complaint on November 16, 2007, without addressing the torture allegations.[378] The prosecutor found that Rumsfeld was not amenable to prosecution, based on the immunity conferred by his former function as defense secretary.[379]

The Paris prosecutor dismissed a subsequent request for consideration.[380] The prosecutor decided that the acts of torture alleged could not be dissociated from Rumsfelds official functions and therefore attracted state immunity.[381] This decision ignored contrary international precedents, including the Nuremberg judgment and the *Pinochet* cases, by suggesting that torture and war crimes can be part of the legitimate functions of a government official.[382]

Two complaints implicating US officials have been filed in Spain. One has been temporarily suspended while the other remains in progress.

In March 2009, a complaint against six former Bush administration lawyers referred to as the Bush SixAlberto Gonzales, David Addington, William Haynes, John Yoo, Jay Bybee, and Douglas Feithwas filed by the Association for the Dignity of Spanish Prisoners.[383] Thecomplaint alleges that as a result of the legal advice these men provided, the US government committed torture and violations of the Geneva Conventions.[384]

The case was admitted on March 28, 2009, by Spanish Investigative Magistrate Baltasar Garzn, who had issued the 1998 warrant in the Pinochet case, but was then reassigned to Judge Eloy Velasco on April 28, 2009.[385] In accordance with Spanish law, which provides that Spanish courts have subsidiary jurisdiction, Judge Velasco on May 4, 2009, requested confirmation from the US of whether an investigation into the allegations was being conducted and, according to the US embassy in Madrid, offered to transfer the investigation to the US under a Mutual Legal Assistance Treaty.[386] After Judge Velasco set a deadline for the US to respond,[387]the US finally answered on March 1, 2011, saying that it had completed several prosecutions (of lower-ranking officials), that there exists no basis for the criminal prosecution of Yoo or Bybee, and that Assistant US Attorney Durham was continuing his investigation.[388] Judge Velasco then ordered the case to be "temporarily stayed," and transferred it to the US Department of Justice "for it to be continued, urgingit [the DOJ]to indicate at the appropriate time the measures finally taken by virtue of this transfer of procedure."[389] The complainants have appealed that decision.[390]

In April 2009, Judge Garzn accepted another complaint filed by civil parties and initiated a criminal investigation into the alleged abuse of four Guantanamo detainees with ties to Spain, citing possible violations of the Spanish Penal Code and other Spanish legislation, the Third and Fourth Geneva Conventions, the Convention against Torture, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[391]

In May 2009, Judge Garzn issued requests to the US and the UK for confirmation as to whether any investigations were currently pending into the individual cases of the four plaintiffs.[392] Neither country has responded.[393]

On January 27, 2010, Garzn decided that jurisdiction over the complaints existed, and that the complaints could proceed.[394] This was, in part, because one alleged victim was a Spanish citizen, another a Spanish resident, and because Spain had previously issued extradition requests for the other two. However, Judge Garzn also found that jurisdiction existed even in the absence of these links, because the alleged crimes were violations of the Geneva Conventions, the Convention against Torture, the ICCPR, and were crimes against humanity.[395] Garzn has since been suspended from office in relation to his investigation of crimes committed during the Franco era[396] and Judge Pablo Ruz is now handling the case.

On January 7, 2011, the CCR and ECCHR requested that Maj. Gen. Miller be subpoenaed to explain his role in the alleged torture of four of these detainees.[397]

The investigation is ongoing at the time of this writing.

In 2009, Spain weakened its universal jurisdiction laws after several countries whose leaders were subject to complaints, including the US, expressed diplomatic concerns[398] Theamendments generally require some connection with Spain for jurisdiction to arise.[399] Since the cases described above affect four Spanish citizens and residents who had been detained at Guantanamo, the amendments did not halt the cases.

Recently released diplomatic cables reveal that US officials privately and repeatedly attempted to influence Spanish prosecutors and government officials to curtail the investigations and to have them taken away from Judge Garzn,[400] considered by the US to have an antiAmerican streak.[401]

This pressure continues under the Obama administration. In March 2009, the US Embassy told the Spanish Foreign Ministry and Justice Ministry it considered the case a very serious matter and asked to be kept informed of developments.[402] In April, the US charg daffaires accompanied US Senator Judd Gregg to the Foreign Ministry to express concern.[403] The next day, the Spanish prosecutor told the embassy that he would seek a review of whether Spain had jurisdiction. The following day, the charg went with Senator Mel Martinez to see the acting foreign minister, where the charg underscored that the prosecutions would have an enormous impact on the bilateral relationship.[404]

In a May 2009 meeting between two State Department lawyers and Spanish prosecutor Javier Zaragoza, Zaragoza reportedly shared with the US lawyers plans to embarrass Garzn into dropping the case. He confirmed that Spain would suspend its proceedings if the US investigated the matters.[405]

In contrast, in a contemporaneous briefing a US State Department spokesperson stated that I'm not aware of any contact with the Spanish Foreign Ministry on this. It's a matter in the Spanish courts, as I'm given to understand. I don't have a comment for you on it at this time. TheObama administration's position on the matters that are under discussion, I think are quite clear.[406]

The cables also reveal US concern in relation to a separate investigation by Spanish judges into the use of a Spanish airport for secret CIA flights reportedly carrying detainees.[407] US officials were worried, following revelations of coordination between German and Spanish prosecutors, that this would complicate our efforts to manage this case at a discreet governmenttogovernment level.[408]

This report was written by Reed Brody, counsel and spokespersonfor Human Rights Watch, based on archival and legal research. Sections of the report were researched and drafted by John Sifton, consultant. The report was edited by Andrea Prasow, senior counterterrorism counsel; James Ross, legal and policy director; and Danielle Haas, senior editor. Alison Parker, director, US program; Graldine Mattioli-Zeltner, international justice programadvocacy director;and Laura Pitter, counterterrorism counsel, provided specialist review. Joanne Mariner, formerly terrorism and counterterrorism director, reviewed earlier versions of the report. Senior Associate Kate Wies contributed to production of the report. Interns Jeremy Shirm, Gunwant Gill and Mathilde Le Maout provided additional research assistance.

[1]George W. Bush, *Decision Points* (New York: Crown Publishers, 2010), p. 170.

[2] Maj. Gen. Antonio Taguba, Preface to Physicians for Human Rights, Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact, http://brokenlives.info/?page_id=23 (accessed June 7, 2011).

[3] Government Withholds Key Torture Documents In ACLU Lawsuit, American Civil Liberties Union press release, September 1, 2009, http://www.aclu.org/national-security/government-withholds-key-torture-documents-aclu-lawsuit. For a listing of the documents withheld, see Index of Information Withheld in FOIA Lawsuit, http://www.aclu.org/pdfs/safefree/oig_vaughnindex.pdf (both accessed June 15, 2011).

[4] As one commentator has written, absent accountability, tactics like torture and disappearance remain policy options, disfavored by the current president, but lying around like a loaded gun for the next. David Cole, Breaking Away, *The New Republic*, December 30, 2010.

[5] TranscriptBarack Obama on MSNBC, *New York Times*, April 4, 2007, http://www.nytimes.com/2007/10/04/us/politics/04obama-text.html?pagewanted=all (accessed June 20, 2011)

[6] Barack Obama, interview by George Stephanopoulos, *This Week*, ABC News, January 11, 2009, transcript at http://abcnews.go.com/ThisWeek/Economy/story?id=6618199&page=1 (accessed June 24, 2011).

[7] Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, US Department of Justice press release, August 24, 2009, http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html (accessed June 21, 2011). In June 2011, *Time* magazine reported that Durham was looking into the death in Abu Ghraib of Manadel al-Jamadi, an Iraqi prisoner known as "the Iceman" because his body was cooled in ice. Adam Zagorin, Haunted by Homicide: Federal Grand Jury Investigates War Crimes and Torture in Death of 'the Iceman' at Abu Ghraib, Plus Other Alleged CIA Abuses, posted by Mark Thompson to Battleland (blog), *Time.com*, http://battleland.blogs.time.com/2011/06/13/haunted-by-homicide-federal-grand-jury-investigates-war-crimes-and-torture-in-death-of-the-ice-man-at-abu-ghraib-and-other-alleged-cia-abuses/#ixzz1PkuG5q8S (accessed June 17, 2011).

[8] Statement of President Barack Obama on release of OLC Memos, White House press release, April 16, 2009, http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/ (accessed June 25, 2011).

[9] Detainee Treatment Act of 2005, Public Law 163-109, 119 Stat. 3136, January 6, 2006, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ163.109.pdf (June 21, 2011), sec. 1404 (a).

[10] The reports are: Central Intelligence Agency Office of Inspector General, Counterterrorism Detention and Interrogation Activities (September 2001-October 2003), May 7, 2004, http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf (accessed June 15, 2011) (CIA IG Report);

Vice Adm. Albert T. Church, III, US Department of Defense, Review of Department of Defense interrogation operations Executive Summary, US Department of Defense, undated, http://www.defense.gov/news/mar2005/d20050310exe.pdf (accessed June 21, 2011) (Church Report);

Brig. Gen. Charles Jacoby, Department of the Army, CFC-A AO Detainee Operations: Report of Inspection, June 25, 2004, http://action.aclu.org/torturefoia/released/061906/JacobyReport.pdf (accessed June 15, 2011);

Senate Select Committee on Intelligence, US Intelligence Communitys Prewar Intelligence Assessments on Iraq, Senate Report 108-301, July 9, 2004, http://intelligence.senate.gov/108301.pdf (accessed June 14, 2011);

Maj. Gen. Antonio M. Taguba, Department of the Army, Article 15-6 Investigation of the 800th Military Police Brigade, May 2004, http://www.aclu.org/torturefoia/released/TR3.pdf, (accessed June 14, 2011);

Lt. Gen. Paul T. Mikolashek, Department of the Army, Detainee Operations Inspection, Department of the Army Inspector General, July 21, 2004, http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/detaineereport.pdf (accessed June 21, 2011) (The Mikolashek Report);

Maj. Gen. George R. Fay, Department of the Army, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, and LTG Anthony R. Jones, Department of the Army, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, August 23, 2004, http://www.defense.gov/news/aug2004/d20040825fay.pdf (accessed June 21, 2011) (Fay/Jones Report);

James R. Schlesinger, Department of Defense, Final Report of the Independent Panel to Review DoD Detention Operations, August 24, 2004, http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf (accessed June 21, 2011) (Schlesinger Report);

Brig. Gen. Richard P. Formica, Department of the Army, Article 15-6 Investigation of CJS-OTF-AP and 5th SF Group Detention Operations, November 8, 2004, http://www1.umn.edu/humanrts/OathBetrayed/Formica%20Report.pdf (accessed June 21, 2011) (Formica Report); and

Army Brig. Gen. John Furlow and Air Force Lt. Gen. Randall M. Schmidt, Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, April 1, 2005 (amended June 9, 2005), http://www.defense.gov/news/Jul2005/d20050714report.pdf (accessed June 21, 2011).

[11] Senate Committee of Armed Services, Report on Inquiry into the Treatment of Detainees in US Custody, November 20, 2008, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf (accessed June 21, 2011) (SASC Report).

[12] US Department of Justice Office of the Inspector General, A Review of the FBIs Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq, May 2008, http://www.aclu.org/national-security/justice-department-office-inspector-general-review-fbis-involvement-and-observatio (accessed June 21, 2011) (DOJ I-G Report).

[13] US Department of Justice Office of Professional Responsibility, Investigation into the Office of Legal Counsels Memoranda Concerning Issues Relating to the Central Intelligence Agencys use of Enhanced Interrogation Techniques on Suspected Terrorists, July 29, 2009, http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (accessed June 21, 2011) (OPR Investigation).

[14] International Committee of the Red Cross (ICRC), Regional Delegation for United States and Canada, ICRC Report on the Treatment of Fourteen High Value Detainees in CIA Custody, February 2007, http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed June 15, 2011).

[15] Human Rights Watch also endorses, without repeating here, its 2005 conclusions regarding Lt. Gen. Sanchez and Maj. Gen. Miller. See Human Rights Watch, *Getting Away with Torture? Command Responsibility for the US Abuse of Detainees*, vol. 17, no. 1 (G), April 2005, http://www.hrw.org/en/reports/2005/04/23/getting-away-torture-0.

[16] The National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) was an independent, bipartisan commission created by legislation in late 2002 to prepare an account of the circumstances surrounding the September 11, 2001 attacks, including preparedness for and the immediate response to the attacks, http://www.9-11commission.gov/ (accessed June 15, 2011).

[17] Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224, September 18, 2001, http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf (accessed June 24, 2011) (authorizing President George W. Bush to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons).

[18] Vice President Dick Cheney, interview by Tim Russert, *Meet the Press*, NBC News, September 16, 2001, transcript available at http://emperors-clothes.com/9-11backups/nbcmp.htm (accessed June 25, 2011).

[19] Testimony of Cofer Black, former chief, DCIs Counterterrorism Center, CIA, Before the Senate Select Committee on Intelligence and House of Representatives Permanent Select Committee on Intelligence, Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, 107th Congress, September 26, 2002, http://www.access.gpo.gov/congress/senate/pdf/108hrg/96166.pdf (accessed June 21, 2011), p. 590.

[20] An account of the September 15, 2001 NSC meeting was provided by a member of the NSC Principals Group and Secretary of the Treasury Paul ONeill, corroborated by additional administration sources, in Ron Suskind, *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul ONeill* (New York: Simon & Schuster Paperbacks, 2004), p. 186.

[21] The order reportedly described the need for exceptional authorities to detain al Qaeda operatives worldwide. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (New York: Doubleday, 2008), p. 40. See also, David Johnston, At a Secret Interrogation, Dispute Flared Over Tactics *New York Times*, September 17, 2001, http://www.nytimes.com/2006/09/10/washington/10detain.html (accessed June 15, 2011). See also CIA Provides Further Details on Secret Interrogation Memos, American Civil Liberties Union press release, January 10, 2007, http://www.aclu.org/national-security/cia-provides-further-details-secret-interrogation-memos (accessed June 15, 2011).

[22]Addingtons central role is described in Mayer, *The Dark Side,* and Philippe Sands, Torture Team: Rumsfelds Memo and the Betrayal of American Values, (New York: Palgrave Macmillan, 2008).

[23]Draft memorandum from John Yoo, deputy assistant attorney general, Office of Legal Counsel, to William J. Haynes II, general counsel, Department of Defense, regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees, January 9, 2002*,* http://www.torturingdemocracy.org/documents/20020109.pdf (accessed June 15, 2011), pp. 11, 23, 28-9, 35.

[24] Memorandum from William H. Taft, IV, legal advisor, to John C. Yoo, regarding Your Draft Memorandum of January 9, January 11, 2002, http://www.torturingdemocracy.org/documents/20020111.pdf (accessed June 16, 2011).

[25] Gonzales was referring to prosecution under the War Crimes Act of 1996 (18 U.S.C. Sec. 2441), which punishes the commission of a war crimes and other serious violations of the laws of war, including torture and humiliating or degrading treatment, by or against a US national, including members of the armed forces. Memorandum from White House Counsel Alberto Gonzales to President George W. Bush, regarding Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, January 25, 2002, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf (accessed June 15, 2011). Although the January 25 memorandum is marked draft, there is no record of any subsequent version of the memorandum. See Human Rights First, *Attorney General Confirmation Hearings: Background Papers on Alberto Gonzales: Torture, Executive Power, the Geneva Conventions and Military Commissions*, December 2004, http://www.humanrightsfirst.org/wp-content/uploads/pdf/brief_20041220_Gonz_all.pdf (accessed June 17, 2011).

[26] Memorandum from Gonzales to Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

[27] See for example, Memorandum from Taft to Yoo, Your Draft Memorandum of January 9, http://www.torturingdemocracy.org/documents/20020111.pdf.

[28] Memorandum from Colin L. Powell to counsel to the president, regarding Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, January 26, 2002, p. 2. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 122.

[29] Memorandum from President George W. Bush to the vice president, secretary of state, secretary of defense, attorney general, chief of staff to the president, director of Central Intelligence, assistant to the president for National Security Affairs and chairman of the Joint Chiefs of Staff, regarding Humane Treatment of al Qaeda and Taliban Detainees, February 7, 2002, http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (accessed June 21, 2011).

[30] Under the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), belligerents captured in the conflict in Afghanistan should have been treated as POWs unless and until a competent tribunal individually determined that they were not eligible for POW status. Taliban soldiers should have been accorded POW status because they openly fought for the armed forces of a state party to the Convention. Al Qaeda detainees would likely not be accorded POW status but the Conventions and customary law still provide explicit protections to all persons held in an armed conflict. See Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950, http://www1.umn.edu/humanrts/instree/y3gctpw.htm (accessed June 27, 2011).

[31] See Human Rights Watch, *Summary of International and US Law Prohibiting Torture and Other Ill-treatment of Persons in Custody*, May 24, 2004, http://www.hrw.org/english/docs/2004/05/24/usint8614.htm. This view is shared by the ICRC and other international observers. See also, for example, Geneva Convention on Prisoners of War, International Committee of the Red Cross (ICRC) press release, February 9, 2002, http://www.fmn.dk/SiteCollectionDocuments/FMN/Lokale%20Resurser/Nyt%20og%20Presse/Arkiv/Pressemeddelelser/2006/Redeg%C3%B8relse/Bilag10PressemeddelelsefraInternationaltR%C3%B8deKorsaf_0756368f-1fa6-4177-8858-48c6a94f57d4.pdf (accessed June 24, 2011) (International Humanitarian Law foresees that the members of armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.); Mary Robinson, Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, January 16, 2002, http://www.unhchr.ch/huricane/huricane.nsf/0/C537C6D4657C7928C1256B43003E7D0B?opendocument (accessed June 24, 2011) (All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.); Rumsfeld dismissed the criticism of Bushs decision as isolated pockets of international hyperventilation High Taliban Official in US Custody, Associated Press, February 9, 2002, http://www.usatoday.com/news/world/2002/02/08/taliban-surrender.htm (accessed June 17, 2010).

[32] See Michael J. Matheson, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, reprinted in "The Sixth Annual American Red-Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy*, vol, 2, no. 2 (Fall1987), p. 427 (We support in particular the fundamental guarantees contained in article 75 [of Protocol I], such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the [Geneva] Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without discrimination.). See also, International Committee of the Red Cross, *Customary International Humanitarian Law* (Cambridge: Cambridge Univ. Press, 2005), rule 90, citing, for example, US Lieber Code, art. 16 (1863) (Military necessity does not admit of cruelty--that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.); Geneva Convention relative to the Treatment of Prisoners of War, http://www1.umn.edu/humanrts/instree/y3gctpw.htm; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, http://www1.umn.edu/humanrts/instree/y5pagc.htm (accessed June 24, 2011), art. 75; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force December 7, 1978, http://www1.umn.edu/humanrts/instree/y6pagc.htm (accessed June 24, 2011), art. 4.

[33] An account of the September 15, 2001 NSC meeting was provided by a member of the NSC Principals Group and Secretary of the Treasury Paul ONeill, corroborated by additional administration sources, in Ron Suskind, *The Price of Loyalty*, p. 186.

[34] See for example, Mark Danner, US Torture: Voices from the Black Sites, *New York Review of Books*, April9, 2009, http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/ (accessed June 15, 2011). A few weeks later, on October 25, 2001, as the war in Afghanistan was unfolding, Bush signed National Security Presidential Directive 9, Defeating the Terrorist Threat to the United States. The directive extended the underlying orders of the September 17, 2001 memorandum and other orders and essentially introduced the concept of a global war on terrorism, not only against al Qaeda and the Taliban but against all terrorist groups that threatened the United States. In the words of the September 11th Commission Report, the United States would strive to eliminate all terrorist networks, dry up their financial support, and prevent them from acquiring weapons of mass destruction. The goal was the elimination of terrorism as a threat to our way of life. See National Commission on Terrorist Attacks Upon the United States*, The 9/11 Commission Report,* July 2004, http://govinfo.library.unt.edu/911/report/index.htm (accessed June 24, 2011), chapter 10.

[35] An account of the September 26, 2001 NSC meeting, based on numerous interviews of Bush administration officials including George Bush, Condoleezza Rice, Colin Powell, and George Tenet, is provided in Bob Woodward, *Bush at War*, (New York: Simon and Schuster, 2002), p. 146 (discussing renditions as capturing or snatching suspects overseas). There are also compelling allegations that the CIA also rendered suspects to Morocco and Syria. See Human Rights Watch, *Getting Away with Torture?* http://www.hrw.org/en/reports/2005/04/23/getting-away-torture-0, chapter IV.

[36] See for example, Alex Perry, Inside the Battle at Qala-I-Jangi, *Time*, December 1, 2001, http://www.time.com/time/nation/article/0,8599,186592-2,00.html (accessed June 17, 2011).

[37] Human Rights Watch, as well as several media correspondents, interviewed numerous detainees who were held at Kandahar and who alleged being beaten, stripped naked, and intentionally exposed to extreme cold, among other abuses. See Human Rights Watch, *Enduring Freedom: Abuses by US Forces in Afghanistan*, March 2004, vol. 16, no. 3(C), http://www.hrw.org/en/reports/2004/03/07/enduring-freedom-0, footnotes 94-98 and accompanying text. See also Carlotta Gall, Released Afghans Tell of Beatings, *New York Times*, February 11, 2002, http://www.nytimes.com/2002/02/11/world/a-nation-challenged-captives-released-afghans-tell-of-beatings.html?scp=1&sq=Carlotta%20Gall,%20%93Released%20Afghans%20Tell%20of%20Beatings,%94%20%20February%2011,%202002%20&st=cse (accessed June 15, 2011); Ellen Knickmeyer, Survivors of raid by US forces say victims were among America's best friends, Associated Press, February 6, 2002; Molly Moore, Villagers Released by American Troops Say They Were Beaten, Kept in Cage, *Washington Post*, February 11, 2002; Eric Slater, US Forces Beat Afghans After Deadly Assault, Ex-Prisoners Say, *Los Angeles Times*, February 11, 2002, http://articles.latimes.com/2002/feb/11/news/mn-27467 (accessed June 15, 2011) ; James Meek, People The Law Forgot, *Guardian*, December 3, 2003, http://www.guardian.co.uk/world/2003/dec/03/guantanamo.usa1 (accessed June 15, 2011). Former Prime Minister Tony Blair was aware of US military abuse of detainees in Afghanistan as early as January 2002. See Ian Cobain, Tony Blair Knew of Secret Policy on Terror Interrogations, *Guardian*, June 28, 2009, http://www.guardian.co.uk/politics/2009/jun/18/tony-blair-secret-torture-policy (accessed June 22, 2011).

[38] See Department of the Army, Commanders Report of Disciplinary or Administrative Action, 0114-02-CID369-23525, May 23, 2003, http://www.aclu.org/torturefoia/released/745_814.pdf (accessed June 24, 2011), pp. 11-12, 27; see also Afghanistan: Killing and Torture by US Predate Abu Ghraib, Human Rights Watch news release, May 20, 2005, http://www.hrw.org/en/news/2005/05/20/afghanistan-killing-and-torture-us-predate-abu-ghraib.

[39] This case was first revealed in a media report in 2005: Dana Priest, CIA Avoids Scrutiny of Detainee Treatment, *Washington Post*, March 3, 2005, http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html (accessed June 15, 2011). It was subsequently confirmed in a report by the CIA Office of the Inspector General (OIG) in 2004, declassified in August 2009: CIA Office of the Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 October 2003), May 7, 2004, http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf (accessed June 24, 2011)(CIA OIG report). See also Douglas Jehl and Tim Golden, CIA to Avoid Charges in Most Prisoner Deaths, *New York Times*, October 23, 2005, http://www.nytimes.com/2005/10/23/international/asia/23intel.html (accessed June 15, 2011).

[40] See Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," *New York Times*, March 4, 2003, http://www.nytimes.com/2003/03/04/international/asia/04AFGH.html (accessed June 24, 2011).Information about these cases is also based on extensive conversations with journalists who have researched the cases and requested information from US military spokespeople in Kabul during 2003.

[41] Senate Committee of Armed Services, Report on Inquiry into the Treatment of Detainees in US Custody, November 20, 2008, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf (accessed June 21, 2011) (SASC Report), p. 54 (citing minutes from an October 2002 Counter Resistance Strategy meeting between military intelligence officers, military attorneys, and a senior attorney from the CIA. The minutes reveal that several abusive interrogation methods under discussion at the meeting and later approved for Guantanamo were known to be already in use in Afghanistan. For example, it was noted by one meeting participant, David Becker, that sleep deprivation was already in use in Afghanistan, as another participant added that officially it is not happening.).

[42] James R. Schlesinger, Department of Defense, Final Report of the Independent Panel to Review DoD Detention Operations, August 24, 2004, http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf (accessed June 21, 2011) (Schlesinger Report), pp. 8-9.

[43] David Johnston and Mark Mazzetti, A Window Into C.I.A.s Embrace of Secret Jails, *New York Times*, August 12, 2009, http://www.nytimes.com/2009/08/13/world/13foggo.html (accessed June 24, 2011) and Matthew Cole, Lithuania Hosted Secret CIA Prison, *ABC News*, August 20, 2009, http://abcnews.go.com/Blotter/story?id=8373807 (accessed June 24, 2011). See also United Nations Human Rights Council, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, et al., Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, A/HRC/13/42, February 12, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf (accessed June 24, 2011), chapter 4, paras. 98-140. The location and set up of CIA secret detention sites in various locations was documented in numerous sources from 2005 to 2009, including US Operated Secret Dark Prison in Kabul, Human Rights Watch press release, December 19, 2005, http://www.hrw.org/en/news/2005/12/18/us-operated-secret-dark-prison-kabul; Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, report of Rapporteur Dick Marty, Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, doc. 11302 rev., June 11, 2007, http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf (accessed June 15, 2011). See also Dana Priest, CIA Holds Terror Suspects in Secret Prisons" *Washington Post*, November 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html (accessed June 15, 2011).

[44] In 2007, Human Rights Watch and five other human rights organizations published the names and details of 39 people who are believed to have been held in secret US custody abroad and whose whereabouts where then unknown. Human Rights Watch, *Off the Record: US Responsibility for Enforced Disappearances in the War on Terror,* June 7, 2007, http://www.hrw.org/legacy/backgrounder/usa/ct0607/ct0607web.pdf. According to CIA Director Hayden, fewer than 100 people have been detained at CIAs facilities. Remarks of Central Intelligence Agency Director Gen. Michael V. Hayden at the Council on Foreign Relations, September 7, 2007, transcript at http://www.cfr.org/terrorism/conversation-michael-hayden-rush-transcript-federal-news-service/p14162 (accessed June 24, 2011).

[45] International Committee of the Red Cross (ICRC), Regional Delegation for United States and Canada, Report on the Treatment of Fourteen High Value Detainees in CIA Custody, February 2007, http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed June 15, 2011).

[46] TranscriptPresident Bushs Speech on Terrorism, *New York Times,* September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=print, (accessed June, 16 2011).

[47] Sheryl Gay Stolberg, Bush Signs New Rules to Prosecute Terror Suspects, *New York Times*, October 18, 2006, http://www.nytimes.com/2006/10/18/washington/18detain.html (accessed June 15, 2010).

[48] Executive Order 13491, Ensuring Lawful Interrogations, signed January 22, 2009, http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf (accessed June 15, 2011). CIA Director Leon Panetta confirmed that the president's order had been implemented in an April 9, 2009 memorandum to all CIA staff that stated unequivocally: "The CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites." Message from the Director: Interrogation Policy and Contracts, CIA press release, April 9, 2009, https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html (accessed June 15, 2011).

[49]SeePACE, Committee on Legal Affairs and Human Rights, Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, June 11, 2007, http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf, para. 70 (stating that Thailand hosted the first CIA black site, and that Abu Zubaydah was held there after his capture).

[50] Senate Select Committee on Intelligence (SSCI), Declassified Narrative Describing the Department of Justice Office of Legal Counsels Opinions on the CIAs Detention and Interrogation Program, document released April 22, 2009, http://intelligence.senate.gov/pdfs/olcopinion.pdf (accessed June 24, 2011), pp. 2-3.

[51] As one JPRA instructor explained, SERE training is based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War) of prisoners over the last 50 years. The techniques used in SERE school are based, in part, on Chinese Communist techniques used during the Korean War A former senior JPRA psychologist, James Mitchell, began working for the CIA in December 2001; he and another JPRA psychologist, Bruce Jessen, provided consultation services for CIA in early 2002. JPRA also provided training for Defense Intelligence Agency interrogators deploying to Afghanistan and Guantanamo in February-March 2002 and training for other government agenciesCIA interrogatorsin July 2002. SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. xiii, 6-11.

[52] Ibid., p. xiii.

[53]George W. Bush, *Decision Points*, p. 169.

[54] SSCI, Declassified Narrative, April 22, 2009, http://intelligence.senate.gov/pdfs/olcopinion.pdf, pp. 3-4. According to the account of Ali Soufan, an FBI agent involved in the first parts of Abu Zubaydahs interrogation, however, some of the harsher techniques such as prolonged sleep deprivation, stripping the detainee naked, and placing him in painful positions in a small box started on Zubaydah in May 2002. According to Soufan, a CIA official told him in April 2002 that the aggressive techniques already had gotten approval from the "highest levels" in Washington. The official even waved a document in front of Soufan, saying the approvals "are coming from [White House counsel Alberto] Gonzales. Michael Isikoff, We Could Have Done This the Right Way: How Ali Soufan, an FBI agent, got Abu Zubaydah to talk without torture, *Newsweek*, April 25, 2009, http://www.newsweek.com/id/195089 (accessed June 15, 2011.

[55] Memorandum from Jay S. Bybee, assistant attorney general, to Alberto R. Gonzales, counsel to the president, regarding "Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A," August 1, 2002, http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf (accessed June 15, 2011) (First Bybee Memo), p. 2, 39.

[56] Ibid., pp. 1, 24.

[57] Memorandum from Jay S. Bybee, assistant attorney general, to John Rizzo, acting general counsel of the CIA, regarding Interrogation of al Qaeda Operative, August 1, 2001, http://image.guardian.co.uk/sys-files/Guardian/documents/2009/04/16/bybee_to_rizzo_memo.pdf (accessed June 25, 2011) (Second Bybee Memo), pp. 2, 10-11.

[58] Johnston, At a Secret Interrogation, Dispute Flared Over Tactics, *New York Times*, http://www.nytimes.com/2006/09/10/washington/10detain.html.

[59]Memorandum from Steven G. Bradbury, principal deputy assistant attorney general, to John A. Rizzo, senior deputy general counsel, CIA, regarding Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees, May 30 2005, http://ccrjustice.org/files/05-30-2005_bradbury_40pg_OLC%20torture%20memos.pdf (accessed June 15, 2011), p. 37. See also The CIA Interrogation of Abu Zubaydah, http://www.aclu.org/files/assets/CIA_Interrogation_of_AZ_released_04-15-10.pdf (accessed June 15, 2011).

[60] See ICRC, Report on the Treatment of Fourteen High Value Detainees in CIA Custody, http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf, p. 30.

[61] See Verbatim Transcript of Guantanamo Bay Combatant Status Review Tribunal hearing of ISN 10016 [Zayn al Abidin Muhammad Husayn aka Abu Zubaydah], March 27, 2007, http://www.defenselink.mil/news/transcript_ISN10016.pdf (accessed June 15, 2011), p. 23-4.

[62] Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, Department of Justice news release, November 9, 2010, http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html (accessed June 15, 2011).

[63] George W. Bush, Remarks by the President at Connecticut Republic Committee Luncheon, Hyatt Regency Hotel, Greenwich, Connecticut, April 9, 2002, http://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020409-8.html (accessed June 22, 2001).

[64]*Zayn Al Abidin Muhammad Husayn v. Robert Gates*, Respondents Memorandum of Points and Authorities in Opposition to Petitioners Motion for Discovery and Petitioners Motion for Sanctions, United States District Court for the District of Columbia, Civil Action No. 08-cv-1360, October 27, 2009, http://archive.truthout.org/files/memorandum.pdf (accessed June 22, 2011), p. 82.

[65] Peter Finn and Joby Warrick, Detainees Harsh Treatment Foiled No Plots, Washington Post, March 29, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032802066.html (accessed June 15, 2011). See in particular Testimony of Ali Soufan, chief executive, The Soufan Group, Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration, 111th Congress , May 13, 2009, http://www.fas.org/irp/congress/2009_hr/wrong.html (accessed June 15, 2011) (many of the claims made in the memos about the success of the enhanced techniques are inaccurate. simply by putting together dates cited in the memos with claims made, falsehoods are obvious.). According to Bush and others, however, the enhanced techniques were highly effective. Bush, *Decision Points*, p. 169.

[66] Testimony of Michael Hayden, CIA director, Before the Senate Select Committee on Intelligence, Current and Projected Threats to the National Security, 110th Congress, February 5, 2008,

http://intelligence.senate.gov/pdfs/110824.pdf (accessed June 25, 2011), pp. 71-2; Testimony of Steven G. Bradbury, principal deputy assistant attorney General, Office of Legal Counsel, Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, Justice Departments Office of Legal Counsel, 110th Congress, February 14, 2008, http://judiciary.house.gov/hearings/printers/110th/40743.PDF (accessed June 25, 2011), p. 6.

[67] See ICRC, Report on the Treatment of Fourteen High Value Detainees in CIA Custody, http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf, p. 8.

[68] Ibid., pp. 8-9.

[69] CIA OIG Report, http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf, pp. 41-3, 69-73.

[70] Ed Whelan has denied attending this meeting. See Scott Horton, Straight to the TopCorrection, *Harpers Magazine*, April 29, 2009, http://harpers.org/archive/2009/04/hbc-90004849 (accessed January 11, 2011).

[71] SSCI, Declassified Narrative, April 22, 2009, http://intelligence.senate.gov/pdfs/olcopinion.pdf, p. 7.

[72] Ibid.

[73]Mayer, *The Dark Side*, p.288.

[74] See Scott Shane and Mark Mazzetti, Interrogation Debate Sharply Divided Bush White House, *New York Times*, May 3, 2009, http://www.nytimes.com/2009/05/04/us/politics/04detain.html?pagewanted=all (accessed June 15, 2011) (describing how CIA personnel in mid 2003 were already concerned that the program involved illegal activities); see also Jeffrey Smith, Hill Panel Reviewing CIA Tactics: Investigators Examining Interrogations, Legal Advice, *Washington Post*, May 10, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/09/AR2009050902489.html (accessed June 25, 2011); Jeffrey Smith and Joby Warrick, CIA Fights Full Release Of Detainee Report *Washington Post*, June 17, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061603516.html (accessed June 15, 2011).

[75] SSCI, Declassified Narrative, http://intelligence.senate.gov/pdfs/olcopinion.pdf, p. 8.

[76] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 147.

[77] Mark Mazzetti and Scott Shane, Interrogation Memos Detail Harsh Tactics by the C.I.A., *New York Times*, April 16, 2009, http://www.nytimes.com/2009/04/17/us/politics/17detain.html (accessed June 15, 2011). For the three May 2005 memos by Steven Bradbury, see ACLU, The Bush Admins Secret OLC Memos, Accountability for Torture (website), http://www.aclu.org/accountability/olc.html (accessed June 15, 2011).

[78] Email communication from James Comey, deputy attorney general, to his chief of staff, Chuck Rosenberg, May 31, 2005, publicized on June 6, 2009 (on file with Human Rights Watch), posted by the Torturing Democracy Project, http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20050531.pdf (accessed June 27, 2011).

[79] TranscriptPresident Bushs Speech on Terrorism, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=print.

[80] Executive Order 13440, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, signed July 20, 2007, http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf (accessed June 15, 2011). See alsoKaren DeYoung, Bush Approves New CIA Methods, *Washington Post*, July 21, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001264.html (accessed June 15, 2011) ; Mark Mazzetti, Rules Lay Out C.I.A.s Tactics in Questioning, *New York Times*, July 21, 2007, http://www.nytimes.com/2007/07/21/washington/21intel.html (accessed June 15, 2011).

[81] Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, April 7, 2008, http://www.hrw.org/en/reports/2008/04/07/double-jeopardy-0, p. 6.

[82] Peter Bergen and Katherine Tiedemann, Disappearing Act: Rendition by the Numbers, The New America Foundation, March 3, 2008, http://www.newamerica.net/publications/articles/2008/disappearing_act_rendition_numbers_6844 (accessed June 15, 2011) (We found information on 117 renditions that have occurred since September 11, 2001. When we excluded renditions to Afghanistan, CIA secret prisons (or black sites), Guantanamo, or American custody, we found 53 cases of extraordinary rendition. All individuals for whom the rendition destination is known were sent to countries that have been criticized by the State Department's annual Country Reports on Human Rights Practices, which document torture or other cruel, inhuman or degrading treatment or punishment.").

[83] Editorial, No Price to Pay for Torture, *New York Times*, June 15, 2010, http://www.nytimes.com/2010/06/16/opinion/16wed2.html (accessed June 15, 2011).

[84] Maher Arar, Statement, CanWest news service, November 4, 2003, http://www.cbc.ca/news/background/arar/arar_statement.html (accessed June 25, 2011).

[85] Harpers apology means the world: Arar, *CBC News.com*, January 26, 2007, http://www.cbc.ca/news/canada/story/2007/01/26/harper-apology.html (accessed June 25, 2011).

[86] Editorial, The Unfinished Case of Maher Arar, *New York Times*, February 17, 2009, http://www.nytimes.com/2009/02/18/opinion/18wed2.html (accessed June 15, 2011). For more information on this case and 10 others, compiled from news reports, see Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to Extraordinary Renditions* (New York: ABCNY & NYU School of Law, 2004), http://www.chrgj.org/docs/TortureByProxy.pdf (accessed June 15, 2011).

[87] The Trials of Mamdouh Habib, *Dateline*, SBS News (television broadcast, Australia), July 7, 2004, transcript posted by reporter Bronwyn Adcock, Bronwyn Adcock (blog), March 8, 2010, http://bronwynadcock.com/2010/03/08/the-trials-of-mamdouh-habib/ (accessed June 25, 2011).

[88]See *Habib v. Bush*, Declaration of Joseph Margulies, attached to Plaintiffs Application for Temporary Restraining Order, United States District Court for the District of Columbia, Civil Action 02-CV-1130, November 24, 2004. According to The New Yorker, Hossam el Hamalawy said that Egyptian security forces train German shepherds for police work, and that other prisoners have also been threatened with rape by trained dogs, although he knows of no one who has been assaulted this way. Jane Mayer, Outsourcing Torture, *New Yorker*, February 14, 2005, p. 118. Dr. Hajib Al-Naumi, Qatars former justice minister, told the Australian television program Dateline that according to reports from contacts of his in Egypt, Habib was in fact tortured. He was interrogated in a way which a human cannot stand upWe were told that he - they rang the bell that he will die and somebody had to help him. The Trials of Mamdouh Habib, *Dateline*. See also Natalie O'Brien, Australians saw Habib tortured, says officer, *Sydney Morning Herald*, February 13, 2011, http://www.smh.com.au/national/australians-saw-habib-tortured-says-officer-20110212-1aran.html?from=smh_sb (accessed June 15, 2011).

[89] Raymond Bonner, Australians Long Path in US Antiterrorism Maze, *New York Times*, January 29, 2005, http://www.nytimes.com/2005/01/29/international/29habib.html (accessed June 25, 2011).

[90] Habib drops torture case against Government, *ABC News* (Australia), January 8, 2011, http://www.abc.net.au/news/stories/2011/01/08/3108799.htm (accessed June 15, 2011).

[91] Habib free to sue Government, *ABC News* (Australia), February 25, 2010, http://www.abc.net.au/news/stories/2010/02/25/2830398.htm (accessed June 15, 2011).

[92] Sweden Violated Torture Ban in CIA Rendition, Human Rights Watch news release, November 9, 2006, http://www.hrw.org/en/news/2006/11/09/sweden-violated-torture-ban-cia-rendition; ACLU, Biography of Plaintiff Ahmed Agiza, May 30, 2007,http://www.aclu.org/national-security/biography-plaintiff-ahmed-agiza (accessed June 15, 2011).

[93] The Broken Promise, *Kalla Fakta*, Swedish TV4, May 17, 2004, English transcript available from Human Rights Watch, http://hrw.org/english/docs/2004/05/17/sweden8620.htm; Craig Whitlock, A Secret Deportation of Terror Suspects, *Washington Post*, July 25, 2004, http://www.washingtonpost.com/wp-dyn/articles/A11976-2004Jul24.html (accessed June 25, 2011).

[94] Stephen Grey, "US Agents Kidnapped Militant for Torture in Egypt," *The Sunday Times*, February 6, 2005, http://www.timesonline.co.uk/tol/news/world/article511059.ece, (accessed June 17, 2011).

[95] Parla l'avvocato di Abu Omar L'imam sar liberato a giorni,*La Republica*, October 17, 2006, http://www.repubblica.it/2006/10/sezioni/cronaca/sismi-mancini6/abu-omar-presto-libero/abu-omar-presto-libero.html (accessed January 11, 2011).

[96] First CIA rendition trial begins, *Guardian*, June 8, 2007, http://www.guardian.co.uk/world/2007/jun/08/italy.usa (accessed January 11, 2011).

[97] Grey, US Agents Kidnapped Militant for Torture, http://www.timesonline.co.uk/tol/news/world/article511059.ece.

[98] Italy indicts 31 in alleged CIA kidnapping, *MSNBC*, February 16, 2007, http://www.msnbc.msn.com/id/17184663/ns/world_news-terrorism/ (accessed January 11, 2011).

[99] CIA agents guilty of Italy kidnap, *BBC News*, November 4, 2009, http://news.bbc.co.uk/2/hi/europe/8343123.stm (accessed January 11, 2011).

[100] Colleen Barry, Italy convicts Air Force O-6 in CIA kidnap case, Associated Press, November 4th, 2009, http://militarytimes.com/news/2009/11/airforce_italy_case_110409/ (accessed June 15, 2011); Nicole Winfield, Italy Appeals Court Ups US Sentences in CIA Trial, Associated Press, December 15, 2010, http://abcnews.go.com/International/wireStory?id=12402877&page=1 (accessed June 15, 2011).

[101] Italian Judge Convicts 23 in CIA Kidnap Case, Associated Press, April 11, 2009, http://www.msnbc.msn.com/id/33620676/ns/world_news-europe/t/italian-judge-convicts-cia-kidnap-case/ (accessed June 23, 2011).

[102] As in Arars case, Zammar was technically a dual citizen because Damascus does not allow those born in Syria to renounce their citizenship.

[103]Peter Finn, Al Qaeda Recruiter Reportedly Tortured, *Washington Post*, January 31, 2003, http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A3684-2003Jan30&notFound=true (accessed June 25, 2011).

[104] Douglas Frantz, War of Secrets: Sharing Information; Learning to Spy with Allies, *New York Times*, September 8, 2002, http://www.nytimes.com/2002/09/08/weekinreview/war-of-secrets-sharing-information-learning-to-spy-with-allies.html; John Crewsdon, Bid for New Witness Could Slow Plot Trial, *Chicago Tribune*, January 29, 2003, http://articles.chicagotribune.com/2003-01-29/news/0301290341_1_mohammed-haydar-zammar-ramzi-binalshibh-mounir-el-motassadeq (both accessed June 25, 2011).

[105]Peter Finn, Al Qaeda Recruiter Reportedly Tortured, http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A3684-2003Jan30&notFound=true.

[106] See Amnesty International, Syria: Syrian German Held Three Years Without Charge in Rat-Infested Syrian Tomb, October 7, 2004, http://www.amnesty.org/en/library/asset/MDE24/066/2004/en/c53b2335-d575-11dd-bb24-1fb85fe8fa05/mde240662004ar.html (accessed June 16, 2011).

[107] Mitch Frank, Help From an Unlikely Ally, *Time Magazine*, July 1, 2002, http://www.time.com/time/magazine/article/0,9171,1002753,00.html (accessed June 25, 2011). *The Daily Telegraph* and *The Washington Post* also reported that US agents were telling Syrian interrogators what questions to ask Zammar; David Rennie and Toby Helm, Syrians Reveal Secret Help in al-Qaeda Hunt, June 20, 2002, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/1397842/Syrians-reveal-secret-help-in-al-Qaeda-hunt.html (American agents had been allowed to submit written questions to Zammar and had received a steady flow of information in return); Glenn Kessler, U.S.-Syria Relations Not Quite as Cold, *Washington Post*, June 20, 2002, http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A13898-2002Jun19&notFound=true (both accessed June 25, 2011)(While US officials have not been able to question Zammar, Americans have submitted questions to the Syrians); Howard Schneider, Syria Evolves as Anti-Terror Ally, *The Washington Post*, July 25, 2002 (it is unclear whether US officials are being allowed to question [Zammar] in person or merely pose questions through Syrian interrogators).

[108] Rajiv Chandrasekaran and Peter Finn, U.S. Behind Secret Transfer of Terror Suspects, *Washington Post*, March 11, 2002.

[109]Ibid.

[110] Jane Perlez, Raymond Bonner and Salman Masood, An Ex-Detainee of the U.S. Describes a 6-Year Ordeal, *New York Times*, January 5, 2009, http://www.nytimes.com/2009/01/06/world/asia/06iqbal.html (accessed January 11, 2011). It should be noted that *The New York Times* states that [m]uch of Mr. Iqbals account could not be independently corroborated.

[111] Daniel McGory, Ghost Prisoners Haunt Terrorism Hunt, *The London Times*, September 11, 2004.

[112] Perlez, Bonner, and Masood, An Ex-Detainee of the U.S. Describes a 6-Year Ordeal,http://www.nytimes.com/2009/01/06/world/asia/06iqbal.html.

[113] US Department of Defense, List of detainees who went through complete CSRT process, undated, http://ensmp.net/2006/04/21/guantanamo_detainees.html (accessed June 15, 2011).

[114] Summarized Unsworn Detainee Statement, ISN# 743, Combatant Status Review Tribunal Transcripts, undated, http://projects.nytimes.com/guantanamo/detainees/743-muhammad-saad-iqbal/documents/4 (accessed June 15, 2011), p.10.

[115] Perlez, Bonner, and Masood, An Ex-Detainee of the U.S. Describes a 6-Year Ordeal,http://www.nytimes.com/2009/01/06/world/asia/06iqbal.html.

[116]See Human Rights Watch, *Guantanamo: Detainee Accounts*, October 2004, http://www.hrw.org/backgrounder/usa/gitmo1004; Center for Constitutional Rights (CCR), *Detention in Afghanistan and Guantanamo Bay: Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed*, August 4, 2004, http://ccrjustice.org/v2/legal/september_11th/docs/Guantanamo_composite_statement_FINAL.pdf (accessed June 15, 2011).

[117]Paisley Dodds, "Guantanamo Tapes Show Teams Punching, Stripping Prisoners," Associated Press, February 1, 2005.

[118]See Human Rights Watch, *Guantanamo: Detainee Accounts*, http://www.hrw.org/backgrounder/usa/gitmo1004/; CCR, *Detention in Afghanistan and Guantanamo Bay*, http://ccrjustice.org/v2/legal/september_11th/docs/Guantanamo_composite_statement_FINAL.pdf. See alsoUS Department of Justice Office of the Inspector General, A Review of the FBIs Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq, May 2008, http://www.justice.gov/oig/special/s0805/final.pdf (accessed June 21, 2011) (DOJ I-G Report). Solitary confinement is discussed in this report in chapter 8, section II (F), and chapter 5 in relation to al-Qahtani, particularly at p. 81. See also Army Brig. Gen. John Furlow and Air Force Lt. Gen. Randall M. Schmidt, Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, April 1, 2005 (amended June 9, 2005), http://www.defense.gov/news/Jul2005/d20050714report.pdf (accessed June 21, 2011) (Schmidt-Furlow Report).

[119] See for example, detainee abuse cases outlined in Maj. Gen. Antonio M. Taguba, Department of the Army, Article 15-6 Investigation of the 800th Military Police Brigade, May 2004, http://www.aclu.org/torturefoia/released/TR3.pdf, (accessed June 14, 2011) (Taguba Report), annex 26; Maj. Gen. George R. Fay, Department of the Army, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, and LTG Anthony R. Jones, Department of the Army, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, August 23, 2004, http://www.defense.gov/news/aug2004/d20040825fay.pdf (accessed June 21, 2011) (Fay/Jones Report). See also Human Rights Watch, Human Rights First, New York University Center for Human Rights and Global Justice, *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, April 25, 2006, http://www.hrw.org/en/reports/2006/04/25/numbers-0.

[120] One example is the beating and suffocation death of a 56-year-old former Iraqi general named Abed Hamed Mowhoush at a base near the Syrian border in November 2003. See Army Criminal Investigation Command documents and Autopsy Examination Reports and Death Certificate, obtained under the Freedom of Information Act by the ACLU and other organizations, http://www.aclu.org/torturefoia/released/041905/m001_203.pdf (accessed June 15, 2011), pp. 93-100; Arthur Kane, Iraqi General Beaten 2 Days Before Death, *Denver Post*, April 5, 2005; Guardsman: CIA beat Iraqis with hammer handles, *Denver Post*, July 25, 2005; Josh White, US Army Officer Convicted in Death of Iraqi Detainee, *Washington Post*, January 23, 2006; and notes taken by Human Rights First during court martial, see "Welshofer In His Own Words," January 20, 2006 (on file with Human Rights First), excerpts posted by Human Rights First, https://secure.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed June 15, 2011).

[121] See Fay-Jones Report, http://www.defense.gov/news/aug2004/d20040825fay.pdf, p. 71 (sexual abuse of an Iraqi female detainee at Abu Ghraib in late 2003 by three soldiers in the 519th Military Intelligence Battalion). See also Department of the Army, Commanders Report of Disciplinary or Administrative Action, Agents Investigation Report, October 23, 2003, and Agent Notes and Supplementary Documents from the Field File, obtained and posted by the ACLU, http://www.aclu.org/torturefoia/released/22TFa.pdf and http://www.aclu.org/torturefoia/released/22TFb.pdf (both accessed June 15, 2011). See also, Elise Ackerman, Abu Ghraib Interrogators Involved in Afghan Case, *Knight Ridder*, August 22, 2004. Another case of sexual abuse involved a military contractor abusing an Iraqi minor: see the Taguba Report, http://www.aclu.org/torturefoia/released/TR3.pdf, annex 26; and records of Army criminal investigators, May July, 2004, obtained and posted by the ACLU and others under FOIA litigation, http://www.aclu.org/torturefoia/released/FBI.121504.4311.pdf and http://www.aclu.org/torturefoia/released/294_334.pdf (both accessed June 15, 2011).

[122] For instance, in April 2003 a Marine in the 3rd Battalion, 5th Marine Regiment in Iraq was alleged to have mock executed four Iraqi juveniles by forcing them to kneel next to a ditch while the Marine fired his weapon to simulate an execution. See United States Marine Corps, USMC Alleged Detainee Abuse Cases Since 11 Sep 01, August 5, 2004, at http://www.aclu.org/torturefoia/released/navy3740.3749.pdf (accessed June 15, 2011). The Marine was later put before a court martial and found guilty of cruelty and maltreatment and sentenced to 30 days of hard labor without confinement, and a fine of $1,056. For a similar case involving an Army soldier mock executing an Iraqi in January 2004, see Department of the Army Criminal Investigation Division, CID Report of Investigation, January 30, 2004, http://www.aclu.org/torturefoia/released/28TF.pdf (accessed June 15, 2011).

[123] In April 2004, three Marines in the 2nd Battalion, 2nd Marine Regiment in Iraq allegedly shocked a detainee with an electric transformer during an interrogation. A Marine witness stated that one of the three Marines held the wires against the shoulder area of the detainee and that the detainee danced as he was shocked, a second Marine operated the transformer, and a third guarded the detainee. See USMC, Alleged Detainee Abuse Cases, http://www.aclu.org/torturefoia/released/navy3740.3749.pdf, p. 3. After court-martial, the first Marine was given one year of confinement; the second received eight months, and the third soldier 60 days.

[124] See Human Rights Watch, *No Blood, No Foul: Soldiers Accounts of Detainee Abuse in Iraq*, July 22, 2006, http://www.hrw.org/en/reports/2006/07/22/no-blood-no-foul. Many of allegations contained in the 2006 report were confirmed in documents released to the ACLU and other organizations pursuant to Freedom of Information Act litigation. Human Rights Watch also confirmed abuses with veterans and government officials.

[125] See Memorandum from Vice Adm. Lowell E. Jacoby to Undersecretary of Defense for Intelligence [Stephen A. Cambone], regarding Alleged Detainee Abuse by TF 6-26 Personnel, June 25, 2004, http://www.aclu.org/torturefoia/released/t2596_0297.pdf (accessed June 15, 2011). See also sworn statement of an Army interrogator (name redacted) in the 1st Engineer Battalion, 3rd Combat Support Brigade, 95th Division, attached to the 519th Military Intelligence Battalion, http://www.aclu.org/torturefoia/released/030905/DOD565_615.pdf, p. DOD 589; sworn statement of a lieutenant colonel (name redacted) in the 115th Military Police Battalion, at http://www.aclu.org/torturefoia/released/030905/DOD780_821.pdf, p. DOD 812; sworn statement of a soldier in the 321st Military Intelligence Battalion, originally in the classified annex of the Fay-Jones report, at: http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf (p. DOD 508-514); email communication, redacted FBI sender and recipient, regarding TF 6-26 Update, June 25, 2004, http://www.aclu.org/torturefoia/released/FBI.121504.4887.pdf; unknown DIA interrogator (name redacted), Memorandum For Record: Report of Violations of The Geneva Conventions and the International Laws of Land Warfare, June 10, 2004, http://www.aclu.org/projects/foiasearch/pdf/DODDIA000172.pdf; various investigation files from Army Criminal Investigative Command, Baghdad, Iraq, http://www.aclu.org/torturefoia/released/030705/9117_9134.pdf and http://www.aclu.org/torturefoia/released/030705/9135_9166.pdf (all accessed June 15, 2011). See also Eric Schmitt and Carolyn Marshall, In Secret Units Black Room a Grim Portrait of US Abuse, *New York Times*, March 19, 2006, http://www.nytimes.com/2006/03/19/international/middleeast/19abuse.html (accessed June 25, 2011); Josh White, US Generals in Iraq Were Told of Abuse Early, Inquiry Finds, *Washington Post*, December 1, 2004, http://www.washingtonpost.com/ac2/wp-dyn/A23372-2004Nov30?language=printer (accessed June 25, 2011).

[126] The sequence went like this. I received a proposal from the commander in charge of Guantanamo Bay, to permit a series of techniques to be used for interrogation. Donald Rumsfeld, interview by David Frost, *BBC Breakfast with Frost*, BBC News, June 27, 2004, transcript at http://news.bbc.co.uk/2/hi/programmes/breakfast_with_frost/3844047.stm (accessed June 15, 2011).

[127] Philippe Sands, *Torture Team: Rumsfelds Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008).

[128] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 6. The SERE techniques are described above in The Case of Abu Zubaydah.

[129] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. 8-11.

[130] These JPRA trainings were in addition to other trainings provided to the CIA, discussed above.

[131] This document was also given to the CIA and OLC when they were drafting the Bybee Memo. See Second Bybee Memo, http://image.guardian.co.uk/sys-files/Guardian/documents/2009/04/16/bybee_to_rizzo_memo.pdf, citing memoranda provided by JPRA personnel. See also SASC report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. xv, stating that JPRA provided another government agency with the same information.

[132] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. xv.

[133] Ibid., pp. 4349.

[134] Accounts of this visit are recounted in various reports and books, including the SASC Report, p. 49; Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W. W. Norton, 2007); and Mayer, *The Dark Side*, p.198.

[135] This was the view of military lawyer Lt. Col. Diane Beaver, in Mayer, *The Dark Side*, p. 198.

[136] Sands, *Torture Team*, p. 76.

[137] Memorandum from LTC Diane Beaver for Commander, Joint Task Force 170, regarding Legal Brief on Proposed Counter Resistance Strategies, October 11, 2002, http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf (accessed June 26, 2011), PDF p. 7-13. Beaver, who had no background in international law and no access to a proper law library later told Philippe Sands that she expected that other attorneys would review and augment her analysis and that it never occurred to her that on so important an issue she would be the one writing the decisive legal advice. Sands, *Torture Team*, p. 77. Additional analysis did not occur, however, and Beavers memorandum was among the documents given to Rumsfeld.

[138] See Col. Brittain Mallow, CITF commander, interview by Washington Media Associates, Torturing Democracy Project, September 21, 2007, http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/brittain_mallow.html (accessed June 15, 2011).

[139] See SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. 84-86.

[140] Ibid., p. 85.

[141] DOJ I-G Report, http://www.justice.gov/oig/special/s0805/final.pdf, p. 104. See also various sworn statements of FBI special agents to Brig. Gen. John Furlow, January 20, 2005, attached as annexes to the Schmidt-Furlow Report , http://www.aclu.org/torturefoia/legaldocuments/july_docs/(M)%20SCHMIDT-FURLOW%20DEFERRED.pdf (accessed June 15, 2011).

[142] Memorandum from William J. Haynes, II, general counsel, to secretary of defense, regarding Counter-Resistance Techniques, (with attachments), November 27, 2002, approved December 2, 2002, http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf (accessed June 15, 2011).

[143] Memorandum from LTC Jerald Phifer to commander, Joint Task Force 170, regarding Request for Approval of Counter-Resistance Strategies, October 11, 2002, attached to Memorandum from Haynes to secretary of defense, Counter-Resistance Techniques, http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf.

[144] Memorandum from Haynes to secretary of defense, Counter-Resistance Techniques, (with attachments), http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf.

[145] Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949) (Third Geneva Convention) states: Should any doubt arise as to whether persons, having committed a belligerent act and

having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. Geneva Convention Relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950, http://www1.umn.edu/humanrts/instree/y3gctpw.htm (accessed June 27, 2011).

[146] Common article 3 to the 1949 Geneva Conventions prohibits, at any time and in any place whatsoever, violence to life and person of those in custody, cruel treatment and torture, and outrages upon personal dignity, in particular humiliating and degrading treatment. See also, article 31 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) which prohibits physical or moral coercion against protected persons (i.e. non-POW detainees), and article 27 states that civilian detainees must at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950. Article 17 of the Third Geneva Convention states, No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

[147] Navy instructors from the Brunswick SERE school traveled to Guantanamo and conducted trainings for interrogators there in late December 2002, SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 103.

[148] The account in this paragraph is based on the SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. 106-107, citing Memorandum from Alberto Mora to the Inspector General of the Department of the Navy, Statement for the Record: Office Of General Counsel Involvement in Interrogation Issues, July 7, 2004, http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf (accessed June 26, 2011) (Mora Statement for the Record). See also Washington Media Associates Interview with Alberto Mora, September 17, 2007, http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/alberto_mora.html (accessed June 15, 2011).

[149] Mora Statement for the Record, http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf, pp. 13-14. See also SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 107.

[150] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 107. Italics in original.

[151] Ibid., p. xxi. Rather than discard the techniques entirely, however, Rumsfeld ordered that any use of the harsher categories of techniques be approved by him personally, thus suggesting that he continued to consider them legitimate: Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the use of such techniques. Memorandum from Donald Rumsfeld to Commander US, Southern Command, regarding "Counter-Resistance Techniques," January 15, 2003, http://www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf (accessed June 15, 2011).

[152] Memorandum from Donald Rumsfeld, secretary of defense, to [James T. Hill,] Commander, US Southern Command, regarding "Counter-Resistance Techniques in the War on Terrorism," April 16, 2003. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers*, p. 360. Rumsfeld added, however, that "If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee." Ibid.

[153]SASC Report,http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. xxii.

[154] James R. Schlesinger, Department of Defense, Final Report of the Independent Panel to Review DoD Detention Operations, August 24, 2004, http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf (accessed June 21, 2011) (Schlesinger Report), p. 14. The report states that Interrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq, p. 37. The report also makes this point on p. 14, stating that the confusion caused by the series of Rumsfeld directives from December 2002 through April 1, 2003 allowed abuse to spread: changes in DoD interrogation policies between December 2, 2002 and April 16, 2003 were an element contributing to uncertainties in the field as to which techniques were authorized. At the operational level, in the absence of specific guidance from CENTCOM [Central Command], interrogators in Iraq relied on Field Manual FM 34-52 and on unauthorized techniques that had migrated from Afghanistan. There are also suggestions that CIA military support operations may have infected military operations as well, see DOD I-G Report, http://www.justice.gov/oig/special/s0805/final.pdf, pp. 48, 49.

[155] Vice Adm. Albert T. Church, III, US Department of Defense, Review of Department of Defense interrogation operations Executive Summary, US Department of Defense, undated, http://www.defense.gov/news/mar2005/d20050310exe.pdf (accessed June 21, 2011) (Church Report), p. 6.

[156] Ibid, pp. 6-7.

[157] DOD I-G Report, http://www.justice.gov/oig/special/s0805/final.pdf, pp. 26 - 28.

[158] See SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. 153-154.

[159] See Department of Defense Inspector General, Review of DoD-Directed Investigations of Detainee Abuse, Report No. 06-INTEL-10, August 25, 2006, http://www.fas.org/irp/agency/dod/abuse.pdf (accessed June 25, 2011), p. 16. See also SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 158 (citing classified portions of the Church report). The SASC report explained: Specifically, in February 2003, prior to the invasion of Iraq in March, the SMU Task Force designated for operations in Iraq obtained a copy of the interrogation SOP in use by the SMU personnel in Afghanistan, changed the letterhead, and adopted the SOP verbatim. It should be noted that around the same time, late 2003, JPRA personnel were ordered to Iraq to help train interrogators there in mock interrogation methods, just as they had earlier trained CIA personnel, and personnel deployed at Guantanamo and in Afghanistan.

[160] Memorandum from Captain Carolyn Wood to C2X, JTF-7 (Iraq), Abu Ghraib Saddam Fedayeen Interrogation Facility (SFIF) Detainee Interrogation Policy,July 26, 2003, quoted in SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 159-60. One motivation for drafting the policy, she later admitted, was that interrogators under her command had come from a variety of other sites, including Guantanamo and Afghanistan, where they had been authorized to use more abusive techniques than allowed under the baseline Army Field Manual, and that interrogators wished to use the more permissive techniques in Iraq.In order to use those similar techniques from GTMO and Afghanistan in Iraq, we sought approval from the higher command, she told investigators. Sworn Statement of Capt. Carolyn Wood, December 17, 2004, quoted in SASC Report, p. 166. The SASC report added that Commander Gen. Ricardo Sanchez stated that a key purpose of his eventually issuing an interrogation policy was to regulate approach techniques believed derived, in part, from techniques used in Guantanamo Bay and Afghanistan. Statement by LTG Ricardo Sanchez to the Department of the Army Inspector General, October 2004, quoted in SASC report, p. 198.

[161] Ibid., p. 166.

[162] On August 14, 2003, Capt. William Ponce, a more senior intelligence officer, sent out an email to subordinate intelligence units (both Capt. Woods and others) requesting that they submit their interrogation techniques wish lists. Ponce wrote: Immediately seek input from interrogation elements (Division/Corps) concerning what their special interrogation knowledge base is and more importantly, what techniques would they feel would be effective techniques that SJA could review (basically provide a list). . . . The gloves are coming off gentleman regarding these detainees. Col. Boltz has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks. Email communication from Capt. William Ponce, Jr. to CS165MI, HECC, August 14, 2003, quoted in SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. 167-8.

[163] Memorandum from Cpt. Carolyn Wood, SFIF Detainee Interrogation Policy, quoted in SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 169. According to the SASC Report, p. 169, Wood resubmitted her request because her superiors had made it clear that they want[ed] these guys broken and said that her August submission may have been a response the gloves are coming off e-mail from Capt. Ponce.

[164] CJTF-7 Interrogation and Counter-Resistance Policy, cited in SASC report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp. 201-2.

[165]Federal Law 18 U.S.C. sec. 2441.

[166] Federal Law 18 U.S.C. sec. 2340A(a). Section 2340(3) defines the United States as including all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49. The USA Patriot Act broadened the scope of section 7, extending jurisdiction under that section to foreign diplomatic, military, and other facilities. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amends section 2340(3) to define the United States as the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States (H.R.4200, 108th Cong. sec. 1089 (2004)).

[167] Federal Law 18 U.S.C. sec. 2340A(a). Federal law 18 U.S.C. sec. 2340(2) further defines severe mental pain or suffering as the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

[168] Federal Law 18 U.S.C. sec.3282.

[169] Federal Law 18 U.S.C. sec 3292.

[170] Federal Law 18 U.S. C. sec. 3286 adopted in 2001 as part of the Patriot Act extended to eight years the statute of limitations for certain terrorism offenses listed in 18 U.S. C. sec. 2332(g)(5)(b), including torture.

[171] Federal Law 18 U.S.C. sec. 3286(b) states that there is no limitation for any offense listed in 18 U.S.C. section 2332(g)(5)(b) if the commission of such an offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person. Torture is among the offenses listed in section 2332(g)(5)(b) and it arguably meets the foreseeable risk of death or serious bodily injury threshold.

[172] If two or more persons conspire either to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. (18 U.S.C. sec. 371)

[173]See *United States v. Belfast II*, United States Court of Appeals for the Eleventh Circuit, No. 09-10461, July 15, 2010, http://caselaw.findlaw.com/us-11th-circuit/1531578.html (accessed June 12, 2011).

[174]*United States v. Rogers*, United States Court of Appeals for the 10th Circuit, No. 10-6070, 2010, 556 F.3d 1130 (10th Cir. 2010). An overt act is any statement or act that is knowingly said or done by one or more of the conspirators in an effort to accomplish the conspiracy. See Joseph F. McSorley, *A Portable Guide to Federal Conspiracy Law Tactics and Strategies for Criminal and Civil Cases,* 2nd Ed. (New York: American Bar Association, 2003), p. 184.

[175] The overt act does not have to be a crime itself and all conspirators need not join or participate in the commission of the overt act in order to be charged under the federal conspiracy statute.*United States v. Merida*, United States Court of Appeals for the 5th Circuit, June 27, 1985, 761 F.2d 12, 15 (1st Cir. 1985).

[176]*United States v. Wallace,* United States Court of Appeals for the 2nd Circuit, No. 1578, June 19, 1996, 85 F. 3d 1063 (2d Cir. 1996).

[177]*State of Connecticut v. Wells*, Appellate Court of Connecticut, No. 26671, April 3, 2007, http://caselaw.findlaw.com/ct-court-of-appeals/1034918.html (accessed June 14, 2011).

[178]*United States v. Feola*, United States Supreme Court, No. 73-1123, March 19, 1975, 420 U.S. 671, 688 (1975).

[179] In *Fiswick v. United States*, the court stated, The state of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy. The overt acts averred and proved may thus mark the

duration, as well as the scope of the conspiracy. Fiswick v. United States, United States Supreme Court, No. 51, December 9, 1946, 329 U.S. 211, 216 (1946).

[180] Executive Order 13440, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, signed July 20, 2007, http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf (accessed June 15, 2011). See alsoKaren DeYoung, Bush Approves New CIA Methods, Interrogations Of Detainees To Resume, *Washington Post*, July 21, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001264.html (accessed June 15 2011) ; Mark Mazzetti, Rules Lay Out C.I.A.s Tactics in Questioning, *New York Times*, July 21, 2007, http://www.nytimes.com/2007/07/21/washington/21intel.html (accessed June 15, 2011).

[181]The OLC in 2000 concluded thatThe indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions (emphasis added), affirming a 1973 opinion to that effect. The OLC opinion said that [r]ecognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment.Memorandum from the Office of Legal Counsel for the attorney general, A Sitting President's Amenability to Indictment and Criminal Prosecution, Oct. 16, 2000, http://www.justice.gov/olc/sitting_president.htm (accessed June 24, 2011) sec. II (B)3. Indeed, in 2000, the OLC concluded, that despite any double-jeopardy concerns, [t]he Constitution permits a former President to be indicted and tried for the same offenses for which he was impeached by the House of Representatives and acquitted by the Senate. Memorandum from the Office of Legal Counsel for the attorney general, Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, August 18, 2000, http://www.justice.gov/olc/expresident.htm (accessed June 24, 2011). By contrast, a former president is entitled to absolute immunity from damages liability predicated on his official acts. *Nixon v. Fitzgerald*, United States Supreme Court, No-79-1738, June 24, 1982, 457 U.S. 731, 749 (1982).

[182] See for example, Federal Law 18 U.S.C. sec. 2 ((a) Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.).

[183] See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, http://www1.umn.edu/humanrts/instree/y5pagc.htm (accessed June 26, 2011), art. 86(2), which is recognized as customary laws of war. ICRC, *Customary International Humanitarian Law*, rule 152. The Rome Statute of the International Criminal Court, art. 25 states:

a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002.

[184] US Army *Field Manual 27-10*, section 501 states: In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof. Department of the Army, *Field Manual 27-10: The Law of Land Warfare*, July 1956, http://www.aschq.army.mil/gc/files/fm27-10.pdf (accessed June 26, 2011).

[185]*In Re Yamashita*, United States Supreme Court, February 4, 1946,327 US 1, 16 (1946). For a fuller discussion of command responsibility, see Human Rights Watch, *Getting Away with Torture? Command Responsibility for the US Abuse of Detainees*, April 23, 2005, http://www.hrw.org/en/reports/2005/04/23/getting-away-torture-0, Annex.

[186]*Toca* is a kind of cloth, such that would be placed over the victims nose and mouth.

[187] The Istanbul Protocol: The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a prominent set of international guidelines for documentation of torture and its consequences, states:

Near asphyxiation by suffocation is an increasingly common method of torture. It usually leaves no marks and recuperation is rapid. This method of torture was so widely used in Latin America, that its Spanish name "submarino" became part of the human rights vocabulary. Normal respiration might be prevented through methods such as covering the head with plastic bag, closure of the mouth and the nose, pressure or ligature around the neck, or forced aspiration of dusts, cement, hot peppers, etc. This is also known as "dry submarino." Various complications might develop such as petechiae of the skin, nosebleeds, bleeding from the ears, congestion of the face, infections in the mouth and acute and chronic respiratory problems Forcible immersion of the head into water, often contaminated with urine, feces, vomit, or other impurities, may result in near drowning or drowning. Aspiration of the water into the lungs may lead to pneumonia. This form of torture is also called wet submarino. (United Nations: Geneva, 1999), E.01.XIV.1.

[188] According to Malcolm Nance, a former master instructor and chief of training at the US Navy's Survival, Evasion, Resistance and Escape school, who has himself been waterboarded as part of the training, There is nothing simulated about waterboarding at all. It's controlled drowning. [Y]ou can feel every drop. Every drop. You start to panic. And as you panic, you start gasping, and as you gasp, your gag reflex is overridden by water. And then you start to choke, and then you start to drown more. Because the water doesn't stop until the interrogator wants to ask you a question. And then for that second, the water will continue, and you'll get a second to puke and spit up everything that you have, and then you'll have an opportunity to determine whether you're willing to continue with the process. Malcolm Nance, chief of training, US Navy SERE, interview by Washington Media Associates, Torturing Democracy Project, November 15, 2007, http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/malcolm_nance.html (accessed June 15, 2011).

[189] The second August 1, 2002, Bybee memo describes the officially sanctioned procedure of waterboarding as follows: The individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individuals feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, airflow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individuals blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of suffocation and incipient panic. Memorandum from Jay S. Bybee, assistant attorney general, to John Rizzo, acting general counsel of the CIA, regarding Interrogation of al Qaeda Operative, August 1, 2001, http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf (accessed June 25, 2011) (Second Bybee Memo), pp. 3-4.

[190] See Richard Abel, et al. Open Letter to Attorney General Alberto Gonzales, April 5, 2006, posted by Human Rights Watch, http://www.hrw.org/en/news/2006/04/05/open-letter-attorney-general-alberto-gonzales.

[191] Testimony of Lt. Gen. Michael Maples, director of the Defense Intelligence Agency, Before the US Senate Armed Services Committee, Annual Threat Assessment, February 27, 2008, http://www.dni.gov/testimonies/20080227_transcript.pdf (accessed June 15, 2011), p. 31.

[192] U.S Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices2004, Tunisia, February 28, 2005, http://www.state.gov/g/drl/rls/hrrpt/2004/41733.htm (accessed June 15, 2011), stating The forms of torture included: electric shock; confinement to tiny, unlit cells; submersion of the head in water.

[193] Louise Arbour, UN High Commissioner for Human Rights, stated that she "would have no problems with describing [waterboarding] as falling under the prohibition of torture.U.N. says waterboarding should be prosecuted as torture, Reuters, February 8, 2008, http://uk.reuters.com/article/idUKN0852061620080208 (accessed June 15, 2011).

[194] UN Committee Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture, United States of America, U.N. Doc CAT/C/USE/CO/2, July 25, 2006, http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf (accessed June 26, 2011), para. 24.

[195] Then-UN Special Rapporteur on Torture Manfred Nowak stated that "[t]his is absolutely unacceptable under international human rights law ... [the] [t]ime has come that the government will actually acknowledge that they did something wrong and not continue trying to justify what is unjustifiable. Martin Hodgson, US censured for waterboarding, *Guardian*, February 7, 2008, http://www.guardian.co.uk/world/2008/feb/07/humanrights.usa (accessed June 15, 2011).; *UN Blasts White House on Waterboarding*, Associated Press, February 6, 2008, http://www.truth-out.org/article/un-blasts-white-house-waterboarding (accessed January 12, 2011). An earlier special rapporteur on torture had condemned the practice in the mid-1980s, long pre-dating the Bush administration use of waterboarding. See UN Commission on Human Rights, Torture and other cruel, inhuman or degrading treatment or punishment, Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, E/CN.4/1986/15, February 19, 1986, http://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf (accessed June 26, 2011), para. 119 (describing suffocation by near-drowning in water (sous-marin) and/or excrement.

[196] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum, Mission to the United States of America, A/HRC/6/17/Add.3, November 22, 2007, http://www.unhcr.org/refworld/type,MISSION,,USA,4757c5f52,0.html (accessed June 26, 2011), p. 16.

[197] Evan Wallach, Drop by Drop: Forgetting the History of Water Torture in US Courts, *Columbia Journal of Transnational Law*, vol. 45, iss.2 (2007), p.472.

[198] Ibid., pp. 494-501. See also Eric Weiner, Waterboarding: A Tortured History, *NPR News*., November 3, 2007, http://www.npr.org/templates/story/story.php?storyId=15886834 (accessed June 17, 2011).

[199] Wallach, Drop By Drop, pp. 478-489.

[200] Ibid., pp. 478494.

[201] Weiner, Waterboarding: A Tortured History, http://www.npr.org/templates/story/story.php?storyId=15886834; Mark Tran, Cheney endorses simulated drowning, *Guardian*, October 27, 2006,http://www.guardian.co.uk/world/2006/oct/27/usa.guantanamo (accessed June 15, 2011); Torture and the Constitution, Editorial, *Washington Post*, December 11, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/10/AR2005121000934.html (accessed June 15, 2011); Scott Shane, Remarks on Torture May Force New Administrations Hand, *New York Times*, January 16, 2009, http://www.nytimes.com/2009/01/17/us/politics/17detain.html (accessed June 15, 2011). But see Walter Pincus, Waterboarding Historically Controversial, *Washington Post*, October 5, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html (accessed June 15, 2011), in which Pincus states that this photograph reportedly led to an investigation, but does not state that a courtmartial occurre.

[202]*In re Estate of Ferdinand E. Marcos Human Rights Litigation*, United States District Court for the District of Hawaii, 1995, 910 F. Supp. 1460, 1463 (D. Haw. 1995)

[203] The appeal was limited to a procedural matter concerning a refusal to grant a severance: an application for the prosecution of one defendant to be heard separately, *United States v. Lee*, United States Court of Appeals for the 5th Circuit, No. 83-2675, October 12, 1984, 744 F.2d 1124 (5th Cir. 1984), pp. 1124-25.

[204] The White House, News Conference by the President, April 29, 2009, http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-4/29/2009/ (accessed June 27, 2011) (What I've said . . . is that waterboarding violates our ideals and our values. I do believe that it is torture.). Josh Meyer, Holder calls waterboarding torture; Obamas nominee for Attorney General promises big changes at a badly shaken Justice Department, *Los Angeles Times*, January 16, 2009 (quoting Attorney General-designate Eric Holder during his confirmation hearing, Waterboarding is torture).

[205] Former Bush official: Waterboarding is torture, Associated Press, January 18, 2008; Intelligence Chief Couches Reference to Waterboarding as Torture, Associated Press, January 13, 2008.

[206] Memorandum from William J. Haynes, II, general counsel, to secretary of defense, regarding Counter-Resistance Techniques, (with attachments), November 27, 2002, approved December 2, 2002, http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf (accessed June 15, 2011).

[207]Department of the Army, *Field Manual 34-52: Intelligence Interrogation*, September 28, 1992, http://www.fas.org/irp/doddir/army/fm34-52.pdf (accessed June 27, 2011), pp. 1-9. In September 2006, the army replaced FM 34-52 with *FM 2-22.3: Human Intelligence Collector Operations*, http://www.loc.gov/rr/frd/Military_Law/pdf/intel_interrogation_sept-1992.pdf (accessed June 15, 2011). The new version has been criticized

for guidelines in the appendix that could be construed as permitting US interrogators to use sleep deprivation and sensory deprivation techniques on high value detainees. See Letter from interrogators and defense officials to Robert M. Gates, November 16, 2010, http://www.humanrightsfirst.org/our-work/law-and-security/torture-and-accountability/appendix-m-of-the-army-field-manual/letter-from-interrogators-and-intelligence-officials/ (accessed June 16, 2011).

[208] The UN Committee Against Torture (CAT), in its consideration of the report of Israel, for example, noted that methods allegedly included: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committees view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case. CAT, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Israel, A/52/44, September 5, 1997, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.52.44,paras.253-260.En?OpenDocument (accessed June 27, 2011), para. 257, emphasis added). See also, CAT, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Republic of Korea, A/52/44, November 13, 1996, para. 56 (severe sleep deprivation constitutes torture); CAT, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, New Zealand, A/48/44, June 26, 1993, para.148 (threat of torture constitutes torture).

[209] CAT, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, July 25, 2006, http://www.universalhumanrightsindex.org/documents/828/877/document/en/text.html (accessed June 27, 2011), para. 24.

[210] UN Commission on Human Rights, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/59/324, September 1, 2004, http://www.statewatch.org/news/2004/nov/un-torture-doc1.pdf (accessed June 27, 2011), para 17.

[211] See Human Rights Watch, United States: Critique of State Departments Human Rights Report, April 3, 2003, http://www.hrw.org/en/news/2003/04/03/united-states-critique-state-departments-human-rights-report).

[212] US State Department, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices2004, February 28, 2005, http://www.state.gov/g/drl/rls/hrrpt/2004/ (accessed June 27, 2011).

[213] See Department of the Army, *Field Manual 34-52*, http://www.fas.org/irp/doddir/army/fm34-52.pdf, chapter 1 (The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government). Under 18 U.S.C. sec.2340(1), torture is defined to include an act specifically intended to inflict severe mental pain or suffering. Section 2340(2) defines severe mental pain or suffering to mean: the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; or (C) the threat of imminent death.

According the UN special rapporteur on torture, A number of decisions by human rights monitoring mechanisms have referred to the notion of mental pain or suffering, including suffering through intimidation and threats, as a violation of the prohibition of torture and other forms of ill-treatment. Similarly, international humanitarian law prohibits at any time and any place whatsoever any threats to commit violence to the life, health and physical or mental well-being of persons. It is my opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even torture, especially when the victim remains in the hands of law enforcement officials. Commission on Human Rights, Civil and Political Rights, Including the Questions of: Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, E/CN.4/2002/76, Annex III., December 27, 2001, p. 10.

See also UN Commission on Human Rights, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution 2002/38, UN E/CN/4/RES/2002/38, which states, intimidation and coercion, as described in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including serious and credible threats, as well as death threats, to the physical integrity of the victim or of a third person, can amount to cruel, inhuman or degrading treatment or to torture. In Brazil, for example, the UN Special Rapporteur on Torture found that the most common forms of torture were electric shocks, beatings, and threats. Quoted in US Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices2001: Brazil, March 4, 2002, http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8305.htm (accessed June 27, 2011).

[214]Maj. Gen. George R. Fay, Department of the Army, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, August 23, 2004, http://www.defense.gov/news/aug2004/d20040825fay.pdf (accessed June 21, 2011), p. 68.

[215]*Hamdi, et al. v. Rumsfeld, Secretary of Defense, et al.*, United States Supreme Court, No. 03-6696, June 28, 2004, 2004 US LEXIS 4761, p. 13.

[216]Federal law 22 U.S.C. sec. 2304(d)(1) (1994).

[217] International Convention for the Protection of All Persons from Enforced Disappearance, adopted December 20, 2006, GA res. 61/177, UN Doc. A/RES/61/177 (2006), entered into force December 23, 2010, http://www1.umn.edu/humanrts/instree/h4paped.html (accessed June 27, 201), art.2 (emphasis added). The US is not a party to the convention.

[218] Ibid.,.17(1). See also, art. 20.

[219] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975), http://www1.umn.edu/humanrts/instree/h1dpast.htm (accessed June 27, 2011), article 10.

[220] UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, Resolution 60/148, UN Doc. A/RES/60/148, February 21, 2006, p.2, art.11; UN Commission on Human Rights, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution 2005/39, UN Doc. E/CN.4/RES/2005/39, April 19, 2005, art.9.

[221] UN Commission on Human Rights, Civil and Political Rights, Including the Question of: Disappearances and Summary Execution, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/2006/56, December 27, 2005, para. 22.

[222] 25th International Conference of the Red Cross, Geneva, October 23-31, 1986, Obtaining and transmitting personal data as a means of protection and of preventing disappearances, Res. XIII, (adopted by consensus), sec. 2434.

[223] 27th International Conference of the Red Cross and Red Crescent, Geneva, October 31 November 6, 1999, Adoption of the Declaration and the Plan of Action, Res.I (adopted by consensus).

[224] International Committee of the Red Cross, Regional Delegation for United States and Canada, ICRC Report on the Treatment of Fourteen High Value Detainees in CIA Custody, February 2007, http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed June 15, 2011), p. 8.

[225] Ibid., p. 24.

[226] 28 Code of Federal Regulations sec. 0.25(a) (2007).

[227] Memorandum from White House Counsel Alberto Gonzales to President George W. Bush, regarding Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, January 25, 2002, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf (accessed June 15, 2011).

[228] President George W. Bush, interview by Martha Raddatz, ABC News, April 11, 2008, transcript at http://abcnews.go.com/Politics/story?id=4634219&page=1 (accessed June 27, 2011). See also George W. Bush, interview by Matt Lauer, A Conversation with George W. Bush: Decision Points, NBC News, November 8, 2010, transcript at http://www.msnbc.msn.com/id/40076644/ns/politics-decision_points/ (accessed June 27, 2011) (Bush: I said to our team, Are the techniques legal? And a legal team says, Yes, they are. And I said, Use them. Q Why is waterboarding legal, in your opinion? Bush: Because a lawyer said it was legal. He said it did not fall within the anti-torture act. I'm not a lawyer, and -- but you've got to trust the judgment of people around you, and I do.

[229] Mistake of law appears to be ruled out as a defense at customary international law. See Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, *European Journal of International Law*, 10 (1999), http://www.ejil.org/pdfs/10/1/570.pdf (accessed June 15, 2011), p. 155. Under article 2(3) of the Convention against Torture, [a]n order from a superior officer or a public authority may not be invoked as a justification of torture.

[230] Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea, *University of Chicago Law Review*, vol. 8, no. 4 (June 1941), p. 652 ("[l]awyers are under enough temptations toward dishonesty already, without giving them the power to grant indulgences, for a fee, in criminal cases.").

[231]*United States v. Urfer*, United States Court of Appeals for the 7th Circuit, April 26, 2002, 287 F.3d 663, 665 (7th Cir. 2002).

[232] Model Penal Code sec. 2.04(3)(b) (rev.ed. 1985). According to one in-depth analysis, while there is a widespread belief in OLC's immunity-conferring power, and there are strong practical and institutional considerations that stand in the way of the Justice Department prosecuting someone who relied on its opinions, the actual immunizing effect of OLC opinions appears to be ambiguous as a doctrinal matter. The most applicable exception to the ignorance-is-no-defense maxim, labeled "entrapment by estoppel" (EBE) applies when four requirements are met: first, a government official with authority over the area in question affirmatively represented that the conduct was legal; second, the defendant relied on the representation; third, reliance was reasonable; and fourth, prosecution would be unfair. According to this analysis, the applicability of this affirmative defense in the context of the OLC is attenuated by the fact that unlike the paradigmatic EBE situation where the two parties are typically a public official and a private citizen, often on adversarial footing, with the advice tendered at arm's length, [in] the OLC context, the two are members of the same team: the executive branch. The fear is that granting [EBE] in practice may amount to providing advance immunity for officials' intended actions. This fear would be augmented, of course, when the potential defendants are top-ranking government officials who solicited the advice. Note: The Immunity-Conferring Power of the Office of Legal Counsel, *Harvard Law Review*, vol. 121 (2008), http://hlr.rubystudio.com/media/pdf/office_legal_counsel.pdf (accessed June 27, 2011), pp. 2086, 2092-5 (footnotes omitted). But see Joseph Lavitt, The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration, *Maine Law Review*, vol. 62, no. 1 (Fall 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474940## (accessed June 27, 2011), distinguishing the defense of "advice of counsel" from reasonable reliance upon the assurance of government officials.

[233]*United States v. Albertini*, United States Court of Appeals for the 9th Circuit, October 15, 1987, 830 F.2d 985, 989 (9th Cir. 1987) (citations omitted).

[234] Detainee Treatment Act of 2005, Public Law 163-109, 119 Stat. 3136, January 6, 2006, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ163.109.pdf (June 21, 2011), sec. 1404(a).

[235] The ACLU has stated, persons who might not be covered by the advice of counsel defense include: persons who engaged in torture or abuse prior to the issuance of the OLC opinions; persons who did not rely on the OLC opinions; persons who knew the OLC opinions did not accurately reflect the law; persons who are lawyers or were trained as interrogators on applicable law; persons who acted outside the scope of the OLC opinions; or any persons who ordered the OLC opinions drafted specifically for the purpose of providing a defense. The determination of the likely effect of the statutory defense would depend on the facts of a particular instance of alleged torture and abuse. There is no immunity, and certainly nothing that should cut off a criminal investigation before it even starts. See ACLU Letter to US Attorney General Eric Holder, ACLU Asks Justice Department to Appoint Independent Prosecutor to Investigate Torture, March 18, 2009, http://www.aclu.org/national-security/aclu-asks-justice-department-appoint-independent-prosecutor-investigate-torture, (accessed June 17, 2011).

[236] See Richard B. Bilder & Detlev F. Vagts, Editorial Comment, Speaking Law to Power: Lawyers and Torture, *American Journal of International Law*, vol. 98, no. 4 (October 2004), p. 694.

[237]Anthony Lewis, Making Torture Legal, *The New York Review of Books*, July 15, 2004, pp, 4-8.

[238] Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (New York: Doubleday, 2008), p. 328

[239]Ibid., p. 308.

[240]Ibid., p. 309.

[241] Vice President Dick Cheney, interview by Jon Ward and John Solomon, Transcript, *Washington Times*, December 17, 2008, http://www.washingtontimes.com/weblogs/potus-notes/2008/Dec/22/cheney-interview-transcript/ (accessed June 15, 2011).

[242] In his interview with the Justice Departments Office of Professional Responsibility (OPR), Chertoff stated that he told group that in his view, it would not be possible for the Department to provide an advance declination. Rizzo confirmed, in his interview, that Chertoff flatly refused to provide any form of advance declination to the CIA. Although Bybee was not present at this meeting, he told us that he was aware that there was some discussion with the criminal division over the question of providing advance immunity [and that it] was not their practice, to provide that kind of advance [sic]. Department of Justice, Office of Professional Responsibility, Investigation into the Office of Legal Counsels Memoranda concerning Issues Relating to the Central Intelligence Agencys Use of Enhanced Interrogation Techniques on Suspected Terrorists, July 29, 2009, http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (accessed June 17, 2011) (OPR Investigation), p. 47.

[243] Ibid., p. 11. OPR recommended that both lawyers be referred to their respective state bar associations for discipline. Associate Deputy Attorney General David Margolis overruled the OPRs recommended sanctions, however, finding that while Yoo and Bybee exercised poor judgment, they did not knowingly provide false advice, and therefore were not guilty of professional misconduct. Memorandum from David Margolis, associate deputy attorney general, to attorney general and deputy attorney general, regarding Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibilitys Report of Investigation into the Office of Legal Counsels Memoranda Concerning Issues Relating to the Central Intelligence Agencys Use of Enhanced Interrogation Techniques on Suspected Terrorists, January 5, 2010, http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf (accessed June 27, 2011), p. 68.

[244] R. Jeffrey Smith and Dan Eggen , Gonzales Helped Set the Course for Detainees, *Washington Post*, January 5, 2005, http://www.washingtonpost.com/ac2/wp-dyn/A48446-2005Jan4?language=printer (accessed June 15, 2011).

[245] OPR Investigation, http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf, p. 39.

[246] Ibid., p. 51.

[247] Ibid., p. 160.

[248] Ibid., pp. 150-51.

[249] Ibid., p. 131.

[250] Email communication from James Comey to Chuck Rosenberg, April 27, 2005, available at Justice Department Communication on Interrogation Opinions, *New York Times*, http://documents.nytimes.com/justice-department-communication-on-interrogation-opinions#p=1 (accessed June 15, 2011).

[251]For example, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), article 146 (states parties shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.). Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950. See ICRC, *Customary International Humanitarian Law*, rule 158; see also Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, http://untreaty.un.org/cod/icc/index.html (accessed June 15, 2011), art. 21, preamble (noting "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

[252] ICRC, *Customary International Humanitarian Law*, pp. 568-74.

[253] Ibid., p. 556.

[254] Ibid., p. 554.

[255] The duty to investigate and prosecute those responsible for grave violations of human rights has its legal basis in such treaties as the International Covenant on Civil and Political Rights (art. 2); and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (arts. 4, 5, and 7).

[256] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), entered into force March 23, 1976, art. 2. The US ratified the ICCPR in 1992.

[257] Command responsibility and its elements are well-established under customary international law. See International Criminal Court for the former Yugoslavia, *Delalic and Others,* Judgment, IT-96-21-T, Nov. 16, 1998, sec. 333. See e.g., Rome Statute of the International Criminal Court, art. 28; First Additional Protocol of 1977 to the Geneva Conventions, art.86(2). The Convention against Torture in articles 4 and 16 provide that superior officials may be found guilty of complicity or acquiescence if they knew or should have known of torture or ill-treatment practiced by persons under their command. See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford Univ. Press, 2008), p. 248.

[258]*United States v. Reynolds*, United States Supreme Court, No. 21, March 9, 1953, 345 U.S. 1 (1953).

[259] See, for example, *In re United States*, United States Court of Appeals for the District of Columbia Circuit, April 14, 1989,872 F.2d 472, 477 (D.C. Cir. 1989) (refusing to dismiss Federal Tort Claims action merely on basis of the governments unilateral assertion that privileged information lies at the core of th[e] case.); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of contract suit on basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, United States District Court for the Southern District of New York, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds as premature); *Hepting v. AT&T Corp*., 439 F. Supp.2d 974, 994 (N.D. Cal. 2006) (refusing to evaluate whether parties could prove claims and defenses without state secrets, and refusing to dismiss on that basis).

[260] See, for example, *El-Masri v. United States*, United States Court of Appeals for the 4th Circuit, No. 06-1667, March 2, 2007, 552 U.S. 947 (2007)(upholding lower courts dismissal of suit on grounds that El-Masri, who alleged that he was kidnapped, illegally detained and abused by the CIA, would not be able to make his case except by using evidence barred by the state secrets privilege); *Arar v. Ashcroft*, 130 S.Ct. 3409 (2010) (upholding lower courts dismissal of suit, on the basis that it would interfere with national security and foreign policy, by Canadian national who claimed he was sent by the United States to Syria, where he was tortured for one year until his release); *Mohamed v. Jeppesen Dataplan, Inc*., 614 F.3d 1070 (9th Cir. Cal. 2010)(cert. denied May 2011) (dismissing on state secrets grounds a case against the CIAs alleged flight-planning contractor for allegedly flying five individuals to secret sites and countries where they were tortured).

[261] See, for example, *Rasul v. Myers*, 130 S.Ct. 1013 (2009)(affirming lower courts dismissal of torture and related claims on immunity grounds); *Mohammed v. Rumsfeld*, 2011 WL 2462851 (June 21 2011, D.C.Cir.) (dismissing claims on immunity grounds). See also *Saleh et al v. Titan Corporation*, Amicus Curiae Brief for the United States of America, May 2011, available at http://www.ccrjustice.org/files/09-1313%20Titan%20US%20Br%20(2).pdf (accessed June 23, 2011) (brief submitted by the Obama administration claiming that the court need not consider the case because federal preemption blocked consideration, and because there was no disagreement among lower courts requiring resolution by the highest court in the land).

[262]While compensation in conjunction with a full criminal investigation comports with international standards, the Human Rights Committee, which supervises compliance with the ICCPR has recognized that "purely disciplinary and administrative remedies" cannot be deemed to constitute effective remedies when a victim has suffered "a particularly serious violation[] of human rights, notably in the event of an alleged violation of the right to life." *Bautista v. Colombia*, communication No. 563/1993, para. 8.2, CCPR/C/55/D/563/1993 (1995).

[263]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987., art. 14. The US ratified Convention against Torture in 1994.

[264] In *Mohamed v. Jespesen* for example, the 9th Circuit Court of Appeals rejected the plaintiffs claims of torture and abuse suffered while in detention under the Bush administration. *Mohamed v. Jeppesen Dataplan, Inc*., 614 F.3d 1070, 1091-1092 (9th Cir. Cal. 2010). However it did so not based on the merits of the case but based on the state secrets privilege. Under this US legal doctrine, a case must be dismissed even if the claims potentially have merit, if bringing the litigation will reveal state secrets that will negatively impact national security. In doing so however the court noted and encouraged the possibility of compensation as a remedy. Our holding today. . .does not preclude the government from honoring the fundamental principles of justice. The government, having access to the secret information, can determine whether plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands. For instance, the government made reparations to Japanese Latin Americans abducted from Latin America for internment in the United States during World War II.

[265] Ibid., 1091.

[266] Ibid., 1092.

[267] President Bush, interview by Martha Raddatz, http://abcnews.go.com/Politics/story?id=4634219&page=1.

[268]George W. Bush, *Decision Points* (New York: Crown Publishers, 2010), p. 169

[269]Ibid., p. 170. Bush repeated the admission on a number of occasions after the book was published.

[270] Richard B. Cheney, interview by Bob Schieffer, *Face the Nation*, CBS, May 10, 2009, http://www.cbsnews.com/htdocs/pdf/FTN_051009.pdf (accessed June 27, 2011), pp. 4-5.

[271] George W. Bush, Presidential Radio Address, March 8, 2008, quoted in John R. Crook, President Vetoes Legislation to Limit CIA Interrogation Methods; Superseded Justice Memorandum on Interrogation Techniques Fans Controversy, *American Journal of International Law*, vol. 102, no. 3 (July 2008).

[273]Bush, *Decision Points*, p 169.

[274] TranscriptPresident Bushs Speech on Terrorism, *New York Times,* September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=print (accessed June, 16 2011).

[275] Bob Woodward, *Bush at War*, (London: Simon and Schuster UK, 2002), pp. 146-47. Woodward does not specify his source for this quote. His book is based on numerous interviews of Bush administration officials including George Bush, Condoleezza Rice, Colin Powell, and George Tenet.

[276] Remarks by President George W. Bush at the 20th Anniversary of the National Endowment for Democracy, United States Chamber of Commerce, Washington, DC, November 6, 2003, http://www.ned.org/george-w-bush/remarks-by-president-george-w-bush-at-the-20th-anniversary (accessed June 15, 2011).

[277] Mayer, *The Dark Side*, p. 288.

[278] Cheney has been described by one author as the single-minded driving force behind the most aggressive aspects of the Bush administrations counterterrorism policy (Mayer, *The Dark Side*, p. 343) and by the *Washington Post* as a prime mover behind the Bush administration's decision to violate the Geneva Conventions and the U.N. Convention Against Torture. (Vice President for Torture, *Washington Post*, October 26, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102501388.html (accessed June 27, 2011)).

[279] Cheney, interview by Jon Ward and John Solomon, *Washington Times*, http://www.washingtontimes.com/weblogs/potus-notes/2008/Dec/22/cheney-interview-transcript/.

[280] Senate Select Committee on Intelligence (SSCI), Declassified Narrative Describing the Department of Justice Office of Legal Counsels Opinions on the CIAs Detention and Interrogation Program, document released April 22, 2009, http://intelligence.senate.gov/pdfs/olcopinion.pdf (accessed June 24, 2011), p. 7.

[281] Dan Eggen, Cheney's Remarks Fuel Torture Debate, *Washington Post*, October 27, 2006.

[282] Richard Cheney, former vice president, interview by Chris Wallace, *FOX News Sunday*, FOX, August 30, 2009, Transcript, http://www.foxnews.com/politics/2009/08/30/raw-data-transcript-cheney-fox-news-sunday/ (accessed June 15, 2011).

[283] Katharine Q. Seeyle, A Nation Challenged: The Prisoners; First Unlawful Combatants Seized in Afghanistan Arrive at US Base in Cuba, *New York Times*, January 12, 2002, p. A7.

[284]Geneva Convention Doesnt Cover Detainees, Reuters, January 11, 2002.

[285] Secretary of Defense Donald H. Rumsfeld, interview by Matt Lauer, *Today*, NBC, May 5, 2004, Transcript, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2986 (accessed June 15, 2011).

[286] Douglas Jehl and Andrea Elliott, The Reach of War: GI Instructors; Cuba Base Sent its Interrogators to Iraqi Prison, *New York Times*, May 29, 2004, p. A1.

[287] William H. Taft, IV, Keynote Remarks, The Geneva Convention and the Rules of War in the Post 9-11 and Iraq World, conference, Washington College of Law American University, March 24, 2005. On file with Human Rights Watch.

[288] That doctrine is embodied in US Department of the Army, *Field Manual 34-52:Intelligence Interrogation*, which stresses cooperation as the basis for successful interrogation. It specifically prohibits torture or coercive interrogations. The field manual also lists relevant sections of the Geneva Conventions, including the prohibition against, subjecting the individual to humiliating or degrading treatment, implying harm to the individual or his property or implying a deprivation of rights guaranteed under international law because of failure to cooperate.

[289] Memorandum from LTC Jerald Phifer to commander, Joint Task Force 170, regarding Request for Approval of Counter-Resistance Strategies, October 11, 2002, attached to Memorandum from William J. Haynes,II, to secretary of defense, Counter-Resistance Techniques, November 27, 2002, and approved by Secretary Rumsfeld on December 2, 2002, http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf (accessed June 15, 2011) (capitalization in original).

[290] Memorandum from Donald Rumsfeld, secretary of defense, to commander, US Southern Command, regarding Counter-Resistance Techniques, January 15, 2003, www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf (accessed June 15, 2011).

[291]Memorandum from Donald Rumsfeld, secretary of defense, to [James T. Hill,] Commander, US Southern Command, regarding "Counter-Resistance Techniques in the War on Terrorism," April 16, 2003. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers*, p. 360.

[292]Ibid.

[293] James R. Schlesinger, Department of Defense, Final Report of the Independent Panel to Review DoD Detention Operations, August 24, 2004, http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf (accessed June 21, 2011) (Schlesinger Report).

[294]Ibid., p. 68.

[295] Senate Committee of Armed Services, Report on Inquiry into the Treatment of Detainees in US Custody, November 20, 2008, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf (accessed June 21, 2011) (SASC Report), Conclusion 13, p. xxviii.

[296] See Donald Rumsfeld, interview by David Frost, *BBC Breakfast with Frost*, BBC News, June 27, 2004, transcript at http://news.bbc.co.uk/2/hi/programmes/breakfast_with_frost/3844047.stm (accessed June 15, 2011) (You asked how [approval of the techniques] happened. It happened because there was a single detainee that was being interrogated. His name was Katani - Al Katani - who was considered to be the 20th hijacker in connection with the 9-11 attack on the United States.See also Philippe Sands, Torture Team: Rumsfelds Memo and the Betrayal of American Values, (New York: Palgrave Macmillan, 2008), p. 8.

[297]Rumsfeld, *BBC Breakfast with Frost,"*http://news.bbc.co.uk/2/hi/programmes/breakfast_with_frost/3844047.stm.

[298]Sands, *Torture Team*, pp. 130-31. Gen. James T. Hill, Commander of Southern Command, told Sands, none of us can recall who gave that. Sands concludes from the testimony of of Lt Gen. Randall M. Schmidt that the officials felt it was safer to assume that Rumsfeld approved it. Testimony of LTG Randall M. Schmidt, taken August 24, 2005, at Davis Mountain Air Force Base, Arizona, p. 14 http://www.salon.com/entertainment/col/fix/2006/04/14/fri/Schmidt.pdf (accessed June 14, 2011).

[299]Sands, *Torture Team*, p. 138.

[300] Testimony of Schmidt, August 24, 2005, http://www.salon.com/entertainment/col/fix/2006/04/14/fri/Schmidt.pdf.

[301]Interrogation log for detainee 063 [al-Qahtani], obtained by *Time*, available at http://www.time.com/time/2006/log/log.pdf (accessed June 15, 2011). See Adam Zagorin, Inside the Interrogation of Detainee 063, *Time*, June 12, 2005, http://www.time.com/time/printout/0,8816,1071284,00.html (accessed June 27, 2011).

[302]See Sands, *Torture Team*, p. 8.

[303]Interrogation log for detainee 063 [al-Qahtani], http://www.time.com/time/2006/log/log.pdf; Zagorin, Inside the Interrogation of Detainee 063, http://www.time.com/time/printout/0,8816,1071284,00.html.

[304]Zagorin, Inside the Interrogation of Detainee 063, http://www.time.com/time/printout/0,8816,1071284,00.html.

[305] Interrogation log for detainee 063 [al-Qahtani], http://www.time.com/time/2006/log/log.pdf.

[306] Testimony of Schmidt, August 24, 2005, http://www.salon.com/entertainment/col/fix/2006/04/14/fri/Schmidt.pdf.

[307]Michael Ratner and the Center for Constitutional Rights, *The Trial of Donald Rumsfeld* (New York: New Press, 2008), p. 59.

[308] [David Becker] told the Committee that, on several occasions, [Maj. Gen.] Dunlavey had advised him that the office of Deputy Secretary of Defense Wolfowitz had called to express concerns about the insufficient intelligence production at GTMO [Guantanamo]. Mr. Becker recalled [Maj. Gen.] Dunlavey telling him after one of these calls, that the Deputy Secretary himself said that GTMO should use more aggressive interrogation techniques. SASC staff interview with David Becker, September 17, 2007, cited in SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 41.

[309] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, pp.73-4 and 142. However, the Report notes, at p. 74, that Gen. Miller stated in his SASC interview that he misspoke in his interview with the Army inspector general. While Miller stated in his interview with the Army inspector general that he spoke regularly with Wolfowitz, in his interview with the SASC that he stated that he only briefed Wolfowitz quarterly, in person. Another officer working at Guantanamo stated in his SASC Interview that Miller and Wolfowitz were in phone contact a lot.

[310] Army Brig. Gen. John Furlow and Air Force Lt. Gen. Randall M. Schmidt, Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, April 1, 2005 (amended June 9, 2005), http://www.defense.gov/news/Jul2005/d20050714report.pdf (accessed June 21, 2011).

[311] Testimony of Schmidt, August 24, 2005, http://www.salon.com/entertainment/col/fix/2006/04/14/fri/Schmidt.pdf.

[312] Ibid., p. 33.

[313] Ibid.

[314] Ibid., p. 34.

[315] Ibid., p. 36.

[316] Testimony of Gen. James T. Hill, taken October 7, 2005, at Coral Gables, Florida, by Department of the Army inspector general, http://images.salon.com/ent/col/fix/2006/04/14/fri/HILL.pdf (accessed June 15, 2011).

[317] Ibid., p. 19.

[318] SASC Report, http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, p. 106-107, citing Memorandum from Alberto Mora to the Inspector General of the Department of the Navy, Statement for the Record: Office Of General Counsel Involvement in Interrogation Issues, July 7, 2004, http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf (accessed June 26, 2011) (Mora Statement for the Record), pp. 2-3. Mora included in his communications to Rumsfelds office a memorandum from Navy JAG Corps Commander Stephen Gallotta providing a legal analysis, in which Commander Gallotta wrote that some of the techniques, both taken alone and especially when taken together, could amount to torture; that some constituted assault; and that most of the techniques were *per se* illegal. See section Authorization in the Face of Controversy, below.

[319] Bob Woodward, Detainee Tortured, Says US Official: Trial Overseer Cites Abusive Methods Against 9/11 Suspect, *Washington Post*, January 14, 2009.

[320] See Setback for US Taleban Defence, *BBC News*, April 1, 2002, http://news.bbc.co.uk/1/hi/world/americas/1905647.stm (accessed June 15, 2011).

[321]*United States of America v. John Philip Walker Lindh*, US District Court, E.D. Va., No. 02-37-A, Proffer of facts in Support of Defendants Motion to Suppress, June 13, 2002, http://www.lindhdefense.info/20020613_FactsSuppSuppress.pdf (accessed June 15, 2011).

[322] Ibid.

[323]Richard A. Serrano, Prison Interrogators Gloves Came off before Abu Ghraib, *Los Angeles Times*, June 9, 2004.

[324] Ibid.On the eve of a court hearing on his motion to suppress his confession, at which he likely would have testified to his treatment in Afghanistan, Lindh agreed to plead guilty to lesser charges than those for which he was indicted. As part of the arrangement Lindh, reportedly at the request of the Department of Defense, agreed to the following statement: The defendant agrees that this agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn. The defendant acknowledges that he was not intentionally mistreated by the US military. See Dave Lindorff, A First Glimpse at Bushs Torture Show, *Counterpunch*, June 5-6, 2004; Dave Lindorff, Chertoff and Torture, *The Nation*, February 14, 2005.

[325] Memorandum from Donald Rumsfeld to Jim Haynes, regarding Walker, January 14, 2002, http://edge-cache.gawker.com/gawker/rumsfeld.html (accessed June 15, 2011), p. 84.

[326] Peter Slevin and Robin Wright, Pentagon Was Warned of Abuse Months Ago, *Washington Post*, May 8, 2004, p. A12; Mark Matthews, Powell: Bush Told of Red Cross Reports, *Baltimore Sun*, May 12, 2004.

[327]Slevin and Wright, Pentagon Was Warned of Abuse Months Ago.

[328] Human Rights Watch interviews with Afghan officials, Kabul, September 2002.

[329]See for example, Transcript of news conference, Secretary of Defense Rumsfeld, the Pentagon, January 22, 2002, http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm (accessed June 27, 2011) (dismissing claims about mistreatment of detainees captured in Afghanistan as utter nonsense); Transcript of news conference, Secretary Rumsfeld and Gen. Myers, the Pentagon, February 12, 2002, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636 (accessed June 27, 2011).

[330] International Committee of the Red Cross, Regional Delegation for United States and Canada, ICRC Report on the Treatment of Fourteen High Value Detainees in CIA Custody, February 2007, http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed June 15, 2011), pp. 4-5.

[331] Office of the Provost Marshal General of the Army, Report on Detention and Corrections Operations in Iraq, November 5, 2003, http://www.aclu.org/torturefoia/released/18TF.pdf (accessed June 15, 2011); Chronology: Early Warnings Missed; A Prison-Abuse Timeline, *Los Angeles Times*, May 16, 2004.

[332] Josh White, US Generals in Iraq Were Told of Abuse Early, Inquiry Finds, *Washington Post*, December 1, 2004.

[333]Carlotta Gall, US Military Investigating Death of Afghan in Custody, *New York Times*, March 4, 2003.

[334] The Schlesinger report counted about 300 allegations of prisoner mistreatment in Iraq, Afghanistan, and Guantanamo, beginning almost immediately after the invasion of Afghanistan in 2001. In addition, there may be as many as 100 ghost detainees kept hidden from the ICRC. Schlesinger Report, http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf, p. 5; Rumsfeld Defends Pentagon in Abuse Scandal, Associated Press, September 10, 2004.

[335] The Department of Defense has reported that abuses against detainees fell sharply after the Abu Ghraib revelations (Josh White, Reported Abuse Cases Fell after Abu Ghraib, *Washington Post*, March 17, 2005, p. A17). This suggests that attention to proper treatment of detainees can have a salutary effect.

[336] Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York: Simon & Schuster, 2007), pp. 82-3.

[337]Woodward, *Bush at War,* p.146. Woodward does not specify his source for this account.

[338] Michael Scheuer, A Fine Rendition, New York Times, March 11, 2005, http://www.nytimes.com/2005/03/11/opinion/11scheuer.html (accessed June 27, 2011).

[339]Transcript of Rendition, File on 4, BBC Current Affairs Group, February 8, 2005, http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15_02_05_renditions.pdf (accessed June 15, 2011), p. 13.

[340]Michael Hirsh, John Barry, and Daniel Klaidman, A Tortured Debate, Newsweek, June 21, 2004. Al-Libi was also a principal source for Bush administration claims that al-Qaeda collaborated with Saddam Hussein, particularly the assertion by Secretary of State Colin Powell to the United Nations that Iraq had provided training in poisons and deadly gases for al-Qaeda.

[341] George Tenet *and Bill Harlow, At the Center of the Storm: My Years at the CIA (New York: Harper Collins, 2007), p.353-54.*

[342] John Barry,Michael Isikoff,and Michael Hirsh, The Roots of Torture, *Newsweek*, http://www.newsweek.com/2004/05/23/the-roots-of-torture.html (accessed June 15, 2011).

[343] Suskind, *The One Percent Doctrine* p. 87. Another person in attendance confirmed this in an interview with Jane Mayer. Mayer, *The Dark Side*, p. 365.

[344] Dana Priest and Barton Gellman, US Decries Abuse but Defends Interrogations, *Washington Post*, December 25, 2002.

[345]Jane Mayer, Outsourcing Torture: The Secret History of Americas Extraordinary Rendition Program, *New Yorker*, February 8, 2005; Transcript of Rendition, *File on 4*, http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15_02_05_renditions.pdf; CIA Flying Suspects to Torture? *60 Minutes*, CBS, March 6, 2005.

[346] See US: Critique of State Departments Human Rights Report, Human Rights Watch news release, April 3, 2003, http://www.hrw.org/en/news/2003/04/03/united-states-critique-state-departments-human-rights-report.

[347] US State Department, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices2003: Egypt, February 25, 2004, http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm (accessed June 15, 2011).

[348] US State Department, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices2003: Syria, February 25, 2004, http://www.state.gov/g/drl/rls/hrrpt/2003/27938.htm (accessed June 15, 2011).

[349] Shannon McCaffrey, Canadian Sent to Syria Prison Disputes US Claims against Torture, *Knight Ridder*, July 28, 2004, http://www.commondreams.org/headlines04/0729-01.htm (accessed June 15, 2011). See also Dana Priest, Man was Deported after Syrian Assurances, *Washington Post*, November 20, 2003: Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible. *The Washington Post* quoted an Arab diplomat, whose country is actively engaged in counterterrorism operations and shares intelligence with the CIA, as saying that it was unrealistic to believe the CIA really wanted to follow up on the assurances. "It would be stupid to keep track of them because then you would know what's going on," he said. "It's really more like 'Don't ask, don't tell. Dana Priest, CIA's Assurances on Transferred Suspects Doubted, *Washington Post*, March 17, 2005.

[350]Dana Priest, CIA Puts Harsh Tactics on Hold, Washington Post, June 27, 2004, http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html (accessed June 15, 2011).

[351]Mayer, *The Dark Side*, p.167.

[352] Toby Harnden, Condoleezza Rice Approved Torture Techniques, *London Times,* April 23, 2009, http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5208701/Condoleezza-Rice-approved-torture-techniques.html , (accessed June 17, 2011).

[353] See, for example, Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, November 1, 1998, http://www.hrw.org/en/reports/1998/11/01/pinochet-precedent. Also see: Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, June 27, 2006, http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe. The general discussion of universal jurisdiction is largely drawn from these two reports.

[354] See for example, International Law Commission, Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic, The obligation to extradite or prosecute (*aut dedere aut judicare*), Study by the Secretariat, UN Doc. A/CN.4/630, June 18, 2010, http://untreaty.un.org/ilc/guide/7_6.htm (accessed June 27, 2011). According to Amnesty International, all UN member states have ratified treaties with *aut dedere aut judicaire* obligations to exercise jurisdiction over foreigners suspected of committing certain crimes abroad against other foreigners. Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)*, AI Index: IOR 40/001/2009, February 2009, http://www.amnesty.org/en/library/info/IOR40/001/2009/en (accessed June 15, 2011), pp. 74-98.

[355] United Nations Treaty Collection, Status of Treaty, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (accessed June 15, 2011).

[356] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res.39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. VII.

[357] During situations of armed conflict, the US is also bound by customary laws of warstate practices that are broadly accepted as binding law. Thus even if the 1949 Geneva Conventions were not applicable, the US would still be required to adhere to customary law, which includes clear prohibitions on torture and inhuman treatment, secret detention, and other practices US personnel engaged in post September 11, 2001.

[358] See Human Rights Watch, *The Pinochet Precedent*, http://www.hrw.org/en/reports/1998/11/01/pinochet-precedent.

[359] The House of Lords, then the UKs highest court, twice rejected Pinochet's claim of immunity. In its first judgment, later annulled, the Lords ruled that although a former head of state enjoys immunity for acts committed in his functions as head of state, international crimes such as torture and crimes against humanity were not "functions" of a head of state. In the second, more limited, judgment, the Lords held that once Britain and Chile had ratified the United Nations Convention against Torture, Pinochet could not claim immunity for torture. A British magistrate then determined that Pinochet could be extradited to Spain on charges of torture and conspiracy to commit torture. In March 2000, however, after medical tests were said to reveal that Pinochet no longer had the mental capacity to stand trial, he was released and he returned home to Chile. See Reed Brody and Michael Ratner, *The Pinochet Papers* (The Hague: Kluwer Law International, 2000).

[360] Over the past two decades, universal jurisdiction cases have been brought before the courts of Argentina, Austria, Belgium, Canada, Denmark, France, Germany, The Netherlands, Norway, Senegal, Sweden, Spain, Switzerland, the United Kingdom, and the United States.

[361] See Human Rights Watch, Q&A: Charles Chuckie Taylor, Jr.s Trial in the United States for Torture Committed in Liberia, September 23, 2008, http://www.hrw.org/en/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia.

[362] These countries often also allow trials in absentia in passive personality cases. Human Rights Watch believes fairness requires that the accused be present in court during a trial to put forward a defense. If an accused is apprehended following a trial in which he was convicted in absentia, the verdict rendered should be quashed and a completely new trial held. This is indeed the practice in many countries.

[363] Rumsfeld Sued for Alleged War Crimes, November 20, 2004, *Deutsche Welle* & AFP, http://www.dw-world.de/dw/article/0,,1413907,00.html (accessed June 15, 2011). The German Code of Crimes against International Law in article 1, part 1, section 1 states: "This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offenses designated therein even when the offense was committed abroad and bears no relation to Germany.

[364] See relevant documents at German War Crimes Complaint against Donald Rumsfeld, et al., *Center for Constitutional Rights,* http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al (accessed June 15, 2011). The military officers named are Gen. Geoffrey Miller, Gen. Ricardo Sanchez, Gen. Walter Wojdakowski, Gen. Barbara Fast, Col. Thomas Pappas, Col. Marc Warren, and Lt. Col. Three of those named in the complaint were present in Germany: Sanchez and Wojdakowski were stationed in Heidelberg; Pappas was in Wiesbaden.

[365] Human Rights Watch, *Getting Away with Torture? Command Responsibility for the US Abuse of Detainees* , April 23, 2005, http://www.hrw.org/en/reports/2005/04/23/getting-away-torture-0.

[366] Bradley Graham, Rumsfeld's Attendance at Security Conference Uncertain, *Washington Post*, January 28, 2005, http://www.washingtonpost.com/wp-dyn/articles/A42850-2005Jan27.html (accessed June 15, 2011).See also Rumsfeld to Bypass Munich Conference, *Deutsche Welle*, January 21, 2005, http://www.dw-world.de/dw/article/0,,1465263,00.html (accessed June 15, 2011).

[367]Transcript of news conference, Department of Defense, February 3, 2005, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1691 (accessed June 15, 2011). The exchange continued as follows: Reporter: Are you concerned at all about the universal jurisdiction that Germany has, and the fact that Rumsfeld: It's certainly an issue, as it was in Belgium [where suits against US officials led Secretary Rumsfeld to threaten to move NATO headquarters]. It's something that we have to take into consideration.

[368] General Kay Nehm, Decision to Dismiss Complaint against Donald Rumsfeld, et al., February 10, 2005, English translation, http://www.brussellstribunal.org/pdf/RumsfeldGermany.pdf (accessed June 17, 2011).

[369] Rumsfeld to Attend Munich Security Conference in Germany, Xinhua News Agency, February 11, 2005.

[370] Katherine Gallagher, Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture, *Journal of International Criminal Justice*, November 2009, 1087 at 1105.

[371] Center for Constitutional Rights (CCR), German War Crimes Complaint Against Donald Rumsfeld, et al., undated, http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al (accessed June 15, 2011).

[372] They included Alberto Gonzales, Jay Bybee, John Yoo, William J. Haynes, II, and David Addington.

[373] CCR, German War Crimes Complaint Against Donald Rumsfeld, http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al.

[374] Prosecutor General, *Re: Criminal Complaint against Donald Rumsfeld et al.*, April 5, 2007, http://ccrjustice.org/files/ProsecutorsDecision.pdf (accessed June 15, 2011).

[375] Ibid., pp. 6-7.

[376] Stuttgart Higher Regional Court Decision, Criminal Panel5, April 21 2009, English translation, http://www.ccrjustice.org/files/Stuttgart%20Appeals%20Court%20Decision%20Rumsfeld%20Case%20-%20EN.pdf (accessed June 15, 2011), p. 10.

[377] Katherine Gallagher, Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture, *Journal of International Criminal Justice*, vol. 7 (November 2009), http://jicj.oxfordjournals.org/content/7/5/1087.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT (accessed June 27, 2011), p. 1109.

[378] France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint, International Federation for Human Rights (FIDH) news release, November 27, 2007, http://www.fidh.org/FRANCE-IN-VIOLATION-OF-LAW-GRANTS-DONALD-RUMSFELD (accessed June 15, 2011).

[379] The prosecutor relied on the ICJ decision of Arrest Warrant of 11 April 2000*Democratic Republic of the Congo v. Belgium*) stating that law established by the International Court of Justice, immunity from criminal jurisdiction for Heads of State and Government and Ministers continues to apply after termination of their functions, for acts carried out during their time of office and hence, as former Secretary of Defense, Mr. Rumsfeld, by extension should benefit from this same immunity for acts carried out in the exercise of his functions. *See* Gallagher, Universal Jurisdiction in Practice, http://jicj.oxfordjournals.org/content/7/5/1087.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT, p. 1110.

[380] Letter from Public Prosecutor (*Procureur gnral*) to the Paris Court of Appeal to Mr. Patrick Baudouin, regarding Case of Donald Rumsfeld - triggering contesting the decision of the Paris District Prosecutor (Procureur de la Rpublique) to dismiss the case, February 27, 2008. For translation see http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf (accessed June 15, 2011).

[381] Ibid.

[382] See Nuremberg Charter, art.7 ([t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment); Statute of the ICTY, art. 7(2) (same); Decision on Preliminary Matters, Milosevic (IT-02-54-PT), November 8, 2001, 32 (quoting Nuremberg Judgment, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10: He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.); Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), Opinion of Lord Browne-Wilkinson (Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong grounds for saying that the implementation of torture . . . cannot be a state function.); Issue of subpoena duces tecum, Blaskic (IT-95-14-AR), Appeals Chamber, October 29, 1997, para. 41 (those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity).

[383] Julian Borger and Dale Fuchs, Spanish judge to hear torture case against six Bush officials, *Guardian*, March 29, 2009, http://www.guardian.co.uk/world/2009/mar/29/guantanamo-bay-torture-inquiry (accessed June 15, 2011). See also Scott Horton, The Bush Six to Be Indicted, *Daily Beast*, April 13, 2009, http://www.thedailybeast.com/blogs-and-stories/2009-04-13/the-bush-six-to-be-indicted/ (accessed June 15, 2011).The complaint is available at http://imagenes.publico.es/resources/archivos/2009/3/27/1238184153397QUERELLA_VERSION_FINAL.pdf (accessed June 15, 2011).

[384] Ibid.

[385] This occurred following objections by the Spanish attorney-general over a potential conflict of interest of Garzns with another pending investigation for which he has responsibility, and a report filed by the Public Office Prosecutor requesting discontinuance. See CCR, The Spanish Investigation into US Torture, undated, http://www.ccrjustice.org/spain-us-torture-case (accessed June 15, 2011). In May 2010, the Spanish General Council of the Judiciary suspended Judge Garzn, pending trial, over his decision to open investigations into war crimes allegedly committed by General Franco during and after the Spanish Civil War. Garzn faces up to 20 years in prison if the suspension is confirmed. See Reed Brody, The dismal assault on Baltasar Garzn, *Guardian* , April 13, 2010, http://www.guardian.co.uk/commentisfree/2010/apr/13/baltasar-garzon-spanish-judge-prosecution (accessed June 15, 2011); Denholm Barnetson, Embattled Spanish judge suspended ahead of trial, Agence France Presse, May 14, 2010, http://www.google.com/hostednews/afp/article/ALeqM5ikra4-NwT53TijA7gDtFEbmXL3HQ (accessed June 15, 2011). Judge Garzn was subsequently retained as a consultant with the International Criminal Court. Raphael Minder, Spanish Judge Says His Fight for Human Rights Will Endure, *New York Times*, June 8, 2010, http://www.nytimes.com/2010/06/09/world/europe/09iht-garzon.html (accessed June 15, 2011).

[386] US State Department Memorandum, Garzon opens second investigation into alleged US Torture of Terrorism Detainees, May 5, 2009, http://ccrjustice.org/files/wikileaks/WikiLeaks_Cable_09MADRID440_GARZON_OPENS_SECOND_INVESTIGATION.pdf (accessed June 15, 2011).

[387] John Paul Putney, Spain judge seeks US government response to Guantanamo abuse allegations, post to Paper Chase (blog), jurist.com, January 28, 2008, http://jurist.org/paperchase/2011/01/spain-judge-seeks-us-government-response-to-guantanamo-abuse-allegations.php (accessed June 15, 2011).

[388] Letter from Criminal Division, US Department of Justice, to Paula Mong Royo, Subdirectora General de Cooperacin Jurdica Internacional, March 1, 2011, http://ccrjustice.org/files/US%20Letters%20Rogatory%20Response%20March%201,%202011%20-%20ENG.pdf (accessed June 15, 2011)..

[389] Judge Velasco's decision is available at http://ccrjustice.org/files/13%20April%202011%20Order%20SPAN.pdf (accessedJune 15, 2011). An unofficial English translation is available at http://ccrjustice.org/files/13%20April%202011%20Order%20ENG.pdf (accessed June 15, 2011)

[390] CCR, The Spanish Investigation into U.S. Torture, http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture.

[391] The complainants were Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latif AlBanna, and Omar Deghayes. Ahmed was a Spanish citizen and Ikassrien a longterm Spanish resident, and extradition requests had previously been issued for Al Banna and Deghayes. The requests were also issued by Garzn. See Gallagher, Universal Jurisdiction in Practice, http://jicj.oxfordjournals.org/content/7/5/1087.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT, p. 1113; Juzgado Central de Instruccion N8 5, Audiencia Nacional, Madrid (Spanish High Court), decision (auto) of 27 April 2009, Preliminary Investigations (*diligencias previas*) 150/09N, unofficial English translation available from CCR, http://www.ccrjustice.org/files/Unofficial%20Translation%20of%20the%20Spanish%20Decision%2004-27-2009.pdf (accessed June 15, 2011)) (Garzn Decision).

[392] Putney, Spain judge seeks US government response, http://jurist.org/paperchase/2011/01/spain-judge-seeks-us-government-response-to-guantanamo-abuse-allegations.php (accessed June 15, 2011). For an English copy of the letter, see http://www.ccrjustice.org/files/Letter%20Rogatory%2005.26.09_English.pdf (accessed June 15, 2011).

[393] Ibid.

[394] Judge Garzns decision is available at http://ccrjustice.org/files/09.04.27_Spanish%20Preliminary%20Decision.pdf (accessed June 23, 2011). An unofficial English translation is available at http://ccrjustice.org/files/Unofficial%20Translation%20of%20the%20Spanish%20Decision%2004-27-2009_0.pdf (accessed June 23, 2011).

[395] Ibid.

[396]See Brody, The dismal assault on Baltasar Garzn,http://www.guardian.co.uk/commentisfree/2010/apr/13/baltasar-garzon-spanish-judge-prosecution.

[397] Rights Groups Urge Spanish Judge to Subpoena Former Guantanamo Commander for Role in Detainee Torture, CCR news release, January 7, 2011, http://ccrjustice.org/newsroom/press-releases/rights-groups-urge-spanish-judge-subpoena-former-guant%C3%A1namo-commander-role-0 (accessed June 15, 2011).

[398] Gallagher, Universal Jurisdiction in Practice, http://jicj.oxfordjournals.org/content/7/5/1087.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT, p.1114.See also Reed Brody, Spain must resist diplomatic pressure to limit application of universal jurisdiction, *Jurist*, May 22, 2009, http://jurist.law.pitt.edu/hotline/2009/05/spain-must-resist-diplomatic-pressure.php (accessed June 15, 2011).

[399] Articles 23 (4)-(5), Spanish Organic Law of the Judicial Power; See CCR, The Spanish Investigation into US Torture, http://www.ccrjustice.org/spain-us-torture-case.

[400] Giles Tremlett, Wikileaks: US pressured Spain over CIA rendition and Guantanamo torture, *Guardian*, December 1, 2010, http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition?INTCMP=SRCH (accessed June 15, 2011). Scott Horton, The Madrid Cables, *Harpers*, http://www.harpers.org/archive/2010/12/hbc-90007836 (accessed June 23, 2011)

[401] US Embassy cables: Ambassador warns of anti-American Spanish judge Baltasar Garzn, December 21, 2007, http://www.guardian.co.uk/world/us-embassy-cables-documents/135369 (accessed June 15, 2011).

[402] US embassy cables: Dont pursue Guantanamo criminal case, says Spanish attorney general, April 17, 2009, http://www.guardian.co.uk/world/us-embassy-cables-documents/202776 (accessed June 15, 2011)

[403]Ibid.

[404] Ibid. See also US embassy cables: Ambassador warns of anti-American Spanish judge, http://www.guardian.co.uk/world/us-embassy-cables-documents/135369.

[405] US State Department cable, Garzon Opens Second Investigation into Alleged US Torture of Terrorism Detainees, May 5, 2009, http://ccrjustice.org/files/wikileaks/WikiLeaks_Cable_09MADRID440_GARZON_OPENS_SECOND_INVESTIGATION.pdf (accessed June 15, 2011). See alsoHorton, The Bush Six to Be Indicted, *Daily Beast*, April 13, 2009, in which a person in attendance described the meeting as correct and formal, and that US officials were basically there just to collect information.

[406] The World According to Garzn: The State Department doesn't get it, *Wall Street Journal*, April 8, 2009, http://online.wsj.com/article/SB123914679286098931.html (accessed June 15, 2011).

[407] Tremlett, Wikileaks, http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition?INTCMP=SRCH. US embassy cables: Spanish prosecutor weighs Guantanamo criminal case against US officials, April 1, 2009, http://www.guardian.co.uk/world/us-embassy-cables-documents/200177 (accessed June 15, 2011).

[408] Tremlett, Wikileaks, http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition?INTCMP=SRCH.