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FROM THE DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART IV)

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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FROM THE DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART IV)

TUESDAY, JULY 15, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:15 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Davis, Wasserman Schultz, Ellison, Conyers, Scott, Watt, Franks, Pence, Issa, and King.

Staff Present: David Lachmann, Subcommittee Chief of Staff; Sam Sokol, Majority Counsel; Heather Sawyer, Majority Counsel; Caroline Mays, Majority Professional Staff Member; Paul Taylor, Minority Counsel; and Charlotte Sellmeyer, Minority Professional Staff Member.

Mr. NADLER. Ladies and gentlemen, before we start this hearing, may I remind everybody that this is an official hearing of the Subcommittee. No disruption or calling out will be tolerated. Anyone who does will be instantly evicted from the room. We have had pretty good decorum at previous hearings on this subject. Please, let's not change that. I don't like to evict anybody from the room. But if I have to, I will, and I won't hesitate, because we have to do this in a business-like manner and respect the rights of the witnesses, the Committee Members and, for that matter, everybody watching.

So those who have the privilege of having a seat in the room to observe this, you are observers. Observe. You're not participants in the sense of calling out or voicing opinions. You can voice opinions through blogs, e-mails, anything else you want after the hearing. Thank you.

This hearing of the Subcommittee on the Constitution, Civil Rights and Civil Liberties is called to order. Without objection, the Chair is authorized to declare a recess of the hearing.

Mr. KING. Objection. Objection, Mr. Chairman.

Mr. NADLER. The gentleman wants us to sit here through votes, is that the point?

Mr. KING. Mr. Chairman, I object to granting unanimous consent to the Chair, and that is an issue that can be dealt with when the situation arises.

Mr. NADLER. Members of the Committee, I move that the Chair be authorized to declare a recess at the Chair's discretion. All in favor? Opposed? The ayes have it. The Clerk will call the roll. Is there a Clerk?

Mr. ISSA. Mr. Chairman.

Mr. NADLER. Who seeks recognition?

Mr. ISSA. Mr. Chairman, might I suggest in the absence of a recording clerk that——

Mr. NADLER. There is a recording clerk.

Mr. ISSA. Might I suggest before the reporting clerk gets down to call the roll, that if the Chairman and Ranking Member were to agree to, and whoever is sitting as Ranking Member, were to agree to a recess at any time, I am quite sure there would be no objection.

Mr. NADLER. I will accept that assurance. I do not anticipate having controversy between the Chairman and the Ranking Member over whether to call a recess. That has never occurred, to my knowledge, or my memory, certainly. So with that assurance, the Committee will proceed, in the understanding that if it is necessary to call a recess because of votes on the floor, or any other unforeseen event, that we will call a recess.

We will now begin by proceeding to Members' opening statements. As has been the practice in this Subcommittee, I will recognize the Chairs and Ranking Members of the Subcommittees and of the full Committee to make opening statements. In the interest of proceeding through our witnesses, and mindful of our busy schedule, I would ask that other Members submit their statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

The Chair now recognizes himself for 5 minutes for an opening statement.

Today, this Subcommittee continues its investigation into this Administration's interrogation policies, which have brought disgrace to our Nation. Whatever euphemism one chooses, harsh interrogation, enhanced interrogation, or whatever justification might be offered, I believe, given all we know now, that it is clear that this Administration has authorized torture and that under its auspices, torture has been inflicted on people in U.S. custody and that assurances that this Nation does not use torture, when it clearly does, does not make the situation any better.

The testimony we have received so far has been deeply troubling. Perhaps nothing was so troubling as discovering that the Chief of Staff to the Vice President of the United States could not bring himself to make an unequivocal statement that the President lacked the authority to order someone buried alive.

I have also been astonished to discover that despite the radical departure from past practice and the past understanding of the law governing interrogation and treatment of detainees, no one appears to have been responsible for the changed understanding of the word "torture." In fact, it has been surprisingly difficult to find

anyone who can remember much about the decision-making process at all. Perhaps there is something in the White House drinking water these days that causes amnesia.

The facts have also been obscured by expansive claims of privilege, extraordinary claims of secrecy, sometimes concerning matters that were later made public without so much as a ripple, and claims that some matters were so super secret that Members of Congress couldn't be told even in a classified setting.

I do not believe that this country has ever had an Administration that was as obsessed with secrecy as this one. The public is ill-served by concealing questions of law and policy from the public or from other branches government. Not questions of execution, but questions of law.

Nonetheless, the picture that has emerged from our investigations, despite the Administration's stonewalling, is deeply disturbing. It seems clear from the evidence that we have been able to assemble so far that the Administration decided early on to engage in torture, to use any rationale to do what generations of soldiers understood we could not do, and to conceal that fact from the American people and from the world. As a result, our Nation, and especially our men and women in uniform, are unsafe today.

It was also interesting to hear from Mr. Yoo at a previous hearing that he could not say that a foreign power or enemy power that waterboarded our troops would be doing anything illegal. That is the consequence of our adopting policies of torture.

Instead of uniting our allies and isolating our enemies, the Administration has accomplished the exact opposite. We must find out who is responsible for this and must determine how we can prevent this from happening again.

Today, we will hear from Douglas Feith, one of the individuals most closely associated with the decision-making process concerning detainees. Mr. Feith was a top ranking official at the Department of Defense when many of these matters were considered and many of the policies set in place. I hope that Mr. Feith will be able to enlighten the Subcommittee about how some of these decisions were made and what the justification was for these policies.

Before we begin, I need to address the issue of the subpoena that Chairman Conyers issued to Mr. Feith compelling his testimony before the Subcommittee. I had not intended to raise it, but Mr. Feith has included in his prepared testimony a discussion of the subpoena. So I want to make sure everyone understands our understanding of the facts.

We would rather proceed without having to authorize subpoenas, and I know the Chairman of the full Committee does not like issuing them. But they are an important tool available to the Congress to ensure that individuals with information necessary to the work of the Congress will cooperate.

In Mr. Feith's case, the Committee worked with him and his counsel for several months, finally obtaining his voluntary agreement to appear at a hearing. He cancelled that appearance the morning of the hearing. His attorney gave as the reason for the last minute cancellation Mr. Feith's objection to one of the other witnesses and his stated belief that the hearing would not be businesslike.

We cannot permit a witness whose testimony we require to censor the Committee's choice of other witnesses.

After the Subcommittee authorized the subpoena, Committee staff again contacted Mr. Feith's attorney, attempting to obtain his voluntary agreement to appear. Although counsel did make an oral statement that Mr. Feith was available to appear, Committee staff were unable to obtain unambiguous written commitment that there were no circumstances in which he would fail to appear. As a result, issuing the subpoena was only prudent.

Mr. Feith's failure to cooperate with this investigation so far goes beyond his earlier refusal to appear. Nearly 2 months ago, Subcommittee staff met with Mr. Feith's counsel and informed him that Committee Members would be interested in Mr. Feith's role in Secretary Rumsfeld's approval of harsh interrogation measures for Guantanamo Bay. Staff even identified the particular document in which Defense Department General Counsel Jim Haynes states that he discussed the issue with Mr. Feith.

While Mr. Feith has provided us with a lengthy statement for this morning a couple of days ago, it is striking in its failure to address his role in the Administration's interrogation program beyond the narrow question of the Geneva Conventions. Yet, Mr. Feith simply ignores this issue in his statement.

Given our prior experience, it was clear that the only way to ensure the appearance today was to issue the subpoena. I hope my colleagues will agree that witnesses do not decide what we will investigate or which witnesses we will invite to assist us in our work. Especially the case in which the accountability of public servants is involved, those public servants do not have the option of refusing to account for their actions.

The subject matter of this hearing is extremely important, and I hope that despite earlier difficulties, we will be able to conduct our work in a businesslike manner and that the witnesses will endeavor to assist the Members in getting the facts as easily as possible.

I thank the witnesses for their cooperation. I yield back the balance of my time.

I now recognize for his opening statement our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, the subject of detainee treatment was the subject of over 60 hearings, markups, and briefings during the last Congress in the Armed Services Committee alone, of which I am a Member. This hearing is yet another on terrorist interrogation programs, including those Speaker Pelosi was fully briefed on many years ago, and during those briefings, no objections were made by Speaker Pelosi or anyone else.

Let me be clear again, as I have been in the past, by saying that torture is illegal. Torture is banned by the various provisions of law, including the 2005 Senate amendment prohibiting the cruel, inhumane, or degrading treatment of anyone in U.S. custody. But special interrogations, while legal, are very infrequent.

CIA Director Michael Hayden has confirmed that despite the incessant hysteria in some quarters, the waterboarding technique

has only been used on three high-level captured terrorists, the very worst of the worst of our terrorist enemies.

What are these people like, Mr. Chairman? When the terrorist Zabaydah, a logistics chief of al-Qaeda was captured, he and two other men were caught building a bomb. A soldering gun used to make the bomb was still hot on the table, along with the building plans for a school.

John Kiriakou, a former CIA official involved in Zabaydah's as interrogation, said during a recent interview, "These guys hate us more than they love life and so you're not going to convince them that because you're a nice guy and that they can trust you and that they have a rapport with you, that they are going to confess and give you their operations."

He said the interrogation was a great success and that it led to the discovery of information that led to the capture of terrorists, thwarted their future plans, and saved innocent American lives.

The result of these brief special interrogations of three of the worst of the worst terrorists were of immeasurable benefit to the American people. CIA Director Hayden has said that Mohammad and Zabaydah provided roughly 25 percent of the information CIA had on al-Qaeda from all human sources. The President has also described in some detail other crucial information we received through special interrogations programs.

Now after the May 6, 2008 House Constitution Subcommittee hearing, our Chairman said that silence was the response when today's witnesses were asked to identify a single example of a ticking bomb scenario ever occurring. But, unfortunately, that gives a misleading impression. If they are asking about specific incidents, then maybe we are a little bit to obsessed with the television show 24. But if we are talking about general threats and imminent threats generally, then the case of Khalil Sheikh Mohammad should be placed front and center.

As Benjamin Wittes of the Brookings Institute has written in his book, Law and the Long War, "Khalil Sheikh Mohammad is far more than a ticking bomb. He is all of the bombs in various stages of imagination and construction. While the United States has not captured many such people, he was not the only one. And for leaders and operatives dedicated to protecting the country, failing to get all available information from such people is simply not an outcome."

Mr. Chairman, just a personal note. I believe this is about the 10th hearing that we have had in this Subcommittee that was dedicated primarily to making sure that we are protecting the right of terrorists. I understand that. But we have had none that I know of that are dedicated to trying to protect the lives of American citizens. I think ten to zero is a little out of balance.

So with that, I want to yield back. Thank you.

Mr. NADLER. I thank the gentleman. I now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers, for an opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I begin by expressing my pride at the work of you and this Subcommittee, all of its Members, in continuing to press for the truth on these important matters.

My dear friend from Arizona, the Ranking Member, Mr. Trent Franks, said, "This is the 10th hearing we have had protecting the rights of terrorists." I would like to yield to the gentleman to tell us about these 10 hearings. Which 10 hearings are you referring to?

I yield.

Mr. FRANKS. Mr. Chairman, thank you. We would be glad. I think this is one of the examples. I think that this is a repetitive hearing that we have had certainly on this subject.

Mr. CONYERS. Would you provide me after the hearing with a list of the 10 hearings?

Mr. FRANKS. We will try to do that, Mr. Chairman. Thank you.

Mr. CONYERS. Thank you very much.

We are not here to protect rights of terrorists. This is the Constitutional Committee of the Judiciary. It is to protect the rights of Americans. That is what brings us here. That is what this proceeding I think is all about, and to prevent our own government from violating the laws and treaties that obtain to torture. That is what we are hearing.

I counted some hearings myself. This is the fourth hearing. The first hearing was when Professor Philippe Sands, who we welcome to the Committee today, who is with us again, explained in detail that the torture that was visited in Guantanamo was ordered from the top and not from a few bad apples on the bottom.

The second hearing that this Committee had, we had Dan Levin of the Office of Legal Counsel, who told us about flaws in Professor Yoo's memos and how he was forced out of the OLC while attempting to impose constraints on torture. Mr. Wilkerson told us that Colin Powell was worried about torture and that the President was complicit.

The third hearing of this Committee we had Messrs. Yoo and Addington, who refused to take responsibility for approving torture or the memos and documents surrounding them and could not or would not remember the facts. So here we are at the fourth hearing.

Now the fourth hearing was necessitated because we had trouble getting Professor Feith to the hearing. It's quite likely that we would not have had this hearing if he had been able to fit his schedule in with the other three previous ones that I noted. I will give him plenty of opportunity to respond to that at the appropriate time.

Now what have we learned here? We have had disturbing information coming out in an unbroken stream about the way we have treated detainees. We heard about numerous deaths in the United States' custody. We have heard about extreme methods of questioning involving the harshest possible treatment.

Just today, we heard reports of a young Canadian detainee deprived of sleep for over 50 consecutive days. Last week, we had news of a Red Cross report that determined that it was Administration officials who approved torture, and that in their judgment, in this report, that they had committed war crimes. A respected Major General Taguba also has written that war crimes were committed. And the question is: How high does this responsibility go.

So it is clear that the current leadership is not going to do the investigation that our Nation requires.

Last week, I received a letter from Attorney General Mukasey, refusing to appoint a special prosecutor to investigate the advice givers and policymakers who apparently directed this abuse. Attorney General Mukasey said that these people acted in good faith and so it would not be fair to prosecute them.

Well, that starts off sounding fairly reasonably,

but let's look at it more closely. How does anyone know they acted in good faith without having an investigation beforehand. How can we start off with that assumption. Final decisions on what to do in this area can't be responsibly made until after the facts are given a full and independent investigation.

When the Attorney General appeared before us, this Committee, in February, I asked if he would investigate those who use waterboarding. He said no. He said the reason was because, "Whatever was done, was part of a CIA program at the time that it was done, was the subject of a Department of Justice opinion, and was found to be permissible."

Well, after that, we get to a question of calling for a special counsel is not to prove guilt, it is to inquire into whether these folks did act in a normal and reasonable manner and were acting under instructions. So we asked for an investigation of the people who gave the legal approval and of other policymakers that were involved. The Attorney General says that they cannot be investigated either because they were simply responding in good faith to a CIA request for approval.

So here is the problem the Committee on the Constitution find itself engaged in this morning. We can't investigate those who did the waterboarding because they had legal approval. We can't investigate those who gave the approvals because our intelligence agents relied on them for advice. It is a perfect circle that leads us round and round and round and nowhere closer to the truth.

So I say to all the Members of the Committee, this isn't repetition. We are just trying to find out what has happened.

I thank the Chairman for his giving me additional time to make this statement.

Mr. NADLER. I thank the distinguished Chairman. I now want to welcome our——

Mr. KING. Mr. Chairman. Mr. Chairman, I seek time for an opening statement.

Mr. NADLER. The gentleman is recognized for an opening statement.

Mr. KING. I thank you, Mr. Chairman. I appreciate the opportunity, and I know that it's not standard procedure, but our Ranking Member is not here and in that 5-minute period of time, I would appreciate the full Ranking Member of the full Committee, as in Mr. Conyers' counterpart.

So I just think it is important for us to frame this hearing today within the context of the work and the service of the people that are under this scrutiny. I would ask us to role our minds back to that terrible day of September 11, 2001, the day that my sons came together in our household, grown men, some with families, and said, One more attack and we are all going to join the military

today; the day that all of us looked at that blazing inferno tumbling down in New York and thought the planes that were in the air that aren't grounded may be planes that still come into the Capitol, into the White House, other places unknown across this country. The day that, when the sun set on September 11, 2001, no one in this country would have logically predicted that we would be sitting here today on this date in 2008, having not suffered an attack, a successful attack by al-Qaeda or other significant terrorists in the entire continent of the United States, and Hawaii and Alaska included.

That has been the success of this Administration. That was not even a dream then. It would not have been uttered by our leadership back in September of 2001, because it would considered to be a pipe dream. In fact, if President Bush would have stepped up and said, I can hear you now, and you hear me now; there will be no American who is suffering from this kind of attack on our sovereign soils during the Bush administration, you would have all been busy here trying to discredit the President for the audacity of a statement like that. But that is the reality of where we are today.

The reality that these men who are under scrutiny for the decisions that made at that time was that they were working while that smoking hole in New York was still burning, and while that burning rubble, and as bodies and ashes were brought out of there, they were trying to protect this country from seeing that kind of inferno again, they were using the legal guidelines that they had, and as I read through those guidelines and I try to second-guess that logic, I think all of us have to second-guess that logic if we are going to do it within the context of the scenario that I have painted.

I think it is inappropriate for us to bring people up now and turn them slowly on a spit because there are people on the Committee that despite the Administration. I remind you that this Administration will be over January 20, 2009, and it is time for us to turn our focus to the future of the United States of America, not to the past, and turning people on a spit that have been serving America in the fashion that they have, who have a legal foundation for their analysis, because there are people that disagree with that legal analysis, I think is an inappropriate kind of show for us to have before the American people.

I have disagreements with the majority party on how they analyze those definitions of torture, and in fact, it is just not possible to write a complete definition of what torture is. So that will allow Monday morning quarterbacks, any time there is any pressure made, to draw that kind of a judgment.

So I would caution this Committee to, when we listen to Mr. Feith's testimony in particular, to think about what he was thinking, what was in his mind, how recent and how current the smoking hole in New York was, the smoking ground in Pennsylvania was, and the Pentagon and the United States. That is the context that this hearing should be considered in.

I thank the Chairman for recognizing me for the opportunity to frame that, and I would yield back the balance of my time.

Mr. NADLER. I thank the gentleman. I would simply like to point out that regardless of the situation of the country, we can all judge

that for ourselves at any given point. We do have laws in this country, and that is what distinguishes us from other countries. Those laws are not set aside by difficult circumstances. Among the questions we are considering is whether those laws were violated. We can differ on that question. But no one can take the position that our laws against torture or any other laws can be simply set aside at the whim of the Administration, which thinks that that is the best way to deal with the challenges with which we are faced.

We are a Nation of laws. Those laws must be obeyed. If they are inadequate, they should be changed through constitutional processes. That is what this Committee is examining, whether those laws were obeyed, whether they were disobeyed, and if so, why and what we can do about it in the future.

Mr. ISSA. Mr. Chairman.

Mr. NADLER. That is a legitimate inquiry.

Mr. ISSA. Mr. Chairman, point of parliamentary inquiry.

Mr. NADLER. Yes, sir.

Mr. ISSA. Isn't it true that we are having another hearing on Thursday, the fifth in the series?

Mr. NADLER. That is a hearing of the full Committee.

Mr. ISSA. Further inquiry. Isn't it true that under the law, this alleged torture had to be reported to Congress, and that it was reported to Congress?

Mr. NADLER. First of all, I don't know the answer to your question. In any event, that is not a parliamentary inquiry.

Mr. ISSA. Then a further inquiry of the Chair. Isn't it true that Speaker Pelosi and Jane Harman of California both were briefed, and would thus fall under the Chairman's definition of advice and counsel?

Mr. NADLER. That, again, is not a parliamentary, and you might want to address any questions to the witnesses.

Mr. ISSA. One final parliamentary inquiry.

Mr. NADLER. I am yet to hear the first one. But go ahead.

Mr. ISSA. Do we have the ability to summon Members of Congress who may know about the torture at Guantanamo or other places? Do we have that authority, Mr. Chairman?

Perhaps the full Committee Chairman can tell us whether we can bring a Member of Congress to answer those answers. Can we even invite a Member of Congress to give testimony or to tell us what they knew?

Mr. NADLER. We can certainly invite a Member of Congress to testify about anything. We have had Members of Congress in front of our Committee. Whether we can compel a Member of Congress, frankly, I don't know. We would have to consult the Parliamentarian.

Mr. ISSA. Thank you, Mr. Chairman. I then move that we invite Speaker Pelosi and Ms. Harman to give us the knowledge they knew, since my understanding, as a Member of the Intel Committee, is that they were both fully briefed in real-time on what we are going to hear today, and that we do it for Thursday, since before we come to an end of these endless hearings, we certainly should know what did they know and when did they know it.

Mr. NADLER. The gentleman's suggestion, which I will take as a suggestion since a motion would not be in order, will be taken under advisement.

Mr. ISSA. I thank the Chairman.

Mr. KING. Would the Chairman yield?

Mr. NADLER. For what purpose does the gentleman seek recognition?

Mr. KING. For further clarification on your remarks, Mr. Chairman.

I appreciate that. I wanted to clarify. I hope no one misunderstood my remarks. I think I was clear that I didn't advocate for violation of the law or the law of torture. My remarks were that it is not possible to define torture precisely enough. That we will always have a debate on it. So I hope there wasn't a misunderstanding on my advocacy and my statement.

Mr. NADLER. I thank the gentleman for the clarification.

Ladies and gentlemen, I want to welcome our distinguished panel of witnesses, at last, today. Douglas Feith is professor and a distinguished practitioner in national security policy at Georgetown University. He is a Belfor Center visiting scholar at Harvard's University's Kennedy School of Government. And a distinguished visiting fellow at the Hoover Institution at Stamford University. Professor Feith served as the Under Secretary of Defense for Policy, the number three position in the Department, from July, 2001, until August, 2005. In the Reagan administration, Professor Feith worked at the White House as a Middle East specialist for the National Security Council, and then served as Deputy Assistant Secretary of Defense for negotiations policy. Professor Feith holds a JD from Georgetown University Law Center and an AB from Harvard College.

Philippe Sands QC is on the faculty of the University College at London, where he has been a Professor of Law and Director of the Center on International Courts and Tribunals in the faculty, and a member of the staff of the Center for Law and the Environment. Professor Sands has litigated cases before the International Court of Justice, the International Tribunal for the Law of the Sea, the International Center for the Settlement of Investment Disputes, and the European Court of Justice.

He is the author of Torture Team: Cruelty, Deception and the Compromise of Law, and of Lawless World: America and the Making and Breaking of Global Rules.

Deborah Pearlstein is currently a visiting scholar at the Woodrow Wilson School of Public and International Affairs at Princeton University. From 2003 to 2006, she was the director of the law and security program at the nonprofit organization Human Rights First. She clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit, and Justice John Paul Stevens of the United States Supreme Court. Professor Pearlstein is a graduate of Harvard Law School.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hands to take the oath.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative.

You may be seated, as you already have been.

Without objection, your written statements will be made a part of the record in their entirety. We would ask each of you to summarize your testimony in 5 minutes or less. To help you keep time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then to red when the 5 minutes are up.

Our first witness I will recognize now is Professor Feith for 5 minutes.

TESTIMONY OF DOUGLAS FEITH, PROFESSOR, GEORGETOWN UNIVERSITY, AND FORMER DEFENSE UNDER SECRETARY FOR POLICY

Mr. FEITH. Mr. Chairman, Mr. Franks, Members of the Committee, I am pleased to testify today. All I will say in my opening statement is that the subpoena was unnecessary. I am happy to have the opportunity to counter some widely believed falsehoods about the Administration's policies.

The history of war on terrorism detainee policy goes back nearly 7 years. Some critics of the Administration have twisted that history into what has been called the torture narrative. It is an unsubstantiated accusation that top level Administration officials sanctioned abuse and torture of detainees.

The book by Philippe Sands is an important prop for that false narrative. Central to the book is its story about me and my work on the Geneva Convention. Mr. Sands says I was hostile to Geneva and that I devised the argument that Gitmo detainees shouldn't receive any protections at all under Geneva. Those assertions are wrong. In fact, I strongly championed a policy of respect for Geneva, and I did not recommend that the President set aside Common Article 3.

In January and February 2, 2002, Administration lawyers brought to the President the question of the detainees' legal status. A key issue was whether the war with the Taliban was subject to the Geneva Convention. Some lawyers argued that the President could say that Geneva didn't apply, even though Afghanistan was a party to the Convention. Their argument was that Afghanistan at that time was a failed state and the Taliban was not a proper government.

General Myers, the Chairman of the Joint Chiefs of Staff, didn't like that argument. He said the United States should not try, in his words, to weasel out of its obligations under Geneva. I agreed with him wholeheartedly. The two of us argued to Secretary Rumsfeld that the United States had a compelling interest in showing its respect for Geneva.

I drafted a memo on the subject for Mr. Rumsfeld, and cleared it with General Myers. The memo stressed that Geneva is crucial for our own Armed Forces. I described Geneva as a good treaty that requires its parties to treat prisoners of war the way we want our captured military personnel treated. I noted that U.S. troops are trained to uphold Geneva, and this training is an essential element of U.S. military culture.

I wrote that Geneva is morally important, crucial to U.S. morale, and it is also practically important, for it makes U.S. Forces the gold standard in the world, facilitating our winning cooperation from other countries.

My memo made the case that Geneva should apply to our war with the Taliban. Secretary Rumsfeld arranged for me to make these points to the President at the National Security Council meeting, which I did. The Department's leadership took a strongly pro-Geneva position.

The Committee can therefore see that the charge that the department's leadership was hostile to Geneva is untrue. The picture that Mr. Sands' book paints of me as an enemy of the Geneva Convention is wildly inaccurate.

Mr. Sands also misstates my position on the treatment detainees were entitled to under Geneva. He writes that I argued that they were entitled to none at all. But that is false. I argued simply that they were not entitled to POW status.

There was a question whether the President should grant POW status to all the detainees as a magnanimous gesture, without regard to whether they were entitled to it. I believe that would be a bad idea. Geneva sets conditions for POW eligibility. It uses POW status as an incentive to encourage fighters to wear uniforms and comply with the other rules designed to protect noncombatants. Giving that status to terrorists would undermine the Convention's incentive to mechanism.

Also, giving POW status to undeserving terrorists would make it impossible to get intelligence from many of them. It was legal and proper. Furthermore, it was necessary and urgent that U.S. officials interrogate war-on-terrorism detainees effectively.

In fighting the enemy after 9/11, the key intelligence was not discoverable by satellite, as it was during the Cold War, when we could watch the Soviet Western military district from space for signs of a planned attack. In our post-9/11 challenge, the most important intelligence was not visible from space. We aimed to prevent future 9/11-type attacks, as Congressman King pointed out, by learning what was in the heads of a few individuals, by learning what captured terrorists knew about their groups' plans and capabilities. It would have made no sense for the President to throw away the possibility of effective interrogations by bestowing POW status on detainees who were not actually entitled to it under Geneva.

The President ultimately decided Geneva applied in Afghanistan and that none of the Gitmo detainees qualified for POW status.

So what standard of treatment then should the detainees receive? President Bush said they should be given humane treatment, which brings us to the essence of the books' attack on me. It is the claim that in the deliberations leading up to the President's decision on humane treatment, I not only argued against relying on Common Article 3 for the definition of humane treatment, but I somehow invented that argument.

Those assertions are false. There is no evidence for them. I did not invent any argument against Common Article 3. I was not even making such an argument. In fact, I was receptive to the view that Common Article 3 should be used.

So Mr. Sands' account about me is fundamentally wrong. This is important not simply because that account smears me, it is significant because it exposes the astonishing carelessness or recklessness of his book and his Vanity Fair article. It impeaches Mr. Sands as a commentator.

I was a policy official and didn't serve in the Administration as a lawyer, but I asked the lawyers occasional-Questions about detainee matters being handled in legal channels. I asked, "Why not use Common Article 3 to define humane treatment and why not use so-called Article 5 tribunals to make individual determinations that the detainees are not entitled to POW status?"

The lawyers in charge, however, opposed using Article 5 tribunals. They said they were unnecessary. The lawyers also decided that Common Article 3 was not applicable because, according to its language, it applies to only non-international conflicts.

On February 7, 2002, the President declared that he accepted the Justice Department's legal conclusion that Common Article 3 doesn't apply to the detainees. Contrary to Mr. Sands' story, I had nothing whatever to do with that Justice Department legal conclusion.

Now I know that various lawyers dispute the legal conclusion adopted by the President on Common Article 3. Reasonable people differ on the matter. When the U.S. Supreme Court eventually dealt with Common Article 3's applicability to the Gitmo detainees, a question of first impression, the Justices split. The majority ruled against the Administration, but there were justices who went the other way. The President has deferred to the Supreme Court, as he must.

In no way does the record bear out Mr. Sands' allegation that I argued against using Common Article 3, much less that I invented the legal argument against it. Mr. Sands dragged me into his book and painted me as a villain without any evidence for his key accusation that I opposed the use of Common Article 3.

Mr. Sands' book is a weave of inaccuracies and distortions. He misquotes me by using phrases of mine like, "that is the point," and making the word "that" refer to something different.

Mr. NADLER. The witness will suspend.

Mr. CONYERS. I ask unanimous consent that the witness be given additional time.

Mr. FEITH. I only need a minute more.

Mr. NADLER. Without objection, the witness will be given an additional minute, loosely interpreted.

Mr. FEITH. Thank you.

As I was saying, Mr. Sands' book is a weave of inaccuracies and distortions. He misquotes me by using phrases of mine like, "that's the point," and making the word that refer to something different from what I referred to in our interview. I challenge Mr. Sands to publish whatever on-the-record audio he has of our interview. I believe it will clearly show that he has given a twisted account.

Likewise, Mr. Sands' book presents a skewed account of the Rumsfeld memo referred to in the book's subtitle. I hope we will get into in this during today's hearing.

I want to conclude this statement by

reiterating that I have focused on issues relating to me, not because they are necessarily the most important but because I can authoritatively say that Mr. Sands has presented those issues inaccurately. His ill-informed attack on me is a pillar of the broader argument of his book, and that flawed book is a pillar of the argument that Bush administration officials despise the Geneva Convention and encouraged abuse and torture of detainees.

Congress and the American people should know that this so-called torture narrative is built on sloppy research, misquotations, and unsubstantiated allegations.

Mr. NADLER. I thank the witness.

[The prepared statement of Mr. Feith follows:]

PREPARED STATEMENT OF DOUGLAS FEITH

STATEMENT BY DOUGLAS J. FEITH
BEFORE THE
CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
SUBCOMMITTEE
OF THE
HOUSE COMMITTEE ON THE JUDICIARY
JULY 15, 2008

Mr. Chairman, I'm pleased to have a chance to testify today. I think it's important to help counter some widely held false beliefs about the administration's policies on detainee interrogation.

I agreed to testify voluntarily. I did so because the Committee staff gave the assurance that the aim was a serious review of administration policy – not a vitriolic hearing designed to promote personal attacks. I wish to note for the record why I did not attend the originally scheduled hearing: On the afternoon before that hearing, the Chairman's staff told me my panel would include someone who has made a practice lately of directing baseless and often vicious attacks on me personally. That violated the assurances I had been given, so I insisted on a new date to testify. I'm glad we quickly arranged a new hearing date, but I object to the Committee's having needlessly issued a subpoena for me. It falsely implies that I was not willing to appear voluntarily.

The history of war-on-terrorism detainee policy goes back nearly seven years. It involves many officials and both the law and the facts are enormously complex. Some critics of the administration have simplified and twisted that history into what has been called the "torture narrative," which centers on the unproven allegation that top-level administration officials sanctioned or encouraged abuse and torture of detainees.

The "torture narrative" is grounded in the claim that the administration's top leaders, including those at the Defense Department, were contemptuous of the Geneva Convention (which I refer to here as simply "Geneva.") The claim is false, however. It is easy to grasp the political purposes of the "torture narrative" and to see why it is promoted. But these hearings are an

opportunity to check the record – and the record refutes the "torture narrative".

The book by Phillipe Sands[1] is an important prop for that false narrative. Central to the book is its story about me and my work on the Geneva Convention. Though I'm not an authority on many points in Sands's book, I do know that what he writes about me is fundamentally inaccurate – false not just in its detail, but in its essence. Sands builds that story, first, on the accusation that I was hostile to Geneva and, second, on the assertion that I devised the argument that detainees at GTMO should not receive any protections under Geneva – in particular, any protections under common Article 3. But the facts are (1) that I strongly championed a policy of respect for Geneva and (2) that I did not recommend that the President set aside common Article 3.

I will briefly review my role in this matter and then discuss Sands's misreporting. As it becomes clear that the Sands book is not rigorous scholarship or reliable history, members of Congress and others may be persuaded to approach the entire "torture narrative" with more skepticism.

My main involvement in the issue of detainee interrogation was in January and February 2002. US forces in Afghanistan had just taken custody of the first detainees. Administration lawyers brought forward to the President the question of the detainees' legal status. The lawyers distinguished between the worldwide US war against al Qaida and the US war with the Taliban regime in Afghanistan. As I recall, no one in the administration argued that Geneva applied to the war against al Qaida, which is neither a state nor a party to Geneva.

There was controversy, however, over whether the war with the Taliban was governed by Geneva. Some lawyers contended that the President could lawfully decide that Geneva did not apply even though Afghanistan was a party to the Convention. Their argument was that Afghanistan was at that time a failed state, and the Taliban could be seen not as a government, but as as merely a criminal gang. Those lawyers were obviously straining to give their client, the President, as much flexibility as possible to handle the unprecedented requirements of the war on terrorism. I did not question their

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

good faith, but I strongly favored a different approach, one that gave greater weight to Geneva as a treaty that embodied important American principles.

Secretary of Defense Rumsfeld called in the Chairman of the Joint Chiefs of Staff, General Richard Myers, and me to discuss this controversy. I describe that discussion in my book, *War and Decision.*[2]

The main point that General Myers and I made to the Secretary was that the United States had a compelling interest in showing respect for Geneva. The Secretary, we said, should urge the President to acknowledge that Geneva governed our war with the Taliban. We argued that Taliban detainees should receive the treatment to which they were entitled under Geneva. But we did *not* think they had met the defined conditions for POW privileges under Geneva.

After our meeting, Secretary Rumsfeld asked me to write up what General Myers and I had argued for. The Secretary wanted to use the write up as "talking points" for the National Security Council meeting with the President on February 4, 2002.

The memo I drafted and then cleared with General Myers[3] stressed that Geneva is crucial for our own armed forces. It said that it is "important that the President appreciate DOD's interest in the Convention." I described Geneva as a "good treaty" that "requires its parties to treat prisoners of war the way we want our captured military personnel treated." I noted that "US armed forces are trained to treat captured enemy forces according to the Convention" and this training is "an essential element of US military culture." I wrote that Geneva is "morally important, crucial to US morale" and it is also "practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries."

The memo said that "US forces are more likely to benefit from the Convention's protections if the Convention is applied universally." So I warned: It is "Highly dangerous if countries make application of [the] Convention hinge on subjective or moral judgments as to the quality or

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[2] Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: Harper, 2008).

[3] See attached.

decency of the enemy's government. (That's why it is dangerous to say that [the] US is not legally required to apply the Convention to the Taliban as the illegitimate government of a 'failed state.')"

The memo explained why a "pro-Convention" position is dictated by the logic of our stand against terrorism. I argued:

- The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
- Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.
- The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.
- The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW status if they [are] captured.
- The US can apply the Convention to the Taliban (and al-Qaida) detainees as a matter of policy without having to give them POW status because none of the detainees remaining in US hands played by the rules.

The memo urged "Humane treatment for all detainees" and recommended that the President explain that Geneva "does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention."

This memo represented the thinking of the top civilian and military leadership of the Defense Department. I felt confident being aligned with General Myers on this matter and we were both pleased that Secretary Rumsfeld asked me to make these points to the President at the NSC meeting, which I did. The department's leadership took a strongly pro-Geneva position.

The Committee can therefore see that the charge that the department's leadership was hostile to Geneva is untrue. The picture that Mr. Sands's book paints of me as an enemy of the Geneva Convention is false – wildly so.

Mr. Sands also misrepresents my position on the treatment GTMO detainees were entitled to under Geneva. He writes that I argued that they were entitled to none at all. But that is not true; I argued simply that they were not entitled to POW privileges.

I pointed out that Geneva grants POW privileges to captured fighters as a incentive to encourage good behavior. Geneva's drafters wisely demanded that fighters meet four conditions if they are to receive such privileges: They must (1) wear uniforms, (2) carry their arms openly, (3) operate within a chain of command and (4) obey the laws of war. These conditions serve the Convention's highest purpose, which is protecting the safety of non-combatants in war zones. Many journalists and others wrongly assume that if Geneva governs a conflict then the detainees must receive POW treatment. But that is misconception. Detainees in wars governed by Geneva are entitled to POW treatment *only* if they meet these four conditions.

In early 2002, it was clear that the President would be urged by some commentators to grant POW status to all the detainees as a magnanimous gesture, without regard to whether they met the conditions. I believed that would be a bad idea. First of all, it would have the opposite of its intended humanitarian result. Granting POW status to terrorists who pose as civilians and who purposefully target civilians would undermine the incentive mechanism that Geneva's drafters knew was crucial to the Convention's humanitarian purposes.

I had strong views specifically on the issue of POW status because I had worked on that issue in the Reagan administration Defense Department in connection with a treaty called "Protocol I," which aimed to amend the Geneva Convention. President Reagan, in line with my analysis, opposed the amendments. One of his main objections was that they would have granted POW status to terrorists. I relate in my book the favorable press reaction to President Reagan's position:

> The *New York Times* and the *Washington Post*, not usually Reagan supporters, both praised his decision. In an editorial titled "Denied: A Shield for Terrorists," the *New York Times* said that Protocol I created "possible grounds for giving terrorists the legal status of P.O.W.'s," and declared that, if the president had ratified it, "nations might also have read that as legitimizing terrorists." The *Post's* editorial, "Hijacking the Geneva Conventions," highlighted POW status for terrorists as among the "worst" features of Protocol I. "The Reagan administration has often and rightly

> been criticized for undercutting treaties negotiated by earlier administrations," it concluded. "But it is right to formally abandon Protocol I. It is doing so, moreover, for the right reason: 'we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.'"

Preserving Geneva's incentive system was an important reason not to grant POW status to detainees who had not earned it. Also, the purpose of holding POWs in a conventional war was different from the purpose for holding detainees in the war on terrorism. The former were held simply to keep them off the battlefield. But the latter were being held for that reason *and also* to interrogate them for information to prevent future 9/11-type attacks.

It was legal and proper – furthermore, it was necessary and urgent – that U.S. officials interrogate war-on-terrorism detainees effectively. In fighting the enemy after 9/11, the key intelligence was not discoverable by satellite, as it was during the Cold War when we could watch from space for signs of an imminent attack by monitoring armored divisions in the USSR's western military district. In our post-9/11 challenge, the most important intelligence was not visible from space. It was inside the heads of a few individuals. Our best hope of preventing future attacks against the United States was to learn what captured terrorists knew about their groups' plans, capabilities and organizations.

A detainee entitled to POW status under Geneva could not be subjected to any kind of pressure at all to provide information. He is required to reveal only his name, rank and serial number. Interrogators are not allowed to subject him to even the most ordinary techniques employed every day in U.S. jails on American criminal defendants. Regarding *unlawful* combatants, on the other hand, Geneva does not prohibit *humane* forms of pressure by interrogators.

President Bush had a constitutional duty to safeguard our national defense and to try to prevent future 9/11-type attacks. He knew the importance of the intelligence available only through detainee interrogations. It would have made no sense for him to throw away the possibility of effective interrogations by bestowing POW status on detainees who were not actually entitled to it under Geneva.

Three days after the February 4, 2002 NSC meeting at which General Myers and I made our case, the President decided – in line with the Defense Department recommendation – that Geneva governed the U.S. conflict with the Taliban and that the Taliban detainees would *not* receive POW privileges because they had not met Geneva's conditions for eligibility. He decided also that Geneva did *not* govern the worldwide U.S. conflict with al Qaida. So neither the Taliban nor the al Qaida detainees would be given POW privileges.

So what standard of treatment should these detainees receive? U.S. forces in Afghanistan had been ordered from the outset to give any and all detainees "humane treatment." President Bush reaffirmed the standard of "humane treatment."

How to define the term "humane treatment" was a question on which the President looked to his lawyers for guidance. In his book, Mr. Sands focuses on whether Article 3 of the Geneva Convention (known as common Article 3, explained below) should have been the basis for the definition of "humane treatment."

This gets to the essence of the book's attack on me. Mr. Sands asserts that in the deliberations leading up to the President's decision on common Article 3, I not only argued against relying on that provision, but that I was somehow the source of the argument. These assertions are false and utterly without evidence. I did not invent any argument against common Article 3. I was not even making such an argument. In fact, I was receptive to the view that common Article 3 should be used.

So Mr. Sand's account is altogether inaccurate, both in his book and in his *Vanity Fair* article. This is important not simply because it smears me. It is significant because it exposes the astonishing carelessness of his book and his article. It impeaches Mr. Sands as a commentator.

In the weeks before the NSC meeting on the detainees' legal status, administration lawyers discussed how to flesh out the term "humane treatment." The President evidently considered this to be a legal rather than a policy question.

I was a policy official and did not serve in the administration as a lawyer, but I occasionally raised questions about matters being handled in legal

channels. Two of the questions I know I raised were: Why not use common Article 3 to define "humane treatment"? And why not use so-called Article 5 tribunals to make *individual* determinations that the detainees are not entitled to POW status? I posed these questions not because I had done my own legal analysis or had firm opinions myself – I had not. But I remembered these provisions generally from my Geneva-related work during the Reagan administration and I thought that using them, if judged legally appropriate, would be a further sign of U.S. support for Geneva.

Answers came back to me through the Defense Department's office of the General Counsel. The lawyers resolved against using Article 5 tribunals because the President had found that the Taliban fighters collectively failed to meet the Geneva conditions for POW status, so there was no need for individual determinations. And the lawyers also decided that common Article 3 was not applicable because (by its own terms) it covered only conflicts "not of an international character" and the conflicts with the Taliban and with al Qaida were both of an international character.

I don't believe I even attended any of the early 2002 meetings where the lawyers debated common Article 3. But my understanding is that they gave the issue good-faith consideration. Stressing that it was a legal (rather than policy) judgment, the President declared on February 7, 2002 that he accepted "the legal conclusion of the Department of the Justice" and determined that "Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"

Now, I know that lawyers dispute the Justice Department's legal conclusion about common Article 3. Reasonable people differ on the matter. As a policy official, I never studied the legal arguments in enough depth to have a confident judgment of my own on this question. When the U.S. Supreme Court eventually dealt with common Article 3's applicability to the GTMO detainees (a question of first impression), the justices split – the majority ruled against the administration, but there were justices who went the other way.

In no way does the record bear out Mr. Sands's allegation that I argued against using common Article 3, much less that I invented the legal argument against it. Mr. Sands dragged me into his book and painted me as

a villain without supporting evidence. He seems to have made that mistake either because he was not rigorous in his research or he interpreted what he read and heard through his own inaccurate preconceptions.

Mr. Sands's book is a weave of inaccuracies and distortions. He misquotes me by using phrases of mine like "That's the point" and making the word "that" refer to something different from what I referred to in our interview. I challenge Mr. Sands to publish whatever on-the-record audio he has of our interview. I believe it will clearly show that he has given a twisted account.

Likewise, Mr. Sands's book presents a skewed account of the Rumsfeld memo referred to in the book's subtitle. By what he says and what he omits to say, he gives the reader an extreme misimpression of the nature of SOUTHCOM's request for authority to use a list of counter-resistance techniques on some important, recalcitrant detainees. I hope we will get into this issue during today's hearing.

I want to conclude this statement by reiterating that I have focused on issues relating to me not because they are necessarily the most important, but because I can authoritatively say that Mr. Sands has presented those issues inaccurately. His ill-informed attack on me is a pillar of the broader argument of his book. And that flawed book is a pillar of the argument that Bush administration officials despised the Geneva Convention and encouraged abuse and torture of detainees. Congress and the American people should know that this so-called "torture narrative" is built on sloppy research, misquotations and unsubstantiated allegations.

List of Attachments to the Statement by Douglas J. Feith
Before the Constitution, Civil Rights and Civil Liberties Subcommittee of the
House Committee on the Judiciary – July 15, 2008

1 Douglas J. Feith Memorandum on *Points for 2/4/02 NSC Meeting on Geneva Convention*, February 3, 2002

2 President George W. Bush Memorandum for 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 on *Humane Treatment of al Qaeda and Taliban Detainees*, February 7, 2002

3 William J. Haynes Action Memo for Secretary of Defense on *Counter-Resistance Techniques*, November 27, 2002 (with attachments)

4 Secretary of Defense Donald H. Rumsfeld Memorandum for Commander of USSOUTHCOM on *Counter-Resistance Techniques*, January 15, 2003

5 Statement by Douglas J. Feith, Under Secretary for Policy before the House Permanent Committee on Intelligence on *The Need for Interrogation in the Global War on Terrorism*, July 14, 2004

6 John Moustakas Letter to the Honorable John Conyers, Jr., June 16, 2008

7 John Moustakas Letter to the Honorable John Conyers, Jr., June 18, 2008

February 3, 2002
Feith draft

Points for 2/4/02 NSC Meeting on Geneva Convention

The options as to law and policy:

- US is applying the Convention to *all* detainees as a matter of *policy*.
  - All detainees are getting the humane treatment to which they would be entitled if the US were legally bound to apply the Convention to them.
  - None is entitled to POW status under the Convention.
- All USG agencies (though State's position is unclear) agree that US is *not legally bound* to apply the Convention to *al-Qaida* detainees. (Convention applies only to wars between states or to civil wars, not to a war between a state and al-Qaida worldwide.)
- The question for the President: What should USG say about whether the US is *legally bound* to apply the Convention to *Taliban* detainees.
  - There are three options:
  - 1. Declare that US is *not* legally required to apply Convention to Taliban.

    Option 1 – not a good option, given DOD's interest in universal respect for the Convention for the benefit of our own forces.
  - 2. Declare that US is legally required to apply Convention to Taliban.

    Option 2 – a good option. Would help dampen criticism.
  - 3. Declare only that US is applying the Convention to Taliban (and to al-Qaida, for that matter), though USG has not resolved the difficult (but academic) question of whether we are legally required to do so.

    Option 3 – also a good option.

    US could make a virtue of its analytical conundrum by noting that the legal question is difficult precisely because our war on terrorism is unique and does not fit neatly into the categories of war envisioned in 1949 by the Convention's drafters. (Meanwhile, as noted, the US is applying the Convention to all detainees.)

DOD interest in the Geneva Convention

- Important that the President appreciate DOD's interest in the Convention.
- The Convention is a good treaty.
  - One could quibble about details, but the Convention is a sensible document that requires its parties to treat prisoners of war the way we want our captured military personnel treated.
- US armed forces are trained to treat captured enemy forces according to the Convention.
  - This training is an essential element of US military culture. It is morally important, crucial to US morale.
  - It is also practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries.
- US forces are more likely to benefit from the Convention's protections if the Convention ~~commands~~ is applied universally.
  - Highly dangerous if countries make application of Convention hinge on subjective or moral judgments as to the quality or decency of the enemy's government. (That's why it is dangerous to say that US is not legally required to apply the Convention to the Taliban as the illegitimate government of a "failed state.")
- A "pro-Convention" position reinforces USG's key themes in the war on terrorism.
  - The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
  - Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.
  - The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.
  - The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW status if they captured.
  - The US can apply the Convention to the Taliban (and al-Qaida) detainees as a matter of policy without having to give them POW status because none of the

detainees remaining in US hands played by the rules.

- In sum, US public position on this issue should stress:
  - Humane treatment for all detainees.
  - US is applying the Convention. All detainees are getting the treatment they are (or would be) entitled to under the Convention.
  - US supports the Convention and promotes universal respect for it.
  - The Convention does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention.

[redacted] UNCLASSIFIED

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

[redacted] Reason: 1.5 (d)
Declassify on: 02/07/12

NSC DECLASSIFICATION REVIEW [E.O. 12958 as amended]
DECLASSIFIED IN FULL ON 6/17/2004
by R.Soubers

[redacted] UNCLASSIFIED

exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. 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.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

UNCLASSIFIED

-C.
-PD.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

2002 DEC -2 AM 11: 03

GENERAL COUNSEL

OFFICE OF THE
SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC_____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION

Approved D.R. Disapproved _____ Other _____

However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?

D.R. DEC 0 2 2002

Attachments
As stated

cc: CJCS, USD(P)

Declassified Under Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William F. Marcuss, CAPT, USN
June 18, 2004

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Page 1 of 2
X04C30-02

AUG. 1. 1999 1:09PM UNCLASSIFIED NO. 224 P. 2

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DEPARTMENT OF DEFENSE
UNITED STATES SOUTHERN COMMAND
OFFICE OF THE COMMANDER
3511 NW 91ST AVENUE
MIAMI, FL 33172-1217

REPLY TO ATTENTION OF

SCCDR

25 October 2002

MEMORANDUM FOR Chairman of the Joint Chiefs of Staff, Washington, DC 20318-9999

SUBJECT: Counter-Resistance Techniques

1. The activities of Joint Task Force 170 have yielded critical intelligence support for forces in combat, combatant commanders, and other intelligence/law enforcement entities prosecuting the War on Terrorism. However, despite our best efforts, some detainees have tenaciously resisted our current interrogation methods. Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ.

2. I am forwarding Joint Task Force 170's proposed counter-resistance techniques. I believe the first two categories of techniques are legal and humane. I am uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute. I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family. However, I desire to have as many options as possible at my disposal and therefore request that Department of Defense and Department of Justice lawyers review the third category of techniques.

3. As part of any review of Joint Task Force 170's proposed strategy, I welcome any suggested interrogation methods that others may propose. I believe we should provide our interrogators with as many legally permissible tools as possible.

4. Although I am cognizant of the important policy ramifications of some of these proposed techniques, I firmly believe that we must quickly provide Joint Task Force 170 counter-resistance techniques to maximize the value of our intelligence collection mission.

James T. Hill
General, US Army
Commander

Encls

1. JTF 170 CDR Memo dtd 11 October, 2002
2. JTF 170 SJA Memo dtd 11 October, 2002
3. JTF 170 J-2 Memo dtd 11 October, 2002

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

~~SECRET/NOFORN~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-CG

11 October 2002

MEMORANDUM FOR Commander, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida 33172-1217

SUBJECT: Counter-Resistance Strategies

1. Request that you approve the interrogation techniques delineated in the enclosed Counter-Resistance Strategies memorandum. I have reviewed this memorandum and the legal review provided to me by the JTF-170 Staff Judge Advocate and concur with the legal analysis provided.

2. I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information. Based on the analysis provided by the JTF-170 SJA, I have concluded that these techniques do not violate U.S. or international laws.

3. My point of contact for this issue is LTC Jerald Phifer at DSN 660-3476.

MICHAEL E. DUNLAVEY
Major General, USA
Commanding

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09860

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJ: Legal Review of Aggressive Interrogation Techniques

1. I have reviewed the memorandum on Counter-Resistance Strategies, dated 11 Oct 02, and agree that the proposed strategies do not violate applicable federal law. Attached is a more detailed legal analysis that addresses the proposal.

2. I recommend that interrogators be properly trained in the use of the approved methods of interrogation, and that interrogations involving category II and III methods undergo a legal review prior to their commencement.

3. This matter is forwarded to you for your recommendation and action.

DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

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~~FOUO/LES NOFORN~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09860

JTF-J2

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Request for Approval of Counter-Resistance Strategies

1. ~~(S//NF)~~ PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.

2. ~~(S//NF)~~ Request approval for use of the following interrogation plan.

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally-comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.

(1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)

(2) Techniques of deception:

(a) Multiple interrogator techniques.

(b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the OIC, Interrogation Section, the interrogator may use the following techniques.

(1) The use of stress-positions (like standing), for a maximum of four hours.

(2) The use of falsified documents or reports.

(3) Use of the isolation facility for up to 30 days. Request must be made to through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected

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By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

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JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.

(4) Interrogating the detainee in an environment other than the standard interrogation booth.

(5) Deprivation of light and auditory stimuli.

(6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

(7) The use of 20-hour interrogations.

(8) Removal of all comfort items (including religious items).

(9) Switching the detainee from hot rations to MREs.

(10) Removal of clothing.

(11) Forced grooming (shaving of facial hair etc...)

(12) Using detainees individual phobias (such as fear of dogs) to induce stress.

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any of these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

(2) Exposure to cold weather or water (with appropriate medical monitoring).

(3) Use of a wet towel and dripping water to induce the misperception of suffocation.

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JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

(4) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

3. (U) The POC for this memorandum is the undersigned at 23476.

JERALD PHIFER
LTC, USA
Director, J2

~~SECRET/NOFORN~~ UNCLASSIFIED

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~~SECRET/NOFORN~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09860

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

1. (U) ISSUE: To ensure the security of the United States and its Allies, more aggressive interrogation techniques than the ones presently used, such as the methods proposed in the attached recommendation, may be required in order to obtain information from detainees that are resisting interrogation efforts and are suspected of having significant information essential to national security. This legal brief references the recommendations outlined in the JTF-170 J2 memorandum, dated 11 October 2002.

2. (U) FACTS: The detainees currently held at Guantanamo Bay, Cuba (GTMO), are not protected by the Geneva Conventions (GC). Nonetheless, DoD interrogators trained to apply the Geneva Conventions have been using commonly approved methods of interrogation such as rapport building through the direct approach, rewards, the multiple interrogator approach, and the use of deception. However, because detainees have been able to communicate among themselves and debrief each other about their respective interrogations, their interrogation resistance strategies have become more sophisticated. Compounding this problem is the fact that there is no established clear policy for interrogation limits and operations at GTMO, and many interrogators have felt in the past that they could not do anything that could be considered "controversial." In accordance with President Bush's 7 February 2002 directive, the detainees are not Enemy Prisoners of War (EPW). They must be treated humanely and, subject to military necessity, in accordance with the principles of GC.

3. (U) DISCUSSION: The Office of the Secretary of Defense (OSD) has not adopted specific guidelines regarding interrogation techniques for detainee operations at GTMO. While the procedures outlined in, Army FM 34-52 Intelligence Interrogation (28 September 1992), are utilized, they are constrained by, and conform to the GC and applicable international law, and therefore are not binding. Since the detainees are not EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO. Consequently, in the absence of specific binding guidance, and in accordance with the President's directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive interrogation techniques recommended in the J2 proposal.

a. (U) International Law: Although no international body of law directly applies, the more notable international treaties and relevant law are listed below.

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By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 23, 2004

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JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

(1) (U) In November of 1994, the United States ratified The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. However, the United States took a reservation to Article 16, which defined cruel, inhumane and degrading treatment or punishment, by instead deferring to the current standard articulated in the 8th Amendment to the United States Constitution. Therefore, the United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitution's Amendment against cruel and unusual punishment. The United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in U.S. Courts. This convention is the principal U.N. treaty regarding torture and other cruel, inhumane, or degrading treatment.

(2) (U) The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits inhumane treatment in Article 7, and arbitrary arrest and detention in Article 9. The United States ratified it on the condition that it would not be self-executing, and it took a reservation to Article 7 that we would only be bound to the extent that the United States Constitution prohibits cruel and unusual punishment.

(3) (U) The American Convention on Human Rights forbids inhumane treatment, arbitrary imprisonment, and requires the state to promptly inform detainees of the charges against them, to review their pretrial confinement, and to conduct a trial within a reasonable time. The United States signed the convention on 1 June 1977, but never ratified it.

(4) (U) The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation, and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.

(5) (U) The United Nations' Universal Declaration of Human Rights, prohibits inhumane or degrading punishment, arbitrary arrest, detention, or exile. Although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves.

(6) (U) There is some European case law stemming from the European Court of Human Rights on the issue of torture. The Court ruled on allegations of torture and other forms of inhumane treatment by the British in the Northern Ireland conflict. The British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud noise, and depriving them of sleep, food, and water. The European Court concluded that these acts did not rise to the level of torture as defined in the Convention Against Torture, because torture was defined as an aggravated form of cruel, inhumane, or degrading treatment or punishment. However, the Court did find that these techniques constituted cruel, inhumane, and degrading treatment. Nonetheless, and as previously mentioned, not only is the United States not a part of the European Human Rights Court, but as previously stated, it only ratified the definition of cruel, inhuman, and degrading treatment consistent with the U.S. Constitution. See also Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Geor. 2002); Committee Against Torture v. Israel, Supreme Court of Israel, 6 Sep 95, 7 BHRC 31; Ireland v. UK (1978), 2 EHRR 25.

JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

b. (U) Domestic Law. Although the detainee interrogations are not occurring in the continental United States, U.S. personnel conducting said interrogations are still bound by applicable Federal Law, specifically, the Eighth Amendment of the United States Constitution, 18 U.S.C. § 2340, and for military interrogators, the Uniform Code of Military Justice (UCMJ).

(1) (U) The Eighth Amendment of the United States Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. There is a lack of Eighth Amendment case law relating in the context of interrogations, as most of the Eighth Amendment litigation in federal court involves either the death penalty, or 42 U.S.C. § 1983 actions from inmates based on prison conditions. The Eighth Amendment applies as to whether or not torture or inhumane treatment has occurred under the federal torture statute.[1]

(a) (U) A principal case in the confinement context that is instructive regarding Eighth Amendment analysis (which is relevant because the United States adopted the Convention Against Torture, Cruel, Inhumane and Degrading Treatment, it did so deferring to the Eighth Amendment of the United States Constitution) and conditions of confinement if a U.S. court were to examine the issue is Hudson v. McMillian, 503 U.S. 1 (1992). The issue in Hudson stemmed from a 42 U.S.C. § 1983 action alleging that a prison inmate suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate resulting from a beating by prison guards while he was cuffed and shackled. In this case the Court held that there was no governmental interest in beating an inmate in such a manner. The Court further ruled that the use of excessive physical force against a prisoner might constitute cruel and unusual punishment, even though the inmate does not suffer serious injury.

(b) (U) In Hudson, the Court relied on Whitley v. Albers, 475 U.S. 312 (1986), as the seminal case that establishes whether a constitutional violation has occurred. The Court stated that the extent of the injury suffered by an inmate is only one of the factors to be considered, but that there is no significant injury requirement in order to establish an Eighth Amendment violation, and that the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. The Court based its decision on the "...settled rule that the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley at 319, quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977). The Hudson Court then held that in the excessive force or conditions of confinement context, the Eighth Amendment violation test delineated by the Supreme Court in Hudson is that when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated, whether or not significant injury is evident. The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, but the question of whether the measure taken inflicted unnecessary and wanton pain and suffering, ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very (emphasis added) purpose of causing harm. If so, the Eighth Amendment claim will prevail.

[1] Notwithstanding the requirement that U.S. personnel are bound by the Constitution, the detainees confined at GTMO have no justiciable standing to bring a section 1983 action alleging an Eighth Amendment violation in U.S. Federal Court.

(c) (U) At the District Court level, the typical conditions-of-confinement claims involve a disturbance of the inmate's physical comfort, such as sleep deprivation or loud noise. The Eighth Circuit ruled in Singh v. Holcomb, 1992 U.S. App. LEXIS 24790, that an allegation by an inmate that he was constantly deprived of sleep which resulted in emotional distress, loss of memory, headaches, and poor concentration, did not show either the extreme deprivation level, or the officials' culpable state of mind required to fulfill the objective component of an Eighth Amendment conditions-of-confinement claim.

(d) (U) In another sleep deprivation case alleging an Eighth Amendment violation, the Eighth Circuit established a totality of the circumstances test, and stated that if a particular condition of detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. In Ferguson v. Cape Girardeau County, 88 F.3d 647 (8th Cir. 1996), the complainant was confined to a 5-1/2 by 5-1/2 foot cell without a toilet or sink, and was forced to sleep on a mat on the floor under bright lights that were on twenty-four hours a day. His Eighth Amendment claim was not successful because he was able to sleep at some point, and because he was kept under those conditions due to a concern for his health, as well as the perceived danger that he presented. This totality of the circumstances test has also been adopted by the Ninth Circuit. In Green v. CSO Strack, 1995 U.S. App. LEXIS 14451, the Court held that threats of bodily injury are insufficient to state a claim under the Eighth Amendment, and that sleep deprivation did not rise to a constitutional violation where the prisoner failed to present evidence that he either lost sleep or was otherwise harmed.

(e) (U) Ultimately, an Eighth Amendment analysis is based primarily on whether the government had a good faith legitimate governmental interest, and did not act maliciously and sadistically for the very purpose of causing harm.

(2) (U) The torture statute (18 U.S.C. § 2340) is the United States' codification of the signed and ratified provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and pursuant to subsection 2340B, does not create any substantive or procedural rights enforceable by law by any party in any civil proceeding.

(a) (U) The statute provides that "whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

(b) (U) Torture is defined as "an act committed by a person acting under color of law *specifically intended* (emphasis added) to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control." The statute defines "severe mental pain or suffering" as "the *prolonged mental harm caused by or resulting* (emphasis added) from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death or 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."

(c) (U) Case law in the context of the federal torture statute and interrogations is also lacking, as the majority of the case law involving torture relates to either the illegality of brutal tactics used by the police to obtain confessions (in which the Court simply states that these confessions will be deemed as involuntary for the purposes of admissibility and due process, but does not actually address torture or the Eighth Amendment), or the Alien Tort Claim Act, in which federal courts have defined that certain uses of force (such as kidnapping, beating and raping of a man with the consent or acquiescence of a public official, See Ortiz v. Gramajo, 836 F.Supp. 162 (D. Mass. 1993)) constituted torture. However, no case law on point within the context of 18 USC 2340.

(3) (U) Finally, U.S. military personnel are subject to the Uniform Code of Military Justice. The punitive articles that could potentially be violated depending on the circumstances and results of an interrogation are: Article 93 (cruelty and maltreatment), Article 118 (murder), Article 119 (manslaughter), Article 124 (maiming), Article 128 (assault), Article 134 (communicating a threat, and negligent homicide), and the inchoate offenses of attempt (Article 80), conspiracy (Article 81), accessory after the fact (Article 78), and solicitation (Article 82). Article 128 is the article most likely to be violated because a simple assault can be consummated by an unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, and a specific intent to actually inflict bodily harm is not required.

4. U ~~(S//NF)~~ ANALYSIS: The counter-resistance techniques proposed in the JTF-170-J2 memorandum are lawful because they do not violate the Eighth Amendment to the United States Constitution or the federal torture statute as explained below. An international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not EPWs.

(a) U ~~(S//NF)~~ Based on the Supreme Court framework utilized to assess whether a public official has violated the Eighth Amendment, so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm, the proposed techniques are likely to pass constitutional muster. The federal torture statute will not be violated so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm. Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause prolonged and long lasting mental harm, the proposed methods will not violate the statute.

(b) U ~~(S//NF)~~ Regarding the Uniform Code of Military Justice, the proposal to grab, poke in the chest, push lightly, and place a wet towel or hood over the detainee's head would constitute a per se violation of Article 128 (Assault). Threatening a detainee with death may also constitute a violation of Article 128, or also Article 134 (communicating a threat). It would be advisable to have permission or immunity in advance from the convening authority, for military members utilizing these methods.

(c) U ~~(S//NF)~~ Specifically, with regard to Category I techniques, the use of mild and fear related approaches such as yelling at the detainee is not illegal because in order to communicate a threat, there must also exist an intent to injure. Yelling at the detainee is legal so long as the yelling is not done with the intent to cause severe physical damage or prolonged mental harm. Techniques of deception such as multiple interrogator techniques, and deception regarding interrogator identity are all permissible methods of interrogation, since there is no legal requirement to be truthful while conducting an interrogation.

(d) ~~(S//NF)~~ With regard to Category II methods, the use of stress positions such as the proposed standing for four hours, the use of isolation for up to thirty days, and interrogating the detainee in an environment other than the standard interrogation booth are all legally permissible so long as no severe physical pain is inflicted and prolonged mental harm intended, and because there is a legitimate governmental objective in obtaining the information necessary that the high value detainees on which these methods would be utilized possess, for the protection of the national security of the United States, its citizens, and allies. Furthermore, these methods would not be utilized for the "very malicious and sadistic purpose of causing harm," and absent medical evidence to the contrary, there is no evidence that prolonged mental harm would result from the use of these strategies. The use of falsified documents is legally permissible because interrogators may use deception to achieve their purpose.

(e) ~~(S//NF)~~ The deprivation of light and auditory stimuli, the placement of a hood over the detainee's head during transportation and questioning, and the use of 20 hour interrogations are all legally permissible so long as there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering. There is no legal requirement that detainees must receive four hours of sleep per night, but if a U.S. Court ever had to rule on this procedure, in order to pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result. Removal of comfort items is permissible because there is no legal requirement to provide comfort items. The requirement is to provide adequate food, water, shelter, and medical care. The issue of removing published religious items or materials would be relevant if these were United States citizens with a First Amendment right. Such is not the case with the detainees. Forced grooming and removal of clothing are not illegal, so long as it is not done to punish or cause harm, as there is a legitimate governmental objective to obtain information, maintain health standards in the camp and protect both the detainees and the guards. There is no illegality in removing hot meals because there is no specific requirement to provide hot meals, only adequate food. The use of the detainee's phobias is equally permissible.

(f) ~~(S//NF)~~ With respect to the Category III advanced counter-resistance strategies, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent is not illegal for the same aforementioned reasons that there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering. Exposure to cold weather or water is permissible with appropriate medical monitoring. The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would. Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause. The use of physical contact with the detainee, such as pushing and poking will technically constitute an assault under Article 128, UCMJ.

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JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

5. ~~(S//NF)~~ RECOMMENDATION: I recommend that the proposed methods of interrogation be approved, and that the interrogators be properly trained in the use of the approved methods of interrogation. Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving category II and III methods must undergo a legal, medical, behavioral science, and intelligence review prior to their commencement.

6. (U) POC: Captain Michael Borders, x3596.

DIANE H. BEAVER
LTC, USA
Staff Judge Advocate

~~SECRET/NOFORN~~

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[redacted]
SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MEMORANDUM FOR COMMANDER USSOUTHCOM JAN 15 2003

SUBJECT: Counter-Resistance Techniques (U)

(S) My December 2, 2002, approval of the use of all Category II techniques and one Category III technique during interrogations at Guantanamo is hereby rescinded. 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 employment of those techniques and a detailed plan for the use of such techniques.

(U) In all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.

(U) Attached is a memo to the General Counsel setting in motion a study to be completed within 15 days. After my review, I will provide further guidance.

Classified by: Secretary Rumsfeld
Reason: 1.5(a)
Declassify on: 10 years

UNCLASSIFIED

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

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Other panel members: Pat Philbin Justice
Steve Kappes CIA

Statement
by
Douglas J. Feith
Under Secretary of Defense for Policy
before the
House Permanent Select Committee on Intelligence
on
The Need for Interrogation in the Global War on Terrorism

JULY 14, 2004

Mr. Chairman, Ms. Harman, members of the Committee:

(U) I appreciate the opportunity to discuss with you the development of the Administration's thinking and policies regarding detention and interrogation in the war on terrorism.

9/11 and the stakes for the US in the war on terrorism (U)

(U) When the 9/11 attack occurred, the first thoughts of Defense Department policy makers were directed at preventing the next major terrorist attack against the United States. Civil aviation over the United States was shut down. After the anthrax attacks that occurred in the weeks following 9/11, delivery of packages and mail was curtailed. Other defensive measures were adopted.

(U) It became clear that the United States is vulnerable to additional terrorist attacks and that defensive measures can severely disrupt our lives and require us to relinquish important freedoms. With this in mind, President Bush determined that the purpose of the war on terrorism was not simply to defend against terrorist attacks and attack terrorist organizations, but to preserve the nature of our society – to preserve our liberties.

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A strategy of activity, offense and initiative (U)

(U) Aiming to defeat terrorism as a threat to our freedom — to our way of life as a free and open society — means that we cannot rely solely or even primarily on a defensive strategy. If we tried to do so, we would have to clamp down drastically across America, intruding grossly on the privacy rights and other civil liberties of Americans. As terrorist attacks occurred, US officials would continually be under pressure to move toward police state tactics — to sacrifice our freedom and change our way of life.

(U) The alternative to that bad option is a strategy *not* of waiting reactively to defeat terrorists on American soil, but striking them abroad where they do so much of their recruiting, training, equipping and planning. Given that our aim is to preserve our society's liberties, we have no alternative to a strategy of offense – of taking the initiative.

(U) In other words, we concluded that, in dealing with the terrorists, we had either to change the way *we* live, or change the way *they* live.

(U) The key to making this strategy successful is timely, authoritative intelligence.

The importance of intelligence in the war on terrorism (U)

(U) The 9/11 attack showed that relatively small numbers of people can cause large-scale harm to an open, advanced society such as ours. This means that the United States needs fine-grain intelligence to fight our terrorist enemies. In the Cold War, we could look down from satellites for indications that Soviet tank divisions might be readying to maneuver. Terrorist operations, in contrast, do not easily lend themselves to detection through technical means. To prevent or defeat such operations, HUMINT – human intelligence – is especially important.

(U) In the current war, the United States needs information on the enemies':

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- plans for attacks,
- leadership and organization,
- facilities,
- financing,
- training,
- weapons and
- recruitment and indoctrination.

Detainees from Afghanistan (U)

(U) As US forces began military operations in Afghanistan in October 2001, we understood that fighters we would capture on the battlefield there could be an important source of such information. The means to prevent the next 9/11-type attack – to save thousands of American lives – might be information in the head of one such detainee. So we needed to create proper ways to identify detainees of intelligence interest to us and to interrogate them effectively.

(U) The US took custody of its first detainees in Afghanistan in December 2001.

(U) There were a number of basic questions about detainees that required decisions from the US Government:

- The legal status of the various types of detainees?
- Where to hold them?
- The role of the International Committee of the Red Cross (ICRC)?
- How to deal with the respective home countries of the detainees?
- Whether, when and under what conditions to transfer detainees to their home countries?
- How to decide when they should be prosecuted? Or released?

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Status of Taliban and al Qaeda detainees (U)

(U) The question of how the laws of war apply to the war on terrorism is not simple. The main body of the law of war is the 1949 Geneva Conventions, which apply to conflicts between states that are parties to the Conventions.

(U) It is standard for the U.S. military to give Geneva Convention protections to detainees. Indeed, in Operation Enduring Freedom, General Myers communicated to General Franks the Secretary's guidance to treat detainees humanely and consistent with the Geneva Convention protections for prisoners of war, with the further explicit guidance that this treatment policy does not confer any legal status or rights. *See* CJCS message 211658Z NOV 01.

(U) The Geneva Conventions provide structure for US military doctrine – in particular, in the Army Field Manual, FM 34-52, on Intelligence Interrogation.

(U) But the war on terrorism is not a standard war. Al Qaeda is a terrorist network and not a state, let alone a party to the Geneva Conventions. Moreover, the Taliban government of Afghanistan, which harbored al Qaeda, used Afghan military forces that did not function as a regular army and did not comply with the laws of war.

(U) The ultimate resolution on whether and how the Geneva Conventions apply to the Afghanistan conflict involved some challenging legal and policy issues. Meanwhile, however, as noted above, Secretary Rumsfeld had directed General Franks to maintain a high level of treatment for detainees.

(U) Secretary Rumsfeld asked his team how best to think through the applicability of the laws of war to the war on terrorism. The Chairman of the Joint Chiefs of Staff, General Richard Myers, and I worked closely together in developing advice for the secretary.

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(U) General Myers told me that he believed in the Geneva Conventions' importance. He became intense, indeed passionate, as he described the Geneva Conventions as ingrained in U.S. military culture. He said that an American soldier's self-image is bound up with the Conventions. As we want *our* troops, if captured, treated according to the Conventions, we have to encourage respect for the law by our own example.

(U) I shared those views. General Myers and I together briefed the Secretary on the subject. I drafted and cleared with General Myers a February 3, 2002 point paper for Secretary Rumsfeld. The paper addressed the question of whether the Geneva Conventions applied as a matter of law – or should be applied as a matter of policy – to the coalition's conflict with the Taliban. (There was already broad agreement within the U.S. Government that the Conventions did not govern our worldwide conflict with al Qaeda, given that al Qaeda is not a state-party.)

(U) Secretary Rumsfeld understood, of course, that the United States is a party to the Geneva Conventions and so the Conventions are part of U.S. law. The point paper that General Myers and I developed, which I drafted, stressed the Defense Department's interest in the Geneva Conventions as "a good treaty" that serves US national interests and, in particular, the interests of the U.S. armed forces. The following are quotations from that February 2002 point paper:

- ...[T]he Convention is a sensible document that requires its parties to treat prisoners of war the way we want our captured military personnel treated.
- US armed forces are trained to treat captured enemy forces according to the Convention.
- This training is an essential element of US military culture. It is morally important, crucial to U.S. morale.

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- It is also practically important, for it makes U.S. forces the gold standard in the world, facilitating our winning cooperation from other countries.

US forces are more likely to benefit from the convention's protections if the Convention's commands are applied universally.

- Highly dangerous if countries make application of Convention hinge on subjective or moral judgments as to the quality or decency of the enemy's government. (That's why it is dangerous to say that US is not legally required to apply the Convention to the Taliban as the illegitimate government of a "failed state.")

A "pro-Convention" position reinforces [the US Government's] key themes in the war on terrorism.

- The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
- Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.
- The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.
- The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW [i.e., prisoner of war] status if they are captured.
- The US can apply the Convention to the Taliban (and al-Qaeda) detainees as a matter of policy without having to

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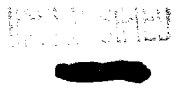

give them POW status because none of the detainees remaining in US hands played by the rules.

In sum, US public position on this issue should stress:

- Humane treatment for all detainees.
- US is applying the Convention. All detainees are getting the treatment they are (or would be) entitled to under the Convention.
- US supports the Convention and promotes universal respect for it.
- The Convention does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention.

(U) So, the Defense Department's top leadership (1) supported the Geneva Conventions, (2) believed that they applied as a matter of law to the conflict with the Taliban, (3) believed that Taliban detainees should *not* be accorded POW privileges for they failed to comply with the Conventions' conditions for such privileges and (4) had determined that all detainees would get humane treatment.

The President's determination on humane treatment of detainees (U)

(U) On February 7, 2002, the President issued his Memorandum on Humane Treatment of Al Qaeda and Taliban Detainees. That memorandum concluded that "none of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, Al Qaeda is not a High Contracting Party to Geneva."

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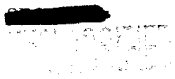

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(U) The President determined that "the provisions of Geneva will apply to our present conflict with the Taliban."

(U) Finally, the President determined that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva," noting that, "because Geneva does not apply to our conflict with Al Qaeda, Al Qaeda detainees also do not qualify as prisoners of war."

(U) The President further stated, as follows:

> Our values as a Nation, values that we share with many nations in the world, call us to treat detainees humanely, including those who are not entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. 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.
>
> I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

(U) The President thus expressed strong support for the Geneva Conventions.

(U) Stories that have circulated in the press and elsewhere in recent months to the effect that the top Defense Department officials created a bad atmosphere by expressing disrespect for the Conventions are not true. The record shows them to be false. The Defense Department's top officials upheld the Conventions within confidential government councils as they did in their public pronouncements. The atmosphere in the Department, as

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affected by the views of the leadership, was distinctly "pro" Geneva Conventions.

A Personal Matter (U)

(U) A few press stories have asserted that I personally harbor a hostile attitude toward the Geneva Conventions. They have cited as evidence the title of an article that I published in *The National Interest* in 1985: "Law in the Service of Terror." I would like to take this opportunity to explode this bizarre inversion of my views.

(U) The phrase "law in the service of terror" referred not to the Geneva Conventions, but to a proposed set of amendments to those Conventions. The proposed amendments are known as Protocol I to the Geneva Conventions. I criticized Protocol I because it weakens the protections that the Geneva Conventions provide to non-combatants.

(U) In my work on Protocol I in the mid-1980s, I praised the Geneva Conventions as part of a body of law that is "the pride of Western civilization" and observed that no nation has a greater interest in seeing the Conventions honored than does the United States. In other words, my article "Law in the Service of Terror" shows that I have for twenty years defended the Geneva Conventions, not opposed them.

(U) In the mid-1980s, I served as Deputy Assistant Secretary of Defense for Negotiations Policy in the Reagan administration. One of my responsibilities was the issue of whether the USG should ratify Protocol I, which had been negotiated in the mid-1970s.

(U) Protocol I embodied a number of radical features. It began by expanding the term "international armed conflicts" to include so-called national liberation wars, which it defined as: "Peoples ... fighting against colonial domination and alien occupation and against racist regimes." Protocol I aims to increase protections for fighters in designated national liberation movements, with the designation being made by regional political

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organizations – e.g., the Arab League and the Organization of African Unity. The effect of this is to politicize the laws of war – to make their applicability hinge on subjective, political terminology. This does not conduce to the universal application of the Conventions according to their terms.

(U) The Geneva Conventions say that militia fighters, if they want to get POW privileges upon capture, must wear uniforms, carry their arms openly and comply with the laws of war. The purpose of those conditions is to protect non-combatants. But Protocol I would eliminate those conditions for national liberation movements, some of whom are terrorist organizations. That is, Protocol I would reduce protections for non-combatants in order to increase them for favored irregulars (some of whom are terrorists).

(U) The beauty of the Geneva Conventions is that they accord solicitude first and foremost to non-combatants, then to fighters who obey the laws of war. The lowest level of solicitude is for fighters who do not obey the laws of war. Regarding the conditions for POW status, Protocol I turned the order of precedence on its head.

(U) These were among the principal reasons that in 1986 the Joint Chiefs, Secretary of Defense Caspar Weinberger, Secretary of State George Shultz and Attorney General Ed Meese all recommended against ratification of Protocol I.

(U) President Reagan agreed and formally notified the Senate that USG had decided not to ratify Protocol I. He stressed that it would politicize the law of war and hurt interests of non-combatants by making it easier for terrorist groups to get POW status.

(U) At the time, both New York Times and Washington Post editorialized in favor of Reagan's decision. In "Hijacking the Geneva Conventions," *The Washington Post* (February 18, 1987) applauded the Reagan administration's action and agreed that Protocol I would harm "the traditional purpose of humanitarian law, which is to offer protection to noncombatants by isolating them from the perils of combat operations."

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(U) The *Post* further noted that Protocol I would have "granted status as combatants (and, when captured, as prisoners of war) to irregular fighters who do not wear uniforms and who otherwise fail to distinguish themselves from combatants—in brief, to those whom the world knows as terrorists."

(U) The editorial concluded that the Reagan administration, "which has often and rightly been criticized for undercutting treaties negotiated by earlier administrations," was right to oppose Protocol I for what the *Post* termed the "right reason": "We must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law."

(U) *The New York Times*, in a February 17, 1987 editorial, stated that President Reagan faced "no tougher decision" than whether to seek ratification of Protocol I: "If he said yes, that would improve protection for prisoners of war and civilians in wartime, but at the price of new legal protection for guerrillas and possible terrorists. He decided to say no, a judgment that deserves support." The *Times* noted that the Protocol could have provided grounds "for giving terrorists the legal status of POWs."

(U) To this day, US remains a party to the Geneva Conventions, but not to Protocol I.

(U) The journalists and others who have asserted that my article "Law in the Service of Terror" shows disdain for the Geneva Conventions appear to have jumped to a perfectly backwards conclusion from the title. I would encourage them to make the effort to read the article itself.

Guantanamo (U)

(U) Consistent with the critical need for interrogation in the war on terrorism, DoD took action to ensure that enemy combatants captured in Afghanistan would be effectively interrogated and properly detained. Facilities were built at Guantanamo to allow for detention and interrogation

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of detainees in the war on terrorism consistent with the President's determination regarding humane treatment.

(U) CENTCOM began sending detainees in substantial numbers to Guantanamo in January 2002. Secretary Rumsfeld said that he did not want to overbuild there. He did not want to hold people there who should be released and he wanted to get in place screening procedures to restrict the flow of detainees to Guantanamo to ensure that only detainees who belonged at such a facility were sent there.

(U) ~~(S)~~ My office helped draft the screening procedures approved by the Secretary on January 6, 2002. [redacted]

(U) On February 5, 2002, Secretary Rumsfeld approved a policy on foreign government access to detainees at Guantanamo. Foreign government access is allowed only for law enforcement or intelligence collection purposes. Permitting foreign government access for these purposes has benefited US interests, because foreign government representatives have provided us law enforcement and intelligence data on their nationals and the fruits of their interviews have been made available to us. The same policy allows the ICRC to visit GTMO, though it otherwise does not allow visits by foreign non-government officials

(U) The Secretary approved guidance on February 23, 2002 for US Government official fact-finding and informational visits to observe detainee operations at Guantanamo Bay Naval Station. That guidance ensured that such visits can be done in ways that are compatible with base operations and security. It established procedures for review and approval of visit requests, and placed regulated the size, frequency, duration, and activities of the visits.

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(U) ~~(S)~~ On April 4, 2002, my office circulated policy guidance approved by the Secretary on transferring detainees from U.S. control to the control of other countries. [redacted] The policy sets guidelines for determining whether U.S. control of a detainee remains necessary for U.S. intelligence or law enforcement purposes or to protect U.S. security interests. It also provides that detainees will not be transferred to foreign governments without assurances of humane treatment. [redacted]

Release and transfer policy (U)

(U) Detainees are held at GTMO if they are (1) deemed to have intelligence value or (2) considered potentially of interest for criminal prosecution or (3) assessed to be a serious threat.

(U) If none of the conditions any longer apply, they are released.

(U) ~~(S)~~ If the first two are not applicable and the threat is moderate and can be mitigated through action by the home country, we try to work out a transfer agreement. Some have been made; others are being negotiated. [redacted]

(U) Annual review procedures have now been put in place, run by the Secretary of the Navy, to ensure that all detainees at Guantanamo will have their cases looked at periodically and those who are eligible get properly released or transferred.

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Iraq (U)

(U) It was understood from the outset that the Geneva Conventions would apply to the conflict in Iraq. The Execute Order for the Iraq war plans so directed. No special policies were promulgated from Washington on interrogations in Iraq, because the subject was covered by established U.S. military doctrine and practice, given the applicability of the Geneva Conventions.

(U) Interrogation policy in Iraq was made by the military commanders within the overall policy of applying the Geneva Conventions to the conflict.

(U) My office did work on various policy issues concerning detainees in Iraq. These issues included, for example, a number of questions regarding the "blacklist" of high value detainees:

- We helped the Secretary prepare guidance for the Central Command to undertake planning to identify, apprehend and hold blacklisted persons.

- We worked with other USG agencies on such questions as which high value detainees would be on the so-called blacklist, where they would rank (i.e., among the top 55 or at a lesser priority), and who would have release authority for those detainees.

- My office also worked with other USG agencies on the question of who should prosecute members of the former Iraqi regime. After considering various options (including prosecution by the United States, the coalition, an international body, or others), we concluded that the Iraqis should have the option to prosecute the key figures in the former regime.

- My office worked also on the related matter of transferring legal (though not yet physical) custody to the Iraqi government of those high value detainees whose files are sufficiently developed to permit an Iraqi authority to issue an Iraqi arrest warrant. Pursuant to such an

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arrangement, Saddam Hussein was recently transferred to Iraqi legal custody, along with nearly a dozen other top former regime officials.

Other key issues (U)

(U) On the issues of (1) General Hill's proposal on counter-resistance interrogation techniques, (2) interrogation practice in Afghanistan and (3) interrogation practice in Iraq, Under Secretary Cambone's testimony reviews the relevant history.

Conclusion (U)

(U) The war that the United States awoke to on 9/11 has imposed a number of difficult challenges and burdens on us as a nation. The detention and interrogation of people caught on battlefields of the war on terrorism are among the most difficult, but also among the most necessary to handle.

(U) The Guantanamo project was unique. The work there was continually blazing new trails. Over time, detainee operations at Guantanamo achieved a high degree of professionalism. They have produced valuable intelligence, which Under Secretary Cambone will summarize in his testimony.

(U) In Afghanistan and Iraq, especially at the notorious Abu Ghraib prison, problems and abuses have occurred that are the subject of investigations now underway throughout the Defense Department. The Abu Ghraib abuses have damaged the United States. The Department is determined to ensure personal accountability and to take the steps needed to reduce to a minimum the chances that such abuses will occur again.

(U) Before the investigations are completed, we cannot say definitively what accounted for the various detainee abuses. We can be confident, however, that we know that the legal, policy and moral guidance that the President and the leadership of the Defense Department were giving to the field were proper. That guidance was to respect the law, including the Geneva Conventions, and to treat all detainees humanely.

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(U) One hopes that we will emerge from this terrible scandal with a heightened appreciation at home and abroad of the U.S. interest in upholding the Geneva Conventions and with U.S. armed forces better trained and organized to perform crucial tasks like interrogation skillfully and properly.

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June 16, 2008

VIA FAX AND U.S. MAIL

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: Douglas J. Feith

Dear Chairman Conyers:

I write to acknowledge receipt by me this morning of your June 13, 2008 letter addressed to my client, Douglas J. Feith. The letter formally invites Mr. Feith to participate in a June 18, 2008 hearing on "Administration Lawyers and Administration Interrogation Rules" before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Civil Liberties. This formal invitation comes, of course, on the heels of several conversations with members of your staff following their informal request for Mr. Feith's testimony and, I presume, includes the assurances given during those conversations.

Much of what has been said and written in the public debate about the interrogation of detainees has been passionate and vitriolic – much has been in the form of *ad hominem* attacks. Consequently, there has been little factual, serious public review of these difficult questions. It is for these reasons that we were especially glad to learn from your staff that you intend the Subcommittee's hearings to be conducted in a manner that elevates substance over sound bites; that treats the witnesses with dignity and respect; and that approaches all viewpoints with an open mind.

It is my pleasure to accept your invitation on Mr. Feith's behalf. He looks forward to the opportunity to contribute to the Subcommittee's understanding of the issues and to correct gross distortions of his views and of his role in the relevant events. In an effort to prepare, we have asked the Department of Defense to collect relevant documents and have begun reviewing them. We have not had time to complete the review of the documents, but your staff has told us that holding fast to the June 18, 2008 hearing date is more important to the Subcommittee than Mr. Feith's finishing his review of the documents. Recognizing that this may limit the

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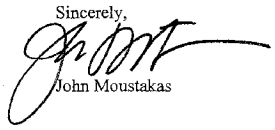
usefulness and completeness of his testimony, Mr. Feith will nonetheless do his best to answer the Subcommittee's questions.

Your letter asks for electronic and hard copies of Mr. Feith's written statement by June 13, 2008. I assume that this was a typographical error and that the letter intended for statements to be submitted by today, June 16, 2008. Regrettably, owing to other obligations, Mr. Feith will not be able submit a written statement today. He hopes to be able to submit one prior to his appearance, however.

If you have any questions, please do not hesitate to contact me at (202) 346-4236.

Sincerely,



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June 18, 2008

VIA FAX AND U.S. MAIL

The Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: Douglas J. Feith

Dear Chairman Conyers:

I regret to inform you that I have had to advise my client, Douglas J. Feith, not to participate in this afternoon's hearing on Administration Lawyers and Administration Interrogation Rules before the Subcommittee on the Constitution, Civil Rights and Civil Liberties. He is, however, willing to reschedule his appearance for a mutually convenient future date.

As my June 16 letter stated, Mr. Feith's acceptance of your recent invitation to testify today confirmed an agreement with Committee staff made many weeks ago. Your staff assured us that the hearing would be a substantive, respectful public discussion about the interrogation of detainees in an atmosphere free from the vitriol and *ad hominem* attacks that have regrettably dominated the debate to date. Despite a request weeks ago, it was not until late yesterday afternoon – and only after again repeating my request – that I was informed that Lawrence Wilkerson had been asked to join the roster of witnesses for this afternoon's hearing.

Having spent several hours yesterday evening reviewing Mr. Wilkerson's public statements in recent years, especially about detainees issues, and his reckless, bigoted and defamatory remarks about my client in particular, I have concluded that today's hearing cannot have the character we expected when Mr. Feith agreed to participate. For that reason, I have recommended that he reschedule his appearance.

What I object to is not that Mr. Wilkerson disagrees with Mr. Feith about the issues; in discussions of issues of public importance, disagreements are inevitable and welcome. But what should neither be expected nor tolerated are the kinds of personal, vicious, groundless attacks

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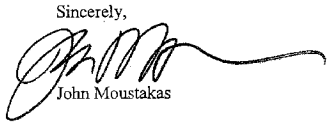
that Mr. Wilkerson has repeatedly directed against my client. Mr. Wilkerson has made a point of setting himself up as a personal antagonist of Mr. Feith.

Among other things, Mr. Wilkerson has accused my client of disloyalty to the United States. Specifically, in an April 2006 interview in American Prospect, he accused Mr. Feith of being a "card-carrying member[] of the Likud party" whose allegiance is to Israel rather than to the United States. Wilkerson said of Mr. Feith in 2005: "Seldom have I met a dumber man." though Mr. Feith believes he not only has never met Mr. Wilkerson, but has never even been in the same room with him. Mr. Wilkerson has accused Mr. Feith of producing a "labyrinth of lies," as he has called Mr. Feith's meticulously documented recent book, *War and Decision*, in a debate sponsored by the New America Foundation. And Mr. Wilkerson has been actively promoting the notion that United States Government officials who did not share his views about the conduct of the global war on terror should be prosecuted as war criminals in foreign or international tribunals.

To be sure, the Subcommittee is free to give a microphone to whomever it chooses. But my client volunteered to meet with the Subcommittee for a proper, substantive discussion. That will not happen if he is appearing with the likes of Lawrence Wilkerson.

As I have said, Mr. Feith is at the ready to reschedule his appearance at a mutually agreeable time. For planning purposes, please note that he is unavailable on Thursday, June 26. In addition, I will be on vacation with my family from July 18 to 28, 2008. Feel free to have your staff contact me at their earliest convenience to select a new date.

Sincerely,



John Moustakas

Mr. NADLER. Our next witness will be Professor Pearlstein, who is recognized for 5 minutes.

TESTIMONY OF DEBORAH N. PEARLSTEIN, ASSOCIATE RESEARCH SCHOLAR, LAW AND PUBLIC AFFAIRS PROGRAM, WOODROW WILSON SCHOOL FOR PUBLIC AND INTERNATIONAL AFFAIRS, PRINCETON UNIVERSITY

Ms. PEARLSTEIN. Thank you, Mr. Chairman, Ranking Minority Member Franks, Members of the Committee. Thank you very much for the opportunity to testify before you today.

My testimony today is about the consequences of the Administration's legal policy, and it is informed by my work both as a scholar of U.S. constitutional and national security law and as a human rights lawyer. In the course of my work I have been privileged to meet an array of senior retired military leaders, JAG officers, civilian intelligence, and defense department officials who spent their careers devoted to pursuing national security interests, and who have been overwhelmingly deeply troubled by the Administration's approach to human intelligence collection and detainee treatment.

I have also met with Iraqi and Afghan nationals who have been victims of gross abuse in U.S. detention facilities, and have reviewed hundreds of pages of government documents detailing our treatment of the many thousands of detainees who have passed through U.S. custody since 2002.

Based on this work, it has become clear to me that the U.S. record of detainee treatment has fallen far short of what our laws require and what our security interests demand.

Well beyond the few highly publicized incidents of torture at Abu Ghraib, as of 2006, there have been more than 330 cases in which U.S. military and civilian personnel have been credibly alleged to have abused or killed detainees. These figures are based almost entirely on the U.S. Government's own documentation.

These cases involved more than 600 U.S. Personnel and more than 460 detainees held at U.S. facilities throughout Afghanistan, Iraq, and Guantanamo Bay. They include some 100-plus detainees who died in U.S. custody, including 34 whose deaths the Defense Department reports as homicides. At least eight of these detainees were, by any definition of the term, tortured to death.

Beyond these obviously dismaying human rights consequences, multiple U.S. defense and intelligence officials have now described the negative strategic and tactical security consequences or our treatment of detainees. Polling in Iraq has underscored how U.S. Detention practices helped galvanize public opinion against the United States. Extremist group Web sites now invoke the image of Abu Ghraib to spur followers to action against the U.S.

Arguably, even more alarming, a remarkable recent study by the British parliament found that U.S. detainee treatment practices led the U.K. to withdraw from previously planned covert operations with the CIA because the U.S. failed to offer adequate assurances against inhumane treatment.

But I think it was the statement of the young army intelligence office who put the intelligence impact most succinctly. The more a prisoner hates America, the harder he will be to break. The more

a population hates America, the less likely its citizens will be to lead us to a suspect.

Over the course of my work it has become clear to me that these effects were not merely the consequences of misconduct by a few wrongdoers. Rather, senior civilian legal and policy guidance was, in my judgment, a key factor that led to the record just described.

In addition to Mr. Sands' important work, I highlight here two other factors that led me to this conclusion. First, the abuse I have described followed a series of legal decisions to change what had been for decades settled U.S. law. This law embodied in military doctrine, field manuals, and training had unambiguously provided that detention operations in situations of armed conflict were controlled by the Geneva Conventions, including Common Article 3 of those treaties affording all detainees a right to humane treatment, not just prisoner of war detainees.

The Administration's 2002 legal interpretation to the contrary, as the Supreme Court later made clear in Hamdan versus Rumsfeld, was wrong as a matter of law. It was also disastrous as a matter of policy. In suspending application of Common Article 3, the Administration offered no consistent set of rules to replace those it had summarily rejected, producing rampant confusion and ultimately gross abuse by frontline troops.

Although troops moved seamlessly from Afghanistan to Guantanamo to Iraq, the operative interrogation orders in each theater differed. The orders differed further within each detention center, depending on the month, the Agency affiliation of the interrogator, and the legal status assigned, which itself shifted repeatedly, to the prisoner himself. These policies and orders and the confusion they engendered unquestionably played a role in facilitating abuse.

Second, and critically, gross acts of abuse continued long after senior Pentagon officers, including that of Secretary of Defense Rumsfeld, knew it was happening, and yet no meaningful action was taken to stop it. By February 2004, the Pentagon had seen extensive press accounts, NGO reports, FBI memoranda, Army criminal investigations, and even the report of Army Major General Antonio Taguba detaining detainee torture and abuse, yet essentially no investigative progress had been made by 2004 in some of the most serious cases, including the interrogation-related homicides of detainees in U.S. custody.

On the contrary, shortly after the Taguba report was leaked to the press in early May, 2004, Mr. Feith's office sent an urgent e-mail around the Pentagon, warning officials not to read the report. The e-mail, according to a News Week report, warned that no one should mention the Taguba report to anyone, including family members.

This is not the response of an Administration, in my judgment, that takes either human rights or law enforcement seriously.

I am deeply supportive of this Committee's efforts to review the record on these matters, and I am grateful for the opportunity to share my views. I look forward to your questions.

Mr. NADLER. I thank Professor Pearlstein.

[The prepared statement of Ms. Pearlstein follows:]

PREPARED STATEMENT OF DEBORAH N. PEARLSTEIN

Deborah N. Pearlstein
Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
July 15, 2008

Administration Lawyers and Administration Interrogation Rules

Chairman Nadler, Ranking Minority Member Franks, members of the Subcommittee, thank you for giving me the opportunity to testify today. I would like to share with you some of what I have learned in the past several years of researching the effects of administration legal interpretation and policy toward detainees held since the attacks of September 11.

My testimony is informed by two different areas of expertise – both as a scholar of U.S. constitutional and national security law, and as a human rights lawyer. I am currently a visiting scholar at the Woodrow Wilson School of Public & International Affairs at Princeton University, where I teach and study in the fields of U.S. constitutional law, national security law, and international human rights. From 2003-2006, I served as director of the Law and Security Program at the non-profit organization Human Rights First, where I led the organization's efforts to study the impact of U.S. counterterrorism operations on human rights. Before that, I was privileged to serve as a judicial clerk to Justice John Paul Stevens at the U.S. Supreme Court, and to pursue a litigation practice in public and constitutional law at the law firm of Munger, Tolles and Olson in California.

Human Rights Effects

My work as a human rights lawyer was for an organization that had, for most of its 30-year history, pursued research, reporting, litigation and advocacy to advance the cause of human rights overseas – through efforts on behalf of dissidents in oppressive regimes, victims of crimes against humanity, and refugees seeking asylum from political violence and persecution. Human Rights First (formerly called the Lawyers Committee for Human Rights) prided itself on providing dispassionate legal analysis and pragmatic policy advice to help craft solutions to the world's most pressing human rights problems. It was with these values that the organization decided to engage some of the administration's most concerning post-September 11 counterterrorism efforts by creating a new program on the human rights questions presented by U.S. national security policies. I was hired in 2003 to establish and direct that program.

Over the next three and a half years, I had occasion to travel to Guantanamo Bay; meet with Iraqi and Afghan nationals who had been victims of gross abuse in U.S. detention facilities there; consult with military service-members and medical experts whose work had been touched by these events; and review hundreds upon hundreds of pages of government documents detailing our treatment of the many thousands of detainees who have passed through U.S. custody since 2002. Based on this work, and as documented in several reports, which I attach to my testimony today, it became clear to me that the United States' record of detainee treatment fell far short of what our laws require and what our security interests demand.

Well beyond the few highly publicized incidents of torture at Abu Ghraib, as of 2006 there had been more than 330 cases in which U.S. military and civilian personnel

were credibly alleged to have abused or killed detainees (this, according to a study based almost entirely on the U.S. government's own documentation by New York University, Human Rights First, and Human Rights Watch issued in April 2006). These cases involved more than 600 U.S. personnel and more than 460 detainees held at U.S. facilities in Afghanistan, Iraq and Guantanamo Bay. They included some 100-plus detainees who died in U.S. custody, including 34 whose deaths the Defense Department reported as homicides. At least eight of these detainees were, by any definition of the term, tortured to death.[1] (My former colleagues, who continue to track these cases, tell me that the numbers of detainee deaths in custody have increased significantly since the 2006 report.)

It also became clear to me that these patterns were not merely the results of accidents or misconduct by a few wrong-doers. Rather, senior civilian legal and policy guidance was one of the key factors that led to the record of abuse just described. In addition to the testimony this Committee has already received from Philippe Sands and others on the role of direct authorization for abusive interrogation, I based my conclusion on several findings in particular, which I describe here. I should note, by way of introduction, that by focusing on these additional aspects of administration conduct, I do not mean to underemphasize the importance of direct authorizations for abusive interrogations by Mr. Rumsfeld and others. Nor do I wish to overlook the many fine military and civilian leaders who pushed back against these policies as they were being developed and carried out. What I do wish to underscore is that looking at direct orders

[1] N.Y. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE ET AL., BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006), http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf; HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

alone is not enough to provide a clear picture of the extent to which responsibility lies among senior administration leaders.

First, as one of the many Pentagon investigations conducted into the issue concluded in 2004,[2] and as the numbers just discussed confirm, the problem of detainee abuse was systemic in nature. My friend, former Navy TJAG Rear Adm. John D. Hutson put it succinctly in commenting on some of our research on detainee treatment: "One such incident would be an isolated transgression; two would be a serious problem; a dozen of them is policy."[3]

Second, the pattern of abuse we documented followed a series of broad legal decisions (as other witnesses have addressed) to change what had been for decades settled U.S. law. This law, embodied in military doctrine, field manuals, and training, had unambiguously provided that detention operations in situations of armed conflict were controlled by the Geneva Conventions, including Common Article 3 of those treaties affording all detainees a right to basic humane treatment. The administration's 2002 legal interpretation to the contrary, as the Supreme Court later made clear in *Hamdan v. Rumsfeld*, was wrong as a matter of law. It was also disastrous as a matter of policy. In suspending application of Common Article 3, the administration offered no comprehensive or even consistent set of rules to replace those it had summarily rejected, producing rampant confusion and ultimately gross abuse by front-line, inexperienced troops. Although young troops and command moved seamlessly from Afghanistan to Guantanamo Bay to Iraq (as a result of transfers and shifting troop deployments), the

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[2] MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.
[3] HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006) (back cover blurb), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

operative detention and interrogation orders in each theater differed. The orders differed further within each detention center depending on the month, the agency affiliation of the interrogator, and the legal status assigned (which itself shifted repeatedly) to the prisoner himself. These policies and orders, and the confusion they engendered, unquestionably played a role in facilitating abuse.[4]

Finally, it is now clear that gross acts of detainee abuse continued long after senior Pentagon offices, including that of Defense Secretary Rumsfeld, knew it was happening. And yet no meaningful action was taken to stop it. By February 2004, the Pentagon had seen extensive press accounts, NGO reports, FBI memoranda, Army criminal investigations, and even the report of Army Maj. Gen. Antonio Taguba detailing detainee torture and abuse – yet essentially no investigative progress had been made by 2004 in some of the most serious cases, including the interrogation-related homicides of detainees in U.S. custody. On the contrary, shortly after the Taguba Report was leaked to the press in early May 2004, the office of then Under Secretary of Defense for Policy Douglas Feith reportedly sent an urgent e-mail around the Pentagon, warning officials not to read the report.[5] The e-mail warned that the leak was being investigated for "criminal prosecution" and that no-one should mention the Taguba Report to anyone, including family members.[6] This is not the response of an administration that takes human rights – or law enforcement – seriously. For far too long, the message from senior Defense

[4] I describe the evolution of these policies (based largely on the Pentagon's own investigations) and the effects they had in detail in my article, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006).
[5] Michael Hirsh and John Barry, *The Abu Ghraib Scandal Cover-Up?*, NEWSWEEK, June 7, 2004, available at http://www.newsweek.com/id/53972.
[6] *Id.*

Department leadership was that violators could break U.S. and international law against cruel treatment with impunity.

It is my understanding based on a Defense Department directive that throughout the period of most serious abuse, Douglas Feith had "primary staff responsibility" for overseeing the detainee program.[7] As then Under Secretary of Defense for Intelligence Stephen Cambone testified to the U.S. Senate Armed Services Committee in 2004, "[t]he overall policy for the handling of detainees rests with the undersecretary of defense for policy, by directive."[8] In light of the record just described, it is difficult for me to imagine how someone in this position would not bear some responsibility for the consequences of policy in this area.

National Security Effects

As I mentioned at the outset, I am also here today as a scholar of U.S. constitutional and national security law, fields I have studied as a Supreme Court clerk, a lawyer in private practice, and now in academia. It was because of these interests that one of my earliest decisions as director of a human rights program in law and security was to engage the security community on these issues directly – to learn about the critical government challenge of counterterrorism, to inform our advocacy by working with those most expert on the issues, to consult with military and intelligence experts who could ensure that our policy understandings reflected the best technical knowledge, and (as it turned out) to cultivate relationships with colleagues keen to work with us in advancing positions of common concern. In interviewing experts in the course of our research, and

[7] Dep't of Defense, Department of Defense Program for Enemy Prisoners of War and Other Detainees, 4.1.1, August 18, 1994, available at http://www.dtic.mil/whs/directives/corres/text/d23101p.txt.
[8] Stephen Cambone, Hearing of the Senate Armed Services Committee on the Treatment of Iraqi Prisoners, p. 11, May 11, 2004.

in convening off-the-record conferences on methods of human intelligence gathering, I was privileged to meet an array of senior retired military leaders, JAG officers, and civilian intelligence and Defense Department officials who spent their careers devoted to pursuing U.S. national security interests – and who were, overwhelmingly, deeply troubled by the administration's approach to human intelligence collection and detainee treatment.

While I would hardly purport to speak for these professionals, I have drawn from their insights several critical points that I would like to bring to the Committee's attention. First, multiple U.S. defense and intelligence officials have described the negative effects such practices have had on the United States' strategic counterterrorism and counterinsurgency efforts – that is, our strategic interest in mitigating the threat of terrorism over the long term.[9] Polling in Iraq in 2004 underscored how U.S. detention practices helped to galvanize public opinion against the United States.[10] Extremist group websites invoke the image of Abu Ghraib to spur followers to action against the United States.[11] There is thus by now substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security.[12]

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[9] *See* News Transcript, Dep't of Defense, Coalition Provisional Authority Briefing (May 10, 2004), available at http://www.defenselink.mil/transcripts/2004/tr20040510-0742.html (Brigadier General Mark Kimmitt, spokesman for the U.S. military in Iraq, acknowledged "The evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency, that winning over Iraqis before the planned handover of some sovereign powers next month had been made considerably harder by the photos."); *see also* John Hendren and Elizabeth Shogren, Shooting Spurs Iraqi Uproar, U.S. Inquiry, L.A. TIMES, Nov. 17, 2004.

[10] Edward Cody, *Iraqis Put Contempt for Troops on Display*, WASH. POST, June 12, 2004, at A1; *see also* John Hendren and Elizabeth Shogren, *Marine May Be Charged in the Fallouja Killing of an Unarmed Fighter: The Footage Airs on Arab TV, Further Tarnishing America's Image*, L.A. TIMES, Nov. 17, 2004.

[11] Daniel Benjamin and Gabriel Weimann, *What the Terrorists Have in Mind*, N.Y. TIMES, Oct. 27, 2004, at A21.

[12] *See, e.g.*, *Guantanamo's Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40 (polling a bipartisan group of leading foreign policy experts and finding 87% believed the U.S. detention system had hurt more than

Second, beyond the damage these policies have done to U.S. strategic interests, it is now apparent they have also had an adverse impact on *tactical* intelligence collection – that is, short-term operational efforts geared toward producing more immediate counterterrorism gains. A comprehensive review of the effectiveness of interrogation methods by the U.S. Intelligence Science Board uncovered no study that had ever found that torture or coercion produces reliable information,[13] raising substantial question as to whether interrogation programs produced any security benefits. But there can be little question about the security burdens of these methods. As a remarkable recent study by the Intelligence and Security Committee of the British Parliament found, widely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist suspects led the British to withdraw from previously planned covert operations with the CIA because the United States failed to offer adequate assurances against inhumane treatment and rendition.[14] Along similar lines, former Navy General Counsel Alberto Mora testified to the Senate Armed Services Committee last month presenting his own list of such consequences, including his report that senior NATO officers in Afghanistan left the room when issues of detainee treatment have been raised by U.S. officials out of fear that they may become complicit in detainee abuse. As one U.S. Army intelligence officer

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helped in the fight against Al Qaeda) ("Nothing has hurt America's image and standing in the world—and nothing has undermined the global effort to combat nihilistic terrorism—than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands; if its behavior descends to the level employed by the terrorists, then we have all become them instead of us.").

[13] Gary Hazlett, *Research on Detection of Deception: What We Know vs. What We Think We Know, in* EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART-- FOUNDATIONS FOR THE FUTURE (U.S. Intelligence Science Board, ed., 2006), at 45, 52.

[14] *See* Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007 at A6 ("Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said."). *See also* INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, ISC 160/2007, *available at* http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf.ashx (providing the full report of the Committee).

who served in Afghanistan put the challenge perhaps most succinctly: "The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect."[15]

To what extent can the administration's approach to law be held responsible for such consequences? At the broadest level, I believe responsibility lies with those who acted on a view seemingly embodied in the Pentagon's 2005 National Defense Strategy, that: "Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism."[16] On one reading of this statement – a reading consistent with ongoing charges of "lawfare" against lawyers seeking to enforce America's constitutional and treaty obligations – the Constitution and many laws constraining the exercise of U.S. executive power are generally adverse to U.S. security interests. They are an obstacle to be overcome when possible, ignored when necessary.

I believe the past six years have demonstrated as an empirical matter why this view is incorrect. Indeed, our society has long thought the rule of law a good idea for reasons that are centrally relevant to the intelligence collection mission. The law can create incentives and expectations that shape institutional cultures (to help overcome, for example, the excessive institutional secrecy the 9/11 commission highlighted). The law can construct decision-making structures that take advantage of comparative institutional competencies, and maximize the chance for good security outcomes (like requiring experts to participate in the development of interrogation techniques – rather than simply

[15] CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: TASK FORCE 500 AND AMERICA'S SECRET WAR AGAINST AL QAEDA 44–45 (Little, Brown & Co. 2004).
[16] Special Defense Dep't Briefing by Under Secretary of Defense for Policy Douglas Feith (Mar. 18, 2005), available at http://www.defenselink.mil/transcripts/2005/tr20050318-2282.html.

substituting detailed training with "gloves off" directives). Law can provide a vehicle for building and maintaining more reliable working relationships with international partners (through mutual respect for international treaty obligations). Finally, and not least, the law sets limits on behavior and ensures accountability. If we take our national commitment against torture seriously, we cannot fail to establish such limits.

This list of law's virtues is, of course, only the way law functions ideally; the law itself must be clearly stated and reliably enforced. But in considering the lessons of the past several years, it is to me apparent that our military and intelligence communities *needs* law to fulfill these roles. Law and legal rules must be considered an essential component of counterterrorism strategy going forward.

Recommendations

To that end, it should be clear in all U.S. practices – detention, rendition, interrogation, and trial – that there is no "intelligence collection" exception to the commitment of the U.S. government to operate under the Constitution and a system bound by the rule of law. The laws governing the treatment of U.S.-held detainees – rules already established by the Constitution, treaties, and statutes of the United States, and reflected in the U.S. Army Field Manual on Intelligence Interrogation – should be standardized government-wide. U.S. efforts to educe information from detainees, whether held by our own military or intelligence agencies, or other agents acting at the United States' behest, should be guided by uniform rules and training programs, backed by the clear support of the law and the best evidence of what is effective. And violations of these rules should be met with swift and sure discipline proportionate to the offense. Whether to deter the kind of policy disaster we saw with Abu Ghraib, to enhance our

chances of obtaining meaningful human intelligence, or to clarify for ourselves and the rest of the world the advantages of a free and democratic society, the law is the among the most important counterterrorism weapons we have.

I am grateful for this Committee's efforts, and for the opportunity to share my views on these issues of such vital national importance.

Mr. NADLER. I now recognize for 5 minutes for his opening statement, Professor Sands.

TESTIMONY OF PHILIPPE SANDS, PROFESSOR, INTERNATIONAL LAW, UNIVERSITY COLLEGE LONDON

Mr. SANDS. Thank you very much.

Mr. Chairman, Subcommittee, it is a pleasure to be back for the second time, and a privilege also to share this table with my two colleagues to my right.

Since I last appeared on the 6th of May, important details have emerged, filling out and developing accounts that I and others have given, and that account, my account, other accounts have been sustained and strengthened by what has emerged.

I then described really four simple steps to what happened. First, get rid of Geneva and the international rules prohibiting aggressive interrogations. Second, find new interrogation techniques and disarm their opponents by circumventing the usual consultations. Third, deploy those techniques. And fourth, make it look as though the initiative came from the bottom up.

New information and testimony conclusively shows the decision to move to aggressive military interrogations at Guantanamo came from the top. We now know, for example, since the hearing before the Senate Armed Services Committee, that as early as July, 2002, the Office of General Counsel at DOD was actively engaged in exploring sources for new techniques of interrogation, including from the SERE program. That seems to have pre-dated the efforts at Guantanamo.

There has been, until this morning, no challenge to my conclusion that the Geneva Conventions were set aside to allow new interrogation techniques to be developed and applied. That Act created a legal vacuum within which the torture memo of August 1, 2002, was written by Jay Bybee and John Yoo. Nothing has emerged, frankly, to contradict my conclusion and that of others that it was Professor Yoo's memo rather than Colonel Beaver's legal advice that served as the true basis for Mr. Haynes' recommendation and Mr. Rumsfeld's authorization of cruelty on the 2nd of December, 2002.

Most significantly, in my view, in her testimony before the Senate Armed Services Committee on June 17, Jane Dalton, who was the general counsel to General Myers, the Chairman of the Joint Chiefs of Staff, confirmed my account that Mr. Haynes actively and directly short-circuited the decision-making process.

Admiral Dalton went further. She revealed that there was serious objections already by November from military lawyers, that these were known to General Myers and Mr. Haynes, and that steps were taken to prevent them from being taken any further. That is entirely consistent with my belief that a conscious decision was taken at the upper echelons of the Administration to avoid unhelpful legal advice.

These are very serious matters that, in my humble submission, do require further investigation. That is an important role for this Committee and for Congress and perhaps also for others.

Professor Yoo testified before this Committee on June 26. Whether deliberately or by accident, he fell into error with respect to my

previous testimony. Professor Yoo said that I had never interviewed him for my book, and that is right, but he also asserted in my testimony that I had claimed to have done so, and that is wrong. It seems that if he did read my testimony, he did so with insufficient care.

I didn't say to this Committee that I had interviewed him. I chose my words with great care. What I said on May 6 was, and I quote, "Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example, the Deputy Assistant Attorney General at DOJ, Mr. Yoo."

I was, of course, referring to the debate I had with Professor Yoo in the autumn of 2005 at the World Affairs Council in San Francisco. It is fully described in my book. If you are interested, you can listen to it on the Web.

Congressman King seized on Professor Yoo's words with impressive speed. The Congressman seemed to be under the impression that I had made a full statement to the Committee, and suggested that might reflect on the veracity of the balance of my book. That avenue, I fear, is not available to him because I made no claim in my testimony or in the book to having interviewed Professor Yoo. And because the allegation is serious, I wrote to Professor Yoo, inviting him to correct his error. I have attached a copy of that letter in my written statement. I haven't yet received a reply. I did also copy the letter to Congressman King, and I trust he accepts that if any false statement was made before this House, I was not its author.

Mr. Addington also appeared before this Committee on June 26. His appearance was striking in many respects, not the least for his apparently generous failure of memory. On many key issues he simply said he couldn't remember. He couldn't remember, for example, whether he had been to Guantanamo in September, 2002. He couldn't remember whether they had discussions on interrogation techniques. He couldn't even remember whether he then met Colonel Beaver, Staff Judge Advocate. And yet, he was curiously able to recall one point during this meeting with crystal clarity. Asked by Congressman Wasserman Schultz whether he had encouraged Guantanamo Bay interrogators, "to do whatever needed to be done," Mr. Addington was suddenly be able to provide a clear response. I do deny that, he said. That quote is wrong.

You will appreciate my skepticism at his sudden and selective capacity for recollection. Either he remembers what happened that day, or he does not.

I did interview Mr. Feith for my book. He told me much that was of interest. He told me the decision not to follow the rules reflected in Geneva was taken in the knowledge that it would remove constraints on military interrogations. He told me the decision to move to aggressive military interrogations followed what he called a thoroughly interagency piece of work involving DOJ.

I learned also that Mr. Feith was somewhat reticent about his own role in the decision to treat Al Qahtani, detainee 063, with cruelty. I was able to help him recall that his involvement in that decision came rather earlier than he had wanted me to believe. You can see that for yourself in Mr. Haynes' one-page memo that I in-

cluded as an attachment to my statement. "I have discussed this with Doug Feith," wrote Mr. Haynes.

Mr. Feith later wrote a letter to the editor of Vanity Fair complaining that my article contained more misquotations and errors that can be addressed in this letter. He didn't, however, provide even a single example of misquotation. I believe that I provided an accurate and fair account of that conversation and was able to deal shortly with his allegation when the editor gave me an opportunity to respond. He may not recall that our conversation was recorded, I wrote of Mr. Feith. The quotations are accurate.

Since he has not identified any errors, I wasn't in a position to respond to his allegations. Subsequently, Mr. Feith took matters to another level. Last month, in the course of an interview on the Canadian Broadcasting Corporation program, The Current, he expressed his belief that my book was dishonest. That is a serious charge. Perhaps it is was made in a moment of excess. Even so, it is wrong. It has been made, once again, until this morning, without substantiation.

Now this morning, for the first time I have got an indication of what it is that seems to bother Mr. Feith. I should say I am entirely open to reviewing all the documents in a spirit of transparency if I have got things wrong, but I don't think I have.

This morning, Mr. Feith said, and I read from his introductory statement, that, Sands writes that I argued that the Gitmo detainees were entitled to no rights at all under Geneva. But that is not true, he writes. I argued simply they were not entitled to POW privileges.

Now that, I am afraid, is not an accurate account of what he said to me. And I quote from an extract that I will circulate and make available, and I should say that I am very happy to accede to his request, and if the Committee would like it, to make available to the Committee the audio and the transcript of my interview with him. I leave that to the Committee to indicate.

This is what he said to me. "The point is that the al-Qaeda people were not entitled to have the convention applied at all, period." Obvious. "Al Qaeda people were not entitled to have the convention applied at all, period." End of quote. That word admits of no ambiguity. I understood those words to include what it says: All of Geneva, including Common Article 3. And the thing that is so curious is that in the document that he put in this morning attached to his introductory statement he refers to his contemporaneous memo of February, 2002, and we find no reference in that to his strong and burning desire to ensure that Common Article 3 provisions are respected.

So with respect, I stand to be correct, but I do not see that I have misquoted or miscited in any way what he told me or what the record shows.

Now, Mr. Feith held an important position. He was head of policy, number three, at Pentagon. And yet it seems that he and his colleagues failed to turn their minds to all the possible consequences of——

Mr. NADLER. Without objection, the witness will have an additional minute and a half.

Mr. SANDS. Thank you very much, sir. I will try to wrap within that time.

Having decided to circumvent these international constraints on aggressive interrogation, it seems that some key questions were not asked. Was the Administration satisfied that these new techniques could produce reliable information? Could the techniques undermine the war on terror by alienating allies? Would the fact of aggressive interrogation be used as a recruiting tool?

It seems that Mr. Feith was involved in many aspects of these decisions, from the denial of Geneva rights to all the detainees at Guantanamo, to the appointment of Major General Dunlavey, the combatant commander at Guantanamo, to the adoption of aggressive interrogation techniques.

You would not know that from his recent book, in which six pages out of 900 are devoted to the Geneva decision and the issue of aggressive interrogations is reduced to a mere single paragraph. No mention is made of Detainee 063 or Mr. Feith's role on the interrogation rules or the way in which the Department of Defense Inspector General concluded that the Guantanamo techniques approved on his watch migrated to Abu Ghraib. All this is simply airbrushed out of the story.

Mr. Chairman, Members of the Subcommittee, at the heart of these hearings lie issues of fact. If Congress cannot sort this out, and if a desire for foreign investigations is to be avoided, the need to investigate the facts fully in this House and the other House is an important one. And foreign investigations may become impossible to resist if that does not happen.

I thank you, sir, for allowing me to make this introductory statement.

[The prepared statement of Mr. Sands follows:]

PREPARED STATEMENT OF PHILIPPE SANDS

INTRODUCTORY STATEMENT of

PHILIPPE SANDS QC

PROFESSOR OF LAWS, UNIVERSITY COLLEGE LONDON
BARRISTER, MATRIX CHAMBERS

US HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUB-COMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

Hearing on: From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part IV

JULY 15, 2008, 10 a.m.

[CHECK AGAINST DELIVERY]

Mr Chairman, Honourable Members of the Committee, it is my privilege and honour to have been invited to appear before this Committee on a second occasion, to respond to various matters that have arisen and to address your further questions on the subject of Administration Lawyers and Administration Interrogation Rules.

Since I last appeared, on May 6th, there have been a number of significant developments. This Committee has held two further hearings, and related hearings have been held by the Senate Judiciary Committee (before which I testified) and the Senate Armed Services Committee.

Important details have emerged, filling out and developing the account in my book *Torture Team* and in the article I wrote for Vanity Fair, *The Green Light*. That account - which has been sustained and strengthened by what has emerged since I last appeared – described four simple steps: first, get rid of Geneva and the international rules prohibiting aggressive interrogations; second, find new interrogation techniques and disarm their opponents by circumventing the usual consultations; third, deploy those techniques; and fourth, make it look as though the initiative came from the bottom up. New information and testimony conclusively shows that the decision to move to aggressive military interrogations at Guantanamo came from the top. We now know, for example, that as early as July 2002 the Office of General Counsel at DoD was actively engaged in exploring sources for new techniques of interrogation, including from the SERE programme.[1] That was well before the folks at Guantanamo began their efforts.

There has been no challenge to my conclusion that the Geneva Conventions were set aside to allow new interrogation techniques to be developed and applied. That created the

[1] See Written Testimony of Daniel J Baumgartner before the US Senate Committee on Armed Services, 17 June 2008, http://armed-services.senate.gov/statemnt/2008/June/Baumgartner%2006-17-08.pdf. See also related documents, including Memorandum from JPRA Chief of Staff for Office of the Secretary of Defense General Counsel, July 25 2002,

legal vacuum within which the Torture Memo of August 1st 2002 was written by Jay Bybee and John Yoo (it was noteworthy that when he appeared before this Committee Professor Yoo was reluctant to acknowledge his authorship of that Memo, in sharp contrast to his acknowledgement of that role in his book).[2]

Nothing has emerged to contradict my conclusion – and that of others - that it was Professor Yoo's Memo – rather than Colonel Beaver's legal advice - that served as the true basis for Mr Haynes' recommendation and Mr Rumsfeld's authorisation of cruelty on December 2nd 2002.

And, most significantly, in her testimony before the Senate Armed Services Committee on June 17th, Jane Dalton (who was general counsel to General Myers, the Chairman of the Joint Chiefs of Staff) confirmed my account that Mr Haynes actively and directly short-circuited the decision-making process.[3] Admiral Dalton went further. She revealed that there were serious objections from military lawyers, that these were known to General Myers and Mr Haynes, and that steps were taken to prevent them from being taken any further.[4] This is consistent with my belief that a conscious decision was taken at the upper echelons to avoid unhelpful legal advice.

These are serious matters. They require further investigation, and that is an important role for this Committee and for Congress, and perhaps also for others.

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[2]Congressman Ellison asked Professor Yoo if he wrote the 1 August 2002 memo. "I did not write it by myself", Professor Yoo replied. "Did you write it at any part?", Congressman Ellison asked. "I contributed to a drafting of it", Professor Yoo replied [See HEARING OF THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE, 26 JUNE 2008, Federal News Service Transcript, p. 19.] In his book *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006) Professor Yoo was rather more forthcoming: "We wrote the memo" (page 171) and states: "I realise that we did not explain ourselves as clearly as we could have in 2002" (page 177).

[3] PANEL II OF A HEARING OF THE SENATE ARMED SERVICES COMMITTEE;
SUBJECT: ORIGINS OF AGGRESSIVE INTERROGATION TECHNIQUES, 17 June 2006, Federal News Service Transcript, p. 14 ("When I learned that Mr. Haynes did not want that broad-based legal and policy to -- review to take place, then I stood down from the plans").

[4] *Ibid.*, p 14 et seq.

Professor Yoo testified before this Committee on June 26th. Whether deliberately or accidentally he fell into error with respect to my previous testimony. Professor Yoo said that I had never interviewed him for the book. That is right. But he also asserted that in my testimony I had claimed to have done so. That is wrong. It seems that if he did read my testimony he did so with insufficient care. I did not say to this Committee that I had "interviewed" him. I chose my words with care. What I said on May 6th was this:

> "*Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example,... the deputy assistant attorney general at DOJ, Mr. Yoo.*"

I was referring to a debate I had with Professor Yoo in the autumn of 2005, at the World Affairs Council in San Francisco. It is fully described in my book. You can listen to that debate for yourselves on the web.[5]

Congressman King seized on Professor Yoo's words with impressive speed. The Congressman was under the impression that I had made a "false statement" to the Committee, and suggested that might "reflect on the veracity of the balance of the book." That avenue is not available to him. Because I made no claim in my testimony or in the book to having interviewed Professor Yoo, and because the allegation is serious, I wrote to Professor Yoo inviting him to correct his error. A copy of my letter of June 28th is attached to the written version of this introductory statement. I have not yet received a reply. I also copied the letter to Congressman King. I trust he accepts that if any false statement was made before this House I was not its author.

Mr Addington also appeared before this Committee on June 26th. His appearance was striking in many respects, not least for his apparently generous failure of memory. On many key issues he simply said he could not remember. He couldn't remember, for example, whether he'd been to Guantanamo in September 2002.[6] He couldn't remember whether he had there discussed interrogation techniques. He couldn't even remember

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[5] *America is Undermining the Global Legal Order... Or Not?* John Yoo and Philippe Sands, 31 October 2005, World Affairs Council, available at: http://wacsf.vportal.net/?fileid=4131

[6] HEARING OF THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE, 26 JUNE 2008, Federal News Service Transcript, p. 23.

whether he there met with Colonel Beaver, the Staff Judge Advocate.[7] And yet he was able to recall one point during this meeting with crystal clarity. Asked by Congresswoman Wassermann Schultz whether he had encouraged Guantanamo Bay interrogators "to do whatever needed to be done", Mr Addington was suddenly able to provide a clear response: "I do deny that", he said, "that quote is wrong".[8] You will appreciate my scepticism at his sudden and selective capacity for recollection. Either he remembers what happened that day or he does not. The combatant commander at Guantanamo certainly remembered Mr Addington's visit, he told me about it. "As soon as we saw each other we knew each other", Major General Dunlavey told me.[9] "They wanted to know what we were doing to get to this guy", Major General Dunlavey said of Detainee 063 (Mohammed Al Qahtani), adding that "Addington was interested in how we were managing it".[10] Colonel Beaver also had no difficulty recalling the visit, when Mr Addington was accompanied by his friend Mr Haynes and also by Mr Rizzo of the CIA. She told me in no uncertain terms that Mr Addington was "definitely the guy in charge" (I doubt that description will seem odd to those who watched Mr Addington's testimony on June 26th). It was Colonel Beaver who recalled the message she got from this group of lawyers to do "whatever needed to be done".[11] Whether or not that is to be taken as a form of pressure, it is indicative of early and direct support from the top for the new direction. It was, at the least, a green light. I faithfully reproduced what I was told by Colonel Beaver and Major General Dunlavey. My contemporaneous notes were checked by the fact-checker at Vanity Fair, who was sent from New York to London to spend a full week reviewing my supporting materials. He found no errors. My account accurately reflects what I was told.

I did interview Mr Feith for my book. He told me much of interest. He told me that the decision not to follow the rules reflected in Geneva was taken in the knowledge that it would remove constraints on military interrogations. He told me that the decision to move to aggressive military interrogations followed "a thoroughly interagency piece of

[7] *Ibid.*
[8] *Ibid.*, p. 24.
[9] *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (2008, Palgrave Macmillan), p. 47.
[10] *Ibid.*
[11] *Ibid.*

work", involving DoJ. I learnt that Mr Feith was a little reticent about his own role in the decision to treat Al Qahtani with cruelty. I was able to help him recall that his involvement in that decision came rather earlier than he had wanted me to believe. You can see for yourself in Mr Haynes' one page memo that I have included amongst the documents. "I have discussed this with … Doug Feith", wrote Mr Haynes.

Mr Feith later wrote a letter to the Editor of *Vanity Fair* complaining that my article contained "more misquotations and errors than can be addressed in this letter". He did not, however, provide even one example of misquotation. I believe that I provided an accurate and fair account of our conversation, and was able to deal shortly with his allegation when the Editor gave me an opportunity to respond. "He may not recall that our conversation was recorded", I wrote of Mr Feith, "the quotations are accurate".[12]

Since he has not identified any errors I am not in a position to respond to his allegations. Subsequently, Mr Feith has taken matters to another level. Last month, in the course of an interview on the Canadian Broadcasting Corporation' programme "The Current", he expressed his belief that my book was "dishonest.[13] That is a serious charge. Perhaps it was made in a moment of excess. Even so, it is wrong. It has been made –once again – without any substantiation.

Mr Feith held an important position. He was the head of policy, the number 3 at the Pentagon after Messrs Rumsfeld and Wolfowitz. Yet it seems that he and his colleagues failed to turn their minds to all the possible consequences of abandoning the rules reflected in Geneva. Having decided to circumvent these international constraints on aggressive interrogation, they seem not to have asked themselves the key questions: were they satisfied that these new techniques could produce reliable information? could the techniques undermine the 'war on terror' by alienating allies? would the fact of aggressive interrogation be used as a recruiting tool? It seems that Mr Feith was involved in many aspects of these decisions, from denial of Geneva rights to all the detainees at

[12] *Vanity Fair*, July 2008, p. 22.
[13] *The Current*, 8 June 2006, http://www.cbc.ca/thecurrent/2008/200806/20080605.html, at Part II, at 11 minutes, 30 seconds.

Guantanamo, to the appointment of Major General Dunlavey, to the adoption of aggressive interrogation techniques. You would not know that from his recent book, in which just six pages out of 900 are devoted to the Geneva decision, and the issue of aggressive interrogations is reduced to a mere paragraph.[14] He makes no mention of Detainee 063, or his role on the interrogation issues, or the way in which the DoD Inspector General concluded that the Guantanamo techniques approved on his watch migrated to Abu Ghraib. He airbrushes himself out of his own story.

The removal of Geneva was an act for which, as Mr Feith told me, he was "really a player". It is now clear that the decision led directly to war crimes, a spectre raised by Justice Kennedy in the Supreme Court's ruling in *Hamdan v Rumsfeld* that the rules reflected in Geneva's Common Article 3 applied at Guantanamo. With that important judgment all doubt evaporated as to the commission of war crimes. The issue now is not whether war crimes occurred, but who is responsible for them. As Major General Antonio Taguba has recently written:

> "there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account."[15]

Articles on this subject are now beginning to appear in the press.[16] One important issue will be the question of criminal intent? That is a question of fact and law. The facts are now emerging, including as a result of these hearings. They show that unhelpful or contrary legal advice was avoided with a view to putting into effect a pre-determined policy of abuse, which may reflect criminal intent. The rules of international criminal law indicate that this may be a basis for criminal liability. This is all the more so if the view is taken that the decision on Geneva was manifestly unlawful, or the authorisation of the new interrogation techniques on Detainee 063 were manifestly unlawful by reference to the conventional or customary standards reflected in Geneva's Common Article 3. It is difficult to see on what basis a different view could be taken.

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[14] Douglas J. Feith, *War and Decision* (Harper, 2008), at p. 165.
[15] See Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by the US* (2008), at http://brokenlives.info/?page_id=23
[16] See e.g. Stuart Taylor, 'Our Leaders are Not War Criminals', available at: http://www.nationaljournal.com/njmagazine/or_20080628_2022.php

Mr Chairman, Members of the Sub-Committee, at the heart of these hearings lie issues of fact. What Congress must do is fully investigate how it all began: who did what and when; and how precisely the pressures from the top came to be imposed, whether directly or indirectly. In this way a proper reckoning can take place, so that those who are truly responsible can be identified. It is not immediately apparent that these important and welcome efforts by Congress can really get to the heart of a matter which started not on the ground but in the minds and offices of a small number of senior officials such as Mr Feith. Last month, 56 members of this House wrote to the US Attorney General to request the appointment of a special counsel to investigate the issues, to examine whether the Administration had "systematically implemented, from the top down, detainee interrogation policies that constitute torture or otherwise violate the law". If Congress cannot sort this out, and if the desire for foreign investigations is to be avoided, that call may become impossible to resist.

I thank you for allowing me the opportunity to make this introductory statement.

ATTACHMENT 1

UCL FACULTY OF LAWS

Philippe Sands QC
Professor of Laws and Director,
Centre for International Courts and Tribunals

Professor John Yoo
Professor of Law
Boalt Hall School of Law
University of California at Berkeley
Berkeley, CA 94720

By email: jyoo@law.berkeley.edu

28 June 2008

Dear Professor Yoo,

I am writing to you on a matter that I hope can be cleared up quickly and without difficulty.

I have been provided with a copy of an uncorrected transcript prepared by the Federal News Service of your testimony of 26 June 2008 before the Sub-Committee of the House Judiciary Committee. Pages 14 and 15 of the transcript include an exchange between you and Representative King, which includes the following:

> *MR. YOO: Sir, I haven't read the book. I did read Mr. Sands's testimony before this committee. And I noticed in the testimony he said that he had interviewed me for the book. And I can say that he did not interview me for the book. He asked me for an interview and I declined. So I didn't quite understand why he would tell the committee that he had actually interviewed me.*
>
> *REP. KING: And with that answer, Professor Yoo, then I'm going to interpret that to mean that at least with regard to that statement -- that he had interviewed you -- you find that to be a false statement, and that would perhaps reflect on the veracity of the balance of the book.*
>
> *MR. YOO: I can't tell what else is in the book, but I don't understand why he would say that he interviewed me for the book. I can tell the committee that he contacted me once. He wanted to interview me for the book. And I said, I don't want to talk to you. I wrote my own*

book. You can look at my own book. Everything I have to say is in my book. And then he told the committee that he had interviewed me.

Your recollection accords with mine (although you may also recollect we also debated in conversation at the World Affairs Council, in the autumn of 2005). I have always been careful to be as accurate as I can, and I do not believe that I indicated to the Sub-Committee that I had interviewed you for the book. The uncorrected transcript of the hearing at which I appeared on 6 May 2008 (prepared by the Federal News Service, copy attached) includes the following from my introductory statement:

> *Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example, the combatant commander and his lawyer at Guantanamo, Major General Dunlavey and Lieutenant Colonel Beaver, the commander of United States Southern Command in Miami, General Hill, the chairman of the Joint Chiefs of Staff, General Myers, the undersecretary of Defense, Mr. Feith, the general counsel of the Navy, Mr. Moorer, and the deputy assistant attorney general at DOJ, Mr. Yoo.*

I believe that is an accurate statement. It does not indicate that I interviewed you for the book, and there is no other point in my testimony in which I so indicated. For the avoidance of doubt, in my book *Torture Team* (which I appreciate you have not read), I refer to our debate in conversation at pages 184-5.

I hope you will forgive me for having troubled you with this point. I would not have done so but for the fact that Representative King appears to have concluded that I made "a false statement" to the Committee , and your exchange with him has caused me to receive a number of enquiries by email, raising issues of integrity or veracity.

I am perfectly happy to proceed on the basis that any statement you made (and any error it might have contained) was in good faith, and would be grateful if you could perhaps so communicate to Representative King and the Chairmen of the Committee and the Sub-Committee, and thereby clear up the misperception.

With best wishes,

Philippe Sands

cc. Representative John Conyers, Chairman, Judiciary Committee
Representative Jerrold Nadler, Chairman, Constitution, Civil Rights and Civil Liberties Sub-Committee
Representative Steve King, Member, Chairman, Constitution, Civil Rights and Civil Liberties Sub-Committee

ATTACHMENT 2

UNCLASSIFIED

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

2002 DEC -2 AM 11: 03

OFFICE OF THE SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC_____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of these counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION:

Approved D.R. Disapproved _____ Other _____

However, I stand for 8-10 hours a day. Why is standard limited to 4 hours?

D.R. DEC 0 2 2002

Attachments
As stated

cc: CJCS, USD(P)

Declassified Under Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

UNCLASSIFIED

XC04030-02

Mr. NADLER. I thank you, sir.

We will now begin the questioning of the witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I will begin by recognizing myself for 5 minutes to begin the questioning.

Mr. Feith, I want to ask you about your role in Secretary Rumsfeld's December 2002 approval of techniques for use in interrogations at Guantanamo Bay. The cover memo from the Department of Defense counsel Jim Haynes to Secretary Rumsfeld says, and I quote, "I have discussed this with the deputy, with Doug Feith, and General Myers. I believe that all join in my recommendation," unquote.

Did you undertake your own review of legality of the requested techniques?

Mr. FEITH. No.

Mr. NADLER. And if you didn't, whose legal advice did you rely upon?

Mr. FEITH. We were relying on the general counsel.

Mr. NADLER. That is Mr.——

Mr. FEITH. Mr. Haynes.

Mr. NADLER. Mr. Haynes. And had you seen the August 2002 OLC illegal memo?

Mr. FEITH. I don't think so. I don't remember when I first saw that. I've been doing so much work on this subject in recent years and doing research, that I can't—I don't remember when I first saw that document.

Mr. NADLER. But is it your recollection that that document would not have been influential in your deciding to accede to the Secretary's memo in December?

Mr. FEITH. It's possible that I hadn't seen it at all. But, I mean, I can't say that it's influential, when I don't know that I saw it.

Mr. NADLER. So you're saying it wasn't influential? Even if you had seen it, it wasn't influential? You don't remember seeing it.

Mr. FEITH. I don't remember seeing it.

Mr. NADLER. Okay, fine.

In your written testimony, you state that you argued for application of common Article 3's humane treatment requirements.

Do you believe that the interrogation techniques which you recommended Secretary Rumsfeld give blanket approval—stress positions, isolation, nudity, the use of dogs—qualify as humane—that would in categories 2—qualify as human treatment under the Geneva?

Mr. FEITH. I think it's important, when we discuss this document—there's so much discussion of this document on the Haynes memo and counter-resistance techniques. To understand the way it

looked to us, I think it's extremely important to go back and look at the memo.

Mr. NADLER. We have the memo.

Mr. FEITH. And I would encourage everybody to do that. I attached it as part—as an attachment to my——

Mr. NADLER. We all have the memo, sir.

Mr. FEITH. Okay. I attached it as part of my statement.

When we looked at this statement, what it does is—SOUTHCOM requested some additional techniques. I think there were 18 of them. And it put the techniques into three categories, and——

Mr. NADLER. Excuse me. To cut to the chase, you said that categories 1 and 2 were okay——

Mr. FEITH. No, no, no, cutting to the chase I think leads——

Mr. NADLER. Hold on a second. Tell me if I'm wrong or if my summary is wrong. You said that categories 1 and 2 are okay, could be used. Category 3, while legal, is inadvisable, shouldn't be used.

Mr. FEITH. I think that's largely correct. I think the question that, Mr. Chairman, you seem to be getting at is, shouldn't alarm bells have gone off when we saw this memo that——

Mr. NADLER. No, no. No, sir, the question is that you're acceding to a memo which said that the use of categories 1 and 2 were okay, legal and okay. And category 2 includes such things as the use of 28-hour interrogations, hooding——

Mr. FEITH. No, no, 20-hour.

Mr. NADLER. What? Oh, 20. It looks like 28 here. I don't know if there is a great difference.

These are 20-hour interrogations, hooding, removal of clothing, use of detainee individual phobia, such as fear of dogs, to induce stress.

Wouldn't that be the normal definition of anyone's concept of torture? Hadn't it always been?

Mr. FEITH. I don't believe so, but especially not——

Mr. NADLER. I'm sorry, let me rephrase that. It shouldn't be torture. Are those humane treatments that we should apply?

Mr. FEITH. Okay, this—I imagine one could apply these things in an inhumane fashion, or one could apply them in a humane fashion. The general guidance——

Mr. NADLER. Well, let me ask you, how could you force someone to be naked and undergo a 20-hour interrogation?

Mr. FEITH. It doesn't say naked.

Mr. NADLER. The removal of clothing. Removal of clothing doesn't mean naked?

Mr. FEITH. Removal of clothing is different from naked.

Mr. NADLER. Really?

Mr. FEITH. It talks about removal of comfort item and of clothing that would make—the idea was to induce stress, they talked about, but one could induce—in our police stations around America every day, American citizens are subjected to stress as part of interrogations. It can be done in an inhumane way; it could be done in a humane way.

The general guidance——

Mr. NADLER. Wait, wait. Are you saying—I find it hard to believe—hard to imagine, I should say, how someone could have a

hood placed over his head or be restricting his breathing, undergo a 20-hour interrogation, while having had his clothing removed and using his fear of dogs or other——

Mr. KING. Mr. Chairman, point of order.

Mr. NADLER [continuing]. And how that could be considered humane.

Mr. KING. Mr. Chairman, point of order.

Mr. NADLER. The gentleman will state his point of order.

Mr. KING. The Chairman is ignoring the 5-minute rule. Under rule 11, clause 2(j), it requires that questioning of the witnesses occur under the 5-minute rule until each Member has had an opportunity to question the witnesses. When you allow the Members to take more than 5 minutes, it's a violation of the rules, and it potentially derives——

Mr. NADLER. The gentleman is 5 seconds over the 5-minute rule.

Mr. CONYERS. I'm going to ask that the Chairman be granted an additional minute.

Mr. NADLER. Without objection, the Chairman is granted an additional minute so Professor Feith can finish answering these questions.

Mr. FEITH. When one looks at this memo, what one sees is people were saying in SOUTHCOM that the interrogations under the field manual were not working with respect to some particularly important and difficult detainees. And they said, "We would like to go beyond the field manual."

Our understanding was, at the policy level, that there were legal limits—the limits, for example, set by Geneva to the extent they were applicable, the limits set by the torture stature. We understood there were important legal limits——

Mr. NADLER. I understand the circumstances of which——

Mr. FEITH. Mr. Chairman, I would really——

Mr. NADLER. We are proceeding under Mr. King's strict time instructions, so I have to get the question in.

So your testimony is that the use of these techniques meet the humane treatment standards and that—and let me ask you last, if common Article 3 of the Geneva Convention applied, would these techniques be allowed?

Mr. KING. Mr. Chairman, point of order.

Mr. NADLER. I will recognize your point of order when the gentleman has finished his answer to that question.

Mr. FEITH. Mr. Chairman, I would really like to try to answer this in a way that gives the picture that explains how we read this memo.

Mr. NADLER. If Mr. King will not object, we'll allow additional minutes to answer.

Mr. ISSA. I object, Mr. Chairman. I think the minority—if I may speak, the minority fully intends and wants questions to be answered fully. We're not trying to cut off answers, only follow-up questions after a time has expired, if the Chair would observe that. We certainly want full answers by the witnesses.

Mr. CONYERS. I move that the Chairman be given an additional minute.

Mr. NADLER. Without objection.

Mr. Feith?

Mr. FEITH. Mr. Chairman, the way we looked at—the way I looked at this memo was there were important legal lines that everybody understood cannot be crossed. Whatever was the law of the United States—the Geneva Convention is part of the law of the United States, the torture statute is part of the law of the United States, the torture treaty—whatever the legal limits were, they had to be respected.

The President, furthermore, eventually—well, before this point, the President, furthermore, said, all detainees must get humane treatment.

Mr. NADLER. You have not answered the question. The question is, if common article 3 of the Geneva Convention applied, would these techniques be allowed?

Mr. FEITH. It depends how they are used. They could be used in a way that violated the convention; they could be used in a way that's consistent with the convention. There was guidance given, and all of this was under that guidance.

Mr. NADLER. So they are not per se——

Mr. FEITH. The guidance was that everything had to be done——

Mr. ISSA. Point of order.

Mr. FEITH [continuing]. Lawful and humane.

And one of the things that I would urge you to do, if people would actually read the October 11th memo, you will see that it shows great care, it shows concern for humane treatment, it shows concern for the kind of issues that you raised, Mr. Chairman——

Mr. NADLER. In the——

Mr. FEITH [continuing]. That if they were used in combination, there could be a problem.

Mr. NADLER. In the second round of questioning, perhaps you could show which words in that memo show that.

My time has expired. I'll now recognize for 5 minutes the distinguished Ranking minority Member of the Subcommittee, the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, let me begin by, in deference to the Chairman of the full Committee—he had asked for information related to the number of hearings. Let me first say that my comment was focused on the notion that if this Government has failed at any time in the last 10 years related to terrorism, it's in failing to being able to thwart the tragedy of 9/11.

Now, I'm not suggesting that—I'm not blaming anyone, but certainly there were mistakes led up to that situation. And if we fail, our first purpose is to protect the citizens of the United States of America.

And I had mentioned that there had been approximately 10 hearings here in this Committee that worked to try to protect terrorist rights or thwart our ability to defend American citizens against terrorists, whereas I'm not aware of any hearing that we've had that has tried to specifically protect victims in the United States from terrorism.

And I was asked to—I've just got a rough thing—there were 10—I mentioned the number 10. There was one hearing on habeas corpus litigation rights for terrorists. There was another one on pre-

venting access to business records and terrorist investigations. And this is the eighth hearing on this issue. That's 10.

Now, I'd like unanimous consent to place the official list in the record.

Mr. NADLER. Without objection.

[The information referred to follows:]

List of Hearings Submitted by Ranking Member Franks

6-26-2008, Oversight Hearing on: From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III, Constitution, Civil Rights, and Civil Liberties

6-18-2008, Oversight Hearing on: From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part II, Constitution, Civil Rights, and Civil Liberties

6-5-2008 Oversight Joint Hearing on: the U.S. Department of Homeland Security Inspector General Report OIG-08-18, The Removal of a Canadian Citizen to Syria, Constitution, Civil Rights, and Civil Liberties

5-6-2008 Oversight Hearing on: From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part I; Constitution, Civil Rights, and Civil Liberties

4-15-2008 Hearing Hearing on: H.R. 3189, the "National Security Letters Reform Act of 2007," Constitution, Civil Rights, and Civil Liberties

1-29-2008 Oversight Oversight Hearing on Reform of the State Secrets Privilege, Constitution, Civil Rights, and Civil Liberties

2-14-2008 Oversight Hearing on the Justice Department's Office of Legal Counsel, Constitution, Civil Rights, and Civil Liberties

6-26-2007 Oversight "Habeas Corpus and Detentions at Guantanamo Bay," Constitution, Civil Rights, and Civil Liberties

11-8-2007: "Torture and the Cruel, Inhuman, and Degrading Treatment of Detainees: The Effectiveness and Consequences of 'Enhanced' Interrogation," Constitution, Civil Rights, and Civil Liberties

10-18-2007 Oversight Joint Oversight Hearing on Rendition to Torture: The Case of Maher Arar, Constitution, Civil Rights, and Civil Liberties

Mr. FRANKS. And I don't challenge the Chairman's motivations in the slightest. I believe that the Chairman wants to do the right thing. We may perhaps have a different perspective of it.

But my big concern here is the whole direction of our country here. To suggest that the President of the United States is more committed to perpetrating torture than trying to protect the American people is a ridiculous notion. And, yet, that has been the ultimate effect of a lot of these hearings.

Let me also say that I was, of course, at the hearing that Mr. Addington appeared, and he did—he couldn't remember exactly when he had been to Guantanamo. He said he had been there several times, Professor Sands. I've been to Iraq a couple times; I can't recall exactly which years those were. Now, maybe that explains a lot of things. I don't know, maybe I'm gathering wool. But I don't remember exactly what year sometimes the places I've been.

What he did say was he had clear memory that he hadn't said, "Do whatever is necessary." I think that's reasonable.

And, unfortunately, here, in a country where we have the right to our own opinion, we sometimes suggest that that gives us the ability to consider ourselves unconstrained to the facts and the truth. And there is a difference.

But, Mr. Feith, let me calm down here a little bit and just suggest that—I want to give you an opportunity to describe any more of the inaccuracies that you feel like you've been subjected to here.

Mr. FEITH. Thank you, Mr. Franks.

I think that—I'll give you a quick list of what I think are errors and distortions in Mr. Sands's book.

He says that this memo from Mr. Haynes was completely silent on the use of multiple techniques. And, Mr. Chairman, this is something that you just asked about, whether this memo talked about multiple techniques. The memo said that if multiple techniques were used, they would have to be used, quote, "in a carefully coordinated manner."

Second, Mr. Sands says that I wanted the detainees to receive no protection at all under Geneva and that I worked to ensure that none of the detainees could rely on Geneva. On the contrary, I argued that Geneva applied to the conflict with the Taliban, and what I said is they should not get POW status. That's very different.

And what Mr. Sands said actually confirms my point, because the quote that he cited applied to al-Qaeda detainees, and there was a general view within the Administration that the Geneva Conventions did not apply at all to the al-Qaeda detainees. This is something that, ultimately, the Supreme Court disagreed with the Administration on, but it was not even a controversial issue at the beginning where—I mean, I don't recall any part of the U.S. Government making the argument that our conflict with al-Qaeda was governed by the Geneva Conventions.

Mr. Sands says that if detainees do not get POW or common Article 3 protections, then, quote, "No one at Guantanamo was entitled to protection under any of the rules reflected in Geneva." That's not true. There are various protections that they might get, including ICRC visits, repatriation after the conflict, possibly Article 5 tribunals and other matters.

Mr. Sands says that I solidly resisted——

Mr. NADLER. The gentleman from Iowa has insisted on strict enforcement of the 5-minute rule. I will have to——

Mr. CONYERS. Mr. Chairman——

Mr. NADLER. I will have to——

Mr. CONYERS [continuing]. Be given an additional——

Mr. NADLER. I will have to accede to his demand, and will do so with apologies to Members of the Subcommittee.

And I will now ask for unanimous consent to give the gentleman from Arizona an additional minute to continue his questioning Professor Feith.

Without objection, so ordered.

Mr. FRANKS. Thank you, Mr. Chairman. I would respectfully yield back.

Mr. FEITH. Mr. Sands said that I solidly resisted the idea of returning——

Mr. NADLER. I'm sorry. The gentleman yielded back.

Mr. KING. Mr. Chairman, I would ask unanimous consent to accede to Mr. Watt's request of unanimous consent to allow the witness to answer the question.

Mr. NADLER. Without objection, the witness will have additional minute.

Mr. FEITH. I misinterpreted the comment about yielding back.

Mr. Sands said I solidly resisted the idea of returning any detainees. The fact is I favored returning detainees and, in fact, wrote the policy for doing so.

Mr. Sands says that Secretary Rumsfeld did not reject the Category 3 interrogation techniques in the SOUTHCOM proposal. But he did reject them. They were proposed, and he did not authorize them. By any common definition of "reject," they were rejected.

Mr. Sands says that I hoodwinked General Myers. I spoke to General Myers yesterday, and he says that he was, in fact, in agreement about Geneva. And the General authorized me to say that he believes the Sands book is wrong to say that he was hoodwinked.

Mr. Sands accuses me of circumventing Geneva. I never did that or advocated that.

And with respect to common Article 3, while I raised the question while it was being debated before the President made his decision in February 2007, later, when the issue came up again, my office was active in raising the question about why common Article 3 can't be used, and if it can't be used as a matter of law, why should it not be used as a matter of policy to define humane treatment.

The Deputy Assistant Secretary of Defense for Detainee Affairs, who worked for me, Matt Waxman, was well-known within the Administration as somebody who was championing the idea that common Article 3 could be used.

And given that the entire case against me in Mr. Sands's book relates to common article Article 3, this is an enormously important, and I do believe it impeaches him as a commentator.

Mr. NADLER. The gentleman's time has expired.

I now recognize for the purpose of questioning for 5 minutes the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Professor Feith, you said that there was no argument about the fact that al-Qaeda shouldn't get any protection under the Geneva Convention until the United States Supreme Court said otherwise.

Mr. FEITH. No. What I said, Mr. Conyers, was that, at the time this was initially debated in the run-up to the February 2002 NSC meeting, where the President made his decision on this subject, I don't recall any agency of the U.S. Government making the case——

Mr. CONYERS. All right.

Mr. FEITH [continuing]. That our conflict with al-Qaeda was governed by the Geneva Convention.

Mr. CONYERS. Thank you. You don't remember William Taft, general counsel of the State Department, ever arguing or presenting a contrary position?

Mr. FEITH. No. I don't think he said that the Geneva Conventions apply to the conflict.

Mr. CONYERS. What about Alberto Mora, general counsel?

Mr. FEITH. I'm not aware that he made that argument either.

Mr. CONYERS. What about the Secretary of State, Colin Powell?

Mr. FEITH. I was in the meeting where this was discussed. And I reviewed my notes, and I didn't see that he made that argument either.

Mr. CONYERS. So, in other words, you never heard any of these people or anybody else taking a contrary position?

Mr. FEITH. What happened was——

Mr. CONYERS. Isn't that right?

Mr. FEITH [continuing]. The lawyers in the Administration——

Mr. CONYERS. Is that right?

Mr. FEITH. As I said, I do not recall any agency of the U.S. Government making——

Mr. CONYERS. Okay. I heard you say that. That's fine. All right. We accept that.

Now, let me just ask Professor Pearlstein, you mentioned the importance of these hearings, and I have too. Do these hearings protect America more than torture does? Or what kind of thoughts do you have on this issue?

Ms. PEARLSTEIN. Let me explain why I think these hearings are important, if that's an answer to your question.

It is clear by the facts—and by the facts, I mean the facts as recorded and kept by our own Government—that the United States has engaged in torture. Saying that we haven't has not only proven false, it has done, in the judgment of the intelligence and military community members I have spoken with, significant harm to both our strategic and tactical interests in engaging in counterterrorism.

What can we do to correct what is now an ongoing security problem, namely, the United States' reputation as a country that does engage in torture? I think that one of the most important things we can do is engage in fact-finding that ensures that the full record is known.

As we sit here 7 years later, there are still many OLC memos from the Department of Justice and elsewhere that, to my knowledge, have yet to be made public on the public record. As we sit here, the reportedly two-volume-thick report by the CIA Inspector General on the treatment of detainees held in the secret program at sites that remain undisclosed has yet to be made public or, to my knowledge, even be fully disclosed to this body.

Mr. CONYERS. Thank you very much.

Mr. Feith, as Under Secretary of Defense for Policy, is it not correct that you were responsible for treatment of detainees?

Mr. FEITH. My office had some responsibility in that area, together with the various other parts of the Defense Department.

Mr. CONYERS. Well, the Under Secretary of Defense, Stephen Cambone, testified before the Senate that the overall policy for handling of detainees rests with the Under Secretary of Defense for Policy. That was you.

Mr. FEITH. There were a number of——

Mr. CONYERS. Well, who else was it besides yourself?

Mr. FEITH. I'll be happy to explain.

My office had what was called primary staff responsibility, and we basically were in charge of pulling matters together for presentation to the Secretary.

But the Secretary of the Army was the executive agent for administration of the detainee interrogation program. The secretaries of the military departments were in charge of ensuring appropriate training and the prompt reporting of suspected or alleged violations. The combatant commanders were in charge of——

Mr. CONYERS. I see. It was really spread out all over the place, wasn't it?

Mr. FEITH. There were various responsibilities.

Mr. CONYERS. Yes, great. Okay.

I ask for an additional minute, Mr. Chairman.

Mr. NADLER. Without objection.

Mr. CONYERS. Could I elicit a response from Professor Sands on this and anything else you've heard here this morning.

Mr. SANDS. I would offer just a single response in relation to the question of the compatibility of the techniques that were authorized on the 2nd of December, 2002, with the standard reflected in Geneva Convention common Article 3.

I think I heard Mr. Feith this morning say—please correct me if I got it wrong—that you always believed Geneva Convention, in particular common Article 3, applied to the detainees in Gitmo. And that would certainly be a fine statement—or at least at the standard reflected in common Article 3.

Mr. FEITH. No, I didn't quite say that. What I said was, when this was initially debated before the February 2002 NSC meeting, I raised the question—I had not come to a conclusion on the subject. I considered it a difficult subject. But based on work that I had done on the Geneva Convention in the Reagan administration, I knew enough to know that there was an argument that common Article 3 might be useful or even legally applicable here, and I raised that question.

So, in other words, I was open to the idea——

Mr. NADLER. Without objection, the gentleman will have an additional minute so that this colloquy between Mr. Sands and Professor Feith will be completed.

Mr. FEITH. Okay.

And then some years later, when the common Article 3 issue revived within the Administration, my office went further, because, when I had raised that question—this was a matter that was largely handled in legal channels, rather than policy channels. So when I raised the question to the lawyers that were handling it, they came back and said, "No, the common Article 3, by its language, doesn't apply. It only applies to non-international conflicts."

Mr. CONYERS. Okay.

Mr. FEITH. Later, when the issue came up, my office went beyond that. It said, "Even if it doesn't apply as matter of law, might we not use it as a matter of policy?" And, again, the lawyers who were running the process said no.

Mr. CONYERS. All right. Okay, thank you.

Mr. SANDS. I would simply note that those are fine words, indeed, and they were not shared with me on the occasion.

Let me make my point very, very simple. None of the techniques listed in the memo for approval and the three category 3 techniques not approved are compatible with the standard reflected in common Article 3 of Geneva.

And you can test that in the simplest possible way: If any of the techniques were used on an American serviceman or servicewoman or an American national in any circumstances, this country, quite rightly, would say, "These standards are not being met. They are being violated."

I challenge Mr. Feith to identify a single military lawyer in the United States who would say these techniques all are compatible with common Article 3.

Mr. CONYERS. Mr. Chairman, I ask for another minute.

Mr. NADLER. Without objection.

Mr. FEITH. If I heard you correctly, I'm amazed at that statement. Because the techniques that Mr. Sands just said are, on their face, incompatible, are—number one, yelling at the detainee, not directly in his ear or to the level that would cause physical pain or hearing problems. Another one, techniques of deception, in other words, telling the detainee, "Your buddy over there blew the whistle on you," and it's not true. That's one of the techniques that went beyond the field manual that they were asking for permission for. Multiple interrogator techniques, which we understood was good cop/bad cop. This goes on in American jails every day.

I mean, the suggestion——

Mr. CONYERS. And they may be illegal, too.

Mr. FEITH. Well, the good-cop/bad-cop interrogation technique is—anyway, I find——

Mr. CONYERS. Well, I didn't mean that, but there are illegal techniques going on in American prisons and police stations that are clearly illegal as well.

Mr. FEITH. You're quite right. Mr. Conyers, you're making an enormously important point that I would like to sharpen. And that is, what we just read in the newspaper the other day, that there was a terrible case, I believe it was in Maryland, where somebody in a jail was murdered——

Mr. CONYERS. Mr. Chairman, I will require another minute.

Mr. ISSA. If you don't mind, I'm next. I'd be happy to let him finish on my time, so we could move on.

Mr. CONYERS. I would like another minute. I want you to move on.

Mr. NADLER. The Chairman of the full Committee requests an additional minute. If I don't hear objection, I will grant it.

Without objection.

Mr. CONYERS. Thank you.

Mr. FEITH. There was this case that we read about just the other day, that someone was murdered in a jail in Maryland. I want to make it clear that the essence of the argument that we are hearing this morning when people are saying things like, "The United States had engaged in torture," I believe that statement is no more well-grounded and no more responsible than saying Maryland has

engaged in torture or murder because somebody in a Maryland jail got murdered.

Mr. CONYERS. All right.

Mr. FEITH. The fact is we had a clear policy from the top of this Government that was against torture, against illegality, against inhumane treatment. I don't deny that there were terrible, reprehensible cases of abuse and bad behavior and possibly even torture in various places against detainees. None of them was sanctioned by law or policy.

Mr. CONYERS. Have you ever been considered an uncontrollable witness?

Mr. FEITH. Well, I've been on the receiving end of a lot of allegations that are easy to——

Mr. NADLER. The gentleman's time has expired, and the witness need not answer the rhetorical-Question.

Mr. CONYERS. Why not?

Mr. NADLER. The gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

Professor Feith, good to see you again. I'll try to be short in my questions, short in the answers, and we'll get through a couple of things that I think I would like to have on the record.

First of all, have you ever been to Guantanamo?

Mr. FEITH. Once.

Mr. ISSA. Second of all, have you ever been to a briefing up in the House Select Intelligence hearing room?

Mr. FEITH. Yes.

Mr. ISSA. In those meetings, was now-Speaker Pelosi or Ranking Member Jane Harman present?

Mr. FEITH. Ms. Harman was present.

Mr. ISSA. And were techniques, enhanced techniques or treatment of detainees ever discussed at those meetings? Nothing more specific than that.

Mr. FEITH. I believe so.

Mr. ISSA. So your testimony here today is that Jane Harman, now a Chairwoman, in fact was aware of at least some of techniques that are today being characterized as torture.

Mr. FEITH. I believe so.

Mr. ISSA. Are you familiar with what the Iraqi Government authorized and allowed to be done to some of our prisoners of war and other detainees, civilian and military, in the first Gulf war?

Mr. FEITH. Not in any detail.

Mr. ISSA. Are you familiar to what has been done to some people caught by al-Qaeda?

Mr. FEITH. Well, we have seen videos of beheadings and the like.

Mr. ISSA. So it is very clear that we have documented proof of what is undeniably torture and murder by our enemies. Is that correct?

Mr. FEITH. Yes.

Mr. ISSA. And if I understood you correctly earlier, you have a series of memos—they are in the record—that make it clear that you were neither authorizing torture nor inhumane treatment nor murder or any other crimes in anything other than these enhanced techniques which are on the record, were briefed to the Speaker,

certainly briefed to then-Ranking Member Jane Harman, that are the subject of essentially these hearings today. Is that correct?

Mr. FEITH. Yes. And the techniques were not an exception to the rule against torture or complying with the law. Those techniques were supposed to be done within the law and within the President's decision that all detainees were to be treated humanely.

Mr. ISSA. Now——

Mr. FEITH. So there was no excuse whatsoever for inhumane treatment. And if anybody abused these techniques, they were doing so in the violation of the policies set down by the President. And one of the key policies was complying with the law.

Mr. ISSA. And speaking of the law, I want to circle one more time back to the same point, because it is important to me today because of what is being characterized as torture.

The law requires any Administration—this one, the Clinton administration the Reagan administration—you are required to brief certain select Members of Congress, either the intelligence Committees, both sides, or, if it is extremely sensitive, then a select group, which includes the Speaker and the Chair and Ranking Member of those Committees. Is that correct?

Mr. FEITH. I assume that's correct. I'm not an expert on that area of law, but it sounds right.

Mr. ISSA. So you're aware that these briefings occurred?

Mr. FEITH. Yes.

Mr. ISSA. Either of the other two professors aware of any claims that the briefings did not occur? In other words, do either of you have knowledge here today that Speaker Pelosi or then-Ranking Member Harman were not properly briefed, as required by law? It's a yes or no.

Ms. PEARLSTEIN. I simply have no knowledge of those facts one way or another.

Mr. ISSA. Okay.

Mr. SANDS. I have never heard it said that, in relation to the interrogation of Detainee 063, that issue ever came to Congress. My understanding is that that issue did not come before Congress, but I don't have hard information on that.

Mr. ISSA. Okay. I will just make, not in his testimony, but to go on the record, when I went to the Intelligence Committee, Select Intelligence Committee, within a matter of weeks I was both briefed on these techniques in excruciating detail, and that they were limited to certain areas, and briefed on the fact that this had been briefed and rebriefed to the Committee on a regular basis.

So, here today, my question for Professor Feith is, do you know of any interrogations or any of these techniques that were ever used that, to your knowledge, failed to be briefed to the Congress, including the appropriate—at least the Speaker and Ranking Members?

Mr. FEITH. I have no particular knowledge on that, but——

Mr. ISSA. Were you ever in any meeting where somebody said, "Oh, we can't tell that to the Congress, we can't tell that to the Speaker"?

Mr. FEITH. I don't recollect anything of that kind. The general rule was that intelligence operations were briefed to a small group of the most senior——

Mr. NADLER. The gentleman's time has expired.

Mr. ISSA. I thank the Chairman. Regular order is fine. I yield back.

Mr. NADLER. I will now recognize the gentleman from Alabama for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Professor Pearlstein, let me pick up on the last line of questions from Mr. Issa. Mr. Issa had a clever set of questions, I thought, that implied that the Speaker of the House and former Ranking Member of the Intelligence Committee may have had some knowledge about these knowledge of these techniques.

Of course, he does not point out one very important detail. As he knows very well from his time on the Intelligence Committee, Members of Congress cannot share with their colleagues that which they learn on the Intelligence Committee. If they were to do so, they would be violating Federal criminal statutes, which most Members of Congress try to avoid doing.

Mr. ISSA. Will the gentleman yield for a moment?

Mr. DAVIS. No, I will not. I would like to ask my questions.

And that's an important point, I think, to make. The issue is not whether certain selected members of the leadership were given a confidential briefing that they couldn't share with their colleagues. The issue is whether the making of interrogation policy, the formulation of detainee policy was shared between the executive and legislative branch. I think it is in dispute that that did not happen.

Professor Sands, you would agree with me, and you just said, I believe, that at no point did the Bush administration come to Congress and ask Congress to shape its position on whether Article 3 applied, whether Geneva applied, whether or not the torture statutes applied, what the torture statutes meant, when Geneva meant.

None of that was brought before Congress in a formal debate, was it, Professor Sands?

Mr. SANDS. If it was, I've not come across it.

Mr. DAVIS. Professor Pearlstein, do you have any knowledge of Congress debating any of these subjects, or the Administration coming to Congress and asking for its input?

Ms. PEARLSTEIN. Not until Congress insisted upon it in 2005 with the passage of the Detainee Treatment Act.

Mr. DAVIS. An important point, Professor Feith, I understand there are some things you profess to be expert on; depending on the question, many things you profess to not be expert on.

But there is this interest—may I see the Constitution, Mr. Chairman? It is right in front of you there. Let me borrow it for 1 second.

It is an interesting document. It has all kinds of good stuff in it that is incredibly relevant to a lot of disputes that we have.

There is a provision that talks about the war-making authority. And it says, if I recall it correctly, that Congress shall declare war, that Congress shall raise and support armies, that Congress shall provide for the common defense. It's pretty broad stuff.

Professor Feith, tell me why the United States Congress should not have had a role in 2002, at the time these decisions were made, in shaping detainee policy?

Mr. FEITH. I believe Congress did have a role. I mean, Congress should address any issues that it believes is important. And Congress can have hearings——

Mr. DAVIS. How can issues be addressed, Professor Feith, if Congress——

Mr. FEITH [continuing]. And Congress can have debates and Congress can propose legislation

Mr. DAVIS. Sir, we can't talk at the same time.

How can Congress have a role if the policy debate is confidential, the Intelligence Committee Members can't share it with their colleagues?

I don't want to waste 5 minutes going back and forth playing word games with you, because I think you get the point. For Congress to be involved and to have a role, there has to be transparency.

And certainly the Administration could have come to the United States Congress and could have said, "We have a disagreement over whether or not Article 3 should apply, whether Geneva should apply. Let's have a debate about it." That could have been done in a wide variety of——

Mr. FEITH. But——

Mr. DAVIS. Let me finish my question, sir.

You cite in your opening statement editorials written in 1987 complimenting the Reagan administration for what I think was the correct position that it took regarding Protocol 1 of Geneva. That makes a point that I think you may have missed, sir.

For *The New York Times* and *The Washington Post* to even be writing about this subject means that there was a debate and a discussion that aired in public view. If there had been a debate and discussion that aired in public view about what all of these provisions meant, it would have put in much more transparency.

And I'm a little bit intrigued, also, by your arguments that, "Well, I wasn't involved in formulating the detainee policy. I made some general arguments about Geneva."

I'll close with an old story about Franklin Roosevelt. Mr. Roosevelt was campaigning for re-election in 1936 and got carried away in Philadelphia and made some rather extravagant campaign promises, and they got caught on tape. So he went back to his chairman, and Mr. Farley said to him, "Well, just deny you said it." And he said, "Well, I can't do that. It is on tape." He said, "Well, then just deny you were ever in Philadelphia."

That's what I think of, Mr. Feith, when I hear you today.

Mr. FEITH. Well, I think that's very unfair, because——

Mr. NADLER. The time of the gentleman is expired.

Mr. CONYERS. I ask unanimous consent that the gentleman be given additional minute.

Mr. NADLER. Without objection.

Mr. FEITH. I mean, on your point about things being done in secret, the President's decision on February 7th, 2002, on the applicability of the Geneva Conventions and his point about common Article 3 and various other aspects of this were done in a public statement. There was nothing secret about it. The White House issued a statement to the world. Every Member of Congress could have seen that. If there was any concern, if there was any thought that

he had done anything wrong, there would have been nothing whatsoever to stop any Member of Congress from asking a question, and you would have had an answer. And if you wanted to engage in that and say that the President made the wrong policy, nobody would stop——

Mr. DAVIS. Is that correct, Professor Sands, that in 2002 the Administration announced its position that its interpretation that Geneva would not apply to detainees? Was that on the record in 2002?

Mr. SANDS. I think the actual decision only came out much later. There were news reports that a decision had been taken, but what had not come out what was going on in July, August, September, October, November, and the decision to move, for the first time in American history since 1863, to abandon President Lincoln's prohibition on cruelty. That happened on Mr. Feith's watch. Torture occurred, and Mr. Feith is——

Mr. DAVIS. An additional 30 seconds, Mr. Chairman, just to respond.

Mr. NADLER. Without objection.

Mr. DAVIS. Professor Feith, this is the point that I think you miss. The issue wasn't whether a piece of paper applied or whether a set of words were ritualistically invoked. The issue was what those words meant in application and in practice. That debate was an impossible one to have, because it wasn't shared with the Congress at the time decisions were made. Only after 3 years of extensive newspaper reporting was the extent of the program crystal-clear.

Mr. FEITH. Mr. Davis, that's just not correct. The Administration announced publicly the President's decision when he made it. There are talking points that the White House issued. It was published on the White House and State Department Web sites. It is just not correct. And if Congress, any Member of Congress wanted to talk about it and debate it, they could have done so. And any inquiries that you would've made would've been answered.

Mr. DAVIS. Professor, the issue was not the ritualistic invocation of the words. The issue was what they meant in practice, how it was informed, what "inhumane treatment" meant. To adopt a paper standard without inviting Congress to codify it statutorily was an important omission, in my opinion.

Mr. NADLER. The gentleman's time has expired.

Mr. King of Iowa is recognized for 5 minutes—I'm sorry. I am sorry. Mr. Pence of Indiana is recognized for 5 minutes.

Mr. PENCE. Thank you, Mr. Chairman. There is no need to apologize when you confuse me with Mr. King.

Mr. NADLER. Excuse me. I would never confuse you with Mr. King. I simply didn't see you.

Mr. PENCE. I thank the Chairman for this hearing, and thank all the witnesses for their testimony.

Mr. Feith, I haven't always found myself in agreement with your interpretation of events in recent years, but I am grateful for your service to the country, particularly in the matter about which this hearing has been convened.

I want to get a little bit more into your testimony as someone that was centrally involved in this. Because I have to be honest with you, I went to law school, I graduated, I got the degree on the

wall, but I try to get over it. I try to not think like a lawyer. I try to think like an American in this job. And I try and find myself thinking in very plain terms. I think, you know, very few people back in my hometown worry too much about common Article 3 and Geneva.

I want you to explain, if you can, before this hearing what was the significance of your conclusion that Geneva should cover the conflict with the Taliban, but because Taliban fighters didn't wear uniforms, didn't carry guns openly or operate within a chain of command or obey laws of war, that they didn't qualify for POW privileges.

Now, a lot of this comes across as really interesting law school debate, but we are talking about American lives. We are talking about people who got up every day to figure out new ways to kill Americans in uniform and in the streets of this country. This is not a theoretical debate.

And I want to acknowledge to you that the decisions that you made, and more importantly the President made, were made with an eye toward the safety and security of this country. And to my way of thinking, we put real limitations on our ability to obtain information to save American lives if we attached the letters "POW" to the people that were in our custody.

Can you explain that, in as brief a time as possible? Because I have a very important follow-up. Why would it have been a bridge too far to say that these detainees at Guantanamo or elsewhere were POWs under the Geneva Convention?

Mr. FEITH. Mr. Pence, we had a number of large interests that we had to pursue simultaneously, and there was tension among those interests. One of them was we had an interest, obviously, in preserving the rule of law in America and making sure that laws were obeyed and that we, as a country, behaved humanly. And the President laid that down as a major interest.

At the same time, we had just been attacked on 9/11, and it was clear that in this challenge the most important information that we needed in order to prosecute the war was in the heads of individuals. And if we captured terrorists, we had to interrogate them effectively.

There was tension between effective interrogation and complying with the law. We had to make sure that people understood that they needed to be vigorous in pursuing that information but they needed to be vigorous within the law. And it was clear that people could be vigorous beyond the law, and that was not permitted.

Mr. PENCE. Well, let me interject, if I can, Mr. Feith. To get to this issue of POW, had it been the conclusion of the Administration to denominate these detainees as POWs, as some in Congress would prefer that they did? Could we have exerted any pressure to obtain any information beyond name, rank and serial number?

Mr. FEITH. No, one other problems that—I mean, had the detainees been entitled to POW status under the law, they would've gotten it. But, as I said—and this gets to the important point that you're raising—the question was, should we give POW status to people who are not entitled to it?

And one the major arguments against it is, if you had given POW status to people who are not entitled to it under Geneva, you

would effectively be precluding interrogations of them, because POWs are not held for purposes of interrogation. POWs had held simply to keep them out of combat. The people we were holding on the war on terrorism were being held for two main reasons: to keep them out of combat and to interrogate them.

Mr. NADLER. The gentleman's time——

Mr. FRANKS. I ask the gentleman be given additional time.

Mr. NADLER. How much time?

Mr. PENCE. Could I have another 3 minutes? I, kind of, kept count on the last one. It went about 3 over.

Mr. NADLER. Why don't we do 2 minutes and we'll see how it goes?

Mr. PENCE. Thank you, Mr. Chairman.

Mr. NADLER. Without objection, the gentleman will be awarded an extra 2 minutes.

Mr. PENCE. To get to the point here, though, Mr. Feith, had they been entitled to POW status under Geneva under the law, they would have been required to. But to have extended the status of POW would've taken the United States America out of the interrogation business——

Mr. FEITH. Correct.

Mr. PENCE [continuing]. With regard to the people who had all the information about past and future attacks against this country.

Mr. FEITH. That's correct.

Mr. PENCE. Let me say clearly, I want to associate with comments of the Ranking Member, that torture is illegal, torture is banned by various provisions of the law. I support that. I associate myself strongly with your statement that it is imperative that the United States America be about the rule of law.

But it's also imperative that anyone looking into this hearing understand that to have gone as far as many would have you have gone that day and had the President gone to extend POW status to detainees in Guantanamo Bay would have meant that Khalid Sheikh Mohammed could not have been interrogated beyond his name, rank and serial number.

Is that correct?

Mr. FEITH. I believe so.

Mr. PENCE. And so, I just want people to understand this. And as I have mused at previous numerous hearings on this topic and will muse again this week at another, it is seems to me that, when you look at the terrorist handbooks that have been uncovered and found, they train—isn't it your understanding, Mr. Feith—to endure pressure, to endure interrogation, and also to claim that they were tortured, regardless of the circumstances of their incarceration.

And it seems to me that it is imperative, as Mr. King said before, that we remember that we are talking about protecting the American people and doing so in a way that reflects favorably on the United States, that shows our devotion to the rule of law, our veneration for the Geneva Conventions, but also recognizing that to have extended the status that many would us have extended would have constrained us from any interrogation beyond rank and serial number.

Mr. FEITH. That's correct.

Mr. NADLER. Gentleman's time has expired.

Mr. KING. Mr. Chairman, point of order.

Mr. NADLER. The gentleman will state his point of order.

Mr. KING. Mr. Chairman, in your opening remarks you made the statement that signs and demonstrations would be disallowed in this room. I know it is out of the sight of the Chairman, but there is a sign——

Mr. NADLER. I'm sorry. Say that again. You spoke too fast. You know what?

Mr. KING. Okay. In your opening statement——

Mr. NADLER. No, no, I heard that. You then said, I know that——

Mr. KING. It is out of the vision of Chairman, so I wouldn't hold you responsible to be able to see it. They have just pulled the sign down that was posted on the back of a chair, and it has been there for some time.

Mr. NADLER. The back of the chair?

Mr. KING. On the front chair of the chair, where one sits with their back leaning against it. I would ask that that sign be removed from this room.

Mr. NADLER. I don't see any sign.

Mr. KING. They have just taken it down. It's on the chair directly across from me. The gentleman's picking it up, in the red tie. I'd ask that it be removed.

Mr. NADLER. All right. He is leaving, so I won't have to rule on that.

I will remind everyone no demonstrations, no visible signs. I'd have to repeat that again.

Mr. CONYERS. Mr. Chairman, could we give an additional minute so that Mr. Pence's question can be responded to?

Mr. NADLER. Without objection, if anybody remembers what the question was.

Ms. PEARLSTEIN. Thank you. I'm happy to respond.

Let me just, in particular, clarify one point about the significance of the designation of the detainees as POW under the law, which I think does matter.

The critical distinction under the Geneva regime—there are four conventions; two are relevant here: the convention on POWs and convention on civilians, essentially anybody else who is not a POW caught up in armed conflict.

The critical significance between declaring somebody a POW and declaring them any other detainee in U.S. custody is that a POW cannot be prosecuted for engaging in lawful acts of war. Our soldiers can't be criminally tried for engaging in lawful combat.

It is not a distinction between the treatment of POWs and the treatment of anybody else that common Article 3 and a host of basic protections for the humane treatment of detainees apply. They apply to POWs. They apply equally to everybody else.

There is nothing under law, in my judgment, to be gained, even if one believes that coercive interrogation is useful—and I believe it is not—there is nothing to be gained under law by denying those POW protections. The same standards of treatment apply.

Mr. PENCE. Well, if I could ask Professor Pearlstein——

Mr. NADLER. Without objection, the gentleman will have 1 additional minute.

Mr. PENCE. I thank the Chairman for his extraordinary courtesy, and the Chairman of the full Committee.

Am I right to understand, as Mr. Feith has testified, that the status of POW would essentially eliminate any interrogation, any pressure whatsoever, beyond the obtaining of name, rank, serial number, as the cliche is known?

Ms. PEARLSTEIN. There is no prohibition under the third Geneva convention for the protection of prisoners of war, against asking prisoners of war questions. You can no more coerce a prisoner of war into answers those questions than you can coerce——

Mr. PENCE. But it would be—excuse me for interrupting—it would be constrained from being placed under any kind of pressure whatsoever, they could be asked questions, but they could not be put any kind of pressure as a POW.

Ms. PEARLSTEIN. Nor can they be subject to cruel, inhumane, degrading——

Mr. PENCE. Are you effectively, then, eliminating all interrogation of prisoners who have information about the next terrorist attack on this country?

Ms. PEARLSTEIN. Not necessarily at all. As most of the—in fact, all of the FBI investigators with whom I spoke and the vast majority of military investigators with whom I spoke described, many detainees are interested in speaking and have information to share.

It is not the case that the limit of human intelligence collection is either you torture them and treat them cruelly and get information or you get no information at all. That's not the difference.

Mr. NADLER. The time——

Mr. PENCE. Excuse me.

Mr. NADLER [continuing]. Of the gentleman has expired.

Mr. PENCE. I appreciate it.

Mr. NADLER. The Chair now recognizes for 5 minutes the gentlelady from Florida, Ms. Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

Professor Pearlstein, it seems pretty simple, from what you're saying, as inconvenient as the minority might find treating detainees humanely and not torturing them, doesn't it just boil down to that you can question a POW, you can question a detainee, you just can't torture them and treat them inhumanely? Is this what you're saying?

Ms. PEARLSTEIN. That's the simple answer. I think the designation of POW in that question is a significant distraction from the question of how can any detainee in U.S. custody in the course of armed conflict be treated. The answer to that question is provided in common Article 3, in our own laws and constitutions, in the convention against torture, and the Army's own field manual.

Ms. WASSERMAN SCHULTZ. Is it not possible to get information from a detainee without torturing them?

Ms. PEARLSTEIN. The experts that I have spoken to—and I don't portend to be one myself—assure me that the only thing torture guarantees you is pain—that, according to Joe Navarro, a long-time FBI interrogator—and that, on the contrary, the most effective

techniques tend to, in fact, invariably involve no torture or cruel treatment.

Ms. WASSERMAN SCHULTZ. Thank you.

Professor Feith, I want to, sort of, get to the kernel of the information that we need here, and that's the role that you played or did not play in making the recommendations and developing the Administration's policy on interrogation.

There was a recent report of the Department of Justice Inspector General Glenn Fine that described the role of the NSC's principles committee and policy coordinating committee in formulating the interrogation policy for the Administration.

What was the role of the NSC in developing and implementing interrogation policy? And did you participate in any of those discussions? And who else participated as you did?

Mr. FEITH. The first time that I believe that the principles committee or the National Security Council got involved in this matter, at least the first time that I know of, that I can recollect, is the February 2002 meeting that we've been discussing. When it came to——

Ms. WASSERMAN SCHULTZ. Did you participate in any——

Mr. FEITH. I was at that meeting.

Ms. WASSERMAN SCHULTZ. Who else participated?

Mr. FEITH. It was the whole National Security Council.

Ms. WASSERMAN SCHULTZ. Who?

Mr. FEITH. The President chairs it, Secretary of State Powell, Secretary of Defense Rumsfeld, General Myers as the Chairman of the Joint Chiefs.

Ms. WASSERMAN SCHULTZ. Were any of the legal opinions of the Department of Justice on interrogation discussed at any of those meetings?

Mr. FEITH. I believe so.

Ms. WASSERMAN SCHULTZ. Did you raise any concerns about the legality or consequences of the Administration's interrogation policy at any of those meetings? You represent in your testimony you strongly advocated——

Mr. FEITH. I don't believe that interrogation techniques as such were discussed there.

Ms. WASSERMAN SCHULTZ. Interrogation policy. If interrogation policy was discussed, what would have been discussed, if not interrogation techniques?

Mr. FEITH. Well, I don't recall precisely, but it would not surprise me if what was discussed at that time related to the kinds of questions that Mr. Pence was asking, which was if these people are POWs, does that mean you can interrogate them.

Ms. WASSERMAN SCHULTZ. I am asking you a specific question. Did you, at any of these meetings, raise concern about the direction that the Administration's interrogation policy was going, whether it was on techniques, whether or not they were going in the right direction, whether or not they were going too far. You do represent in your testimony that you were a strong Geneva Convention advocate.

Mr. FEITH. Correct. Those concerns were certainly raised.

Ms. WASSERMAN SCHULTZ. Are you?

Mr. FEITH. We were quite emphatic that it is important that we comply with the Geneva Convention; be seen to comply. That we not make arguments that would bring disrespect to the Geneva Convention.

Ms. WASSERMAN SCHULTZ. So was your advice ignored?

Mr. FEITH. No, on the contrary. The President rejected the advice that he got from some of the lawyers in the Administration not to apply the Geneva Convention to the conflict with the Taliban.

Ms. WASSERMAN SCHULTZ. The President rejected that?

Mr. FEITH. The President rejected that. What the President decided on that point was in line with what General Myers and I and Secretary Rumsfeld had advocated in the meeting, which is that we should not refuse to apply the Geneva Convention to the conflict with the Taliban because we argued that Afghanistan was a party to the Convention. The Convention is part of U.S. Law.

Ms. WASSERMAN SCHULTZ. Secretary Rumsfeld rescinded his November 2002 approval of additional interrogation techniques on January 15, 2003, and he convened a working group. What role did you play in that working group?

Mr. FEITH. I don't believe that I ever attended any of those working group meetings. I am fairly confident I didn't attend any of them.

Ms. WASSERMAN SCHULTZ. What role did the Office of Legal Counsel advice or memos play in the deliberations of that group?

Mr. FEITH. I wasn't in on the meetings

Ms. WASSERMAN SCHULTZ. So you don't know anything about that group itself?

Mr. NADLER. The time of the gentlelady has expired. Without objection, she will have one additional minute if she wants it.

Ms. WASSERMAN SCHULTZ. Thank you very much.

I just want to ask you one additional-Question. Newsweek Magazine has reported that your office sent an urgent e-mail directing the Defense Department staff not to read or discuss the report on Abu Ghraib abuses by Major General Tagubu. Why did your office do that?

Mr. FEITH. I am glad you raise that because that doesn't ring any bells at all. I don't know about that memo. Maybe there was a memo sent by somebody in my office. I was very surprised when I saw that in the testimony.

Ms. WASSERMAN SCHULTZ. The Newsweek report is inaccurate. It shortly after the Tagubu report leaked in early May, your subordinates sent an urgent e-mail around the Pentagon warning officials not to read the report.

Mr. FEITH. I am not aware of that

Ms. WASSERMAN SCHULTZ. You have never seen any e-mail like that?

Mr. FEITH. I don't remember seeing any e-mail like that.

Ms. WASSERMAN SCHULTZ. You don't remember.

Mr. FEITH. I was completely surprised.

Mr. NADLER. Will the gentlelady yield?

Mr. FEITH. Sometimes press reports are wrong.

Mr. NADLER. When you saw Newsweek or others report that your subordinates sent such a memo, you didn't check into it?

Mr. FEITH. To tell you the truth, I don't remember even hearing about it until I read Professor Pearlstein's testimony.

Ms. WASSERMAN SCHULTZ. I am finished

Mr. NADLER. The gentlelady's time has expired. I now recognize the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Mr. Chairman, with consent, I would be happy to yield to another Democrat witness and temporarily pass my turn.

Mr. NADLER. Are you yielding your time?

Mr. KING. Just temporarily passing my turn.

Mr. NADLER. Either you yield your time or you will ask your questions now.

Mr. KING. Mr. Chairman, I would be happy to take advantage of this 5 minutes that you so graciously allowed me, and I will start this out this way:

Mr. Sands, I am looking through your written testimony. I am not able to find this. But this is what I think I heard you say and I would ask you if you can clarify or agree.

Speaking of Mr. Feith, when you said, and I believe this is what I heard, al-Qaeda are not entitled to Geneva Convention protection at all, would that be the exact quote that I heard from you and is that in your written testimony and I missed?

Mr. SANDS. I will happily give you the exact quote again. It is from an abstract, which I will give if the Committee wishes it, the point is that, "the al-Qaeda people were not entitled to have a convention applied at all, period." I interpreted that to include the rules reflected in Common Article 3. The reason it was of interest to me was that my book was about an al-Qaeda individual.

Mr. KING. At least, in essence, I have characterized this relatively accurately, and I think Mr. Feith agrees with that by watching his head nod.

I take you back to a statement that you made in response to Mr. Yoo's testimony in the previous hearing. By the way, we are still looking for that letter that was copied to us. I have no doubt it was sent, but there is a copy in my testimony.

In any case, you say that Mr. Yoo is incorrect, and when he characterizes you as having interviewed him for the book. And here's the quote that says, "Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example, the Deputy Assistant Attorney General at DOJ, Mr. Yoo." Accurate statement from your testimony.

So, Mr. Sands, I would ask can you understand how it would be that Mr. Yoo might have misunderstood, having missed that nuance "I conversed or debated" in that phrase?

Mr. SANDS. I think there is a great difference between the word "interviewed" on the one hand and the words "conversed or debated" on the other hand.

Mr. KING. Would you concede, perhaps, if he is debating you, he didn't think about whether or not he was being interviewed for a book and that statement "conversed or debated?" To me, that is a nuance.

Mr. SANDS. I am happy to read you what he said.

Mr. KING. I am going to run out of time and I don't expect the Chairman is going to grant me an additional minute so I'm going to have to trudge onward here.

I would point out that I think perhaps Professor Feith has chosen his words as carefully as you, Mr. Sands. I would turn to Mr. Feith and ask him if he can clarify the statement that the al-Qaeda are not entitled to Geneva Convention protection at all.

Mr. FEITH. The decision that the President made on February 7, 2002, was that the Geneva Conventions don't apply to our conflict with al-Qaeda. The lawyers in the government made a distinction between the conflict that we had worldwide with al-Qaeda and the conflict we had with the Taliban in Afghanistan. And what the President said is the Geneva Conventions do not apply to our conflict worldwide with al-Qaeda, because al-Qaeda is not a party to the Geneva Conventions. It does apply to our conflict with the Taliban.

Now I understand that there is a controversy over whether Common Article 3 should apply even to groups like al-Qaeda. What I am saying is at the time, I don't recall that anybody in the Administration made that argument. The people who counted, the lawyers who worked this, and I did not work this with them other than ask a question why not use Common Article 3. But the lawyers who actually worked this came up with a recommendation and the President in his statement cited the Justice Department's conclusion that Common Article 3 did not apply.

I realize that reasonable people differ on the subject, as I said, and the Supreme Court ultimately said the Administration was wrong on the subject. But when I was talking with Mr. Sands, I was reflecting the views of the President on the subject.

Mr. KING. Thank you, Mr. Feith. Now there has been some disagreement in your opening statement, yours with Mr. Sands, on who said what, when. Would you like to address that. Are you willing to stand on the statements that are part of your testimony and your rejection of Mr. Sands' accuracy of those?

Mr. FEITH. I think that Mr. Sands essentially confirmed that what he said was inaccurate because he said that I said that no one at Gitmo was entitled to any Geneva Convention protections at all. Then, when he was asked to produce the statement, he produced a statement that applied only to al-Qaeda.

Mr. KING. Mr. Sands, would you release those tapes?

Mr. SANDS. I have already said so. If the Committee wishes to have a copy, I would make them available to the Committee.

Mr. KING. This Committee Member would like to have a copy.

I thank you very much. I thank all the witnesses for your testimony, and yield back the balance of my time with time left over, and I credit it to the Chairman, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I ask unanimous consent that the tapes in question be made a part of the record.*

Mr. NADLER. Without objection.

The Chair now recognizes the gentleman from Minnesota, Mr. Ellison.

Mr. ELLISON. Thank you, Mr. Chairman.

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*The tapes submitted by Mr. Conyers have been made a permanent part of this hearing record and are available at the Committee.

Mr. Feith, just to clear this up, do you concede that people designated as POWs are subject to questioning by authorities that have them in custody?

Mr. FEITH. They can be questioned. According to the Geneva Convention, no form of coercion to secure information can be used.

Mr. ELLISON. So you agree they can be questioned, you just believe they ought—well, I think your answer is clear on the record. Thank you.

Let me also ask this question. In an earlier hearing, we had Colonel Wilkerson here, and I heard you object to being here because of his presence. Was that true?

Mr. FEITH. Yes

Mr. ELLISON. What is your objection to Colonel Wilkerson?

Mr. FEITH. That was laid out in a letter that I sent.

Mr. ELLISON. I want to hear it now.

Mr. FEITH. He has made a number of very personal and vicious remarks. He has accused me of being a card-carrying member of the Likud party in Israel and he has accused me of having loyalty to Israel rather than the United States. I think that is a vicious, false, and bigoted remark.

Mr. ELLISON. Is that the only basis for your objection?

Mr. FEITH. He made other nasty statements too. I don't think I am interested in rehearsing all of them.

Mr. ELLISON. I don't really care if you are interested. He was a witness, you are a witness. You gave a public reason for not being here. And I think the Committee is entitled to know what it is.

Mr. FEITH. I think that remark, in and of itself, establishes why I think he was not an appropriate person for this.

Mr. ELLISON. Is there anything he said with regard to your role in the policy regarding detainee questioning that caused you to refuse to appear on the panel?

Mr. FEITH. I believe he has made a number of very reckless remarks describing top Administration officials as war criminals, and I just think that it's—I think he is a reckless guy. I mean in the hearing here he said an absolutely extraordinary thing. He said that he had to violate the rules when he was a soldier in Vietnam not to shoot a 12-year-old girl. He said it two or three times.

Mr. ELLISON. Mr. Feith, that can't be the basis of your objecting to being here.

Mr. FEITH. It is a sign of the kind of irresponsibility.

Mr. ELLISON. I control the time, Mr. Feith. I am trying to get at why you objected to being here. One is a personal comment that he made about you, another one is that you think he criticized some members of the Administration and you didn't appreciate that criticism.

Mr. FEITH. Third, he speaks recklessly.

Mr. ELLISON. Is there anything that he said about your role with regard to detainee interrogation that was the basis of your refusal to appear?

Mr. FEITH. He is lumping me together with other people in the Administration that he said reckless things about, about war crimes and the like.

Mr. ELLISON. So I am trying to get into did he make a statement regarding your role?

Mr. FEITH. Why don't you tell me what you have in mind.

Mr. ELLISON. Why don't you tell me the truth. I am trying to figure out——

Mr. FRANKS. Regular order here. Badgering the witness here.

Mr. ELLISON. We are not in court.

Mr. NADLER. The gentleman will suspend.

This is not a courtroom. I don't think badgering the witness is an objection.

Mr. FRANKS. But he is certainly doing that.

Mr. NADLER. The gentleman will continue.

Mr. ELLISON. Moving along. I am just going to say there is nothing that he said about your role in regard to detainee questioning policy that formed the basis of your refusal to appear, it's just you don't like him so you didn't appear. That is what I gather.

Mr. FEITH. That is not what I said.

Mr. ELLISON. Then make the record clear, Mr. Feith.

Mr. FEITH. I don't understand what you are getting at.

Mr. ELLISON. It doesn't matter whether you understand, you have to answer the question or refuse to. What is the factual basis with regard to detainee policy?

Mr. FEITH. I laid it out in the letter that we sent you. I will pull the letter out.

Mr. ELLISON. So you are refusing to answer now. Are you refusing to answer?

Mr. FEITH. I will read you what I said.

Mr. ELLISON. The answer is I am trying to get at the facts as to why he refused to appear with Colonel Wilkerson, not at who he didn't like or any kind of personal invectives.

Mr. FEITH. Mr. Ellison, here's what my lawyer said in his letter to Chairman Conyers: What I object to is not that Mr. Wilkerson disagrees with Mr. Feith about the issues. In discussion of issues of public importance, disagreements are inevitable and welcome. But what should neither be expected nor tolerated are the kinds of personal vicious, groundless attacks that Mr. Wilkerson has repeatedly directed at my client.

Mr. ELLISON. That is all, Mr. Feith. You have pretty much made it clear, it is personal invective. In your book, War and Decision, you state that Attorney General John Ashcroft said the main problem with applying the Geneva Conventions is that it would preclude effective interrogation. I want to make sure I understand that correctly. Did Attorney General Ashcroft tell you that prisoners could not be effectively interrogated under Geneva Conventions?

Mr. FEITH. I think what he was addressing was under POW—if they had POW status under the Geneva Convention.

Mr. ELLISON. The first thing you told me is you can question a POW. We don't have to retry that. I want to know, did the Attorney General tell you that prisoners could not be interrogated at Geneva Conventions?

Mr. FEITH. I believe he was saying they couldn't be interrogated effectively.

Mr. ELLISON. Did he tell you?

Mr. FEITH. They couldn't be interrogated effectively if they had POW status.

Mr. ELLISON. So he said to you they could not be interrogated——

Mr. FEITH. It wasn't to me.

Mr. ELLISON. I am going to finish my question. Did Attorney General Ashcroft tell you that prisoners could not be effectively interrogated under Geneva?

Mr. FEITH. If they had POW status.

Mr. ELLISON. All right. Now do you know why he was under the impression that they could not be interrogated effectively if they are in the circumstance you described?

Mr. FEITH. I believe it is because the general view, as I understand it, of the lawyers in the military——

Mr. ELLISON. Is it because——

Mr. FEITH. May I please answer your question?

Mr. ELLISON. Is it because you cannot use coercive methods?

Mr. NADLER. The time of the gentleman has expired

Mr. ELLISON. One more minute.

Mr. NADLER. Without objection, the gentleman may have 1 additional minute.

Mr. ISSA. I object. It's timely. I object.

Mr. NADLER. The gentleman's objection is heard.

I recognize the gentleman from Virginia for 5 minutes.

Mr. ELLISON. Mr. Chairman, can I be heard? How come everybody gets an extra minute but I don't?

Mr. NADLER. Because no one objected. The gentleman from California objected to the request for unanimous consent for an additional minute. The Chair has no power beyond that.

Mr. ELLISON. Mr. Chairman, it has been a practice in this hearing people have had an extra minute.

Mr. NADLER. I understand that. And previously when I requested or someone requested unanimous consent, no objection was heard. In this instance, for some reason, an objection was heard. Apparently, continues to be heard.

Mr. ISSA. Mr. Chairman.

Mr. NADLER. The gentleman from California.

Mr. ISSA. In the spirit that we are going to have a normal-Question and answer, I certainly want a proper opportunity, and would withdraw my objection at this time.

Mr. NADLER. I thank the gentleman for withdrawing his objection.

Without objection, the gentleman from Minnesota has an additional minute.

Mr. ELLISON. Mr. Feith, do you know why the Attorney General would believe that you could not effectively interrogate a detainee?

Mr. FEITH. I would assume that he was reflecting the view of our military lawyers that the way the Geneva Convention provision on POW interrogation reads, you can't even offer any kind of inducement, positive or negative, to a POW to answer a question. You can't say we will give you cigarettes if you answer the question. Anything of that type.

And so the view that many people have is that unless a detainee is completely voluntary and offering information, you are not going to be able to get any information from him if he has POW status.

Mr. ELLISON. Ms. Pearlstein, do you have any reaction to that?

Ms. PEARLSTEIN. I guess I have two reactions. One is that to clarify, if I may, Mr. Feith's testimony. He was speculating that the reason that the Attorney General believed that interrogation would not be effective if conducted as against a detainee who is a established POW was because he imagined that was the advice that the military lawyers were giving. First, that is supposition.

Secondly, based on my own extensive conversations with military lawyers, I have not encountered one who would have taken that position. So I leave that as an open question before the Committee, what position a military lawyer would take with respect to the efficacy of interrogation under Geneva 3.

Mr. NADLER. The time of the gentleman has expired. The Chair now recognizes for 5 minutes the gentleman from Virginia.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Professor Feith, does the present policy of the United States allow torture or not?

Mr. FEITH. It does not

Mr. SCOTT. What you call aggressive techniques or humane treatment doesn't make a technique that everybody considers torture not torture just because you described it. There are a lot of memos that have been discussed. Was the policy changed as to what techniques would be allowable? That is to say, were there some techniques that have previously been prohibited that would be allowed under your guidance?

Mr. FEITH. There were various changes in detainee policy. But what didn't change was the directive that everybody had to comply with the law. Torture was against the law. Everybody had to give the detainees humane treatment. That didn't change.

Mr. SCOTT. Was there any functional difference then as to what was allowed and what was not allowed?

Mr. FEITH. Yes. Absolutely. There were various discussions of what was allowed and not allowed.

Mr. SCOTT. Those concepts were there before, they were there after. Was there any functional difference in what was allowed and what was prohibited before allowed under the new interpretations?

Mr. FEITH. Yes.

Mr. SCOTT. What? What was the difference?

Mr. FEITH. Initially, the interrogators at Gitmo were operating under the Army Field Manual. General Hill, in October 2002, sent up a memo and said the techniques that we are using under the Field Manual are not adequate with respect to a small number of especially important detainees and we would like to use some additional techniques that are within the law but beyond the limits of the field manual.

They were considered. Secretary Rumsfeld approved some of the techniques that were before him and then later, when Secretary Rumsfeld was told there was concern on some of the part of service lawyers about the legality of the arrangement that he had just approved, he, in the middle of January of 2003, said, If there are concerns among lawyers, then I want it stopped. I want all the new procedures stopped. I want all the relevant lawyers brought together in a working group. I want them to study this matter and I want them to come back to me.

I think his reaction was actually very admirable. He did exactly what I think any of you and any of us concerned about civil liberties and respect for the law would have done. He was told there was unease. He said if there's unease, I want all the new procedures stopped. I want this studied. If there are people who are not part of the original process who should be part of the process, I want them brought in.

Mr. SCOTT. Is it your testimony that it was based on everybody else, the interpretation of everybody else in the world, that there was no policy of the United States that people would be subjected to techniques that everybody else in the world considered torture?

Mr. FEITH. By the way, if you are talking about waterboarding, that was one of the techniques mentioned that Secretary Rumsfeld did not approve. When the memo came up, he rejected that.

Mr. SCOTT. Let me ask a more direct question. To the best of your knowledge, were any detainees tortured?

Mr. FEITH. My understanding is that there were detainees who were killed and murdered. I base that, in part, on what Professor Pearlstein said, and various news reports.

Mr. SCOTT. What happened to those?

Mr. FEITH. What we did is what a proper government does under these circumstances. Those things were investigated, people were identified as criminally culpable, they were prosecuted, and when convicted, punished.

Mr. SCOTT. Why do they think they could do what they did?

Mr. FEITH. I don't believe that they necessarily believe they could do what they did. They just did it. There are people who do bad things that are against law and against policy.

Mr. SCOTT. Let me ask Professor Pearlstein. Why did the people who were doing that torturing think they could do what they did?

Ms. PEARLSTEIN. Well, I think there were different reasons that people acted as they did. But I think there is no question that part of the reason that some acted as they did was that they believed they had the authority to do so.

If I may, just from the report you have in your record, I submitted it with the testimony in 2006, in one of the court martial proceedings against a young officer, chief warrant officer, young troop, Chief Warrant Officer Welshoff for the murder of one of the detainees, Welshoff claimed that he was not at all trained for the interrogation of captured detainees.

This is the young soldier put on trial for the murder of a detainee stuffed into a sleeping bag wrapped with rope and suffocated to death. He testified that he understood that he was authorized to force this detainee into a sleeping bag, based in part on a memorandum from General Ricardo Sanchez, the highest ranking military official in Iraq and the time. In that memo, General Sanchez authorized harsh interrogation techniques, including sleep and environmental manipulation, the use of aggressive dogs, and stress positions, even as General Sanchez acknowledged that other countries would view these techniques as inconsistent with the Geneva Conventions.

That memorandum was the only in-theater guidance that Welshoff testified he received. The use of the sleeping bag technique was authorized by his immediate company commander.

The reason I testified earlier as I did that limits——

Mr. NADLER. The time of the gentleman is expired. Without objection, the gentleman will have an additional minute.

Mr. KING. In the interim, I have a parliamentary inquiry.

Mr. NADLER. The gentleman will state his parliamentary inquiry.

Mr. KING. Mr. Chairman, I am watching the witnesses and some of them are undergoing water torture, having drank nearly a pitcher of water. One is undergoing fluid deprivation. All of them are undergoing food deprivation. And I don't know if it's cruel and inhumane at this point but it's 2 hours and 45 minutes into this hearing. I would ask if the Chairman would grant the witnesses 45 minutes to have a break and have some lunch and get some relief from this relentless pressure.

Mr. NADLER. That is not a parliamentary inquiry. But I will state that there is another hearing scheduled for this room and we have to vacate the room by about 1:15 or perhaps 1:30. So, unfortunately, we are not going to be able to do that. I would love to take lunch now, but we can't do that. The hearing will end by 1:15 or 1:30 because we will be chased out of here.

Mr. KING. Mr. Chairman, do you have an opinion on whether this is cruel and inhuman?

Mr. CONYERS. Will the gentleman yield?

Mr. NADLER. I will be happy to yield to the Chairman.

Mr. CONYERS. The question is whether it is cruel and inhuman to the Members of the Committee. I mean, we have all been here, too.

Mr. NADLER. I would also state that none of us are POWs and therefore entitled to the benefits of such treatment.

Mr. CONYERS. I think the professor was in the middle of an answer.

Mr. NADLER. The gentleman had been granted an additional minute of time. We will resume that.

Which professor? Professor Pearlstein.

Ms. PEARLSTEIN. I was just concluding, if I may, and without prejudice to the further consideration of the possibility of a break, the point I was making was simply the ambiguity of guidance and the existence of the authorization of the techniques we have been discussing. Without clarification, not just after 9/11, but over a period of years, clearly in the findings of Defense Department investigations themselves contributed to the record of torture and abuse I discussed.

Mr. SCOTT. Thank you. Now is it a defense to torture that you got good information as a result of the torture?

Ms. PEARLSTEIN. To my knowledge, not a defense to torture under international law. In fact, I know it is not a defense to torture under international law that you got good information.

Mr. SCOTT. Is it a defense that you couldn't get the information under traditional interrogation techniques but you thought you could get it with a little torture?

Ms. PEARLSTEIN. No, that is not a defense.

Mr. SCOTT. Whose responsibility is it to ensure that detainees were not tortured or killed and that our troop are properly trained to avoid torturing and killing people? Let me ask Professor Feith,

since he was in the Department of Defense. Whose responsibility is it?

Mr. NADLER. The gentleman's time has expired, but the witness can answer the question.

Mr. FEITH. My understanding is that the combatant commanders are responsible for proper treatment classification, administrative processing, and custody of detainees, and ensuring prompt reporting of suspected or alleged violations.

Mr. NADLER. The gentleman's time has expired.

The gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Professor Feith, are you intending to imply by that, that responsibility for any kind of conduct that takes place in the military is down at the level that you just described?

Mr. FEITH. It is not down. You are talking about a Four-Star General. I am just telling you what DOD directives say. If it were to be the case that a combatant commander was not fulfilling his responsibility to investigate, prosecute violations of law and policy, then that would be a serious breach of the combatant commander's responsibility and his superior, the Secretary of Defense, would be responsible for remedying that problem.

I mean, the way the U.S. Government works is people have responsibility at various levels. And if people are not fulfilling those responsibilities, people at a higher level have to make sure those get fulfilled.

Mr. WATT. I am not arguing with you, I am just trying to get clarification of whether you were saying that there is no upward responsibility for decisions that get made. I presume the buck stops with the Commander in Chief.

Mr. FEITH. No. The buck stops with the President. That is what Harry Truman said.

Mr. WATT. That wasn't a trick question. I am just trying to get clarification on what it was you were saying.

There has been a lot of dispute about who has responsibility here. Is there any dispute about Professor Pearlstein's testimony that there has, in fact, been torture?

Mr. FEITH. No.

Mr. WATT. Is there dispute about that? The answer to that is no?

Mr. FEITH. There was no dispute there was torture.

Mr. WATT. That is all I am asking, Professor Feith. Is there a dispute about what was reported by the Human Rights First and Human Rights Watch reports that suggest that there were 100-plus detainees who died in U.S. custody, including 34 whose death the Defense Department reported as homicides?

Mr. FEITH. I don't know if that is right or wrong.

Mr. WATT. Professor Pearlstein, is there dispute about that?

Ms. PEARLSTEIN. No, not to my knowledge.

Mr. WATT. Professor Sands.

Mr. SANDS. I am not familiar with the facts, sir.

Mr. WATT. Is there any dispute about the fact that at least eight of those detainees were tortured to death?

Mr. FEITH. If they were, it is disgusting and horrible and they should be punished.

Mr. WATT. I didn't ask you whether it was disgusting and horrible. I am trying to find out whether the facts are in dispute. Is it a fact or is it not a fact? That is all I am trying to find out.

Mr. FEITH. I don't know. I don't have personal knowledge about it.

Mr. WATT. So regardless of who has the responsibility for it, whether it is a general down at the command level, or the Secretary of Defense, or the Commander in Chief, there is no dispute that the United States has engaged in torture. Or somebody who worked for the United States has engaged in torture. Let me put it that way. Is there a dispute about that?

Mr. FEITH. I don't think there is a dispute that there were people who misbehaved and did terrible things.

Mr. WATT. The question I want to get to, Professor Feith, is to what extent if any, in your estimation, and then I would like the response of Professor Pearlstein and Professor Sands to the same question, to what extent if any did that torture take place as a result of either clear communication of what the standards were by whoever had responsibility, or a wink and a nod, or, yeah, you're not supposed to engage in this, but it's okay with us as your superiors if you do.

Professor.

Mr. ISSA. Mr. Chairman, I would ask unanimous consent for 1 additional minute for the gentleman.

Mr. FEITH. I can say that I never saw a wink or a nod from any senior Administration official on these enormously important points for us that the law had to be complied with, the torture statute had to be complied with and all detainees should get humane treatment.

Mr. WATT. So no notice occurred as a result of kind of an implicit approval of it.

Mr. FEITH. That is right.

Mr. WATT. Okay.

Professor Pearlstein and then Professor Sands.

Ms. PEARLSTEIN. I would emphasize two points. In addition to whatever was specifically authorized at any point time, there are two things to me that on the record already seems clear. One is that we sent a bunch of troops into a war zone with completely inadequate guidance about how detainees were to be treated. And, two, is that even after it became clear that the guidance was completely inadequate and unclear and that as a result it was leading to a massive problem of detainee abuse and torture, the Defense Department took years to take any action at all in response to what was going on.

Mr. SANDS. I focused on detainee 063, and in his case there was no need for a nod and a wink or anything implicit because there was an explicit authorization to use techniques that, at the very least, amounted to inhumane treatment and most people now believe amounted to torture. So that was directed explicitly as a result of the memorandum signed by Mr. Rumsfeld on the 2nd of December 2002.

Mr. NADLER. The time of the gentleman has expired. We will now go to a second round of questioning.

Mr. KING. Mr. Chairman.

Mr. NADLER. Who seeks recognition?

Mr. KING. Mr. Chairman, I would ask unanimous consent that the witnesses be able to let us know if they would like a short break in this interim. I am actually feeling sorry for them.

Mr. NADLER. If any witness needs to take a short break, they may do so. But the fact is we only have about 40 minutes at the outside, and I hope we can complete our business within that. So I can't agree to that.

Mr. KING. I yield back.

Mr. NADLER. Thank you.

The Chair now recognizes himself for 5 minutes. I am going to be a little more strict in this round on the 5 minutes because of the timing.

I want to just ask, first of all, Professor Pearlstein and Professor Sands, very quickly. I read before from the definitions of category 2 and category 3; category 2, including 20-hour interrogations, hooding, removal of clothing, use of detainee's phobias such as fear of dogs to induce stress; category 3, including waterboarding, cold weather and cold water, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent to him or his family. And that the memo that we talked about before said that category 3 was legal but not advised and category 2 was okay.

I asked Professor Feith if these techniques were humane under the Geneva Conventions, he said depending on how they were applied, depending on the circumstances.

Professor Pearlstein, Professor Sands, very quickly, are these techniques under any circumstances proper?

Mr. SANDS. They are under no circumstances compatible with Common Article 3. They are clearly prohibited.

Mr. NADLER. That includes category 2.

Mr. SANDS. Includes almost all of category 2 and all of category 3.

Mr. FEITH. Mr. Chairman.

Mr. NADLER. Getting back to detainee number 063, detainee 063 was forced to perform dog tricks on a leash, straddled by female interrogator, told that his mother and sister were whores, forced to wear a woman's bra and thong on his head during interrogation, forced to dance with a male interrogator, and subjected to an unmuzzled dog to scare him. These seem to be category 2 treatments.

Professor Sands, you would assert that this was completely illegal.

Mr. SANDS. He was also forced to stand naked, he was also hospitalized for hypothermia. They are clearly in violation of the minimum standards of international law. There is no question about that.

Mr. NADLER. Did Secretary Rumsfeld approve of the plan for detainee 063, to your knowledge?

Mr. SANDS. He approved the techniques being used. There was then a plan adopted, which we have not seen because it has not entered into the public domain. But it reflected the standards reflected in his memo.

Mr. NADLER. Do you know who reviewed or approved the interrogation plan for Mr. Al Khatani?

Mr. SANDS. I know certainly General Miller, who was down at Guantanamo at the time, approved it.

Mr. NADLER. You don't know of anybody else?

Professor Feith, do you know, did you review or approve the interrogation plan for Mr. Al Khatani?

Mr. FEITH. No.

Mr. NADLER. Do you know who did?

Mr. FEITH. No, I don't.

Mr. NADLER. Professor Sands, do you know if the International Security Council or their deputies discussed it?

Mr. SANDS. I don't know. But my understanding is the treatment of detainee 063 did not go to the National Security Counsel.

Mr. NADLER. Professor Pearlstein, would you agree or not that the category 2, and not to mention the category 3 measures, would be categorically illegal and not dependent, as Professor Feith said, on how they were administered under the circumstances?

Ms. PEARLSTEIN. Everything under category 3 is categorically prohibited under Geneva.

Mr. NADLER. Category 2?

Ms. PEARLSTEIN. Stress positions, yes. I am reading through these to refresh my recollection.

Mr. NADLER. Placing a hood over his head.

Ms. PEARLSTEIN. All of these are, at a minimum, cruel, inhuman, and degrading treatment.

Mr. NADLER. Professor Feith, you do not think these are, per se, cruel and inhuman?

Mr. FEITH. I do not. I want to clarify something. The 18 techniques were brought forward, and General Hill, in bringing them forward, specifically called into doubt the legality of the category 3 techniques. So it is important to point that out.

Then, when Mr. Haynes presented his memo to Secretary Rumsfeld, he specifically said we do not recommend that you approve any of the category 3——

Mr. NADLER. What he said, to be precise, was,

"While all category 3 techniques may be legally available, we believe as a matter of policy a blanket approval of category 3 techniques is not warranted at this time."

Mr. FEITH. I understand that. I was in the meeting. What I remember——

Mr. NADLER. Excuse me. That is the memo signed by Bill Haynes, a memo to Secretary of Defense Rumsfeld, and it is granted it didn't recommend using it, but he did find it legal and did say they could use category 2.

My time has now expired. I recognize the Ranking Member of the Subcommittee, the gentleman from Arizona, for 5 minutes.

Mr. KING. Mr. Chairman, point of order. Another protest sign just came in the room as you were speaking. It is just to the right of camera underneath one of those pink caps. I would ask it be removed from the room.

Mr. NADLER. I don't see a sign.

Mr. KING. It is on a shirt.

Mr. NADLER. If it is on a shirt and the person is sitting down so it is not visible, I will allow that.

Mr. KING. The person walks in and out of the room.

Mr. NADLER. Don't walk out in the half hour or so remaining to the hearing.

The gentleman is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman.

Ms. Pearlstein, I just wanted to get a yes or no answer, then I will let you expand on the next question. In Mr. Witte's book he said, "In Iraq and Afghanistan, detainees actually died in custody in incidents the military deemed homicides, though none of the interrogation tactics used in these case were authorized."

Do you know, of those people who died in custody, do you know of any technique that was used that caused their death that was specifically authorized by the United States Government?

Ms. PEARLSTEIN. I think the answer to that question remains unclear. I quoted before the testimony of the young officer who said he believed that he was authorized to stuff a detainee in a sleeping bag.

Mr. FRANKS. I understand. But you don't know of anything that was authorized like that, yes or no.

Ms. PEARLSTEIN. Some of the soldiers believed it was authorized.

Mr. FRANKS. So I am not going to get an answer. Let me just ask you this then. What specific, specific interrogation techniques would you recommend under the framework that you choose that the government use to obtain information from known terrorists who are resisting the questions when those terrorists refuse to provide information voluntarily. What techniques would you use, Ms. Pearlstein?

Ms. PEARLSTEIN. I think the techniques——

Mr. FRANKS. Specifically.

Ms. PEARLSTEIN. What it is elaborated in the Army Field Manual is an excellent start.

Mr. FRANKS. Enlighten me. What specific techniques would you use?

Ms. PEARLSTEIN. Do you want me to read to you——

Mr. FRANKS. I would like you to give me your opinion.

Ms. PEARLSTEIN. I am not an interrogator, so I am not sure I am the witness best qualified to give that.

Mr. FRANKS. So would you like to make a shot?

Ms. PEARLSTEIN. I think the answer is the U.S. Army Field Manual has multiple sections that describe appropriate interrogation techniques. I think that is a good approach.

Mr. FRANKS. You don't know anything you would use that would get reluctant information from a terrorist.

Ms. PEARLSTEIN. I would prefer to receive some training before I was sent into a room like that.

Mr. FRANKS. That is great. Professor Feith, read one more time the specific phrase that you read earlier about POWs, how they can be questioned and what the course of nature of that could be or could not be.

Mr. FEITH. In Article 17 of the Geneva Convention it says that 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.

It says, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."

Mr. FRANKS. That is pretty clear to me. That may escape a lot of us, but that is pretty clear to me. That means if you said you don't answer that question, we are not going to let you play checkers this afternoon. You wouldn't be able to do that, is that correct?

Mr. FEITH. I believe that is right.

Mr. FRANKS. Well, I think that if we said that you were a prisoner of war, under that language, Mr. Ellison's questions would have been out of bounds. I think that the entire Committee hearing would be out of bounds. I think that, unfortunately, if Osama bin Laden and Khalil Sheikh Mohammad were sitting in the corner, they would be laughing at this Committee right now because they understand our system better sometimes than we do.

In terms of a wink and a nod, don't you think terrorists wink and nod about being tortured to each other?

Mr. FEITH. As we know, and as was referred to earlier, part of the training that al-Qaeda people have received, and it is in writing, is to always claim that they were tortured when they are in detention.

Mr. Franks, may I use your time to clarify something that I wanted to say with regard to what the Chairman was talking about. When I said that the techniques from the 18 techniques memo were consistent with humane treatment, depending on how they were done, I was referring only to those that Secretary Rumsfeld had actually approved because the several that he hadn't approved, there were legal-Questions that were raised by General Hill about them, and it was not recommended that they be used and Secretary Rumsfeld did not approve them.

So I just want to make it absolutely clear that I am not saying—I am not offering an opinion on whether the techniques that were rejected by Secretary Rumsfeld could have been used properly.

Mr. FRANKS. My last thought here.

Mr. FEITH. In other words, Secretary Rumsfeld only approved, of the category 3 items, the only one that he approved was use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

Mr. NADLER. Would the gentleman yield. Did he approve anything or everything or disapprove anything in category 2?

Mr. FEITH. Yes, he approved category 2, but in category 3——

Mr. NADLER. Thank you. But he approved category 2?

Mr. FEITH. Yes.

Mr. FRANKS. Mr. Chairman, essentially, under the rationale of the Committee here, if someone in prison in our American prisons gets beat up tomorrow, we can blame the President.

I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the gentleman from Minnesota.

Mr. ELLISON. Professor Pearlstein, some questions haves been raised about whether you could use interrogation techniques that are designed to get the suspect's trust, and then get information

out of them that way. For example, earlier I think Mr. Feith said you couldn't offer them cigarettes. Is that true?

Ms. PEARLSTEIN. I'm sorry; who cigarettes?

Mr. ELLISON. Detainees.

Ms. PEARLSTEIN. To clarify, it is currently, although I wish it were otherwise, constitutional under U.S. law in U.S. prisons to engage—for police to engage in questioning designed to illicit the trust of a detainee and then get information under that way.

Mr. ELLISON. Under Geneva, Mr. Feith read out a description of what would be permissible questioning strategy for a detainee, and essentially it prescribed or prohibited a course of techniques. What other kinds of interrogation techniques that are non-coercive would be permissible?

Ms. PEARLSTEIN. I think, as the FBI has long called rapport-building techniques are entirely permissible under that standard, among others.

Mr. ELLISON. These are effective at gleaning information, is that right?

Ms. PEARLSTEIN. As the one of the FBI interrogators put to me, all I need to get good information is a room and time.

Mr. ELLISON. You don't need waterboards. Is that what he said?

Ms. PEARLSTEIN. He didn't even get there.

Mr. ELLISON. Let me ask you this question, Mr. Feith. There was a November, 2002, meeting in which I believe the issue of the categories arose. Would you mind describing that meeting for us today?

Mr. FEITH. What I remember is that Jim Haynes, the general counsel of the Defense Department, said that the commander of SOUTHCOM, General Hill, believed that the techniques that were allowed under the field manual, which were those that weren't in effect at the time, while they were sufficient for many of the detainees, were not sufficient for some of the key detainees. And so he said that General Hill wanted authority from the Secretary of Defense to go beyond the field manual but still to stay within the law. And then we looked over the memo and it talked about things like yelling at the detainee and good cop-bad cop.

So what we understood sitting around the table was that the people who were proposing this were proposing something that was very careful, very circumscribed, reflected a good attitude toward the law, toward humane treatment, and the like. If you actually read through this memo you will see——

Mr. ELLISON. I don't want to be rude to you, but I have got only 5 minutes. So General Hill and Jim Haynes were present, you were present. Is that right?

Mr. FEITH. I don't know that General Hill was present.

Mr. ELLISON. Who else was present besides Mr. Haynes?

Mr. FEITH. I don't remember precisely. We went to lots of meetings.

Mr. ELLISON. You were there.

Mr. FEITH. I was there.

Mr. ELLISON. Was it just you and Haynes?

Mr. FEITH. No. In a case like that, I would assume that General Myers or General Pace or both of them was there. I don't know.

One would have to check the record. It is easy enough to find out who was at that meeting.

Mr. ELLISON. Did anybody object to the use of the category 3 techniques?

Mr. FEITH. Yes, absolutely.

Mr. ELLISON. Who objected?

Mr. FEITH. We all did.

Mr. ELLISON. You all did.

Mr. FEITH. They weren't approved. Except for the poke in the chest.

Mr. ELLISON. Did anyone object to any category 2 techniques?

Mr. FEITH. They were considered to be, again, if done within the bounds of no torture, no inhumane treatment, they could have been done in a way that was considered okay.

Mr. ELLISON. Professor Sands, do you have a view of this issue?

Mr. SANDS. I do. What emerged, I had written about it, and what emerged during the course of Admiral Dalton's testimony was there was a review initiated by Admiral Dalton, who was the General Counsel of the Joint Chiefs of Staff to consult with military lawyers. That was terminated early at the intervention of Mr. Haynes. Before that happened, senior military lawyers expressed strong objections to category 2 techniques on the grounds that they were inconsistent with the United States' international obligations and they amounted to cruel, inhuman, and degrading treatment.

It may well be that Mr. Feith was not aware that they had occurred. Admiral Dalton was very clear that the intervention had occurred at the instigation of Mr. Haynes directly, and apparently, on her account, with the knowledge of General Myers.

Mr. NADLER. The gentleman's time has expired. The gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Feith, I would like to take you back to a discussion that went on a little while ago about POW status. First, I would like to ask one question. Looking back now as a professor and in the private sector, if you were back at DOD again and you were dealing with the prisoners of this war, would you, knowing what you know now, have essentially said the Army, Navy, Air Force is not generally equipped or trained to do interrogations that are outside that which is in the Field Manual? Would that be a fair statement to say, that at the beginning of this war, we were trained to do interrogations to that level. CIA, other groups might have been better equipped, the FBI, but not our uniformed military. Is that a lesson learned?

Mr. FEITH. I think so. I think there have been, as you know, I am sure, 15 or 20 investigations, studies of various aspects of the problems, and they came to conclusions along the lines that you just mentioned.

Mr. ISSA. Going back, though, to POW, because I think it is important, first of all, all of the accusations and statements made here today about people who died in captivity, people who clearly were tortured, put into a bag, suffocated, those are all criminal acts under existing law, and as far as you know, nobody above the individuals present at the time of those incidents ever authorized

them. In other words, everyone who we know of that was involved has been punished. Is that correct, to your understanding?

Mr. FEITH. I would say that no senior officials of the Administration ever authorized them. I don't know the details about way down.

Mr. ISSA. Combatant commanders and above had nothing to do with it.

Mr. FEITH. There is no evidence whatever that they were ever authorized.

Mr. ISSA. I would like to take you through a short line of questioning on POWs for a moment. I was an Army enlisted man and an Army officer so I have been through this drill a bunch of times. Isn't it a true a prisoner of war is limited to only answering name, rank, and serial number, essentially?

Mr. FEITH. Yes.

Mr. ISSA. Isn't it true a prisoner of war is entitled to essentially be independently interviewed by outsiders? The Geneva Convention generally calls for the Red Cross. Is that correct?

Mr. FEITH. Yes.

Ms. ISSA. Isn't it true that a POW has a right to its chain of command to be intact? In other words, you can't simply put all of these—totally segregate people and deny them their chain of command. You can't put them in solitary confinement. And in fact, the senior officer or senior noncommissioned officer is, in fact, part of that system, much like Presidential candidate Senator McCain and how they reassembled while they were in captivity, their chain of command.

Mr. FEITH. I think that is right. Whether somebody could be put in solitary for disruptive behavior or something, I can't comment on that.

Mr. ISSA. There are some nuances. But, in general, POWs are not housed in separate facilities and POWs are, in fact, considered to be a unit. In other words, they are allowed to maintain their normal military presence as a group. Isn't that correct?

Mr. FEITH. Yes. Because they are viewed as lawful combatants.

Mr. ISSA. So, essentially there would have been no way to take al-Qaeda and other jihadists who were simply choosing to be on the field and maybe a whole bunch of independents and bring them together in a conventional POW way without essentially allowing people who may have been young and misguided and essentially mixing them in with the most dedicated jihadists of al-Qaeda. Isn't that correct?

Mr. FEITH. That may be.

Mr. ISSA. So, in a sense, although we can have a discussion about lawful and unlawful things that occurred while in captivity, aren't we faced with a responsibility as the U.S. Government to treat these people in a way that does not treat them as conventional combatants because they are not, both for reasons of our benefit, but also for reasons of their benefit?

Mr. FEITH. Yes. I believe there are multiple reasons why we should not give POW protections to terrorist detainees who are not entitled to it.

Mr. ISSA. Thank you very much.

Mr. Chairman, I have got all my questions answered. I yield back.

Mr. NADLER. I thank the gentleman. The gentleman from Iowa is recognized for 5 minutes. I am sorry, the gentleman from Virginia. I didn't see him here.

Mr. SCOTT. Thank you. I was in the back, watching it on the monitor.

Professor Pearlstein, Professor Sands, do you want to respond to that last colloquy?

Ms. PEARLSTEIN. Really, my only response is to emphasize that the designation of al-Qaeda detainees as POWs or not is not the issue. I think it, in many respects, is correct, unlike with respect to the Taliban, that al-Qaeda are not entitled to the full panoply of POW protections. Having said that, it is irrelevant. What they are entitled to, among other things, at a minimum is the protection of Common Article 3, a provision of law that would prohibit the set of techniques that we are discussing here today.

Mr. SANDS. I think I would agree with that. The issue of POW status is a complete red herring. I don't think Mr. Feith and I are in disagreement about the POW issue. I think it may well be worth sharing that in the United Kingdom, this issue doesn't arise because there is no war against al-Qaeda and so the issue of designation of POWs or Geneva Convention simply does not arise. They are treated by reference to the criminal law and they are prosecuted accordingly. That is the way it is done.

So, in a sense, the Administration has created a rod for its own bag by embarking on the direction of a war on terror and getting stuck into issues of the Geneva Conventions. But I think Professor Pearlstein is absolutely correct, the issue of POWs is of total irrelevance. What matters is the standards reflected in Common Article 3.

Mr. SCOTT. Well, if you redefine what constitutes torture, what effect does that have? They have written memos that suggest that what everybody else thought was torture is not torture. Does that mean that that it is because they called it aggressive interrogation techniques or they declare it to be humane, therefore it is?

Mr. SANDS. Well, I've listened with interest during the course of the morning, and of course I accept entirely that there is no Member of this House that would wish to engage in torture. That is a given.

But, of course, if you then engage in a redefinition of torture, as happened in August 2002 in the memo written by Mr. Bybee and Mr. Yoo, and weighs it in terms of a threshold which basically excludes everything short of pain associated with organ failure or death, a great deal is permitted.

And in those circumstances I think is important to come back to a point in relation to something Mr. Feith said earlier. General Hill did make a request on the 25th of October 2002, but that request was for legal advice, not just from DOD but from Department of Justice. And people often forget that.

When I was engaged in my conversation with Mr. Feith, one of the things we did talk about, I'll sure he'll recall, was the extent to which the Department of Justice was involved. And the audio

will show that his belief was this was a full interagency operation. No one believes this was the Department of Defense off on a frolic.

And in that sense, I got from that, as I got from others, a strong sense of confirmation that the Department of Justice memorandum of August 2002 provided a basis for the decision-making, which allowed the Administration to conclude that certain acts would not constitute torture.

Mr. SCOTT. Well, if you can't get information from the traditional interrogation techniques, and if this Administration thinks with a little torture that you can get some good information, what's wrong with torturing people to get the good information?

Mr. SANDS. Well, like Professor Pearlstein, and I'm sure Mr. Feith, we've spoken to a lot of interrogators, and what have I picked up, as Professor Pearlstein has picked up, from professional interrogators in the military, in the FBI, in the Naval Criminal Investigative Service, and anywhere else is you don't need to go to those techniques, because they don't produce useful and reliable information. What works is rapport-building and related techniques.

And it's the main problem with torture, is that it doesn't provide useful information. And, indeed, in the story that I told, as I describe, the aggressive interrogation amounting to inhumanity or torture of Detainee 063 did not produce, as I was told, useful information.

Mr. SCOTT. Professor Feith, what responsibility does the Under Secretary of Defense for Policy have to make sure the troops are properly trained so that they do not torture people?

Mr. FEITH. I don't believe any. That's not what the job of the Under Secretary of Defense for Policy is. The issue for training of military forces is within the services—in other words, within the Army, the Navy, the Air Force. And that's not an issue that is dealt with in the Office of the Under Secretary of Defense for Policy.

Mr. SCOTT. Detainee-related policies don't come under that purview?

Mr. FEITH. Basically, the way——

Mr. NADLER. The time of the gentleman is expired. The professor may answer the question.

Mr. FEITH. I mean, I would answer it similar to what I said before. If it were clear that the services were falling down on their job of training people, so that the problem could not properly be handled in the service, that would be an argument for people working for the Secretary to say, "Mr. Secretary, you need to intervene."

But the way the system is set up, the training of military forces is handled within the services.

Mr. NADLER. Thank you. The time of the gentleman has expired.

The gentleman from Iowa is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I move we adjourn.

Mr. NADLER. There are no more people to be questioned. I will entertain the motion to adjourn in one moment. I must get some boilerplate procedure out of the way.

Mr. KING. Mr. Chairman, there is a proper motion on the floor to adjourn.

Mr. NADLER. If there are no further questions, we will adjourn in a moment, but we must take care of this one paragraph of boilerplate.

Oh, we'll take a vote on the motion to adjourn.

Mr. KING. I would agree if there is boilerplate to be processed pending a vote to adjourn.

Mr. NADLER. We'll adjourn at that point without a vote, but okay.

Without objection, all Members have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can, so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Before we adjourn, I would remind people that this hearing is conducted with decorum. And I would ask that there be no demonstrations as we leave the room and that no one get up with any signs or anything else that could cause anybody to object.

And without the necessity for a motion to adjourn, the hearing is adjourned.

[Whereupon, at 1:21 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Douglas J. Feith, former Undersecretary of Defense (Policy)

You are hereby commanded to be and appear before the Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House of Representatives of the United States at the place, date and time specified below.

☑ **to testify** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: 2141 Rayburn House Office Building, Washington, DC 20515

Date: July 15, 2008 Time: 10:00 a.m.

☐ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: _____

Date: _____ Time: _____

To Any authorized Committee staff

_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 9th day of July, 2008.

John Conyers Jr.
Chairman or Authorized Member

Attest: Lorraine C. Miller
Clerk

TRENT FRANKS
ARIZONA

JUDICIARY COMMITTEE
RANKING MEMBER,
SUBCOMMITTEE ON THE CONSTITUTION

ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON STRATEGIC FORCES

Congress of the United States
Washington, DC

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The Honorable Jerrold Nadler
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
B-353 Rayburn House Office Building

Dear Mr. Chairman,

I write to reiterate the request made by Mr. King in today's Constitution Subcommittee hearing "From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part IV" that a full transcript of the on-the-record audio of the interview Mr. Philippe Sands conducted with Mr. Douglas Feith be provided to the Subcommittee and placed into the record of the Subcommittee's hearing.

I appreciate your consideration of this request.

Sincerely,

Trent Franks
Ranking Member
Subcommittee on the Constitution

PRINTED ON RECYCLED PAPER

UCL FACULTY OF LAWS

Philippe Sands QC
Professor of Laws and Director,
Centre for International Courts and Tribunals

John Conyers, Jr.,
Chairman,
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington DC 20515-6216

By email and courier

24 July 2008

Mr Chairman:

Hearing on Administration Lawyers and Administration Interrogation Rules, 15 July 2008

I am pleased to provide a copy of the entire audio of my interview with Mr Doug Feith that was held in Washington DC on December 6th 2006, as I offered during the above hearing and as you indicated would be helpful. For the convenience of the Sub-Committee, I am also providing a transcript of the audio. The Sub-Committee may wish to prepare its own transcript. The recording was made with Mr Feith's permission and began about 15 minutes after the interview was underway, so it does not include our introductory exchanges, during the course of which I explained the subject and scope of the book I was researching.

As stated in the course of my introductory statement during the hearing held before your Sub-Committee on July 15th, my book (*Torture Team: Rumsfeld's Memo and the Betrayal of American Values*) and article in *Vanity Fair* (*The Green Light*) accurately and fairly reflect the information I obtained from Mr Feith in the course of our interview.

The information I obtained from Mr. Feith and others, as reflected in these writings, situates him at the heart of a decision-making process which caused the Administration to abandon a long-standing and honourable tradition of US military restraint, dating back to President Lincoln. As Undersecretary of Defense for Policy, Mr Feith's role included consideration of the implications of any change in DoD policy or rules on the treatment of detainees. Mr Feith's formal role was confirmed by Mr Stephen Cambone (the Undersecretary for Intelligence) in a hearing before the Senate Armed Services Committee on May 11th 2004, when he told Senator John Warner that "The overall policy for the handling of detainees rests with the undersecretary of defense for policy, by directive."

During the hearing, Mr Feith accepted that torture of detainees and other abuses had occurred on his watch. That unhappy fact has undermined the national security of the US, brought into disrepute the good name of the nation and its fine military, and made it more difficult to engage the cooperation of

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allies in responding to a serious threat. It has also caused international crimes to occur. That necessarily raises issues of accountability and individual responsibility.

In his introductory Statement at the hearing on July 15th, Mr Feith devoted a great deal of attention to the issue of POW status under Geneva. This is not a relevant issue: the rules reflected in Common Article 3 of the Geneva Conventions prohibit inhumane treatment and establish a distinct, minimum standard of protection for all detainees, not just those with POW status. Specifically, these rules prohibit a number of acts for detainees "at any time and in any place whatsoever", including "violence to life and person", "cruel treatment and torture", and "outrages upon personal dignity, in particular humiliating and degrading treatment". These protections are not dependent upon the detainee having POW status and, as the official commentary to Geneva makes clear, the scope of Common Article 3 "must be as wide as possible". Judgments of the International Court of Justice and international criminal tribunals have long held that the rules reflected in Common Article 3 "constitute a minimum yardstick" for all armed conflicts.

POW status was indeed an issue on which Mr Feith dwelt at length during our interview, but he also ranged more widely. In particular, he expressed a clear and unambiguous view on the wholesale non-applicability of Geneva to Al Qaeda detainees at Guantanamo (this was the subject of my inquiry, which focused on the treatment of Mohammed Al Qahtani, Detainee 063). Mr Feith told me that such detainees should have no rights at all under Geneva, in terms that plainly included the rules reflected in Common Article 3. I have listened again to the audio. Mr Feith said to me:

> *"The point is that the Al Qaeda people were not entitled to have the Convention applied at all, period. Obvious."*

I do not see how a reasonable, informed listener could form a different view as to what his words meant.

Mr Feith has raised two major concerns. The first relates to his role in the President's decision to set aside Common Article 3. He considers that I asserted that it is he who "devised" the argument that detainees at Guantanamo should not receive any protections under Geneva, in particular under Common Article 3, or that he was "the source of the argument". I did not make such a far-reaching claim, although it is plain that he did have an important role in the process. I made it clear that many others were involved in the decision-making process, including the lawyers at the DoJ (see *Torture Team*, p. 31 et seq.; see also *Lawless World* (Viking, 2006), pp. 153-155). What I gleaned from the interview was Mr Feith's view and recommendation that detainees such as 063 could have no rights at all under Geneva, including in respect of the standards reflected in Common Article 3. He was not alone in holding that view, but his position as Undersecretary of Defense for Policy gave him a special role and responsibility. His views and arguments proved to be persuasive within the Administration.

The second issue concerns Mr Feith's attitude to Geneva and Common Article 3. In his Hearing Statement Mr Feith said that he was "receptive" to the use of Common Article 3:

> *"I was receptive to the view that common Article 3 should be used."*

I was surprised by this, as it was not a view he expressed to me when we met. Nor is it a view he has expressed in the past (see his article "Law in the Service of Terror – the Strange Case of the Additional Protocol", 1 *National Interest*, p. 36 (1985), which makes no mention of the rule reflected in Common Article 3). At no point during our interview did he indicate that Detainee 063 or others in his situation should have rights under Common Article 3 (or any other rule of international law that sets minimum international standards for the treatment of detainees). I did not pick up any hint of receptivity to Common Article 3, whether directly or indirectly. I do not believe the reader will find such receptivity reflected in the transcript of my interview with him. I have not been able to identify any document that reflects Mr Feith's "receptivity" to Common Article 3.

In his Hearing Statement Mr Feith says:

> *"Mr. Sands also misrepresents my position on the treatment GTMO detainees were entitled to under Geneva. He writes that I argued that they were entitled to none at all. But that is not true; I argued simply that they were not entitled to POW privileges."*

That is not what Mr Feith told me when I interviewed him. It is important to recall that the focus was Mr Rumsfeld's memo of December 2nd 2002, which concerned interrogation standards for Detainee 063, who was alleged to be Al Qaeda. What Mr Feith said to me in December 2006 was:

> *"The point is that the Al Qaeda people were not entitled to have the Convention applied at all, period. Obvious. I don't see a lawyer that could make an argument of the contrary."*

It is plain that Mr Feith was sharing with me his views on the matter. At the time I thought his words were unambiguous, and I continue to think so today. They allowed of only one possible interpretation: Mr Feith believed that no Al Qaeda detainee at Guantanamo could have any rights under Geneva, including those reflected in the Common Article 3 prohibition on torture and other forms of abuse. So it is difficult for me to understand how I could be criticised for failing to see that he was *"receptive to the view that common Article 3 should be used"*. The truth is, by his own account, he was not.

In this regard, it is important also to recall the context at the time the decision was being made, in 2002. Contrary to the view expressed by Mr Feith during the hearing, other lawyers in the Administration (as well as uniformed military lawyers) did support the view that Al Qaeda detainees could and should have rights under Geneva (including by implication Common Article 3). For example, on February 2nd 2002 Mr William H Taft IV, The Legal Adviser at the Department of State, wrote a memo to the White House Counsel that had the effect of arguing in favour of that position in relation to the conflict in Afghanistan (where Al Qahtani was apprehended before being taken to Guantanamo). Such an approach, he wrote, "demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations" (reproduced in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), at p. 129).

Mr Feith took a different approach. He attached to his Hearing Statement a memo he wrote the day after Mr Taft's memo, on February 3rd 2002. I do not recall having seen that document prior to the hearing. But it is consistent with my account. In that memo, Mr Feith does not suggest that Al Qaeda detainees at Guantanamo should have any rights under Common Article 3 (or any other rules of international law). Indeed, the memo is silent on Common Article 3. The contemporaneous evidence on which Mr Feith himself relies does not appear to support the view that he was *"receptive to the view that common Article 3 should be used"*. It shows that he had no objection to the creation of a legal black hole at Guantanamo.

Mr Feith's later actions are also consistent with my conclusion that he was not supportive of the minimum, humanitarian standards set out in Geneva and international law, including Common Article 3. For example, in November 2002 Mr Feith did not object to the use of hooding, stress positions, removal of clothing, deprivation of light and forced grooming, and many other techniques that are *per se* inconsistent with the standards reflected in Common Article 3. That failure to object seems hard to square with a claim to champion Geneva or be receptive to the standards reflected in Common Article 3. During the hearing Mr Feith went so far as to suggest that these and other techniques could be used humanely. I find it difficult to understand how such a suggestion could be made by anyone who purports to recognise the value and significance of the standards reflected in Common Article 3.

I have again reviewed the interview carefully to try to find support from Mr Feith for Geneva for detainees at Guantanamo. The closest I found was his reflection on the President's decision to provide for humane treatment as a matter of policy (but not law). Mr Feith limited himself to a general observation:

> *"I thought that was OK, that's a perfectly fine phrase ,it needs to be fleshed out, but it's a fine phrase – humane treatment."*

One would have expected the Undersecretary of Defense for Policy, charged as he was with deciding on policy for the handling of all detainees, including interrogations, to have a keener interest in the meaning and definition of humane treatment.

In this regard, the problems that began in 2002 and that are the subject of the hearings before your Committee continue to pose real and practical difficulties. Your Committee will be aware that last week the House of Commons Select Committee on Foreign Affairs issued a report that raised serious concerns about US interrogation practises, including the definition of torture. The House of Commons Committee concluded that "given the clear differences in definition, the UK can no longer rely on US assurances that it does not use torture, and we recommend that the Government does not rely on such assurances in the future."[1] There remains an urgent need to bring to an end these difficulties.

I am grateful to Mr Feith for having taken the time to set out his concerns, and for this opportunity to provide a response. The exchange confirms that my conclusions are accurate. Mr Feith did not make recommendations that were supportive of the notion that any detainees at Guantanamo should have rights under the rules reflected in Common Article 3. The recommendations he made in 2002 cannot reasonably be interpreted to mean anything but that Guantanamo detainees such as 063 should have no rights at all under any part of Geneva, including Common Article 3.

I would be pleased to provide such further assistance to the Sub-Committee as may be helpful,

Yours sincerely,

Philippe Sands QC
Professor of Law, University College London
Barrister, Matrix Chambers

[1] House of Commons Select Committee on Foreign Affairs, 9th Report, 9 July 2008, at para. 53: http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/533/53306.htm#a9

[TRANSCRIPT BEGINS]

Douglas J. Feith: O.K., what happened was, [General Richard] Myers [, former chairman of the Joint Chiefs of Staff,] and I were heading into this meeting with [former Secretary of Defense Donald] Rumsfeld, and Myers turned to me, and as I say, it was the first time when I really saw fire in his eyes. I think I said this in the op-ed piece in *The Wall Street Journal*—Myers turned to me and he said, "We have to support the Geneva Convention," and he said something like ". . . if Rumsfeld doesn't go along with this, I'm gonna contradict him in front of the President," and several things struck me about that—that's a very tough statement and, also, I mean, to make to me, right? Also he referred to him as "Rumsfeld," which is *never*—normally we would say "the Secretary," people are very respectful—and he was obviously agitated, and I shocked him by saying—I said "Dick, I'm on your side."

Philippe Sands: This is early February 2002.

February 1st, or something, this was the last two days of January—the decision was made in fact on February 2nd, and published on February 4th. So I said, "Dick, I'm entirely on your side," and he was taken aback, and he said, "You are!"—and I said, "Yeah." So what happened was we went into this meeting, and I remember we were standing up, because Rumsfeld always stood up, and if he wanted to have a short meeting he didn't sit down. I remember, the three of us were just standing there. Nobody else was in the office.

This is in his office?

In Rumsfeld's office. And, near the door—he didn't let us get deeply into his office, he was in a hurry, he had other stuff to do—and Myers starts in on, you know, we've gotta uphold the Geneva Convention–I deferred, the Chairman of the Joint Chiefs, I let him talk first, and he's making this point that, we're going into this meeting and we gotta uphold the Geneva Convention. The Secretary—I don't remember exactly how it went, the Secretary starts grilling him about the Geneva Convention. The Secretary doesn't know—the Secretary wasn't taking a position—he was just asking questions—and the Secretary is more of a lawyer than most lawyers when it comes to precision and questions.

A very smart . . . guy.

He has a lawyerlike way of speaking. And so he's quickly getting to levels of expertise that Myers, as a general, and not a lawyer, didn't have. And so I jumped in—this was really, like, Rumsfeld's firing bullets, and I jumped in front of Myers. . . . [*Laughter*] . . . and I gave a little speech—I remember—I often don't remember what I said in meetings, but this I remembered. This was an interesting moment. It was an interesting part of my early relationship with Rumsfeld, too. And I gave the following speech—I said: "There is no country in the world that has a larger interest in promoting respect for the Geneva Conventions as law than the United States, and there is no

institution in the U.S. government that has a stronger interest than the Pentagon." And then I said something else which was kind of interesting to them, and I said: "Obeying the Geneva Convention is not optional." This was a big deal with Rumsfeld. Rumsfeld is a stickler for the law—with Rumsfeld he is constantly invoking the Constitution and statutes, and he considers that a triumph.

What about international law, what's his view generally? Characterise it generally. How would you characterize it?

I don't know. If it's the law—here's the point that I made to him. I said, "The U.S. Constitution says there are two things that are the supreme law of the land—statutes and treaties." And he said, "Yeah." And I said, "The Geneva Convention is a treaty in force. It is as much part of the supreme law of the United States as a statute." You could see that that put a completely different color on it. In other words, to say to Rumsfeld, "This is the law"—that ends the conversation. Rumsfeld obeys the laws.

But of course, the outcome is . . .

No—hang on one second—let me just tell you the story. O.K. So those were the two main points that I made. It is the law, so obedience is not optional; and secondly, to the extent that it's optional—and we said "It's not,"—I said, but if it were optional, the fact is we have a policy interest in upholding . . . and I specifically made this argument which tied in directly to that 1985 or whatever article that you read. What I said is, "We have an interest in people respecting the Geneva Convention. How do the bad guys around the world try to worm out of the Geneva Conventions?" What the Vietnamese did to us is, they said, "Well, you know, we're criminals, we're not a real government"—in other words, I said, "If you make the applicability of the Geneva Convention hinge on subjective judgments about the quality of your enemy, nobody will ever reply to the Geneva Conventions—we'll never get the protection of them anywhere." This is the bullshit that Protocol 1 introduced, saying that the applicability of the Geneva Conventions hinges on whether you call somebody alien, racist, or colonial. I said, "[President Ronald] Reagan rejected Protocol 1 because introducing subjective political nasty language like that into a treaty undermines the status of the treaty as law."

But, cut to the chase, the decision was taken.

But it was the right–let me tell you. O.K., so, what I did . . .

The big decision is crucial for what happened . . .

Bear with me and let me tell you the story. You know your story from one angle—let me tell you the story from my angle. I mean, the whole story has to be put together from lots of angles, but one of them is mine. This was something I played a major role in. I didn't play a major role in the later stuff, but this I played a major role in. So I gave that speech to Rumsfeld, and Myers could not have been happier. Myers then chimed in and added his point. He said, "I agree completely with what Doug said, and furthermore, it is our military culture," he said, "we train our people to obey the

Geneva Conventions," and he said, "it's not even a matter of whether it is reciprocated—it's a matter of who we are." In other words, he's not saying that our interest is because we want to get those protections.

I have heard that from all the military I have spoken with. I've been hugely impressed by the military.

There is no question. Myers and I became friends as a result of this. This was a major moment. I remember it was the first time he called me at home to coordinate with me. This was a big deal, and he was so happy because basically Rumsfeld was firing these machine-gun bullets at him again, not out of opposition of what he was saying, but just probing questions, and I stepped in to field them and took an extremely strong line, and Rumsfeld knew that I'm not, you know, a standard State Department guy, so he was really taken aback by this. So then what I did is I wrote up what I just said—it was that speech.

That's the memo that was published. . . .

That's the memo. And that memo was the talking-point memo for Rumsfeld to use at the N.S.C. [National Security Council] meeting, and what Rumsfeld did, because he was so impressed with the speech, is he said to me, "You have to come with me to the N.S.C. meeting"—at that time I went to some N.S.C. meetings, but [former deputy secretary of defense Paul] Wolfowitz went to a lot. Later on I went to almost all of them, but Wolfowitz went to a lot, but this one, he said, because it's 'principals plus one,' so he said, "You are gonna be the 'plus one' "—although [William J. (Jim)] Haynes [II, former Pentagon general counsel,] also came. The way it worked . . .

How well did you know Haynes? Did you deal with him a lot?

I dealt with him a lot, but I didn't know him that well. I mean, from before I didn't know him at all. I got to know him just by working with him at the Pentagon.

Can you rate him as a lawyer?

I tried not to rate him as a lawyer, because I'm not, I wasn't supposed to be there as a lawyer—I was there as a policy guy, and as a matter of fact, I needed to promise, when I got confirmed by the Senate, [Senator] Carl Levin hated this. Because he was pro-ABM treaty.

But you could form a view of—one forms a view quickly as to peoples' notabilities.

I didn't. I just—he had his business, I had mine. I wasn't grading his work. Um, the . . .

If it is 'principals plus 1,' on what basis did he come?

It turns out, I guess, it wasn't 'principals plus 1,' this was so obviously a policy and law thing, so I guess it was 'principals plus 2.' In any event, the point that I am making is, the slot that Wolfowitz might have had, the Secretary insisted that I be with him. . . but he said something else, he said: "and I want you explaining that to the President." Normally Rumsfeld would absorb whatever briefing I gave him and then he would present it to the President. It was an interesting moment for me. This was the first time he asked me to brief the President on something. So the argument that I

made in this memo was that the key question, as far as I was concerned, was we needed to say that the Geneva Convention applied as a matter of law to the conflict with the Taliban. I, by the way, put a fallback in there just in case the lawyers would say that it doesn't apply as a matter of law; I said a second-best position, but clearly second-best, is that we are going to apply it as a matter of policy. But I said, the first-best position is that it applies as a matter of law. In any event I said we should not be worming out, you know, wiggling out, of the applicability of the Geneva Convention to the conflict. Then I said, what I thought was equally important—I don't know about *equally* important, but also important, let's put it that way—I don't think I said in the memo "equally," but I said, also important is [that] the Taliban fighters are not entitled to P.O.W. status under the Geneva Convention. And I explained that the Geneva Convention authors wisely built an incentive system into the Geneva Conventions, and the reason they built that incentive system in is because the greatest solicitude went to non-combatants. The next level went to fighters who obeyed the rules, and the lowest level went to fighters who don't obey the rules. And, in order to create an incentive for fighters to obey the rules, they created combatant and P.O.W. status for them, and I said, if we promiscuously hand out P.O.W. status to fighters who don't obey the rules, you are undermining the incentive system that was wisely built into the Geneva Conventions. Which, by the way, was precisely what that article in 1985 said.

I appreciate that.

And so I knew something about this from my previous life, and I made those arguments. So the argument was, "it applies as matter of law but they are not entitled to P.O.W. status." That's what the President decided. And so as far as I was concerned. . .

. . .it was a success. . .

. . .that was a success, and my memo specifically addressed those two points and the President agreed with us on both points.

I am very interested—it's fascinating for me who has only seen this from the outside, to understand how these things work from the inside. But these decisions became absolutely crucial.

From that point forward, then what happened, then you got into this question of—you get into the interrogation techniques question—I can talk to you about that, I know a little bit about that, I had something to do with it. I wasn't as, I mean, here I was really a player. This was a moment.

At the time those issues were discussed, was it ever considered that this would have implications for the interrogation of people who were caught?

Oh yes, sure.

So the fact that they were outside the Geneva Conventions . . .

Absolutely. Hold on a second—you said outside the . . .

Sorry—they are not entitled to prisoner-of-war status?

That's a big difference.

So let's stick to your distinction, which I recognize. They are not prisoners of war, therefore, they are not entitled to the protections . . .

. . . of prisoners of war.

Which precludes protections against forms of interrogation?

Under the Geneva Convention they are not entitled—that's the point. I didn't want anybody saying the Geneva Conventions don't apply. There is an interesting coincidence here, which is, what do the Al Qaeda people get, since they're not covered, their conflict is not covered by the Geneva Conventions, and all the President said, 'humane treatment,' and I thought that was O.K., that's a perfectly fine phrase, it needs to be fleshed out, but it's a fine phrase—humane treatment. Then you get into this very interesting question which is a lacuna in the Geneva Convention. The Geneva Convention says, you get combatant slash P.O.W. status if you obey the four rules—uniform, insignia, carrying arms openly, chain of command, obey the rules. If you do those four things you get combatant status, and if you get caught you get P.O.W. status. The Geneva Conventions are silent on 'what if you don't,' and people have accused us of making up the term "unlawful combatant" . . .

I am one of those people.

You're just wrong.

There is a big debate about it, there is a review of my book in the latest *American Journal of International Law,* and I was told I was wrong, by a very decent friend of mine—Steve Ratner—who I respect . . .

It is so obvious that you are wrong—because what the Convention . . .

I am happy to be told I am wrong . . .

I will tell you when you are right, and I will tell you when I think you are wrong.

There are very few things that I speak as categorically about as this—I know this.

But the consequence of this is crucial—either you are an individual to whom the Geneva Convention doesn't apply, or you are an individual to whom the Geneva Convention applies, but you are not entitled to P.O.W. status. What is the difference in the purpose of interrogation?

It turns out, none. But that's the point. That's a coincidence. The point is that the Al Qaeda people were not entitled to have the Convention applied at all, period. Obvious. I don't see a lawyer that could make an argument to the contrary. Although our Supreme Court kind of got close to that in the Hamdan case—but that's another story. It is clear from the high contracting party language that Al Qaeda is not a high contracting party.

Who were your allies on this argument—where was someone like John Yoo?

I didn't even know John Yoo, I didn't know he existed.

He was junior . . .

The Chairman of the Joint Chiefs of Staff and I were a successful axis on this, and the rest of the administration had a kind of—it was more presidentialist than anything else view. The

presidentialists, and as I said, this is not ideological—all the damn lawyers of the executive branch--the presidentialists don't like to be told that the President is subject to anything—it just drives you crazy.

You're approaching it from a different perspective? Or it may be that some of your conclusions are coincidental?

Yes, of course.

Can I just pause and ask a question? I'm leading an arbitration starting tomorrow—I didn't assume we would get as much time as this, which I am very grateful for.

Actually, we need to break.

I am just wondering, I am in D.C. for two and a half weeks—I have really appreciated this conversation—would there be any point in the next two and a half weeks when we could actually sit down slightly more relaxed, not at the end of the day, and just talk through, probably for two hours?

No, I absolutely cannot—this is a really rare case. I've got to write my book.

Then I'm in a bind, because we are not going to have time to get onto the issues I want to talk about. Can you give me another 45 minutes at some point between now and the 20th of December?

Can we talk right now?

Sure—absolutely.

Let's talk right now for a bit, and focus me on what you. . .

I am interested in what happened over the summer. The story that emerges is that individuals are detained at Guantánamo, they are either individuals to whom the Conventions don't apply, or they are individuals who are not entitled to prisoner of war status. Then the question arises, there are individuals.

What treatment are they entitled to? And the answer is, humane treatment, and then that needed to be fleshed out.

Where some of these individuals are clearly perceived to be threatening individuals, and I'm thinking of al-Qahtani in particular. And again, from the outside you don't—it's very helpful to talk to people, you get a much better impression speaking to [Major General Michael E.] Dunlavey [, the former Guantanamo commander,] and [Lieutenant Colonel Diane] Beaver, [the former Guantanamo staff judge advocate,] of what was going on, who these individuals were. My sense has been, much help. June 2002, a perception is reached that there is at least one individual, Al Qahtani, who is someone who may have . . .

I'm not even sure I knew that he existed. I had nothing to do with that.

And a process, is then determined as you said, to flesh out the rules, what can be done. At what point did you become involved in that process, because . . .

My recollection is this, that I didn't know anything about it until—and I'm not sure that I ever even got briefed on any of this. There may have been people—I had an organization of 1,500 people,

and we were really busy, and so I can't say that there weren't people in my organization doing something, but . . .

Because if that's all I've seen . . .

It was when this memo came up that I believe I first got back—on the interrogation—you see the other thing is this—I didn't work on intel issues so much, the intel issues were mainly Haynes and [Stephen] Cambone [, the former principal deputy undersecretary of defense for policy and the former director for program analysis and evaluation]. And, so, interrogations and stuff like that, I didn't know the names of the people at Gitmo, I didn't see their interrogation reports, I was not asked about their interrogation techniques. I just didn't know. . .

You went to Gitmo?

Much later. I went to Gitmo, I think after the Abu Ghraib thing.

And did you ever meet Mike Dunlavey, because he came up—he told me he came up.

Yes, I met Dunlavey when he came through.

He's an impressive character.

Yes, I didn't have much of an impression of him—I think I met him once or twice. My recollection is that I became aware of the interrogation issue for the first time when this memo came to the Secretary. And I remember there was a roundtable—you see this is me, that's Myers, that's me—and shows a cc—and I think that's when I first learned of this issue.

What it says is, "I've discussed this with dot dot dot Doug Feith, Deputy, and General Myers."

It's pronounced "Fythe," by the way.

So what's that discussion about, because that discussion presumably must touch on issues of . . .

I'll tell you what my thoughts were, O.K.? I saw this as from, again, you gotta . . . in a bureaucracy you have your responsibilities, you've got to discharge your responsibilities, and you can't be doing other peoples' work, I mean, that gets you in trouble, right?

Like any organization.

Right, there's a lawyer, and he's responsible for the law, and then the intelligence people—I asked myself when this thing came up, what are the policy, to use the bureaucratic word, what are the policy equities, as they say? What are the interests in this case that relate to my job? I saw two. One is we have a policy interest in effective interrogation; and we have a policy interest in obeying the law. In other words, the position that I took.

Exactly the same position, a consistent, coherent position.

Right. And I wanted to make sure that we were not being disrespectful of the law in a way that a policy person would say, we've a policy in favor of obeying the law.

So what steps would you have taken when . . .

So, what I said is, I would like to know, does anybody think that these proposals are not serving our intelligence interests? Question one. And, secondly, are the people who are responsible for

legal judgments satisfied that what we are doing is lawful? You see, in other words, I considered my proper role, if this thing had come up and people got in front of the Secretary and said "We have extremely important intelligence interest in doing this," right, and had the Secretary, which is not his way anyway . . .

. . .based on what I've heard was that there was such an interest.

Oh, sure, no question about it, and without a doubt, but here's the thing. Had the Secretary—the Secretary would never make this mistake, but I'm just giving to you in theory—had the Secretary been ready to make a decision on this, simply on the basis of being briefed by intel people, and had he not said 'What are the lawyers saying?,' I would have said that my job as the policy adviser would be to say 'Mr. Secretary, you cannot make this decision without talking to the lawyers.' I didn't have to say that, because he knows that.

Who were the lawyers?

Hang on one second. I want to make it clear, had the lawyers made an argument with no intel considerations, or the intel people made an argument with no legal considerations, I decided that my job was to make sure that as a matter of policy, both of those major policy interests were factored into the decision. But once I made sure—I didn't have to make sure—once I decided that the intel people were essentially at the table, and the lawyers were at the table, at that point I was not going to second-guess the intel people on their judgments or the lawyers on their judgments, so that's why I had a very minor role in this.

Your role is essentially to satisfy yourself.

That the two main relevant considerations were in front of the Secretary.

And that was a matter of institutional protection and protection of the Secretary?

Correct.

Because . . .

And I said, 'What's our policy interest as a department?' And our policy interest is to make sure that we do everything right legally and we do everything right as a matter of serving our intelligence.

So as far as you know, who were the lawyers?

Well, all I knew is that Jim Haynes was representing whoever the relevant lawyers were, and he brought this up. There was not a team of lawyers in the room, but he's the general counsel, and what I wanted to know is, have the lawyers looked at this?

What answer did you get?

Absolutely, the lawyers worked this.

Because the only formal written legal opinion—this is where it gets curious to me—is this very junior lawyer, Diane Beaver, who now feels she's just been dumped in the poo.

O.K., maybe, look—the thing is, you don't understand, I'm not gonna sit there and say—if the general counsel says this has gotten proper legal review—do you know how many decisions we work

on in a given day?—if somebody says this has gotten proper review, you don't say to them, "Stop. I want to know what you consider to be proper legal review, and I want to know who worked on it"—you don't do that.

From your perspective proper legal review—because General [James T.] Hill [, the former head of U.S. Southern Command,] told me—he's a pretty impressive character—he told me that he was very concerned that there should be proper legal review by D.O.D. lawyers and Justice Department lawyers.

Whatever. I think—the general counsel of the department represents that—and if he says it got. . .

To the best of your recollection, was it both Justice and D.O.D.—did that ever come up in your conversation with them?

What came up a lot, you see, the whole idea of military commissions came out of the White House, so it was clear this was not a matter that was being done by D.O.D. lawyers without interagency work. This was a thoroughly interagency piece of work for the lawyers, as far as I understood, from day one.

That's my understanding, and I have been told that the Justice Department lawyers connected through, as I was told, Jim Haynes—that that was the person.

Yes, it could be, that's the impression that I had. But again, if the D.O.D. general counsel says to the Secretary 'the lawyers who need to review this have reviewed this,' it's not for me to say 'explain yourself.' He doesn't work for me, he works for the Secretary, and we're colleagues.

That's totally logical.

And I have no reason to doubt—if I had reason to believe that Jim Haynes was off on a frolic and detour and leaving everybody else behind, then I would come forward and say, "Jim, I got some disturbing reports that you are not coordinating with the right people." I didn't have any such basis for questioning—so he brings this thing forward, explains it, I say to myself, I was asking myself this kind of question in meetings over and over again for years, "What's my role? What am I supposed to be commenting on here?" O.K.? You get a very strong sense—I am not the Secretary of Defense—I am not the President of the United States—I am the Undersecretary of Defense for Policy—you don't want to be a silly small-minded bureaucrat, sticking stupidly to your lane and missing the big picture; you could err too much on that side, too. I'm not giving you a stupid narrow bureaucrat point. In fact, if you read the nonsense written about me, the argument is I got involved in too many other people's business rather than—I clearly didn't have the . . .

. . . I'm not.

I understand—largely bullshit. I'm just giving you the impression, I'm not taking a silly little, I stick to my lane. . .

Let's try to recap—you formed the view, obviously, that Jim Haynes helped you form the view that

this has got legal signoff.

This has got legal signoff from whoever was supposed to do it—and I had no indication, inkling, basis for challenging him on that. Now, what happened then is this: A few weeks later, two, three weeks later—and this is the story that I tell in the piece I just wrote two, three weeks ago about Rumsfeld—Haynes shows up one day at roundtable; if I recall correctly, roundtable was the morning staff meeting. Haynes shows up one day at roundtable and says something like "Mr. Secretary, I've got a problem." Now that was good for the Secretary. The Secretary loved when you brought problems, because that meant you were not concealing them, you were not sitting on them. Right. He would blast you if, as he put it—I put this in that article about him; he had a standard, a lot of standard lines, and one standard line was, "Bad news does not get better with time." So if you had bad news, you had better bring it to him before he heard it from anybody else. If he ever heard bad news and then talked to you and said, "When did you hear it?" and it was several days before, and you hadn't brought it to him, he'd chew your head off. So a very good way to get his attention and score points and do the right thing was, as soon as you heard bad news, you brought it to him. So Haynes said "bad news," and the bad news was, "You just signed that memo, you remember it?" "Yes." "There are lawyers in the services," if I recall correctly, he said something like that. "There are lawyers in the services who are raising legal questions about the new interrogation techniques." And what I remember is, with what struck me as impressive promptness, Rumfeld did not say, "Who are those bastards?" or "Screw them" or "Didn't we make this review?"—he didn't say any of those things, he wasn't defensive, he wasn't offensive against the guys raising the question. What he said was, "Stop what we're doing, stop any new thing that we're doing, get all the relevant lawyers together, get this thing reviewed, and we will not use any new techniques until it gets reviewed again with the lawyers who are raising problems in the process." And I sat there and said, "Boy, I'm proud to be associated with this." That was—and I said in this op-ed, it wasn't an op-ed, it was a commentary article that I wrote about Rumsfeld, I said, "I believe that if the leading civil libertarians in America watched that meeting they would have had no problem with either Haynes or Rumsfeld." That was done right, that was good government.

Did you know Alberto Mora at all?

No.

He was the General Counsel.

He was the guy who raised the problem in the Navy Department.

He's a pretty interesting guy, he now works for Walmart—I went to spend a couple of days with him.

He works for whom?

He's the general counsel of Walmart International. I went to spend time with him . . .

I didn't know him, but I watched that, that was one of those cases where I said 'this is good

government.'

Did you ask yourself—you saw the memo presumably and saw the list of techniques—did you . . .

No, wait a second, I don't think there was a list of techniques at this point.

It came with various attachments—a list of 18 techniques.

At this point, or was it later? What I remember. . . .

It came with—this is what it came with. I'm just interested at a personal level—what was your reaction to these types of techniques? Obviously yelling and stuff is one thing, but were there any of them that made you feel . . .

Part of the thing is, nobody ever walked me through and actually explained—my attitude towards this was, I didn't get involved in military operations; I didn't get involved in intelligence operations; I didn't get involved—I didn't tell military people how to point their guns, or how to do things; I'm not going to tell interrogators how to do things, that's an operational thing. Policy people don't tell operational people what to do. We don't have the skills to do that.

But there were no alarm bells went for you? General Hill's covering memo has alarm bells.

To tell you the truth, I'm not sure I remember seeing this before I got into the Secretary's office—this was not something that I remember staffing personally. I don't know if anybody in my office staffed it.

Did you know [former Justice Department lawyer] John Yoo or David Addington [, former counsel to Vice-President Cheney and his current chief of staff]?

Addington I knew slightly, Yoo I'm not sure I ever met. I'm not sure I've ever met him to this day.

Were you . . .

I think I was in some meetings with him.

Were you surprised by the quality of the advice? Have you ever looked at that advice?

The thing that I looked at after, I think, Abu Ghraib broke, there was a memo, and I think it was Yoo's but I'm not sure, there was a memo that said something like, "Even if Congress passes a statute prohibiting the President from torturing people, he could torture people as commander in chief, no matter what the statute says," and I read that and I said, "Boy, if ever there's a presidentialist's view of exactly the type that I was arguing against in this memo, that's it." The idea that the President, who signs statutes, after all. . .

That was the person who is drafting the advice that is informing Jim Haynes.

I didn't know that until years later—I learned that after Abu Ghraib broke.

So then the question is, what went wrong? Because obviously no one now feels the quality of that advice was adequate. So what went wrong in the process that allowed Jim Haynes to rely on that quality of legal advice?

You're jumping to the idea that it is absolutely wrong and it's foolish and it's low quality and

everything else, and that's not what I'm saying. What I'm saying is, there is a school of thought that I happen not to subscribe to, but it is a widespread school of thought that says that the President has these enormous powers as President that are constitutional, and that are not subject to restriction by statute, and I am not a constitutional scholar. I think a lot of these people are smarter than I am and are more learned than I am when it comes to this constitutional stuff. I know that my instinct is not to agree with that, but I'm not sure that I could win a debate with these guys. They have thought about it more than I have, they've researched it more than I have. And so this idea that it was necessarily wrong, or stupid, or poor quality, I'm not saying that, I don't know enough to say that. What I know is that if I were plunging into legal research on this subject, I would have a different hypothesis. My hypothesis would be, the President can't violate a statute.

What about a treaty like the torture convention?

If it's the law of the land, it's the law of the land.

But if it has been signed with reservations . . .

Again, I'd have to study it.

Fair enough.

The point here is, what bothers me about a lot of this debate, and you are an interesting character—to tell you what my impression is of you, just from this conversation—I have a sense that you have a lot of integrity, because when I'm raising these considerations you're immediately seeing that, the distinctions that I'm drawing, and it's clear to me that you're trying to think about this in a careful, scholarly way. At the same time, you're approaching this with an enormous amount of baggage.

Absolutely, quite right.

And so your initial comments are prejudiced rather than careful, and your second reaction is careful.

That's not an unfair observation.

And so I happen to think you're actually a terrific guy to do this, because if you can discipline yourself in the course of writing what you are writing, to have your second reaction, a careful reaction, rather than the initial prejudiced reaction, you may produce a book that, with your background and credentials, has an enormous amount of credibility and can actually present a truer picture of what was going on here.

I've got no agenda actually, to be frank.

I believe you.

I've changed my mind about Dunlavey and Beaver completely.

It's clear to me that you are trying to approach this in a scholarly way, which is the reason I'm giving you the time. And what I want to get across is . . .

Here's what my baggage is: my baggage is a prejudice in favor of international rule. I start as

an internationalist rather than as a domestic constitutional type of person, and I appreciate that is a haggage. That's something that I have to—and I need to he pretty honest with myself about that. That is my starting point.

It's funny—as I said, I start with the idea that it would be nice if international rules—the way I look at it is this: In the world there are countries that have a concept of law similar to ours; that law constrains power, and that's the greatest achievement of man. And there are other countries that share that view—rule of law, right? Among those countries, so-called international law is like law.

Up to a point.

Up to a point. It's like law—it's much more like law than it is when you are dealing with lawless countries who use law simply as a tool of power, and my view is, you don't have an international community, but there are communities of countries—the democratic countries are like a community because they have rule of law, and they can respect law, and so international law can have a lot more real effect in the world among law-abiding countries. The problem you get into . . .

So let me raise the other . . .

So what I'm trying to say is, I have a prejudice in favor of international law too, in the sense that I think the world would be a better place.

I see that. So here's the other part of my story that I didn't finish telling you about that's been problematic for me. So I come to the Nuremberg side of things—I didn't take you through that whole story—there were just 12 cases. And what I was interested in knowing was, to what extent would the arguments in favor of actions—they're completely different—it's not comparing like for like, I'm going to have to find some way to make that absolutely . . .

I've got a call . . . [*Answers phone call*]

So here was the experience that I had—I read into these Nuremberg cases, there were just 12 lawyers; what I was fascinated in is, what does the lawyer do when faced with an order to do something? And the Nuremberg process, as it turned out, is pretty flawed; you look carefully at the judgments, they are problematic. I focused on one particular case, to get a head start—a guy called Josef Altstotter, who was essentially the equivalent of the O.L.C. [Office of Legal Counsel], head of the O.L.C., the civil division, in Berlin . . .

These were Nazi lawyers you are talking about.

These are Nazi lawyers, but university academics, doctorates, seriously smart people, O.K., who got themselves into positions of power and then found themselves in situations where they are asked, in the case of Altstotter—he was acquitted of crimes of humanity as a lawyer, acquitted of crimes of war as a lawyer, but convicted of membership of an illegal organization with knowledge of what had happened. So I wanted to hone in on the knowledge of what had happened. What exactly had he done? And it turned out that his conviction was based on three letters. One letter, which was allegedly one in which he described [Heinrich] Himmler as a mild and trusted friend, and two other letters in

which he acceded to a request from the head of the security division of the S.S. to take certain steps which I will come on to in a moment. I tracked down his son, and I went and spent a day with him in Nuremberg.

Was he executed?

He was not, he spent five years in prison and was then out and about. Others were executed. I tracked down the son, who is a 78-year-old retired lawyer, he's a real mensch, twinkle in his eye, surprised that I had got in touch with him, he has never spoken to anyone, but he has got all of his dad's papers. I go with a young German doctoral student from Düsseldorf, because my German is useless, again feeling a little weirded out about the situation; and in the end we focus in on two letters, and the letters go to the question of his knowledge of what happened. And one of the letters is a request from—this is where it gets personal—from the head of the security division at the S.S. in Vienna, saying, "We're getting requests from the head of the highest supreme court in Vienna, the *Oberlandesgericht*, the President, to bring before the court Jews who have invoked a law that enables them as non-Jews to prove that they are not Jews for the purposes of not being subject to the racial laws." The difficulty is these people have been evacuated to Theresienstadt and to the east. I had no idea of that. Because that's not in the law reports. So it becomes, at this point, a little personal to me. I'm sitting with this guy whose dad has basically been—"Could you please write to the president of the Tribunal and tell him to stop issuing these orders, it's very inconvenient, transportation difficulties, can't get them back, blah blah blah"—and the letter back from Josef Altstotter is, "Absolutely," he writes to the President of the *Oberlandesgericht* and tells him to stop issuing these orders, it's inconvenient for the war effort, they have been shunted out to Theresienstadt and to the east, blah blah blah—and what I ask myself as I read this stuff: here is a highly educated man, Josef Altstotter, by all accounts.

I must say, I'm fascinated by this. I wrote a big paper in college on Hannah Arendt's *Eichmann in Jerusalem* and the books that were written against her, called *Justice in Jerusalem* by Gideon Hausner and these other guys—I don't know if you are familiar with that literature.

Totally.

And I am fascinated by that history, and it's all very interesting; to tell you the truth, it is so off.

Well, that's what I'm trying to understand.

It's so off, anything that we're dealing with here. What we're dealing with here.

I'm agreeing with you that it's off—I hope you've picked up, I have a real hesitation in even making the—I'm trying to deal with a different issue.

First of all, dealing with inner regime.

But I'm dealing with a different issue, I'm dealing—I'm not comparing atrocity, it's absurd—I sit looking at this stuff—I even feel slightly qualmy and embarrassed in myself looking at it—but I'm interested in this related issue. What happens when a lawyer is called upon to give advice on those

types of issues? And some of the lawyers . . .

The answer is, you've got to be decent, you've got to be humane, you've got to be intelligent, you've got to have integrity.

But the difficulty, Doug, is that there is an analogy in the legal reasoning. If you compare the memoranda that were written, the legal reasoning is essentially the same: we defer to the domestic constitution, international law isn't really law. Did you know there was a memo from that period?

The difference between the domestic constitution of the Nazi government, which was a lawless government . . .

Absolutely.

. . . and the U.S. constitution. There's failure of perspective here that's really serious.

You're pushing at an open door—I'm not disagreeing with you—I'm talking about analogous principles of legal reasoning. And, you can't simply say . . .

I don't think they're analogous, I think you are wrong.

What's the difference between a lawyer in the Justice Department who says 'the President can do anything he wants, he can commit torture, he can carry out a genocide . . .'

He did not say he can carry out a genocide.

He didn't say that in the memo, but he said it orally to Alberto Mora.

Well, that's a stupid thing to say.

Tell me what the difference is.

The difference is the entire context, O.K. You're dealing with a democratic government in a country founded on respect for individual rights. We are under . . .

I agree with you one hundred percent. I want you to articulate this because I will faithfully reproduce it.

I'm a little reluctant. I'm giving it to you off the top of my head, rather than a well-considered answer.

But you can edit it.

But the point is—and also I don't like the idea of giving you an answer that is going to be—if you are planning to do something that says . . .

No no, I'm not, that's the point.

. . . "I wanted to ask Doug Feith why these people are not Nazis, and here's Doug Feith's defense of them that they are not Nazis," I wouldn't dignify that with an answer.

The narrative that I'm telling you is I had a starting point, and I have departed from the starting point.

I understand, but if you plan to put in your book.

Don't worry, don't worry.

I'm just saying, I would object to any comment of mine being in your book, if you plan to start

your book with this as the analogy, and then you're asking me to explain.

No, no, no, Doug, I have a reputation. I'm just raising issues that I get asked—I'm raising issues that I have come to from my own position, because I read, frankly, some of the legal opinions, and I ask myself, O.K., a legal opinion from a sensible U.S. lawyer . . .

Let me give you a different angle on it. I don't know Yoo, O.K.–not you, Y-O-O—I don't know John Yoo, and I didn't know him, and I think I must have been in a meeting with him once or twice, but I don't really know the guy, and I certainly didn't know him at the time. I didn't know who he was. But let me just give you a picture of the people working on these kinds of things, including specifically people with whom I disagree, and people whose inclinations are different from mine. I wouldn't dignify my own position by saying I disagree with them, because, as I said, some of these people are very knowledgeable, scholarly, constitutional experts, and I'm not. But let me just give you the picture of who's around the table working on these things as I see it, and what attitudes people bring to this. I have the sense that everybody around the table loves the Constitution, respects the founding fathers, gets teary-eyed at the principles on which our revolution was fought, believes in the dignity of man and the individual rights that, you know, underlie all the principles on which our government was built, because they're all deeply rooted in philosophical ideas about man's relation to God, man's relation to the State, and man's relation to other men, and these are deep, important things. Nobody around the table was a totalitarian, nobody around the table is a Jihadist, nobody around the table is a murderer and a racial superior—nobody is pushing Aryan superiority or any kind of other racial theory. These are good Americans that, as I ever saw them, interested in human rights and individual rights and constitution principles and everything else. There was no anti-constitutional party represented, as far as I heard.

Do you think something went wrong?

No, hang on, hang on. Now, so you start off with the idea that you are not dealing with Nazis. It's a big difference whether you are dealing with Nazis, O.K.?

Let me be more even more prosaic about it. The difference is you and I having this conversation, the difference is Alberto Mora could do what he did, the difference is the Supreme Court did what it did . . .

And the system works in a way.

That's the point.

But here we are, we've been attacked, we're concerned about the next attack. The only way to fight this war is to get the intelligence about what the enemy is doing. During the Cold War we could get that from satellites looking at armored formations. In this war the intelligence is all in peoples' heads. So interrogation is as important as our eyes in the skies during the Cold War. You cannot overstate—you appreciate that, you were saying it—you cannot overstate the importance of the interrogations because the intelligence that we need to fight this war, defend the country, protect

possibly millions of people from attacks by smallpox or anthrax, that intelligence is in the heads of these people. We need to extract it.

How far are we entitled to go to do that?

Well, I don't know. Again, I haven't made a whole study of this thing. What I know is, whatever we're doing we have to have two—as I said, I decided we have to have two main thoughts. One is, make the maximum reasonable legal effort—intelligent, focused, intense, to get the intelligence we need to defend the country. The other is, make sure you're doing it—we are a country of laws—make sure you're doing it lawfully. O.K.? Now lawfully, as I made the case, means all relevant laws, whether they are treaties or statutes—O.K.? I don't say the law means just treaties and not—I mean just statutes and not treaties—on the contrary, I told you I specifically made the argument, and I wrote it down for Rumsfeld that the Geneva Convention is . . .

Let me put the question in a different way. The question I put to James Hill—I've been very impressed with everyone that I've met and I have to say, I take my hat off because it wouldn't even happen in my country that you could have a conversation with people at this level of seniority, or have been in this position—it's a remarkable thing about the United States. I put this question to him: Would you be happy—obviously you wouldn't be happy—but what would be your reaction to these same techniques being used on Americans or Brits who are captured by them?

Well, O.K., the answer to that is this. When you say "them"—we wear uniforms, carry arms openly, are in a chain of command, and obey the laws of war. So we do what entitles us to P.O.W. treatment.

But we know that some of us don't, because you and I have friends who operate in ways for our services who don't do those things—can they be treated . . .

Sure, that's the whole point.

That's the logic.

It's absolutely understood that they are not entitled to P.O.W. treatment if they get caught. By the way, we have memos that say that.

And they can be interrogated in accordance with the techniques that were signed off on in . . .

First of all, as a matter of law . . .

That's where I get a bit queasy.

As a matter of law, that's the risk they take; they could be shot. We know that. And by the way, we get memos when we have to approve people doing things like out of uniform; the memos warn that these people are not entitled to the protections that people in uniforms are entitled to. We know that. Those are the, I don't make those decisions, but the Secretary was making these decisions every day. And that's point one; point two is, especially in this war, we're fighting enemies who wouldn't give us protections like that anyway; this is extremely theoretical. You are not really in the same world as the rest of us if you are worried about the reciprocity from Al Qaeda.

Does moral authority mean anything?

Of course it does. I'll tell you what the problem with moral authority is. The problem with moral authority, with all due respect, is people who should know better, like yourself, siding with the assholes, to put it crudely.

Well, you make an assumption; I don't think of myself . . .

But I'm saying—instead of people saying—these Americans are people of good faith, dealing with a really difficult problem. They've been attacked; they are trying to head off the next attack; they are trying to fight vigorously, effectively, successfully, and decently; and they are grappling with hard issues, and they are grappling with issues that directly relate to this conflict, and they are grappling with gigantic, large, constitutional issues that are a brooding omnipresence over this whole subject.

And that's where there's a big cultural difference, because for a Brit, of course, who grew up in the time—I'm not again comparing like for like, but the IRA and so on and so forth—there was the instinct to go that way, and in fact it did, as you know, historically, it did partly go that way, and things were done that in the end—the conventional wisdom now is prolonged conflict, so it's not that we don't share the same values and the same, what I say . . .

The point that I would get across is this. When you talk about moral authority, I make the distinction between whether we're entitled to it, and whether we have it. We're entitled to it. All the people involved in this, even the people that I disagreed with, even these presidentialists whose views are, as I said, not my inclination—although, as I said, I doubt my ability to debate them because I think they are more knowledgeable than I am—but my inclinations are very much not theirs. I never for a minute think that they are immoral. They are serious people dealing with serious problems. I disagree with them by inclination, but to say that they lack the moral authority that a decent official is entitled to . . .

Or to suggest that they've crossed the line into criminality?

Or to suggest that they've crossed the line into criminality. The irony is to make charges like that, is to attack the moral authority of one of the few governments that actually is entitled to moral authority. So what happens when you do that? Do you raise the moral level of the world? No. Because the Al Qaeda guys are at their moral level; you're not raising them, all you're doing is you're taking an actual model of proper government dealing with difficult questions with serious ethical dilemmas involved, serious legal judgments involved, constitutional judgments, operational judgments, and you're taking a simple outsider's critical, critic's position, crapping on all of them from a position of non-responsibility and moral superiority; and the overall effect is to persuade people that nobody respects the law, not even these Americans; the law is shit in everybody's view. What's the interest served by that?

And what has ended up happening is you say the system works, it has self-correcting . . .

But not because of overstatement in criticism.

These things are very complex. We don't know what—it doesn't in a sense matter why it got to that; the bottom line is, the system works.

But it does matter. No, no, if one writes a book that says the system works, people made arguments here that ultimately didn't prevail and shouldn't prevail, but the people who made those arguments were not bad people, they do not deserve even to be distinguished from Nazis—that's the thing that really galls me.

I'm very happy that you're saying this. Don't worry. Keep saying . . .

The issue is not—I would not consider it a triumph that you've compared them to Nazis and distinguished them. It is outrageous to even . . . I understand the mind is an interesting beast, and I understand what launches you, and you could be launched from something that's a completely inappropriate analogy, but once you're launched . . .

It's not my analogy. I want to be very clear about that. I went back

I understand you. I'm beginning to formulate your view.

It's not even a view—I went back to a case that was invented by the Americans that said, for the first time, a lawyer in giving legal advice can incur criminal responsibility, that's all I'm interested in. That's it. The stories are completely different.

I would at that point leave it behind and not even refer to it, because it is deeply offensive.

I appreciated that. You're not the first person—I'm struggling with . . .

You're struggling because you think it's cute, and it's also personal to you.

No, no, no, don't say that. That's not fair.

O.K., maybe it's not.

There's a bigger issue which we don't have time to—you have to go and sort out your food with your kids. You shouldn't make assumptions about where I come from. It should be fairly clear.

Fine, look, you strike me as a serious person. I hope you deal with this seriously. And the service that you could do, it seems to me, what's the most powerful thing you can say in my view, the most powerful thing you can say to make a point of this kind is, "I have looked at what these lawyers have done, and I think it's incorrect." That's the most powerful thing you can say, and if you can say "I don't believe they're criminals, I don't believe they're stupid, I don't believe they're ill-motivated, I don't believe they're unpatriotic, I don't think they are totalitarian, I don't think they are brutal and inhumane—I simply think that they made an incorrect judgment"—and . . .

I may well come to that.

And if you then say, and the American system ultimately decided it was incorrect—it went through a process—but it was—what is evident is, you had a whole bunch of people all of whom agreed on basic admirable humane principles, the principles embodied in the U.S. Constitution, and they were all grappling with this extremely difficult problem of how do you defend the system

against enemies of this kind, and some people came up with some ideas that were a little over-enthusiastic, and some of these ideas have nothing to do with the war on terrorism, they have everything to do with these broader points about presidentialists,power, and all the rest of it, and at the end of the day it got sorted out.

That's the crucial thing. It got sorted out relatively quickly.

It got sorted out relatively quickly. And these were good-faith discussions about really difficult issues.

What's interesting for me is that the process of sitting and talking to people that is so important—you don't get it—you see the piece of paper, O.K., and you don't know the individual, you don't know the processes.

I agree.

What I've said to you is, yes, right at the beginning I thought, if I meet Diane Beaver, I'd begin with the assumption that she's evil incarnate; I sit down and I spend three hours with her and actually it's a lot more complicated than that—that's what I'm saying—that's essentially what this book is going to be about.

If you write a book like that, it's profound.

That's what I'm trying to get to, and that's why I'm very grateful to you for giving me time, and it's why I undertake faithfully to reproduce the exchange of views in relation to each person, because I'm not interested in trashing anybody . . .

I saw here arguments being made that I didn't subscribe to, but I never got the impression that the people making these arguments were bad people.

I hear that very, very loudly.

DOUGLAS J. FEITH

July 17, 2008

The Honorable Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties
2334 Rayburn HOB
Washington, DC 20515

Dear Subcommittee Chairman Nadler:

I write to clarify a minor point about my testimony at yesterday's subcommittee hearing.

During questioning by Congressman Scott, I said that in mid-January 2003 Secretary Rumsfeld learned that there was concern among some of the lawyers for the military services about the interrogation techniques he had approved one month earlier. I further explained that, as a result, Secretary Rumsfeld rescinded his approval of the interrogation techniques and asked that a working group – bringing all the relevant lawyers together – be established to study the issues and make recommendations.

To the extent that there is any confusion over what techniques were rescinded, I call to the subcommittee's attention Secretary Rumsfeld's January 15, 2003 Memorandum for Commander USSOUTHCOM. The memo rescinded the approved category II techniques and the only approved category III technique (non-injurious poking); it did not rescind the category I techniques (yelling and deception) and I, of course, did not intend to suggest that it did.

Your truly,

Douglas Feith

Douglas J. Feith

cc: The Honorable John Conyers, Jr.
The Honorable Trent Franks

Douglas J. Feith

August 13, 2008

Chairman Jerrold Nadler
Subcommittee on the Constitution, Civil Rights and Civil Liberties
House Committee on the Judiciary
Rayburn House Office Building
Washington, DC

Subject: War-on-Terrorism Detainee Interrogation Rules

Dear Mr. Chairman:

In my July 15, 2008 testimony before your Subcommittee, I challenged Philippe Sands to release the full transcript of my one interview with him, on December 6, 2006.[i] As my testimony explained, Mr. Sands misrepresented the interview in both his book and his *Vanity Fair* article. The now-publicly-available transcript reveals the extent of Mr. Sands's misrepresentations.[ii] Accordingly, I am requesting the Subcommittee to acknowledge formally that Mr. Sands gave an untrue account of that interview, an account on which he built a false accusation against me of a war crime.

Mr. Sands focuses on Article 3 (often called Common Article 3) of the Geneva Convention ("Geneva") in his case against me.[iii] Article 3 prohibits torture and inhumane treatment of detainees in conflicts "not of an international character occurring in the territory of one of the High Contracting Parties." The Sands book alleges that, in early 2002, when the President was considering the legal status of the Guantanamo detainees, I argued against giving the detainees Article 3 protections. In fact, I never made that argument – in any form whatsoever. I did not directly or indirectly urge the President to withhold Article 3 protections. Mr. Sands has not been able to cite any documents supporting his accusation, for no such documents exist. Instead, he bases his Article 3 accusation solely on our interview. But in that interview *there is not a single mention of Article 3, and I never even alluded to it.*

Sands's misrepresentations are more than a technicality. His untrue claims that I opposed the use of Article 3 and that it was "Feith's logic" that influenced the President on Article 3 are the heart and soul of his case against me.[iv] They are essential elements of his book and are the foundation of his spurious allegation that I committed a war crime. Under the circumstances, it is amazing that *Mr. Sands did not during our interview ask me any questions at all about Article 3.*

Mr. Sands constructed his war crime allegation on the basis of nothing except his own preconception – or prejudice – that I was hostile to Geneva. The record, however, proves the opposite: that I supported Geneva and that I argued not only that the U.S. government should comply with Geneva, but should promote universal respect for it.

In my written statement to the Subcommittee, I described the Sands book as "a weave of inaccuracies and distortions" and said that the author "misquotes me by using phrases of mine like 'That's the point' and making the word 'that' refer to something different from what I referred to in our interview." With the interview transcript in hand, I can now show precisely where and how Mr. Sands distorted my words.

I told Mr. Sands that I had personally played a role in the discussions with the President on two points: first, that Geneva *did* apply to the U.S. conflict with the Taliban regime in Afghanistan; and, second, that the Taliban detainees nevertheless were *not* entitled to POW rights because they had failed to meet the Geneva conditions for POW status. Several times in the interview, I said that the Taliban detainees were entitled to Geneva protections, though not to POW status. According to the transcript provided by Mr. Sands (emphasis added):

> [Feith] So the argument [I made to the president] was: "[Geneva] applies as a matter of law but they are not entitled to P.O.W. status." *That's what the president decided.* And so as far as I was concerned …
>
> **[Sands] It was a success …**
>
> [Feith] … that was a success, and my memo specifically addressed those two points and the president agreed with us on both points.

In asking about how POW status related to interrogations, Mr. Sands then began to restate the two points I had promoted with the President and I started to concur by saying "Absolutely." But when I realized he was restating my points incorrectly – he said that the Guantanamo detainees were "outside the Geneva Convention" – I objected and demanded that Mr. Sands "Hold on a second." Mr. Sands immediately corrected his misstatement: "Sorry—they are not entitled to *prisoner-of-war status*." I said "That's a big difference" because, though the Taliban detainees were *not* entitled to POW status, I believed they had *other* rights under Geneva, given that the Convention applied to the U.S. conflict with the Taliban. Mr. Sands agreed that I was making a proper distinction, as the transcript shows:

> **[Sands] So let's stick to your distinction, which I recognize. They are not prisoners of war; therefore, they are not entitled to the protections …**

> [Feith] … of prisoners of war.
>
> **[Sands] Which precludes protections against forms of interrogation?**
>
> [Feith] Under the Geneva Convention they are not entitled—that's the point. I didn't want anybody saying the Geneva Conventions don't apply.

It is clear that the phrase "that's the point" refers to my statement that Geneva did not entitle the Taliban detainees to POW rights. I never said they had no other Geneva rights. In reiterating that "I didn't want anybody saying the Geneva Conventions don't apply," I was taking pains to reject the notion that those detainees had no Geneva rights at all. Yet the Sands book (on p. 35) applies my words "that's the point" to the proposition that, under Geneva, no one at Guantanamo "was entitled to any protection." *That is an obvious false use of my words.* It discredits Mr. Sands as a scholar, impeaching him as a commentator on this subject.

Also, Sands takes the word "Absolutely" out of the interview and applies it (on pp. 35 and 182) to his untrue assertion that I intended the President to give no Geneva interrogation protections at all to any Guantanamo detainees. I had no such intention and that's not what the word "absolutely" referred to in the interview. The transcript, quoted above, shows that Mr. Sands misrepresented what I said.

Furthermore, the Sands book cites my words "that's what the President decided," quoted (and italicized) above, and claims that I was referring to Geneva Article 3. Even from the interview snippet above, however, it is obvious that I was *not* referring to Article 3. In our interview, as already noted, there was no mention of Article 3 at all, either by me or by Mr. Sands.

There are other important errors and distortions in the Sands book. The eight I specified at the July 15 hearing were:

1. On p. 98, Mr. Sands says the Haynes 18-techniques memo "was completely silent on the use of multiple techniques."

    - That memo said, however, that, if multiple techniques were used, they would have to be used "in a carefully coordinated manner."

2. On p. 99, Mr. Sands says that I wanted the detainees to receive no protection at all under Geneva and that I worked to ensure that "none of the detainees could rely on Geneva."

    - On the contrary, I argued that Geneva applied to the conflict with the Taliban.

- What I said was that the detainees were not entitled to POW status. That's very different.

3. On p. 34, Mr. Sands says that if detainees do not get POW or Article 3 protections, then "no one at Guantanamo was entitled to protection under any of the rules reflected in Geneva."

   - I have never believed that is true.

   - Other Geneva protections that might still have applied include:

     - Article 5 tribunals
     - Visits from the International Committee of the Red Cross
     - Repatriation after the conflict

4. On p. 43, Mr. Sands says "In Feith [Dunlavey] met solid resistance to the idea of returning any detainees ... "

   - In fact, I favored returning detainees. Indeed, my office wrote the policy for doing so.

5. On p. 5, Mr. Sands says that Secretary of Defense Rumsfeld "did not reject" the Category III interrogation techniques in the October 2002 Southern Command proposal.

   - But Secretary Rumsfeld *did* reject them. They were proposed and he did not authorize them; by any common definition of "reject" they were rejected.

6, On p. 97, Mr. Sands says I "hoodwinked" General Myers.

   - In fact, General Myers and I agreed on Geneva and presented a united position to the President at the February 4, 2002 National Security Council meeting. I spoke to Gen. Myers on the day before the July 15, 2008 hearing and he reaffirmed that we had been in agreement about Geneva.

   - General Myers authorized me to tell the Subcommittee that the Sands book is wrong in its "hoodwinking" claim.

7. On p. 99, Mr. Sands accuses me of "circumventing" Geneva.

   - But I never did that or advocated that – and Mr. Sands presents no evidence to support his claim that I did.

8. Throughout his book, Mr. Sands says I opposed giving any detainees at Guantanamo the protections of Geneva Article 3.

- In fact, however, I was open to affording them such protections.
- I raised questions with the administration lawyers in charge of defining "humane treatment." My questions included: Why not use Article 3? And why not use Article 5 tribunals to make individual judgments about each detainee's POW status?
- The lawyers answered that Article 3 says that it applies only to non-international conflicts and Article 5 tribunals are unnecessary because the President found that the Taliban detainees as a group did not meet the Geneva conditions for POW status. It was clear that reasonable people could differ on these matters of legal interpretation.
- In 2004-05, when the issue of Article 3 came up again in interagency meetings, Matthew Waxman, the relevant deputy assistant secretary of defense, who worked for me, became a prominent voice for using Article 3. With my approval, he argued as my representative in those meetings that, if Article 3 did not apply as a matter of law (because it applied only to non-international conflicts), *the United States could nonetheless apply Article 3 standards as a matter of policy*. The administration lawyers did not accept that proposal, however, and their views (which I believe they put forward in good faith) prevailed.

Mr. Sands did not refute any of these eight points, even though the July 15 hearing went on for over three hours. He would have had ample time to do so, if he had any facts to support what he wrote. Regarding point 2, Mr. Sands tried to defend himself at the hearing by reading an excerpt from our interview. In that excerpt, however, I stated my understanding that *al Qaida* detainees had no right to rely on Geneva. I specified "al Qaida" because I believed that the *Taliban* detainees did indeed have rights under Geneva. I never said that "*none* of the detainees could rely on Geneva," yet that is what Mr. Sands claimed I said – a claim he considered important enough to make *at least ten times* in his book.[v] So Mr. Sands's quotation from the transcript proved that his book was wrong – and that I was correct in denouncing him for misrepresenting our interview.

Regarding point 8, Mr. Sands now complains that, in that interview, he "did not pick up any hint of receptivity to Common Article 3" on my part.[vi] This is a shameless posture for Mr. Sands to assume, given that my interview with him was lengthy, yet he chose not to ask me a single question about Article 3. Had he asked me about it, I would have told him my views. In the interview, I focused on matters in which I played a substantial role.

But I played a very small role regarding Article 3, especially in early 2002, so I had no reason to talk about it if Mr. Sands did not bother to raise it with me.

At the July 15 hearing, I contradicted the Sands book's claim that I wanted to undermine or circumvent Geneva. I explained that I argued for a wholehearted application of Geneva at Guantanamo. I also explained why it would not have been consistent with Geneva – and would not have served Geneva's humanitarian purposes – to give POW status to detainees who had failed to meet Geneva's specified conditions for that status. Those conditions are part of an incentive system, which the drafters of Geneva devised to encourage fighters to wear uniforms and otherwise respect the laws of war for the purpose, first and foremost, of protecting the interests of non-combatants. Giving POW status to fighters who have violated those conditions would undermine Geneva's incentive system and harm the interests of non-combatants.

At the July 15 hearing, Mr. Sands admitted: "I don't think Mr. Feith and I are in disagreement about the POW issue." Regarding the al Qaida detainees at Guantanamo, Ms. Pearlstein noted her agreement that they were not entitled to POW status. They both argued at the hearing, however, that the POW issue was "irrelevant." They suggested that the interrogation-related protections for POWs and for detainees protected by Article 3 are the same.[vii] But that suggestion is wrong, as a comparison of Article 3 with Article 17, which governs interrogation of POWs, readily shows.

Article 17 prohibits *any penalties at all* for a detainee who refuses to answer a question:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.
>
> ***
>
> 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.*[viii]

I understand that U.S. military lawyers have traditionally interpreted Article 17 as meaning, for example, that an interrogator cannot tell a detainee: If you answer a question you'll be allowed to play soccer in the afternoon, but if you refuse you won't. That is, Article 17 prohibits even moderate, entirely humane pressure on POWs in interrogations. Article 3, on the other hand, has no such sweeping prohibition. It does *not* forbid penalties for detainees who refuse to answer questions. It does *not* forbid all

forms of interrogation pressure. What Article 3 prohibits is violent, cruel or inhumane treatment.

So there is a large practical difference between the interrogation-related restrictions applicable to a POW and those applicable under Article 3. A detainee with POW status could not be interrogated effectively unless he chose to cooperate with his interrogators entirely willingly. One has to suppose that such cooperation is highly unlikely for ideological extremists from al Qaida and other terrorist groups. Tough but humane interrogation under Article 3 has a better chance of producing important information – the kind that might allow U.S. officials to prevent additional terrorist attacks. Mr. Sands and Ms. Pearlstein misled the Subcommittee about the law when they dismissed the POW-status issue as "irrelevant" and denied the distinction between Article 17 and Article 3 protections.

It would require many more pages for me to highlight and correct all the errors, misquotations and distortions in Mr. Sands's writings and in his testimony regarding my views and work. This letter should suffice to show that Mr. Sands is a thoroughly unreliable commentator on the subject. As I have demonstrated, he has systematically misrepresented the facts. He makes false allegations without any reasonable basis. He cuts and pastes quotations in a grossly inaccurate way that amounts to flagrant misquotation. And when I called him on these errors at the July 15 hearing, he was unable to defend the points on which I challenged him. He dug himself deeper into falsehood by sweepingly asserting that our interview transcript supports what he wrote, though it does not.

It bears noting that Mr. Sands agreed at the beginning of our December 2006 interview (in the talk that preceded the start of the audio recording and the transcript) that he would check with me before he used any of my statements in his book. I said I wanted to ensure that my statements were formulated accurately and unambiguously. In a February 12, 2007 email to me, Mr. Sands reiterated our agreement:

> I am just beginning my writing up phase. Very grateful indeed for you giving me time. You were lucid and clear, provided terrific assistance. As agreed I will run any quotations by you.

But he did not show me the quotations before he published his book. Had he done so, I would have insisted he correct the misrepresentations. Evidently, he did not want to give me a chance to challenge his distortions before he published his book's sensational charges against me. He has never explained why he violated our agreement.

Some journalists and other commentators, apparently predisposed to agree with Mr. Sands's accusations, hold close-mindedly to the notion that the charges are true. So, when they write about the July 15 hearing, they describe my testimony as a "denial" of the accusations. But I did not simply deny them – I refuted them.

I am grateful to the Subcommittee for demanding that Mr. Sands release the transcript of my interview with him. Now that it is public, Mr. Sands has extraordinary brass in continuing to claim his book is accurate.[ix] In fact, the transcript makes plain that Mr. Sands twisted my words and misrepresented my position on Geneva and my work on detainee policy.

Mr. Sands seems to be calculating that no one will actually read the transcript with enough care to see that it exposes fundamental flaws in his book. It shows that Mr. Sands was, at best, careless or ignorant. Actually, the transcript strongly suggests that he was dishonest, a suggestion reinforced by (1) his unwillingness to admit his errors even after I listed a number of them, (2) his brazen claim that the transcript supports the accusations in his book, when it clearly reveals them as untrue, and (3) the violation of his promise, which he had confirmed in writing, to check the accuracy of his quotations with me before he published them.

I concluded my written testimony for the Subcommittee as follows:

> [Mr. Sands's] ill-informed attack on me is a pillar of the broader argument of his book. And that flawed book is a pillar of the argument that Bush administration officials despised the Geneva Convention and encouraged abuse and torture of detainees. Congress and the American people should know that this so-called "torture narrative" is built on sloppy research, misquotations and unsubstantiated allegations.

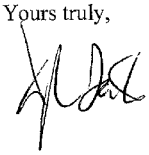
Any Subcommittee member – and anyone else – who reads the transcript of my interview with Mr. Sands and compares it to his book will plainly see Mr. Sands's lack of scholarship and the groundlessness of his allegations against me. Mr. Sands's work shows that the foundation of the "torture narrative" is not rigorously sifted evidence, but the determination of some critics of U.S. policy to preserve their antagonistic preconceptions despite the facts.

When Chairman Conyers invited me to testify, he cited the Sands book as a focus of attention. The Subcommittee's hearings – and the follow-up communications – have now clarified important errors in the Sands book and have shown that the book's accusations against me are untrue.

I respectfully urge the Subcommittee to acknowledge formally that Mr. Sands's testimony misrepresented my views and actions – and, in particular, was wrong in claiming that I opposed the use of Geneva Article 3 and that I opposed giving any Geneva protections to any of the Guantanamo detainees. I think the Subcommittee should help correct the record because your hearings gave widespread publicity to Mr. Sands's false allegation that I committed a war crime, an allegation that Mr. Sands grounded in the errors that are now finally exposed.

Kindly include this letter in the published record relating to the July 15 hearing.

Yours truly,



cc: Representative John Conyers
Representative Lamar Smith
Representative Trent Franks

NOTES

[i] Neither in his book nor in the transcript of our interview does Mr. Sands specify the date of our interview. My calendar shows it as December 6, 2006.

[ii] The Vanity Fair magazine's website published the transcript at http://www.vanityfair.com/politics/features/2008/07/feith_transcript200807.

[iii] In its entirety, Geneva Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following
> provisions:
>
> > (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> >
> > > (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> > > (b) taking of hostages;
> > > (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
> > > (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> >
> > (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[iv] Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008), p. 34.

[v] See the following examples from Sands, *Torture Team*:

> p. 33-4: "none of the detainees could rely on Common Article 3"
>
> p. 34: "The upshot was that no one at Guantanamo was entitled to protection under any of the rules reflected in Geneva."
>
> p. 35: "I observed to Feith that his memo to the President and the Geneva Convention meant that its constraints on interrogation didn't apply to anyone at Guantanamo."
>
> p. 36: "None of the detainees had any rights under the Geneva Conventions."
>
> p. 66: "Beaver began her memo with 'the facts': none of the detainees were protected by Geneva..."
>
> p. 66: "She [Beaver] was stuck with the President's decision on Geneva, which required her to proceed on the basis that Geneva provided no rights for the detainees."
>
> p. 89: "That wasn't what the President decided. The actual decision distinguished between the Taliban – to whom Geneva applied, although detainees could not invoke rights under it – and al-Qaeda, to whom it didn't apply at all. This was Feith's confusing formulation. The effect was that no Guantanamo detainee could rely on Geneva, even its Common Article 3."
>
> p. 98: "Doug Feith was Undersecretary of Defense for Policy and Haynes knew him well. They had agreed on the approach to Geneva – that it shouldn't be available to any Guantanamo detainees – now they could focus on interrogation techniques."
>
> p. 99: "He [Feith] was happy to talk at length about the February moment and his triumph in ensuring that none of the detainees could rely on Geneva."
>
> p. 214: "Doug Feith told me that Hayes had agreed on his approach to Geneva, that it shouldn't be available to any Guantanamo detainees."

[vi] See Philippe Sands letter to Chairman John Conyers, Jr. on "Hearing on Administration Lawyers and Administration Interrogation Rules, 15 July 2008," July 24, 2008, p. 2.

[vii] See, e.g., the following statement at the July 15, 2008 hearing by Deborah Pearlstein:

The critical significance between declaring somebody a POW and declaring them any other detainee in U.S. custody is that a POW cannot be prosecuted for engaging in lawful acts of war. Our soldiers can't be criminally tried for engaging in lawful combat.

It is not a distinction between the treatment of POWs and the treatment of anybody else that common Article 3 and a host of basic protections for the humane treatment of detainees apply. They apply to POWs. They apply equally to everybody else.

There is nothing under law, in my judgment, to be gained, even if one believes that coercive interrogation is useful--and I believe it is not--*there is nothing to be gained under law by denying those POW protections. The same standards of treatment apply.*

See also the following statements at the July 15, 2008 hearing by Ms. Pearlstein and Mr. Sands:

[Pearlstein:] [T]he designation of al Qaeda detainees as POWs or not is not the issue. I think it, in many respects, is correct, unlike with respect to the Taliban, that al Qaeda are not entitled to the full panoply of POW protections. Having said that, *it is irrelevant.* What they are entitled to, among other things, at a minimum is the protection of Common Article 3, a provision of law that would prohibit the set of techniques that we are discussing here today.

[Sands:] *I think I would agree with that. The issue of POW status is a complete red herring. I don't think Mr. Feith and I are in disagreement about the POW issue.*

***

I think Professor Pearlstein is absolutely correct, *the issue of POWs is of total irrelevance.*

Testimony of Deborah Pearlstein and Philippe Sands before the Subcommittee on the Constitution, Civil Rights and Civil Liberties, House Committee on the Judiciary, at hearings "From the Department of Justice to Guantanamo Bay: Administration Lawyers and Interrogation Rules, Part IV," July 15, 2008 (emphasis added), video available at: http://www.c-span.org/search.aspx?For=feith.

[viii] Article 17, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (emphasis added), available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[ix] See Philippe Sands letter to Chairman Conyers, July 24, 2008.

Douglas J. Feith

October 6, 2008

ANSWERS TO QUESTIONS FOR THE RECORD FOR DOUGLAS FEITH FOLLOWING HEARING HELD ON JULY 15, 2008

Question 1: Preface

You testified that you, and your office, championed application of Common Article 3 of the Geneva Convention ("Common Article 3") to Taliban and al Qaeda detainees before and after the President's February 7, 2002 memorandum indicating that Common Art. 3 would not be applied.

You stated further that various Administration lawyers were responsible for deciding that Common Article 3 was not applicable as a matter of law (because it applies only to non-international conflicts) and also responsible for deciding that it should not apply as a matter of policy.

Correction: I did *not* testify that my office and I "championed application of Common Article 3 of the Geneva Convention ('Common Article 3') to Taliban and al Qaeda detainees before and after the President's February 7, 2002 memorandum indicating that Common Art. 3 would not be applied."

There is a distinction between the "before" and the "after" period. *Before* the President's February 7, 2002 decision on Article 3, I had not taken a position on Article 3. I recall that, in informal conversations with Defense Department lawyers, I put a question or two on the Geneva issue. As I said in my July 15, 2008 written testimony for the Subcommittee:

> I was a policy official and did not serve in the administration as a lawyer, but I occasionally raised questions about matters being handled in legal channels. Two of the questions I know I raised were: Why not use common Article 3 to define "humane treatment"? And why not use so-called Article 5 tribunals to make individual determinations that the detainees are not entitled to POW status? I posed these questions not because I had done my own legal analysis or had firm opinions myself – I had not. But I remembered these provisions generally from my Geneva-related work during the Reagan administration and I thought that using them, if judged legally appropriate, would be a further sign of U.S. support for Geneva.

Whether such provisions as Article 3 and Article 5 applied were *legal* questions, as opposed to policy questions. As far as I recall, policy officials did not debate these legal questions at the time. I don't believe they even came up in the February 4, 2002 National Security Council meeting on Geneva, which I attended. I was open to affording

the detainees such protections, but I wouldn't say I championed their application at that time. I don't believe I said anything to the contrary in my testimony to the Subcommittee.

Later, however – in 2004-05 – when the issue of Article 3 came up again in interagency meetings, Matthew Waxman, the relevant deputy assistant secretary of defense, who worked for me, became a prominent voice for using Article 3. With my approval, he argued as my representative in those meetings that, even if Article 3 did not apply as a matter of law (because it applied only to non-international conflicts), *the United States nonetheless could apply Article 3 standards as a matter of policy*. The administration lawyers did not accept that proposal, however, and their views (which I have no reason to doubt were put forward in good faith) prevailed.

Question 1.a

Who was responsible for these decisions?

The President took responsibility by declaring on February 7, 2002 that he accepted "the *legal* conclusion of the *Department of Justice*" and determined that "Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character'" (emphasis added).

Question 1.b

Did you or anyone else object to the legal position that Common Article 3 should not apply to detainees? Who else was present during any such conversations and when did they occur? Were these conversation memorialized in any way, including through written memoranda or notes?

I served as a *policy* official, not a lawyer rendering legal judgments. Accordingly, although I raised a question about Article 3, I did not oppose the legal conclusion of the Justice Department on the matter.

The distinction between a policy role and a legal role was highlighted for me by Chairman Carl Levin of the Senate Armed Services Committee. In the spring of 2001, during my confirmation process, Senator Levin made a special point that, as Under Secretary, I must function as a policy official and not as a lawyer. In any event, I didn't know enough about the Article 3 issue's legal technicalities to have a definite opinion of my own. As I stated in my July 15 written testimony:

> I don't believe I even attended any of the early 2002 meetings where the lawyers debated common Article 3....

> Now, I know that lawyers dispute the Justice Department's legal conclusion about common Article 3. Reasonable people differ on the matter. As a policy official, I never studied the legal arguments in enough depth to have a confident judgment of my own on this question.

Not having participated in any debate about common Article 3, I don't know who was present when the administration lawy
ers discussed the matter or when those discussions occurred or whether the discussions were memorialized. I don't know if anyone else objected to the legal position of the Department of Justice that Article 3 did not apply.

Question 1.c

Did you or anyone else object to the legal argument that Common Article 3 does not apply because it applies only to non-international conflicts? To your knowledge, has the United States previously advanced this interpretation of Common Article 3? If so, when and under what circumstances?

On the question about objecting to the Justice Department's legal position on Article 3, see my answer to Question 1.b. I don't know if the United States previously advanced such an interpretation of Article 3. You might consider consulting with the Office of Legal Counsel at the Justice Department and the State Department's Office of the Legal Adviser for an answer.

Question 1.d

Did you or anyone else object to the policy decision not to apply Common Article 3? Why were Administration lawyers making the decision regarding its non-application as a matter of policy (as well as of law) rather than you, as Under Secretary of Defense for Policy? Did you raise any policy objections to this decision? If so, what were they, when did you make them, who was present, and were these conversations memorialized in any way?

In early 2002, there was no policy decision, as such, not to apply Article 3 – other than the President's February 7, 2002 acceptance of the Justice Department's conclusion on the subject. Article 3's applicability was a question answered by administration lawyers. In the run up to the February 4, 2002 NSC meeting, as I recall, the White House didn't hold meetings of policy officials to discuss the matter, nor did the lawyers who met on the subject invite policy officials to participate.

The February 3, 2002 draft memo I wrote, entitled "Points for 2/4/02 NSC Meeting on Geneva Convention," did not mention Article 3 because I didn't know the matter was then before the President. And, as noted above, I don't think there was a discussion of Article 3 at the February 4, 2002 NSC meeting.

If I recall correctly, it was only *after* the President formally accepted the Justice Department's conclusion that Article 3 did not apply that I learned that the issue had been brought to the President. When DOD lawyers explained to me that Justice Department lawyers had reached the legal conclusion that the plain language of Article 3 limited its application to non-international conflicts, I thought their argument had merit.

Question 1.e

If Common Article 3 was not being applied, either as a matter of law or of policy, how was "humane" treatment defined by the Administration and how did that definition differ from the definition contained in Common Article 3 of the Geneva Conventions?

The President decided that the standard for all the detainees was "humane treatment." Officials with operational responsibility would develop the more detailed definition of that standard, subject to review by administration lawyers. My recollection is that it was not until after the Abu Ghraib scandal became public in April 2004 that the definition of "humane treatment" was brought up at interagency meetings of policy officials – and even then, those meetings were mainly discussions among lawyers. The President evidently considered this issue, in essence, a legal matter.

If the Subcommittee wants to know how the "humane treatment" standard differed from Article 3, it would be best to pose the question to the lawyers who worked on this issue.

Question 1.f

What is your understanding of why Administration lawyers did not want Common Article 3 to apply? Please explain the significance for its non-application both as a matter of law and as a matter of policy.

The issue was not whether administration lawyers *wanted* Common Article 3 to apply. Rather, as a matter of legal analysis, administration lawyers concluded that Article 3 did not apply to our conflicts with the Taliban and with al Qaida because the article itself says that it applies only to "armed conflict not of an international character."

As for why, under those circumstances, a policy maker might be reluctant to use the language of Article 3 to define "humane treatment" as the President used that phrase, the argument that stands out in my memory is that Article 3 contained words and phrases that were wide open to interpretation – for example, "outrages upon personal dignity." Lawyers were uncertain about the degree to which foreign courts and foreign scholars had asserted interpretations of those terms that could be invoked against U.S. military personnel not schooled or trained in those interpretations. Administration lawyers favored defining the concept of humane treatment in language from the

American legal tradition which would be easier for U.S. officials to implement with confidence.

I remember hearing that the U.S. Senate had similar thoughts when it approved ratification of the anti-torture treaty: The Senate said it would interpret the terms in that treaty not based on the phrasing of the treaty itself, but based on the familiar U.S. constitutional phrase "cruel and unusual punishment."

Question 2

If you were taking the position that Common Article 3 should apply, or at least should be used to define "humane" treatment of detainees, why is that not reflected in the February 2002 memo that you provided to the Committee? Is your position reflected anywhere?

As noted above, I did not in early 2002 take a position on whether Article 3 applied. I simply posed informal questions to Defense Department lawyers as to whether that article applied. My February 2002 memo did not mention Article 3 because I didn't know it was then an issue for the President. I learned it was brought to the President only after he made his decision on February 7, 2002.

I don't recall if I raised the Article 3 issue in writing in the period leading up to that decision. I may have, but I would have to review additional files to confirm this.

Question 3

During any discussions regarding the Administration's position that Common Article 3 would be interpreted in a manner that meant it would not apply to Taliban or al Qaeda detainees, did anyone raise concerns that the courts might disagree with this interpretation?

A. Who raised these concerns and when? How (verbally and/or in writing) were they raised, and who was involved in those conversations?

B. Was there a discussion regarding who might be liable if a court disagreed and found that Common Article 3 applies and that approved techniques, such as those contained in Category II that you recommended in the Fall of 2002, violate the Geneva Conventions?

C. If so, what was the conclusion and who was involved in this discussion?

I don't know the answer to these questions. I didn't participate in the interagency discussions on Article 3 and didn't discuss the matter at length with the DOD, Justice Department or White House lawyers. I don't recall ever hearing administration lawyers

voice concerns that the courts would disagree with the administration's position that Article 3 applied only to "armed conflict not of an international character."

Question 4: Preface

During the discussion of various interrogation techniques that you recommended for Secretary Rumsfeld's approval in the Fall of 2002, you acknowledged that you recommended blanket approval of certain techniques, including stress positions, 20-hour interrogations, hooding, and the use of individual phobias (such as dogs) to induce stress (i.e., the "Category II" techniques). You acknowledged that these techniques go beyond what is permitted under the Army Field Manual and that, depending on how these techniques were used, they could be either humane or inhumane.

I did not recommend blanket approval of the referenced techniques. As Jim Haynes's memo made clear, he was recommending some of the techniques raised by SOUTHCOM and not recommending others. I understood that all those techniques recommended for approval were legal and could be used humanely. I also understood that Secretary Rumsfeld's approval of the techniques would *not* authorize anyone to use those techniques in ways that were inhumane.

Question 4.a

Please explain how you define "humane" treatment for purposes of your answer and how that differs from the definition contained in Common Article 3 of the Geneva Conventions.

I did not then (or since) elaborate a definition of the term. And I did not produce an analysis of the difference between the humane-treatment standard and an Article 3 standard.

I said in my July 15, 2008 testimony that the President had set two rules for U.S. officials responsible for the detainees: (1) Everyone had to comply with all applicable laws and (2) everyone had to treat all the detainees humanely. Those were the overarching rules when Secretary Rumsfeld approved the additional interrogation techniques. As noted above, I understood that the officials with operational responsibility would develop the more detailed concept of "humane treatment," subject to review by administration lawyers. When Secretary Rumsfeld approved the additional techniques, he did not formulate his own definition, nor did I.

Question 4.b.I

Was "forced nudity" ever an approved technique? If not, was its use unlawful? Please explain the basis for your conclusion.

I don't recall if I actually made a recommendation about the additional techniques that SOUTHCOM brought forward. The Haynes memo said: "I have discussed this with the deputy, with Doug Feith, and General Myers. I believe that all join in my recommendation." I know I didn't object to Mr. Haynes' recommendation, but I don't think that Mr. Haynes put his recommendation through my office for review and formal coordination. I think he talked about it briefly with me (and, as he says, with Mr. Wolfowitz and General Myers). As his memo says, Mr. Haynes thought we joined in his recommendation. I was not asked to sign his memo to Secretary Rumsfeld. When I formally reviewed a matter and gave a formal concurrence from my office, that concurrence was usually signified by my handwritten initials on a "coordination" line. This interrogation technique matter appears to have been handled within Pentagon almost entirely in legal channels until it got to the department's top level. It was not staffed through my office or (as I understand it) through the Joint Staff.

As for whether "forced nudity" was an approved technique: I'm not aware that the issue ever arose at the time that Secretary Rumsfeld approved the Haynes memo recommendations. No one spoke about forced nudity or recommended it. I understood the phrase "removal of clothing" as part of the general technique of making interrogation subjects sometimes feel detached from people and things (including special articles of clothing such as head coverings) that gave them comfort. I cannot offer an opinion about lawfulness; my office did not do legal analyses of these issues.

Question 4.b.II

If "forced nudity" was not an approved technique, who bears responsibility for the apparent confusion between "removal of clothing" - a technique that you recommended and that was approved - and nudity?

I did not develop or make the recommendation on removal of clothing (or on the other particular techniques). The Subcommittee should be able to find the answer to this question in the numerous investigations and studies done by internal and external experts who were asked to assess the complex questions of responsibility for errors, shortcomings and misunderstandings relating to detainee operations.

Question 4.b.III

Given your testimony that the approved techniques could be either humane or inhumane depending on how they were applied, please explain how interrogators were informed of the difference between humane/inhumane application and provide copies of

any guidance they were given on this issue.

This question deals with chain-of-command issues within SOUTHCOM, which was not within the purview of the Office of the Under Secretary of Defense for Policy. I cannot explain how the interrogators were informed. I don't have copies of their guidance.

Question 4.b.IV

What were the consequences for interrogators who failed to apply an approved technique in a "humane" fashion? Were they informed of these consequences and how were they so informed?

My understanding is that officials who violated rules regarding the treatment of detainees were investigated, charged, and punished. I believe the Subcommittee should have ready access to the facts of the individual cases.

Question 5

In discussing the use of the approved interrogation techniques in combination (e.g., forced removal of clothing during 20-hour interrogations, with the use of dogs to induce stress), you testified that the "memo" limited the use of multiple techniques by requiring that they be used only in a "carefully coordinated manner." That guidance appears to be provided for techniques contained in Category III.

Question 5.a

Were Category II techniques ever used in combination?

Question 5.b

What, if any, guidance was provided regarding the use of multiple Category II techniques in combination?

Answer to Questions 5.a and 5.b. I don't know the operational details of the interrogations. It isn't the military's practice to report such details to officials outside their chain of command (such as the Under Secretary of Defense for Policy).

Question 6

Appearing before the Senate Committee on the Judiciary on June l0th, DOJ Inspector General Glenn Fine testified that techniques that were used at Guantanamo - with the examples being given being short-shackling (meaning that a detainee's hands were shackled close to his feet) to prevent standing or sitting, the use

of extreme temperatures - were approved and authorized by Secretary Rumsfeld, at least for "periods of time."

You joined the recommendation for approving these techniques in November 2002.

Question 6.a

Do you think you bear any responsibility for the actual use of those techniques on detainees?

Question 6.b

Who, if anyone, else bears or shares that responsibility?

Answer to Questions 6.a and 6 b. The November 2002 Haynes memo to Secretary Rumsfeld appeared reasonable, especially given the general sense of urgency throughout the government about getting information from detainees that might allow us to head off additional catastrophic terrorist attacks. It is now clear, however, that the memo was not as good as it should have been.

The guidance the memo recommended the Secretary to provide to SOUTHCOM, for example, lacked useful detail. This became clear to the Secretary (and to me and others) a few weeks after he approved the Haynes memo, when Mr. Haynes reported that other lawyers in DOD were uncomfortable with the new interrogation techniques. The Secretary then suspended all the controversial techniques and asked that a task force be created to bring together all the DOD lawyers interested in this matter. In April 2003, the task force recommended a revised set of additional interrogation techniques, together with a more detailed set of safeguards. I believe the task force recommendation was a better product than the November 2002 memo. I also believe that the effort that Mr. Haynes and Secretary Rumsfeld made to take the DOD lawyers' criticism into account and to suspend the new interrogation techniques was a clear demonstration of the good faith of DOD's leadership.

Question 7

In your testimony, you acknowledged that you were present during National Security Council discussions regarding OLC legal opinions on interrogations. Please provide information regarding when those discussions occurred, what legal opinions were discussed, who was present during those discussions, and whether anyone objected to the legal opinions being expressed and, if so, why they objected (i.e., the basis of their objection).

As I've previously testified, Justice Department legal opinions may have been referred to at an NSC meeting I attended, but I don't believe that specific interrogation techniques were discussed.

Question 8

State exactly your knowledge of the following relating to the October 27, 2003 Memorandum from you to Senate Intelligence Committee Chairman Pat Roberts and Vice Chairman Jay Rockefeller addressing the relationship between al Qaeda and Saddam Hussein:

Question 8.a

How did the Memorandum come to be written? Who tasked you with its preparation?

I believe the October 27, 2003 memo you refer to was not a memo at all, but a classified annex to a written answer I sent in response to a written question for the record from the Senate Intelligence Committee. I was not "tasked" to prepare the annex; I had it prepared for me so I could send it to the Committee.

Question 8.b

Who reviewed this Memorandum prior to its submission to the Senate Intelligence Committee? Did the Vice President or his staff?

I believe the annex was produced entirely by people in the Office of the Under Secretary of Defense for Policy. I didn't provide the annex to the Vice President's office before I sent it to the Committee nor am I aware that anyone in the Vice President's office reviewed the annex before I sent it to the Committee. The annex was provided to the CIA for review of "ORCON" material.

Question 8.c

Who was responsible for classifying this memorandum? What was its security classification?

I don't recall who classified the annex. I think it was highly classified: Top Secret Codeword.

Question 8.d

How did this memorandum come to be provided to the Weekly Standard?

I don't know who purported to leak it to the Weekly Standard. I say "purported" because I don't think the government has ever confirmed that what the Weekly Standard published was an accurate account of that highly classified annex. I helped draft DOD's public statement when the Weekly Standard story on the annex first appeared on the Internet. That statement said it was reprehensible that anyone should purport to leak so sensitive a document. I strongly believe that.

Question 8.e

Did the White House or Office of Vice President approve the leaking of this memorandum?

I know of no basis whatsoever for believing that the White House or the Office of the Vice President approved any leak of the annex. I don't remember the details, but I recall that various Pentagon officials thought that the Weekly Standard's source was someone on the Senate Intelligence Committee. That idea was based on descriptions of the annex contained in the Weekly Standard article.

Question 8.f

Was the Memorandum officially declassified prior to its being leaked? If so, by who and what form did the declassification take?

The annex remained highly classified when the Weekly Standard account of it was published.

Questions 9.a and 9.b.I through 9.b.IX

In December of 2003, the Telegraph reported on a memorandum that it had been provided by Iraqi intelligence, that it described as follows:

> *The handwritten memo, a copy of which has been obtained exclusively by the Telegraph, is dated July 1, 2001 and provides a short resume of a three-day "work programme" Atta had undertaken at Abu Nidal's base in Baghdad.*
>
> *In the memo, Habbush reports that Atta "displayed extraordinary effort" and demonstrated his ability to lead the team that would be "responsible for attacking the targets that we have agreed to destroy".*

> *The second part of the memo, which is headed "Niger Shipment", contains a report about an unspecified shipment - believed to be uranium - that it says has been transported to Iraq via Libya and Syria.*
>
> *Although Iraqi officials refused to disclose how and where they had obtained the document, Dr Ayad Allawi, a member of Iraq's ruling seven-man Presidential Committee, said the document was genuine.*
>
> *"We are uncovering evidence all the time of Saddam's involvement with al-Qaeda," he said. "But this is the most compelling piece of evidence that we have found so far. It shows that not only did Saddam have contacts with al-Qaeda, he had contact with those responsible for the September 11 attacks."*[1]

The American Conservative has reported the following concerning the creation of a forged letter:

> *[D]ick Cheney, who was behind the forgery, hated and mistrusted the [Central Intelligence] Agency and would not have used it for such a sensitive assignment. Instead, he went to Doug Feith's Office of Special Plans and asked them to do the job. The Pentagon has its own false documents center, primarily used to produce fake papers for Delta Force and other special ops officers traveling under cover as businessmen. It was Feith's office that produced the letter and then surfaced it to the media in Iraq.*[2]

Question 9.a

Do you agree or deny that you were involved, directly or indirectly, in the preparation of the document?

Question 9.b

Describe all facts and circumstances associated with the preparation of the document, including:

Question 9.b.I

Who instructed you to prepare the document?

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[1] C. Coughlin, "Terrorist Behind September 11 Strike was Trained by Saddam," *The Telegraph*, Dec. 13, 2003, available at http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1449442/Terrorist-behind-September-11-strike-was-trained-by-Saddam.html.

[2] P. Giraldi, "Suskind Revisited," *American Conservative*, Aug. 7, 2008, available at *http://www.amconmag.com/blog/2008/08/07/suskind-revisited/*.

Question 9.b.II

How were the instructions provided?

Question 9.b.III

Whose idea was it that the document include a supposed connection between Iraqi intelligence and Mohammed Atta?

Question 9.b.IV

Whose idea was it that the document include a supposed the shipment of uranium from Niger to Iraq?

Question 9.b.V

What was the purpose of this document?

Question 9.b.VI

Who reviewed it after it was prepared?

Question 9.b.VII

How was it disseminated?

Question 9.b.VIII

Who, to your knowledge, communicated with Dr. Ayad Allawi to obtain his cooperation in disseminating this document?

Question 9.b.IX

What was the reaction of Vice President Cheney or anyone on his staff when the document was quickly reported to be a forgery?

Answer to Question 9.a and Questions 9.b.I through 9.b.IX.

I had no involvement in the December 2003 Telegraph report you cite. And the material you quote about my former Pentagon office from the American Conservative is a groundless lie, which the author attributed to an anonymous source. Neither my office nor I was ever asked to produce the alleged letter. Nor did we ever produce such a letter.

Question 9.b.X

Are you aware of any involvement by the Office of Special Plans, or by any other unit under your Office, in any effort in 2003 to have Mr. Habbush write a letter or memo of this type backdated to before the start of the US invasion of Iraq, or to fabricate one as if it were prepared by him? This includes any activity that you were aware of even if you were not directly involved in its authorization or execution. Please state all such facts and circumstances of which you were aware.

Question 9.b.XI

Are you aware of any involvement by any other civilian or military office or component of the Department of Defense, or by the Central Intelligence Agency, in the preparation, or placement, or such a document? Please state all such facts and circumstances of which you were aware.

Answer to Question 9.b.X and Question 9.b.XI.

I'm not aware of any such involvement by the Office of Special Plans or by any other unit under my Office – or by any other civilian or military office or component of the Department of Defense, or by the CIA. As far as I know, the forgery allegation is totally false, so there are no facts and circumstances about it of which I am aware.

Question 9.c

Please provide any further information you possess about the origin, creation, use, or validity of this document.

See preceding answer.

ANSWERS TO QUESTIONS FOR THE RECORD SUBMITTED BY RANKING MEMBER TRENT FRANKS FOR THE JULY 15, 2008 CONSTITUTION SUBCOMMITTEE HEARING

Question 1

I understand Subcommittee Chairman Nadler was quoted by The Washington Independent on June 16, 2008 as saying: "The most revealing thing, from my perspective, [that Feith said] is that on the Category II issue, everyone says that Category II techniques are cruel and inhumane treatment," Nadler said. "But he said that done right, it isn't torture. How?" Do you have an answer to Chairman Nadler's question?

It is not true that "everyone" says that Category II techniques are necessarily cruel and inhumane treatment.

As I said above, the Haynes memo did not propose the more detailed guidelines that were eventually recommended by the task force in April 2003 – and the more detailed guidelines were clearly the better approach. But the SOUTHCOM list of Category II techniques did reflect concern about legality and about humane treatment. For example, it clarified that the kind of stress positions that were contemplated were "like standing" and it limited them to a maximum of four hours. It limited the use of isolation to a maximum of 30 days, with extensions requiring approval of the Commanding General. It limited hooding in a number of ways: during transportation and questioning, no restriction on breathing in any way and detainee must be kept under direct observation at the time. Any of the Category II techniques, if extended unduly or taken to extremes, could become inhumane, but the SOUTHCOM request showed that its authors were aware that the techniques had to be limited in their application and kept lawful and humane. The SOUTHCOM request stressed the importance of compliance with the law. It was accompanied by a legal memorandum and General Hill, in his cover note to Secretary Rumsfeld, specifically called into question the legality of some of the Category III techniques and requested further legal analysis.

That is why I said they could be applied in a humane way or in an inhumane way – and SOUTHCOM's memo, as transmitted by Haynes, showed that the command understood the requirement that everything they did had to be legal and humane. The emphasis on legality meant that it was clear that torture could not be used, because torture was illegal.

Question 2

You cited more than half a dozen errors and distortions in Mr. Sands's book, Torture Team. Please provide page citations for the errors and distortions to which you were referring.

The page citations for the errors and distortions are in my August 13, 2008 letter to Chairman Nadler, a copy of which is attached at Appendix A.

Question 3

You have complained about Mr. Sands's misquotation of you. Please identify the misquotations.

As I stated in my August 13, 2008 letter to Chairman Nadler:

> In my written statement to the Subcommittee, I described the Sands book as "a weave of inaccuracies and distortions" and said that the author "misquotes me by using phrases of

> mine [from our one interview, in December 2006] like 'That's the point' and making the word 'that' refer to something different from what I referred to in our interview." With the interview transcript in hand, I can now show precisely where and how Mr. Sands distorted my words.

In that August 13 letter, I identify not only the particular misquotations, but also other important distortions and errors by Mr. Sands. I show that Mr. Sands's legal accusation against me regarding the Geneva Convention is based entirely on error. The foundation of that accusation is Mr. Sands's incorrect assertion that I helped persuade the President not to apply Article 3 to the Guantanamo detainees. I never made any such argument to the President directly or indirectly, however. Where did Mr. Sands get the idea that I did make such an argument? He says he got it from our interview, but that is patently untrue. Now that Mr. Sands has been compelled to publish the transcript of that interview, it is clear that the issue of Article 3 never came up when we talked. Mr. Sands did not ask me a single question about Article 3 and I made no reference to Article 3 expressly or by implication.

I urge interested Subcommittee members to read my August 13 letter to see how shabbily Mr. Sands has operated here in manufacturing out of whole cloth his accusation that I am implicated in a war crime. The transcript of our interview exposes Mr. Sands's case as a flat-out error. He should retract his accusation. In my August 13 letter, I requested that the Subcommittee "acknowledge formally that Mr. Sands gave an untrue account of that interview [between Sands and me on December 6, 2006], an account on which he built a false accusation against me of a war crime."

Question 4

Committee Chairman Conyers commented on the diffuse allocation of responsibilities within the Defense Department for detainee matters. Could you please set them forth for the record.

When Chairman Conyers and I were discussing the diffuse allocation of responsibilities for detainee matters within the Defense Department, I was citing information from a memo that my staff drafted in the summer of 2004 to prepare me for testimony before the House Permanent Subcommittee on Intelligence. The relevant portion of that memo is reproduced as Appendix B, attached.

Question 5

During the Subcommittee's July 15, 2008 heating, I understood Professor Sands and Ms. Pearlstein to say that the scope of permissible interrogation techniques should be the same for POWs and the al-Qaeda and Taliban detainees in U.S. custody. Indicate, with explanation, whether you agree or disagree.

I think Professor Sands and Professor Pearlstein were incorrect in arguing that the scope of permissible interrogation techniques is unaffected by whether the subject is a POW or whether he is simply covered by Article 3. They both made clear at the July 15, 2008 hearing that they agreed with my conclusion that the al Qaida detainees at Guantanamo were *not* entitled to POW status. They both argued, however, that the POW issue was "irrelevant" because the interrogation-related protections for POWs and for detainees protected by Article 3 are the same.[i] But a comparison of Article 3 with Article 17, which governs interrogation of POWs, shows that those protections are *not* the same.

Article 17 prohibits *any penalties at all* for a detainee who refuses to answer a question.[ii] As I explained in my August 13, 2008 letter to Chairman Nadler:

> I understand that U.S. military lawyers have traditionally interpreted Article 17 as meaning, for example, that an interrogator cannot tell a detainee: If you answer a question you'll be allowed to play soccer in the afternoon, but if you refuse you won't. That is, Article 17 prohibits even moderate, entirely humane pressure on POWs in interrogations. Article 3, on the other hand, has no such sweeping prohibition. It does *not* forbid penalties for detainees who refuse to answer questions. It does *not* forbid all forms of interrogation pressure. What Article 3 prohibits is violent, cruel or inhumane treatment.
>
> So there is a large practical difference between the interrogation-related restrictions applicable to a POW and those applicable under Article 3. A detainee with POW status could not be interrogated effectively unless he chose to cooperate with his interrogators entirely willingly. One has to suppose that such cooperation is highly unlikely for ideological extremists from al Qaida and other terrorist groups. Tough but humane interrogation under Article 3 has a better chance of producing important information – the kind that might allow U.S. officials to prevent additional terrorist attacks. Mr. Sands and Ms. Pearlstein misled the Subcommittee about the law when they dismissed the POW-status issue as "irrelevant" and denied the distinction between Article 17 and Article 3 protections.

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[i] See, e.g., the following statement at the July 15, 2008 hearing by Deborah Pearlstein:

> The critical significance between declaring somebody a POW and declaring them any other detainee in U.S. custody is that a POW cannot be prosecuted for engaging in lawful acts of war. Our soldiers can't be criminally tried for engaging in lawful combat.
>
> It is not a distinction between the treatment of POWs and the treatment of anybody else that common Article 3 and a host of basic protections for the humane treatment of detainees apply. They apply to POWs. They apply equally to everybody else.

> There is nothing under law, in my judgment, to be gained, even if one believes that coercive interrogation is useful--and I believe it is not--*there is nothing to be gained under law by denying those POW protections. The same standards of treatment apply.*

See also the following statements at the July 15, 2008 hearing by Ms. Pearlstein and Mr. Sands:

> [Pearlstein:] [T]he designation of al Qaeda detainees as POWs or not is not the issue. I think it, in many respects, is correct, unlike with respect to the Taliban, that al Qaeda are not entitled to the full panoply of POW protections. Having said that, *it is irrelevant.* What they are entitled to, among other things, at a minimum is the protection of Common Article 3, a provision of law that would prohibit the set of techniques that we are discussing here today.
>
> [Sands:] *I think I would agree with that. The issue of POW status is a complete red herring. I don't think Mr. Feith and I are in disagreement about the POW issue.*
>
> ***
>
> I think Professor Pearlstein is absolutely correct, *the issue of POWs is of total irrelevance.*

Testimony of Deborah Pearlstein and Philippe Sands before the Subcommittee on the Constitution, Civil Rights and Civil Liberties, House Committee on the Judiciary, at hearings "From the Department of Justice to Guantanamo Bay: Administration Lawyers and Interrogation Rules, Part IV," July 15, 2008 (emphasis added), video available at: http://www.c-span.org/search.aspx?For=feith.

[ii] Article 17 of the Geneva Convention states:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.
>
> ***
>
> 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.*

Article 17, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (emphasis added), available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

Appendix A

Douglas J. Feith

August 13, 2008

Chairman Jerrold Nadler
Subcommittee on the Constitution, Civil Rights and Civil Liberties
House Committee on the Judiciary
Rayburn House Office Building
Washington, DC

Subject: War-on-Terrorism Detainee Interrogation Rules

Dear Mr. Chairman:

In my July 15, 2008 testimony before your Subcommittee, I challenged Philippe Sands to release the full transcript of my one interview with him, on December 6, 2006.[i] As my testimony explained, Mr. Sands misrepresented the interview in both his book and his *Vanity Fair* article. The now-publicly-available transcript reveals the extent of Mr. Sands's misrepresentations.[ii] Accordingly, I am requesting the Subcommittee to acknowledge formally that Mr. Sands gave an untrue account of that interview, an account on which he built a false accusation against me of a war crime.

Mr. Sands focuses on Article 3 (often called Common Article 3) of the Geneva Convention ("Geneva") in his case against me.[iii] Article 3 prohibits torture and inhumane treatment of detainees in conflicts "not of an international character occurring in the territory of one of the High Contracting Parties." The Sands book alleges that, in early 2002, when the President was considering the legal status of the Guantanamo detainees, I argued against giving the detainees Article 3 protections. In fact, I never made that argument – in any form whatsoever. I did not directly or indirectly urge the President to withhold Article 3 protections. Mr. Sands has not been able to cite any documents supporting his accusation, for no such documents exist. Instead, he bases his Article 3 accusation solely on our interview. But in that interview *there is not a single mention of Article 3, and I never even alluded to it.*

Sands's misrepresentations are more than a technicality. His untrue claims that I opposed the use of Article 3 and that it was "Feith's logic" that influenced the President on Article 3 are the heart and soul of his case against me.[iv] They are essential elements of his book and are the foundation of his spurious allegation that I committed a war crime. Under the circumstances, it is amazing that *Mr. Sands did not during our interview ask me any questions at all about Article 3.*

Mr. Sands constructed his war crime allegation on the basis of nothing except his own preconception – or prejudice – that I was hostile to Geneva. The record, however, proves the opposite: that I supported Geneva and that I argued not only that the U.S. government should comply with Geneva, but should promote universal respect for it.

In my written statement to the Subcommittee, I described the Sands book as "a weave of inaccuracies and distortions" and said that the author "misquotes me by using phrases of mine like 'That's the point' and making the word 'that' refer to something different from what I referred to in our interview." With the interview transcript in hand, I can now show precisely where and how Mr. Sands distorted my words.

I told Mr. Sands that I had personally played a role in the discussions with the President on two points: first, that Geneva *did* apply to the U.S. conflict with the Taliban regime in Afghanistan; and, second, that the Taliban detainees nevertheless were *not* entitled to POW rights because they had failed to meet the Geneva conditions for POW status. Several times in the interview, I said that the Taliban detainees were entitled to Geneva protections, though not to POW status. According to the transcript provided by Mr. Sands (emphasis added):

> [Feith] So the argument [I made to the president] was: "[Geneva] applies as a matter of law but they are not entitled to P.O.W. status." *That's what the president decided.* And so as far as I was concerned …
>
> **[Sands] It was a success …**
>
> [Feith] … that was a success, and my memo specifically addressed those two points and the president agreed with us on both points.

In asking about how POW status related to interrogations, Mr. Sands then began to restate the two points I had promoted with the President and I started to concur by saying "Absolutely." But when I realized he was restating my points incorrectly – he said that the Guantanamo detainees were "outside the Geneva Convention" – I objected and demanded that Mr. Sands "Hold on a second." Mr. Sands immediately corrected his misstatement: "Sorry—they are not entitled to *prisoner-of-war status*." I said "That's a big difference" because, though the Taliban detainees were *not* entitled to POW status, I believed they had *other* rights under Geneva, given that the Convention applied to the U.S. conflict with the Taliban. Mr. Sands agreed that I was making a proper distinction, as the transcript shows:

> **[Sands] So let's stick to your distinction, which I recognize. They are not prisoners of war; therefore, they are not entitled to the protections …**

> [Feith] ... of prisoners of war.
>
> **[Sands] Which precludes protections against forms of interrogation?**
>
> [Feith] Under the Geneva Convention they are not entitled—that's the point. I didn't want anybody saying the Geneva Conventions don't apply.

It is clear that the phrase "that's the point" refers to my statement that Geneva did not entitle the Taliban detainees to POW rights. I never said they had no other Geneva rights. In reiterating that "I didn't want anybody saying the Geneva Conventions don't apply," I was taking pains to reject the notion that those detainees had no Geneva rights at all. Yet the Sands book (on p. 35) applies my words "that's the point" to the proposition that, under Geneva, no one at Guantanamo "was entitled to any protection." *That is an obvious false use of my words.* It discredits Mr. Sands as a scholar, impeaching him as a commentator on this subject.

Also, Sands takes the word "Absolutely" out of the interview and applies it (on pp. 35 and 182) to his untrue assertion that I intended the President to give no Geneva interrogation protections at all to any Guantanamo detainees. I had no such intention and that's not what the word "absolutely" referred to in the interview. The transcript, quoted above, shows that Mr. Sands misrepresented what I said.

Furthermore, the Sands book cites my words "that's what the President decided," quoted (and italicized) above, and claims that I was referring to Geneva Article 3. Even from the interview snippet above, however, it is obvious that I was *not* referring to Article 3. In our interview, as already noted, there was no mention of Article 3 at all, either by me or by Mr. Sands.

There are other important errors and distortions in the Sands book. The eight I specified at the July 15 hearing were:

1. On p. 98, Mr. Sands says the Haynes 18-techniques memo "was completely silent on the use of multiple techniques."

    - That memo said, however, that, if multiple techniques were used, they would have to be used "in a carefully coordinated manner."

2. On p. 99, Mr. Sands says that I wanted the detainees to receive no protection at all under Geneva and that I worked to ensure that "none of the detainees could rely on Geneva."

    - On the contrary, I argued that Geneva applied to the conflict with the Taliban.

- What I said was that the detainees were not entitled to POW status That's very different.

3. On p. 34, Mr. Sands says that if detainees do not get POW or Article 3 protections, then "no one at Guantanamo was entitled to protection under any of the rules reflected in Geneva."

   - I have never believed that is true.

   - Other Geneva protections that might still have applied include:

     - Article 5 tribunals
     - Visits from the International Committee of the Red Cross
     - Repatriation after the conflict

4. On p. 43, Mr. Sands says "In Feith [Dunlavey] met solid resistance to the idea of returning any detainees ... "

   - In fact, I favored returning detainees. Indeed, my office wrote the policy for doing so.

5. On p. 5, Mr. Sands says that Secretary of Defense Rumsfeld "did not reject" the Category III interrogation techniques in the October 2002 Southern Command proposal.

   - But Secretary Rumsfeld *did* reject them. They were proposed and he did not authorize them; by any common definition of "reject" they were rejected.

6, On p. 97, Mr. Sands says I "hoodwinked" General Myers.

   - In fact, General Myers and I agreed on Geneva and presented a united position to the President at the February 4, 2002 National Security Council meeting. I spoke to Gen. Myers on the day before the July 15, 2008 hearing and he reaffirmed that we had been in agreement about Geneva.

   - General Myers authorized me to tell the Subcommittee that the Sands book is wrong in its "hoodwinking" claim.

7. On p. 99, Mr. Sands accuses me of "circumventing" Geneva.

   - But I never did that or advocated that – and Mr. Sands presents no evidence to support his claim that I did.

8. Throughout his book, Mr. Sands says I opposed giving any detainees at Guantanamo the protections of Geneva Article 3.

- In fact, however, I was open to affording them such protections.
- I raised questions with the administration lawyers in charge of defining "humane treatment." My questions included: Why not use Article 3? And why not use Article 5 tribunals to make individual judgments about each detainee's POW status?
- The lawyers answered that Article 3 says that it applies only to non-international conflicts and Article 5 tribunals are unnecessary because the President found that the Taliban detainees as a group did not meet the Geneva conditions for POW status. It was clear that reasonable people could differ on these matters of legal interpretation.
- In 2004-05, when the issue of Article 3 came up again in interagency meetings, Matthew Waxman, the relevant deputy assistant secretary of defense, who worked for me, became a prominent voice for using Article 3. With my approval, he argued as my representative in those meetings that, if Article 3 did not apply as a matter of law (because it applied only to non-international conflicts), *the United States could nonetheless apply Article 3 standards as a matter of policy*. The administration lawyers did not accept that proposal, however, and their views (which I believe they put forward in good faith) prevailed.

Mr. Sands did not refute any of these eight points, even though the July 15 hearing went on for over three hours. He would have had ample time to do so, if he had any facts to support what he wrote. Regarding point 2, Mr. Sands tried to defend himself at the hearing by reading an excerpt from our interview. In that excerpt, however, I stated my understanding that *al Qaida* detainees had no right to rely on Geneva. I specified "al Qaida" because I believed that the *Taliban* detainees did indeed have rights under Geneva. I never said that "*none* of the detainees could rely on Geneva," yet that is what Mr. Sands claimed I said – a claim he considered important enough to make *at least ten times* in his book.[v] So Mr. Sands's quotation from the transcript proved that his book was wrong – and that I was correct in denouncing him for misrepresenting our interview.

Regarding point 8, Mr. Sands now complains that, in that interview, he "did not pick up any hint of receptivity to Common Article 3" on my part.[vi] This is a shameless posture for Mr. Sands to assume, given that my interview with him was lengthy, yet he chose not to ask me a single question about Article 3. Had he asked me about it, I would have told him my views. In the interview, I focused on matters in which I played a substantial role.

But I played a very small role regarding Article 3, especially in early 2002, so I had no reason to talk about it if Mr. Sands did not bother to raise it with me.

At the July 15 hearing, I contradicted the Sands book's claim that I wanted to undermine or circumvent Geneva. I explained that I argued for a wholehearted application of Geneva at Guantanamo. I also explained why it would not have been consistent with Geneva – and would not have served Geneva's humanitarian purposes – to give POW status to detainees who had failed to meet Geneva's specified conditions for that status. Those conditions are part of an incentive system, which the drafters of Geneva devised to encourage fighters to wear uniforms and otherwise respect the laws of war for the purpose, first and foremost, of protecting the interests of non-combatants. Giving POW status to fighters who have violated those conditions would undermine Geneva's incentive system and harm the interests of non-combatants.

At the July 15 hearing, Mr. Sands admitted: "I don't think Mr. Feith and I are in disagreement about the POW issue." Regarding the al Qaida detainees at Guantanamo, Ms. Pearlstein noted her agreement that they were not entitled to POW status. They both argued at the hearing, however, that the POW issue was "irrelevant." They suggested that the interrogation-related protections for POWs and for detainees protected by Article 3 are the same.[vii] But that suggestion is wrong, as a comparison of Article 3 with Article 17, which governs interrogation of POWs, readily shows.

Article 17 prohibits *any penalties at all* for a detainee who refuses to answer a question:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.
>
> ***
>
> 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.*[viii]

I understand that U.S. military lawyers have traditionally interpreted Article 17 as meaning, for example, that an interrogator cannot tell a detainee: If you answer a question you'll be allowed to play soccer in the afternoon, but if you refuse you won't. That is, Article 17 prohibits even moderate, entirely humane pressure on POWs in interrogations. Article 3, on the other hand, has no such sweeping prohibition. It does *not* forbid penalties for detainees who refuse to answer questions. It does *not* forbid all

forms of interrogation pressure. What Article 3 prohibits is violent, cruel or inhumane treatment.

So there is a large practical difference between the interrogation-related restrictions applicable to a POW and those applicable under Article 3. A detainee with POW status could not be interrogated effectively unless he chose to cooperate with his interrogators entirely willingly. One has to suppose that such cooperation is highly unlikely for ideological extremists from al Qaida and other terrorist groups. Tough but humane interrogation under Article 3 has a better chance of producing important information – the kind that might allow U.S. officials to prevent additional terrorist attacks. Mr. Sands and Ms. Pearlstein misled the Subcommittee about the law when they dismissed the POW-status issue as "irrelevant" and denied the distinction between Article 17 and Article 3 protections.

It would require many more pages for me to highlight and correct all the errors, misquotations and distortions in Mr. Sands's writings and in his testimony regarding my views and work. This letter should suffice to show that Mr. Sands is a thoroughly unreliable commentator on the subject. As I have demonstrated, he has systematically misrepresented the facts. He makes false allegations without any reasonable basis. He cuts and pastes quotations in a grossly inaccurate way that amounts to flagrant misquotation. And when I called him on these errors at the July 15 hearing, he was unable to defend the points on which I challenged him. He dug himself deeper into falsehood by sweepingly asserting that our interview transcript supports what he wrote, though it does not.

It bears noting that Mr. Sands agreed at the beginning of our December 2006 interview (in the talk that preceded the start of the audio recording and the transcript) that he would check with me before he used any of my statements in his book. I said I wanted to ensure that my statements were formulated accurately and unambiguously. In a February 12, 2007 email to me, Mr. Sands reiterated our agreement:

> I am just beginning my writing up phase. Very grateful indeed for you giving me time. You were lucid and clear, provided terrific assistance. As agreed I will run any quotations by you.

But he did not show me the quotations before he published his book. Had he done so, I would have insisted he correct the misrepresentations. Evidently, he did not want to give me a chance to challenge his distortions before he published his book's sensational charges against me. He has never explained why he violated our agreement.

Some journalists and other commentators, apparently predisposed to agree with Mr. Sands's accusations, hold close-mindedly to the notion that the charges are true. So, when they write about the July 15 hearing, they describe my testimony as a "denial" of the accusations. But I did not simply deny them – I refuted them.

I am grateful to the Subcommittee for demanding that Mr. Sands release the transcript of my interview with him. Now that it is public, Mr. Sands has extraordinary brass in continuing to claim his book is accurate.[ix] In fact, the transcript makes plain that Mr. Sands twisted my words and misrepresented my position on Geneva and my work on detainee policy.

Mr. Sands seems to be calculating that no one will actually read the transcript with enough care to see that it exposes fundamental flaws in his book. It shows that Mr. Sands was, at best, careless or ignorant. Actually, the transcript strongly suggests that he was dishonest, a suggestion reinforced by (1) his unwillingness to admit his errors even after I listed a number of them, (2) his brazen claim that the transcript supports the accusations in his book, when it clearly reveals them as untrue, and (3) the violation of his promise, which he had confirmed in writing, to check the accuracy of his quotations with me before he published them.

I concluded my written testimony for the Subcommittee as follows:

> [Mr. Sands's] ill-informed attack on me is a pillar of the broader argument of his book. And that flawed book is a pillar of the argument that Bush administration officials despised the Geneva Convention and encouraged abuse and torture of detainees. Congress and the American people should know that this so-called "torture narrative" is built on sloppy research, misquotations and unsubstantiated allegations.

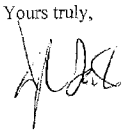
Any Subcommittee member – and anyone else – who reads the transcript of my interview with Mr. Sands and compares it to his book will plainly see Mr. Sands's lack of scholarship and the groundlessness of his allegations against me. Mr. Sands's work shows that the foundation of the "torture narrative" is not rigorously sifted evidence, but the determination of some critics of U.S. policy to preserve their antagonistic preconceptions despite the facts.

When Chairman Conyers invited me to testify, he cited the Sands book as a focus of attention. The Subcommittee's hearings – and the follow-up communications – have now clarified important errors in the Sands book and have shown that the book's accusations against me are untrue.

I respectfully urge the Subcommittee to acknowledge formally that Mr. Sands's testimony misrepresented my views and actions – and, in particular, was wrong in claiming that I opposed the use of Geneva Article 3 and that I opposed giving any Geneva protections to any of the Guantanamo detainees. I think the Subcommittee should help correct the record because your hearings gave widespread publicity to Mr. Sands's false allegation that I committed a war crime, an allegation that Mr. Sands grounded in the errors that are now finally exposed.

Kindly include this letter in the published record relating to the July 15 hearing.

Yours truly,



cc: Representative John Conyers
Representative Lamar Smith
Representative Trent Franks

NOTES

[i] Neither in his book nor in the transcript of our interview does Mr. Sands specify the date of our interview. My calendar shows it as December 6, 2006.

[ii] The Vanity Fair magazine's website published the transcript at http://www.vanityfair.com/politics/features/2008/07/feith_transcript200807.

[iii] In its entirety, Geneva Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following
> provisions:
>
> > (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> >
> > > (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> > > (b) taking of hostages;
> > > (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
> > > (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> >
> > (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[iv] Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008), p. 34.

[v] See the following examples from Sands, *Torture Team*:

p. 33-4: "none of the detainees could rely on Common Article 3"

p. 34: "The upshot was that no one at Guantanamo was entitled to protection under any of the rules reflected in Geneva."

p. 35: "I observed to Feith that his memo to the President and the Geneva Convention meant that its constraints on interrogation didn't apply to anyone at Guantanamo."

p. 36: "None of the detainees had any rights under the Geneva Conventions."

p. 66: "Beaver began her memo with 'the facts': none of the detainees were protected by Geneva..."

p. 66: "She [Beaver] was stuck with the President's decision on Geneva, which required her to proceed on the basis that Geneva provided no rights for the detainees."

p. 89: "That wasn't what the President decided. The actual decision distinguished between the Taliban – to whom Geneva applied, although detainees could not invoke rights under it – and al-Qaeda, to whom it didn't apply at all. This was Feith's confusing formulation. The effect was that no Guantanamo detainee could rely on Geneva, even its Common Article 3."

p. 98: "Doug Feith was Undersecretary of Defense for Policy and Haynes knew him well. They had agreed on the approach to Geneva – that it shouldn't be available to any Guantanamo detainees – now they could focus on interrogation techniques."

p. 99: "He [Feith] was happy to talk at length about the February moment and his triumph in ensuring that none of the detainees could rely on Geneva."

p. 214: "Doug Feith told me that Hayes had agreed on his approach to Geneva, that it shouldn't be available to any Guantanamo detainees."

[vi] See Philippe Sands letter to Chairman John Conyers, Jr. on "Hearing on Administration Lawyers and Administration Interrogation Rules, 15 July 2008," July 24, 2008, p. 2.

[vii] See, e.g., the following statement at the July 15, 2008 hearing by Deborah Pearlstein:

> The critical significance between declaring somebody a POW and declaring them any other detainee in U.S. custody is that a POW cannot be prosecuted for engaging in lawful acts of war. Our soldiers can't be criminally tried for engaging in lawful combat.
>
> It is not a distinction between the treatment of POWs and the treatment of anybody else that common Article 3 and a host of basic protections for the humane treatment of detainees apply. They apply to POWs. They apply equally to everybody else.
>
> There is nothing under law, in my judgment, to be gained, even if one believes that coercive interrogation is useful--and I believe it is not--*there is nothing to be gained under law by denying those POW protections. The same standards of treatment apply.*

See also the following statements at the July 15, 2008 hearing by Ms. Pearlstein and Mr. Sands:

> [Pearlstein:] [T]he designation of al Qaeda detainees as POWs or not is not the issue. I think it, in many respects, is correct, unlike with respect to the Taliban, that al Qaeda are not entitled to the full panoply of POW protections. Having said that, *it is irrelevant.* What they are entitled to, among other things, at a minimum is the protection of Common Article 3, a provision of law that would prohibit the set of techniques that we are discussing here today.
>
> [Sands:] *I think I would agree with that. The issue of POW status is a complete red herring. I don't think Mr. Feith and I are in disagreement about the POW issue.*
>
> ***
>
> I think Professor Pearlstein is absolutely correct, *the issue of POWs is of total irrelevance.*

Testimony of Deborah Pearlstein and Philippe Sands before the Subcommittee on the Constitution, Civil Rights and Civil Liberties, House Committee on the Judiciary, at hearings "From the Department of Justice to Guantanamo Bay: Administration Lawyers and Interrogation Rules, Part IV," July 15, 2008 (emphasis added), video available at: http://www.c-span.org/search.aspx?For=feith.

[viii] Article 17, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (emphasis added), available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[ix] See Philippe Sands letter to Chairman Conyers, July 24, 2008.

Appendix B

[July 2004?]

OUTLINE OF KEY ISSUES
FOR
HPSCI HEARING ON INTERROGATION OF DETAINEES

What are Policy's responsibilities in general for detainees and interrogations?

- DoD Program for Enemy Prisoners of War and other Detainees (DoD Directive 2310.1, 18 August 1994) (Tab B).
  - USD(P) has "primary staff responsibility" and ensures that ASD(ISA) "shall provide for overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed plans, policies, and new courses of action with the DoD Components and other Federal Departments and Agencies, as necessary."
    - NB: By memo of 17 January 2002, USD(P) transferred these responsibilities to ASD(SO/LIC) in regard to persons detained in association with the GWOT (Tab C).
  - **BUT**
    - SecArmy is DoD Executive Agent for administration of the Program (Tab B, 4.2).
    - Secretaries of Military Departments ensure appropriate training, and prompt reporting of suspected or alleged violations (4.3).
    - Combatant Commanders provide for proper treatment, classification, administrative processing and custody of detainees, and ensure prompt reporting of suspected or alleged violations (4.4).
    - CJCS reviews plans, policies and programs of Combatant Commanders to ensure conformance with the Directive (4.5).

- DoD Law of War Program (DoD Directive 5100.77, 9 December 1998) (Tab D).
  - USD(P) has "primary staff responsibility" and ensures that ASD(ISA) "shall provide for overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed policies and plans with the DoD Components and other Federal Departments and Agencies as necessary, and final coordination of DoD positions on international negotiations on the law of war and U.S. signature or ratification of law of war treaties."
  - **BUT**
    - Heads of DoD Components ensure that their members comply with law of war during all conflicts (Tab D, 5.3).
    - Secretaries of Military Departments ensure implementation of programs to prevent violations of laws of war (5.5).
    - SecArmy is Executive Agent for the SecDef for supervising investigation of reportable incidents (5.6).
    - CJCS issues and reviews plans, policies, directives and rules of engagement, ensuring their consistency with the law of war, and ensures that plans, policies, directives and rules of engagement issued by Combatant Commanders are consistent with the law of war (5.7).
    - Combatant Commanders institute programs to prevent violations of law of war and ensure prompt reporting of reportable incidents (5.8).

- SO/LIC and its special operations responsibilities.
  - Title 10 responsibilities: Principal duty is overall supervision (including policy and resources) of special operations and low intensity conflict activities (Tab E).

ASD for SO/LIC (DoD Directive 5111.10, 22 March 1995) (Tab F):

- Overseas implementation of policy for special operations.
- Overseas SO plans, programs and resources to ensure adherence to approved policy and planning guidance.
- Overseas DoD Component plans and policies for training and education in the law of war.
- **BUT**
  - Nothing in the Directive "shall be interpreted to interpose the ASD(SO/LIC) in the operational chain of command ..., or to subsume and replace the functions and responsibilities of" CJCS or Combatant Commanders prescribed by law or DoD guidance (Tab F, 5.4).

Questions for the Record Submitted by Ranking Member Trent Franks For the July 15, 2008 Constitution Subcommittee Hearing

Questions for Mr. Feith:

I understand Subcommittee Chairman Nadler was quoted by The Washington Independent on June 16, 2008 as saying: "The most revealing thing, from my perspective, [that Feith said] is that on the Category II issue, everyone says that Category II techniques are cruel and inhumane treatment," Nadler said. "But he said that done right, it isn't torture. How?" Do you have an answer to Chairman Nadler's question?

You cited more than half a dozen errors and distortions in Mr. Sands's book, Torture Team. Please provide page citations for the errors and distortions to which you were referring.

You have complained about Mr. Sands's misquotation of you. Please identify the misquotations.

Committee Chairman Conyers commented on the diffuse allocation of responsibilities within the Defense Department for detainee matters. Could you please set them forth for the record.

During the Subcommittee's July 15, 2008 hearing, I understood Professor Sands and Ms. Pearlstein to say that the scope of permissible interrogation techniques should be the same for POWs and the al-Qaeda and Taliban detainees in U.S. custody. Indicate, with explanation, whether you agree or disagree.

Questions for Ms. Pearlstein:

I understood you to say that you agree with the administration that al-Qaeda detainees are not entitled to POW status, am I correct? You also seem to have said that, by contrast, Taliban detainees are entitled to POW status, am I correct? If so, please explain your belief that the Taliban detainees are entitled to POW status under the Geneva Conventions.

Questions for Mr. Sands:

You indicated that you and Mr. Feith are not in disagreement about the POW issue. Am I to understand from that assertion that you agree that neither the al-Qaeda detainees nor the Taliban detainees qualify as POWs within the meaning of the Geneva Conventions?

You assert that the aggressive questioning of detainee 063 – Mohammed al-Qahtani – produced no information. Please tell us all of the bases for your belief in the truth of that assertion.

Questions for Mr. Sands and Ms. Pearlstein:

Is it your position that no interrogation pressures of any kind are permissible under common article 3 of the Geneva Conventions? Are all forms of pressure necessarily inhumane or a violation of personal dignity? If not, please indicate what forms of interrogation pressure or coercion you consider permissible under common article 3.

You appear to contend that all 15 of the interrogation techniques approved by Secretary Rumsfeld on December 2, 2002 violate common article 3 of the Geneva Conventions. If not, indicate which approved techniques are permissible under common article 3. Please indicate which, if any, techniques you contend constitutes torture and identify the definition of torture and supporting authorities on which you rely for your contention. For those technique that you contend only violate common article 3, please indicate the language of the provision that is violated by the provision and the supporting authorities you rely on for your position.

Deborah N. Pearlstein
Responses to Written Questions of Ranking Minority Member Franks
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
July 15, 2008

Administration Lawyers and Administration Interrogation Rules

Response to Question 1: Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War defines the term "prisoner of war" (POW) as someone "belonging to one of the following categories," including, for example, "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." The U.S. invasion of Afghanistan in 2001 initiated an international armed conflict within the meaning of this Convention to which the United States and Afghanistan, both Convention signatories, were party. The Taliban fielded the armed forces of Afghanistan at the time of the U.S. invasion. By the terms of the Convention, this fact alone is enough to establish Taliban soldiers' facial entitlement to POW status.

Despite this, the Bush Administration has argued, among other things, that because some Taliban soldiers were known to commit war crimes, no Taliban soldier was entitled to POW status.[1] This argument by the Administration – a blanket declaration that no individual member of the armed forces of a state party to the Geneva Convention would be afforded POW status – is without support in international law and, to my knowledge, without precedent in any major conflict in U.S. history since the Conventions were ratified. Indeed, despite the deplorable record of many of our past enemies in violating the law of war, the United States respected the POW status of German soldiers in World War II, the armed forces of North Korea in the Korean War, North Vietnamese forces in the Vietnam War, and the Iraqi military in the 1991 Gulf War.[2]

The determination as to whether an individual al Qaeda detainee is entitled to POW status is more complex. In addition to the definition of POW quoted above, Article 4 of the Convention also recognizes that individuals who meet the following criteria are entitled to POW protection: "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements,

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[1] Memorandum from Alberto Gonzales, White House Gen. Counsel, to President George W. Bush, Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at http://msnbc.com/modules/newsweek/pdf/gonzales_memo.pdf.
[2] *See* Jennifer Elsea, Treatment of Battlefield Detainees in the War on Terrorism, Congressional Research Service Report for Congress, RL31367, April 11, 2002, p. 29, available at http://www.nimj.org/documents/BattlefieldDetainees.pdf.

fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war." It is entirely possible, and indeed likely, that most Al Qaeda members detained in the Afghanistan conflict do not satisfy this definition. Yet because the Convention expressly provides a method for how states must resolve such status questions in circumstances where there is "any doubt," the United States was required to afford Afghan battlefield detainees a status hearing by a competent tribunal as set forth in Article 5 of the Third Geneva Convention. Under the Convention, until that tribunal determines in the individual case that the detainee is not entitled to POW status, the individual must be accorded the protections of the Third Geneva Convention.[3] It is my understanding that beginning in 2001, the Administration broadly failed to afford Article 5 hearings to individuals taken into U.S. custody in Afghanistan.

Response to Question 2: Chapter 8 of the U.S. Army Field Manual on Human Intelligence Collector Operations 2-22.3, issued September 2006, sets forth the U.S. Army's current doctrinal guidance, techniques, and procedures governing interrogation. This chapter, available at http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf, provides pages of instructions on techniques that are permitted, and techniques that are prohibited, in efforts to obtain intelligence information from individual subjects. In my view, this guidance is broadly in compliance with U.S. obligations under Common Article 3 of the Geneva Conventions requiring the humane treatment of all detainees – including that Article's prohibition against "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment."

Response to Question 3: Common Article 3 of the Geneva Conventions prohibits, inter alia, "violence to life and person, … torture, … [and] [o]utrages upon personal dignity, in particular, humiliating and degrading treatment." The following techniques, approved by Secretary Rumsfeld on December 2, 2002, appear to violate Common Article 3 of the Geneva Conventions: use of stress positions; use of mild, non-injurious physical contact for the purpose of obtaining information; permitting interviewer to identify himself as "an interrogator from a country with a reputation for harsh treatment of detainees"; use of prolonged isolation; deprivation of light and auditory stimuli; hooding during transportation and questioning; 20-hour interrogations; removal of all comfort items (including religious items); forced grooming; using detainees individual phobias (such as fear of dogs) to induce stress. The following techniques could violate Common Article 3 if used in ways that, under the cumulative circumstances of confinement, are aimed at humiliating and ridiculing detainees, or at causing serious physical or mental suffering: yelling at detainees; use of falsified documents or reports; interrogating detainee in an

[3] The Article 5 hearings contemplated by the Third Geneva Convention have been codified in military regulations since the 1960's. *See* U.S. Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," Dep't of the Army, ¶¶ 1-6 (1997).

environment other than the interrogation booth; switching detainee from hot rations to MREs.[4]

The term "torture" is defined in different ways by different instruments of law and government statements.[5] According to the authoritative ICRC Commentary to the Geneva Conventions, "torture" under Common Article 3 is "the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information."[6] Article I of the Convention Against Torture, to which the United States is also signatory, has defined "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, … or intimidating or coercing him or a third person, … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

International tribunals and treaty bodies, including the International Criminal Tribunal for the Former Yugoslavia and the Committee Against Torture, have recognized that certain acts are per se severe enough to constitute "torture" under these definitions. Such acts include mock executions, "exposure of detainees under interrogation to severe cold for extended periods, a combination of restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, threats, including death threats, violent shaking and using cold air to chill."[7] Beyond this, and as a general matter, whether a particular technique is "severe" enough to constitute "torture" under these standards depends on an assessment of all the circumstances of detention and treatment.[8]

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[4] These standards, and the international legal sources supporting them, are summarized in Cordula Droege, *The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 515 (2007).

[5] In U.S. State Department reports on other countries, prolonged isolation, sleep deprivation, forced standing, and blindfolding, for example, as all referred to as torture. *See, e.g.*, Dep't of State, 1999 Country Reports on Human Rights Practices: Jordan 2125 (2000); Dep't of State, 1999 Country Reports on Human Rights Practices: Iran (2000); Dep't of State, 1999 Country Reports on Human Rights Practices: Libya (1999); Dep't of State, 1999 Country Reports on Human Rights Practices: Tunisia (1999); Dep't of State, 2005 Country Reports on Human Rights Practices: Egypt (2006).

[6] Int'l Comm. Red Cross, Commentary on the Geneva Conventions of August 12, 1949, Vol. IV (1958).

[7] Droege, *supra*, note 4, at 529-30 (cataloguing sources).

[8] *See, e.g.*, NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 88 (2d ed. 1999); *see also* Selmouni v. France, 29 E.H.R.R. 403, ¶ 100 (1999); Aydin v. Turkey, 25 E.H.R.R. 251, ¶ 86 (1997).

Command's Responsibility

Detainee Deaths in U.S. Custody in Iraq and Afghanistan

Written by Hina Shamsi and Edited by Deborah Pearlstein
February 2006

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About Us

Human Rights First is a leading human rights advocacy organization based in New York City and Washington, DC. Since 1978, we have worked in the United States and abroad to create a secure and humane world – advancing justice, human dignity, and respect for the rule of law. All of our activities are supported by private contributions. We accept no government funds.

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Command's Responsibility documents a dozen brutal deaths as the result of the most horrific treatment. One such incident would be an isolated transgression; two would be a serious problem; a dozen of them is policy. The law of military justice has long recognized that military leaders are held responsible for the conduct of their troops. Yet this report also documents that no civilian official or officer above the rank of major responsible for interrogation and detention practices has been charged in connection with the torture or abuse-related death of a detainee in U.S. custody. And the highest punishment for anyone handed down in the case of a torture-related death has been five months in jail. This is not accountability as we know it in the United States.

John D. Hutson
Rear Admiral (Ret.), JAGC, USN

The torture and death catalogued in excruciating detail by this important Human Rights First report did not happen spontaneously. They are the consequence of a shocking breakdown of command discipline on the part of the Army's Officer Corps. It is very clear that cruel treatment of detainees became a common Army practice because generals and colonels and majors allowed it to occur, even encouraged it. What is unquestionably broken is the fundamental principle of command accountability, and that starts at the very top. The Army exists, not just to win America's wars, but to defend America's values. The policy and practice of torture without accountability has jeopardized both.

David R. Irvine
Brig. Gen. (Ret.) USA

I. Introduction

Do I believe that [abuse] may have hurt us in winning the hearts and minds of Muslims around the world? Yes, and I do regret that. But one of the ways we address that is to show the world that we don't just talk about Geneva, we enforce Geneva . . . . [T]hat's why you have these military court-martials; that's why you have these administrative penalties imposed upon those responsible because we want to find out what happened so it doesn't happen again. And if someone has done something wrong, they're going to be held accountable.

U.S. Attorney General Alberto Gonzales
Confirmation Hearings before the Senate Judiciary Committee
January 6, 2005

Basically [an August 30, 2003 memo] said that as far as they [senior commanders] knew there were no ROE [Rules of Engagement] for interrogations. They were still struggling with the definition for a detainee. It also said that commanders were tired of us taking casualties and they [told interrogators they] wanted the gloves to come off . . . . Other than a memo saying that they were to be considered "unprivileged combatants" we received no guidance from them [on the status of detainees].

Chief Warrant Officer Lewis Welshofer
Testifying during his Court Martial for Death of Iraqi General Abed Hamed Mowhoush
January 19, 2006

Since August 2002, nearly 100 detainees have died while in the hands of U.S. officials in the global "war on terror." According to the U.S. military's own classifications, 34 of these cases are suspected or confirmed homicides; Human Rights First has identified another 11 in which the facts suggest death as a result of physical abuse or harsh conditions of detention. In close to half the deaths Human Rights First surveyed, the cause of death remains officially undetermined or unannounced. Overall, eight people in U.S. custody were tortured to death.

Despite these numbers, four years since the first known death in U.S. custody, only 12 detainee deaths have resulted in punishment of any kind for any U.S. official. Of the 34 homicide cases so far identified by the military, investigators recommended criminal charges in fewer than two thirds, and charges were actually brought (based on decisions made by command) in less than half. While the CIA has been implicated in several deaths, not one CIA agent has faced a criminal charge. Crucially, among the worst cases in this list – those of detainees tortured to death – only half have resulted in punishment; the steepest sentence for anyone involved in a torture-related death: five months in jail.

It is difficult to assess the systemic adequacy of punishment when so few have been punished, and when the deliberations of juries and commanders are largely unknown. Nonetheless, two patterns clearly emerge: (1) because of investigative and evidentiary failures, accountability for wrongdoing has been limited at best, and almost non-existent for command; and (2)

commanders have played a key role in undermining chances for full accountability. In dozens of cases documented here, grossly inadequate reporting, investigation, and follow-through have left no one at all responsible for homicides and other unexplained deaths. Commanders have failed both to provide troops clear guidance, and to take crimes seriously by insisting on vigorous investigations. And command responsibility itself – the law that requires commanders to be held liable for the unlawful acts of their subordinates about which they knew or should have known – has been all but forgotten.

The failure to deal adequately with these cases has opened a serious accountability gap for the U.S. military and intelligence community, and has produced a credibility gap for the United States – between policies the leadership says it respects on paper, and behavior it actually allows in practice. As long as the accountability gap exists, there will be little incentive for military command to correct bad behavior, or for civilian leadership to adopt policies that follow the law. As long as that gap exists, the problem of torture and abuse will remain.

This report examines how cases of deaths in custody have been handled. It is about how and why this "accountability gap" between U.S. policy and practice has come to exist. And it is about why ensuring that officials up and down the chain of command bear responsibility for detainee mistreatment should be a top priority for the United States.

The Cases to Date

The cases behind these numbers have names and faces. This report describes more than 20 cases in detail, to illustrate both the failures in investigation and in accountability. Among the cases is that of Manadel al-Jamadi, whose death became public during the Abu Ghraib prisoner-abuse scandal when photographs depicting prison guards giving the thumbs-up over his body were released; to date, no U.S. military or intelligence official has been punished criminally in connection with Jamadi's death.

The cases also include that of Abed Hamed Mowhoush, a former Iraqi general beaten over days by U.S. Army, CIA and other non-military forces, stuffed into a sleeping bag, wrapped with electrical cord, and suffocated to death. In the recently concluded trial of a low-level military officer charged in Mowhoush's death, the officer received a written reprimand, a fine, and 60 days with his movements limited to his work, home, and church.

And they include cases like that of Nagem Sadoon Hatab, in which investigative failures have made accountability impossible. Hatab, a 52-year-old Iraqi, was killed while in U.S. custody at a holding camp close to Nasiriyah. Although a U.S. Army medical examiner found that Hatab had died of strangulation, the evidence that would have been required to secure accountability for his death – Hatab's body – was rendered unusable in court. Hatab's internal organs were left exposed on an airport tarmac for hours; in the blistering Baghdad heat, the organs were destroyed; the throat bone that would have supported the Army medical examiner's findings of strangulation was never found.

Although policing crimes in wartime is always challenging, government investigations into deaths in custody since 2002 have been unacceptable. The cases discussed in this report include incidents where deaths went unreported, witnesses were never interviewed, evidence was lost or mishandled, and record-keeping was scattershot. They also include investigations that were cut short as a result of decisions by commanders – who are given the authority to decide whether and to what extent to pursue an investigation – to rely on incomplete inquiries, or to discharge a suspect before an investigation can be completed. Given the extent of the non-reporting, under-reporting, and lax record keeping to date, it is likely that the statistics reported here, if anything, under-count the number of deaths.

Among our key findings:

- Commanders have failed to report deaths of detainees in the custody of their command, reported the deaths only after a period of days and sometimes weeks, or actively interfered in efforts to pursue investigations;
- Investigators have failed to interview key witnesses, collect useable evidence, or maintain evidence that could be used for any subsequent prosecution;
- Record keeping has been inadequate, further undermining chances for effective investigation or appropriate prosecution;
- Overlapping criminal and administrative investigations have compromised chances for accountability;
- Overbroad classification of information and other investigation restrictions have left CIA and Special Forces essentially immune from accountability;
- Agencies have failed to disclose critical information, including the cause or circumstance of death, in close to half the cases examined;
- Effective punishment has been too little and too late.

Closing the Accountability Gap

The military has taken some steps toward correcting the failings identified here. Under public pressure following the release of the Abu Ghraib photographs in 2004, the Army reopened over a dozen investigations into deaths in custody and conducted multiple investigation reviews; many of these identified serious flaws. The Defense Department also "clarified" some existing rules, reminding commanders that they were required to report "immediately" the death of a detainee to service criminal investigators, and barring release of a body without written authorization from the relevant investigation agency or the Armed Forces Medical Examiner. It also made the performance of an autopsy the norm, with exceptions made only by the Armed Forces Medical Examiner. And the Defense Department says that it is now providing pre-deployment training on the Geneva Conventions and rules of engagement to all new units to be stationed in Iraq and responsible for guarding and processing detainees.

But these reforms are only first steps. They have not addressed systemic flaws in the investigation of detainee deaths, or in the prosecution and punishment of those responsible for wrongdoing. Most important, they have not addressed the role of those leaders who have emerged as a pivotal part of the problem – military and civilian command. Commanders are the only line between troops in the field who need clear, usable rules, and policy-makers who have provided broad instructions since 2002 that have been at worst unlawful and at best unclear. Under today's military justice system, commanders also have broad discretion to insist that investigations into wrongdoing be pursued, and that charges, when appropriate, be brought. And commanders have a historic, legal, and ethical duty to take responsibility for the acts of their subordinates. As the U.S. Supreme Court has recognized since World War II, commanders are responsible for the acts of their subordinates if they knew or should have known unlawful activity was underway, and yet did nothing to correct or stop it. That doctrine of command responsibility has yet to be invoked in a single prosecution arising out of the "war on terror."

Closing this accountability gap will require, at a minimum, a zero-tolerance approach to commanders who fail to take steps to provide clear guidance, and who allow unlawful conduct to persist on their watch. Zero tolerance includes at least this:

First, the President, as Commander-in-Chief, should move immediately to fully implement the ban on cruel, inhuman and degrading treatment passed overwhelmingly by the U.S. Congress and signed into law on December 30, 2005. Full implementation requires that the President clarify his commitment to abide by the ban (which was called into question by the President's statement signing the bill into law). It also requires the President to instruct all relevant military and intelligence agencies involved in detention and interrogation operations to review and revise internal rules and legal guidance to make sure they are in line with the statutory mandate.

Second, the President, the U.S. military, and relevant intelligence agencies should take immediate steps to make clear that all acts of torture and abuse are taken seriously – not from the moment a crime becomes public, but from the moment the United States sends troops and agents into the field. The President should issue regular reminders to command that abuse will not be tolerated, and commanders should regularly give troops the same, serious message. Relevant agencies should welcome independent oversight – by Congress and the American people – by establishing a centralized, up-to-date, and publicly available collection of information about the status of investigations and prosecutions in torture and abuse cases (including trial transcripts, documents, and evidence presented), and all incidents of abuse. And the Defense and Justice Departments should move forward promptly with long-pending actions against those involved in cases of wrongful detainee death or abuse.

Third, the U.S. military should make good on the obligation of command responsibility by developing, in consultation with congressional, military justice, human rights, and other advisors, a public plan for holding all those who engage in wrongdoing accountable. Such a plan might include the implementation of a single, high-level convening authority across the service branches for allegations of detainee torture and abuse. Such a convening authority would review and make decisions about whom to hold responsible; bring uniformity, certainty, and more independent oversight to the process of discipline and punishment; and make punishing commanders themselves more likely.

Finally, Congress should at long last establish an independent, bipartisan commission to review the scope of U.S. detention and interrogation operations worldwide in the "war on terror." Such a commission could investigate and identify the systemic causes of failures that lead to torture, abuse, and wrongful death, and chart a detailed and specific path going forward to make sure those mistakes never happen again. The proposal for a commission has been endorsed by a wide range of distinguished Americans from Republican and Democratic members of Congress to former presidents to leaders in the U.S. military. We urge Congress to act without further delay.

This report underscores what a growing number of Americans have come to understand. As a distinguished group of retired generals and admirals put it in a September 2004 letter to the President: "Understanding what has gone wrong and what can be done to avoid systemic failure in the future is essential not only to ensure that those who may be responsible are held accountable for any wrongdoing, but also to ensure that the effectiveness of the U.S. military and intelligence operations is not compromised by an atmosphere of permissiveness, ambiguity, or confusion. This is fundamentally a command responsibility." It is the responsibility of American leadership.

II. Homicides: Death by Torture, Abuse or Force

An American soldier told us of our father's death. He said: "Your father died during the interrogation." So we thought maybe it was high blood pressure under personal stress. This would happen in American detention centers. People would die of high blood pressure. But afterwards the people who were imprisoned, detained with him said: "No. They would torture him and they assigned American soldiers to him especially for the torture. He died during the torture." . . . Honestly, my mother, after the case, after they brought my father dead, she entered a state we can say a coma or like a coma. She withdrew from life.

Hossam Mowoush (in translation)
Son of Iraqi Maj. Gen. Abed Hamed Mowhoush,
Killed in U.S. Custody November 26, 2003[1]

Of the close to 100 deaths in U.S. custody in the global "war on terror,"[2] at least a third were victims of homicide at the hands of one or more of their captors.[3] At least eight men, and as many as 12, were tortured to death.[4] The homicides also include deaths that the military initially classified as due to "natural causes," and deaths that the military continues to classify as "justified." This chapter briefly reviews the facts of some of these worst cases, and the consequences – or not – for those involved.

Definition of a Detainee

In this report, we include any death of a detainee under effective U.S. control as a "death in custody." We adopt the definition of "detainee" used by the U.S. Army Criminal Investigative Command (CID) – the Army's agency for investigating crimes committed by soldiers – "any person captured or otherwise detained by an armed force."[5] For the purposes of this report, we do not include people killed in the course of combat or as a result of injuries sustained during combat, or persons shot at checkpoints when it is alleged that they disobeyed orders to stop their vehicle. We do include prisoners in U.S. military detention centers, as well as those who have been killed while being interrogated in their homes, or shot at the point of their capture, after surrendering to U.S. troops. Once a person has been captured, the U.S. military or intelligence agency assumes control over him, and can restrain him against his will. It is under these circumstances that American law and values are most acutely tested.

PROFILE: HOMICIDE

So then the interrogator came that used to interrogate [me] in the Baghdadi jail. . . . He told me: "We are going to let you see your father." Of course this was a point of relief. [Mohammed was taken by U.S. forces to the facility where his father was held, the "Blacksmith Hotel."]. . . . They took me to my father's room. He was under very tight security. I looked in and I saw him. He looked completely drained and distraught and the impacts or signs of the torture were clear on him. His clothes were old and torn. He was really upset. When I first saw him I was overwhelmed and had a breakdown. I started crying and I embraced him and I told him: "Don't worry. I am brave. I am going to be able to handle these circumstances like you taught me." At this instant the interrogator stormed in. He grabbed me and I tried to remain seated . . . . So he threatened my father that if he didn't speak he would turn me over to the men who interrogated my father and do to me what they did to him or he would have me killed in an execution operation . . . . So they took me to him and they said: "This is your son, we are going to execute him if you don't confess." My father didn't confess. One of them pulled me to a place where my father couldn't see. He pulled his gun, he took it out of the place where it was kept and he shot a fire into the sky. And he hit me a hit so that I would cry out. So, this moment there was at the place where I was, blood, I mean drops of blood. They [then] took [me] to the side and they brought my father and said: "This is your son's blood. We killed him. So, it is better for you to confess lest this happen to the rest of your sons." My father, when he saw the blood, he must have thought that I had been killed. At this moment, he fell to the ground.

Mohammed Mowoush (in translation), describing his last sight of his father, Iraqi Maj. Gen. Abed Hamed Mowhoush. Killed in U.S. Custody November 26, 2003[6]

Major General Abed Hamed Mowhoush with a grandson

Abed Hamed Mowhoush

Abed Hamed Mowhoush turned himself over to U.S. forces in Iraq on November 10, 2003,[7] about a month before U.S. forces captured ousted Iraqi leader Saddam Hussein, and at a time when pressure on Army intelligence to produce information was at its height. At Forward Operating Base ("FOB") Tiger, where Mowhoush appeared, the U.S. Army had set up a base camp and prison operations earlier in the year; the facility was near the town of Al Qaim at the western edge of Anbar province, about a mile from the Syrian border.[8] By mid-October 2003, FOB Tiger was staffed with about 1,000 soldiers from the 1st Squadron of the 3rd Armored Cavalry Regiment ("ACR"), based in Fort Carson, Colorado Springs, Colorado.[9] Their mission included the detention and interrogation of captured prisoners, a mission that took on added importance that November, as U.S. forces picked up Iraqi men and boys in the region in an effort to quell a rising insurgency.

According to Chief Warrant Officer Lewis Welshofer, who was deployed to Iraq in March 2003 as part of the military intelligence company of the 3rd ACR,[10] guidelines on how to conduct prisoner interrogations at FOB Tiger were sparse.[11] Welshofer described a captain's memo he had received in late August 2003, which stated that there were no specific rules of engagement for interrogations in Iraq, and that U.S. Army Central Command officials were still struggling with the basic definition of a "detainee."[12] Although specific rules were hard to come by, command was clear that intelligence to date was inadequate and, as Welshofer put it: "[t]hey were looking for ideas outside the box."[13] In the meantime, captured detainees were to be considered "unprivileged

combatants"[14] – a status that the Bush Administration had separately suggested meant detainees were not to be afforded the protections of the Geneva Conventions.[15] Welshofer understood this guidance to include detainees like Mowhoush,[16] a former uniformed Major General in the Iraqi Army,[17] and a soldier whom in past conflicts the United States would have considered presumptively under Geneva protections.[18]

Soon after, a September 10, 2003 memo from Lt. Gen. Ricardo S. Sanchez, then U.S. Army Commander of the Coalition Joint Task Force in Iraq, underscored with new specificity the confusion over the applicability of Geneva protections in Iraq.[19] Even as he recognized that other countries might view certain practices as inconsistent with the Geneva Conventions, General Sanchez authorized such harsh interrogation techniques as sleep and environmental manipulation, the use of aggressive dogs, and the use of stress positions.[20] Welshofer testified later that the meaning of "stress positions" had never been explained in his Army training back in the States;[21] Welshofer was left largely to his own devices to fill in the meaning of the term. According to Welshofer, the Sanchez memo (disclosed publicly for the first time in January 2006) was the only guidance on permissible interrogation techniques in Iraq he ever received.[22]

The Interrogations

By the time Mowhoush, 57, arrived at FOB Tiger in mid-November, his four sons had been in U.S. custody for approximately 11 days, held in a prison outside Baghdad.[23] According to one of them, Hossam, U.S. forces made clear to the sons in the course of interrogations that they had been arrested for the purpose of making sure General Mowhoush turned himself in.[24] According to the son, Mowhoush arrived at the base expecting that he would be able to set his sons free.[25] But Mowhoush's sons remained in detention; one of them would later play a part in U.S. efforts to extract from their father what information they could.

Chief Welshofer was among the first interrogators Mowhoush would see. According to Welshofer, his interrogation of Mowhoush on the day of Mowhoush's arrival on November 10 was limited to direct questions – a two-hour affair that passed with little of consequence.[26] By the end of that week, though, Welshofer had begun to take a different approach. Welshofer took Mowhoush, his hands bound, before an audience of fellow detainees and slapped him – an attempt, according to Welshofer, to show Mowhoush who was in charge.[27]

Still unsatisfied with Mowhoush's answers in interrogation, Welshofer's unit brought Mowhoush with them when they moved a few days later from FOB Tiger to a converted railroad station called the Blacksmith Hotel.[28] The "Hotel" was a makeshift facility, set up to handle an influx of Iraqi prisoners anticipated from sweeps intended to stop the growing insurgency.[29] There, on November 24, Welshofer called in interrogation reinforcements.[30] According to military documents and trial testimony, Welshofer engaged CIA and possibly Army Special Forces personnel – together with a "Scorpion" team of Iraqi paramilitary forces on the CIA payroll – to ratchet up the pressure.[31] Three separate soldiers eventually recounted what they saw and heard.[32] The new team beat Mowhoush with sledgehammer handles;[33] as one soldier testified, eight to ten of the non-military forces "interrogate[d] Mowhoush and 'beat the crap' out of him."[34] Specialist Jerry Loper, a guard at the Blacksmith Hotel, was standing outside the interrogation room the night of November 24 when some of the beatings were going on, and described hearing the thudding sound of Mowhoush being hit. "It wasn't like they were hitting a wall," said Loper, "[t]here were loud screams."[35] After Mowhoush's death, an Army autopsy revealed the effects of the beatings: Mowhoush had "massive" bruising and five broken ribs.[36]

The next day, Welshofer interrogated Mowhoush again, this time on the roof of the interrogation building. Here, in the absence of any more specific instructions for interrogation techniques, Welshofer reached back beyond his basic training in the Army, to his own service as a trainer at a military school in Hawaii where U.S. service members are coached on what they might face if there were to fall into enemy hands.[37] The military's "SERE" courses (standing for Survival, Evasion, Resistance, Escape) were based on studies of North Korean and Vietnamese efforts to break American prisoners; the courses aimed to subject trainees to the brutal detention conditions they would have faced at the hands of the United States' former enemies.[38] Among other things, the courses put troops through prolonged isolation, sleep deprivation, and painful body positions; studies of the effects on troops subjected to these techniques showed most suffering from overwhelming stress, despair, and intense anxiety, and some from hallucinations and delusions as well.[39] Internal FBI memos and press reports have pointed to SERE training as the basis for some of the harshest techniques authorized for use on detainees by the Pentagon in 2002 and 2003.[40] When Welshofer was asked during his court martial whether anyone told him

that SERE techniques were not to be used in Iraq, Welshofer was unequivocal: "No sir."[41]

With these techniques in his interrogator's mind, Mowhoush's next session included having his hands bound, being struck repeatedly on the back of his arms, in the painful spot near the humerus, and being doused with water[42] – all these, according to Welshofer and others who later testified, drawn from the lessons of techniques learned in SERE.[43] Later that evening, Chief Welshofer arranged for a short meeting between Mowhoush and his youngest son, Mohammed, then 15 years old; Welshofer hoped the meeting would compel Mowhoush to convey more useful information. [44] He later described Mowhoush as being moved to tears upon seeing his son.[45] According to Mohammed though, the meeting was more than a conversation; in interviews with Human Rights First, Mohammed explained that U.S. personnel made Mowhoush believe his son would be executed if he did not speak to their satisfaction, and soldiers fired a bullet into the ground near Mohammed's head within earshot but just beyond the eyesight of Mowhoush.[46] Mohammed reports this was the last time he saw his father alive.[47]

By November 26, Welshofer was ready to try yet another technique – stuffing his subject into a sleeping bag until Mowhoush was prepared to respond.[48] Welshofer had already proposed the sleeping bag technique to his Company Commander, Major Jessica Voss, who authorized its use.[49] Much later, trial testimony would make clear that the technique had been used on at least 12 detainees.[50] It proved catastrophically ineffective in Mowhoush's case. During his final interrogation, Mowhoush was shoved head-first into the sleeping bag, wrapped with electrical cord, and rolled from his stomach to his back. Welshofer sat on Mowhoush's chest and blocked his nose and mouth.[51] At one point, according to Loper, Mowhoush started to clinch and kick his legs, "almost like he was being electrocuted."[52] It was at this point Mowhoush gave out, dying (according to the autopsy report) of asphyxia due to smothering and chest compression.[53]

The day after his death, the U.S. military issued a press release stating that Mowhoush had died of natural causes.[54]

Taking Account

Despite the brutality of Mowhoush's death, and the likely involvement of officials from the CIA, only one individual, Chief Welshofer, has faced court martial for his actions. Over the course of a 6-day trial in Colorado, more than two years after Mowhoush's final interrogation, a 6-member Army jury heard testimony that civilian leaders in the Administration had instructed that Geneva Convention protections against cruel and inhuman treatment would not apply in this conflict; that the U.S. commanding general in Iraq, General Sanchez, had authorized "stress positions" in interrogation[55]; and that, according to Welshofer and his own commanding officer, Major Voss, stuffing a detainee in a sleeping bag was widely understood to fall within that general authorization.[56] Jurors also heard testimony, some closed to the public, of the involvement of the CIA and Special Forces, as well as of the Iraqi paramilitary group, the "Scorpions."[57] Secret Army documents had long noted this involvement: "[T]he circumstances surrounding the death are further complicated due to Mowhoush being interrogated and reportedly beaten by members of a Special Forces team and other government agency (OGA) employees two days earlier."[58] And jurors heard Welshofer's own tearful testimony – that he was trying to be a loyal soldier, and trying to do his job.[59]

Although he was originally charged with murder, Welshofer was convicted of lesser charges: negligent homicide and negligent dereliction of duty.[60] That conviction carried a possible sentence of more than three years in prison, but Welshofer received a far more lenient sentence from the Army jury: a written reprimand, a $6,000 fine, and 60 days with movement restricted to his home, base, and church.[61]

The others implicated in Mowhoush's death have faced less. Chief Warrant Officer Jefferson Williams and Specialist Jerry Loper, who were present during Mowhoush's interrogation, were originally charged with murder, but the charges were later dropped. In exchange for testimony against Welshofer, Williams will receive administrative (not criminal) punishment, and Loper will be tried in a summary proceeding rather than a full court martial.[62] Another soldier, Sgt. 1st Class William Sommer, had his murder charge dropped as well and may receive nonjudicial punishment.[63] No charges have been brought (nor are charges expected to be brought according to law enforcement and intelligence officials) against CIA personnel, and Special Forces Command determined (without public explanation) that none of their personnel were guilty of wrongdoing.[64] Major Voss, the officer who commanded

the Military Intelligence unit responsible for interrogating Mowhoush, was reprimanded for her failure to provide adequate supervision, but she was not charged in the death.[65] The commander of the 3rd ACR from 2002-2004 (including the period of Mowhoush's death) was Colonel David A. Teeples.[66] At a preliminary hearing in Welshofer's case, Teeples testified to his belief that the sleeping bag technique was approved and effective;[67] Teeples was reportedly "reluctant" to press charges against Welshofer, despite the view of military lawyers that Welshofer should be prosecuted.[68] Teeples does not appear to have been disciplined in connection with Mowhoush's death.

Special Forces & the CIA

The involvement of special military forces and members of other governmental agencies in the interrogation and detention of detainees has raised serious concerns regarding proper investigative proceduras and accountability. The Army's CID has jurisdiction over crimes committed by all U.S. Army personnel; CID's Field Investigative Units are trained to conduct investigations that implicate classified activities,[69] and individual detachments have investigated deaths in which Special Forces personnel played a part.[70] Yet it appears that alternative investigative procedures have sometimes been used where Special Forces were involved. For example, in one case involving the 2nd Battalion of the 5th Special Forces Group, commanders conducted their own investigation and failed to inform CID of the death.[71] When CID did learn of the incident, it simply reviewed and approved the pre-existing inquiry – an inquiry that itself remains classified.[72] Brigadier General Richard Formica completed an investigation into allegations of detainee abuse in Iraq by Special Forces personnel, but the Army has also classified the resulting report, refusing to release even a summary of its findings.[73]

Deaths in which the CIA has been implicated (alone or jointly with Army Special Forces or Navy SEALS) have presented additional problems.[74] Such deaths are required to be investigated by the CIA Inspector General and, if cause exists, referred to the Department of Justice for prosecution.[75] Yet while five of the deaths in custody analyzed by Human Rights First appear to involve the CIA,[76] only a contract worker associated with the CIA has to date faced criminal charges for his role in the death of detainees. Further, the CIA has sought to keep closed the courts-martial of Army personnel where CIA officers may be implicated,[77] and has in military autopsies classified the circumstances of the death.[78] These efforts have encumbered the investigation and prosecution of both CIA officials and military personnel.[79] Thus, for example, in the military trial of Navy SEAL Lt. Andrew Ledford, charged in connection with the death of detainee Manadel al-Jamadi, CIA representatives protested questions regarding the position of al-Jamadi's body when he died, and the role of water in al-Jamadi's interrogation; questions by defense lawyers were often prohibited as a result.[80] Finally, press reports suggest, the Department of Justice is unlikely to bring criminal charges against CIA employees for cases involving the death, torture, or other abuse of detainees, including the deaths of al-Jamadi and General Abed Hamed Mowhoush and a detainee whose name has not been made public and who died of hypothermia at a CIA-run detention center in Afghanistan.[81] The Department of Justice has not made the reasons for its decisions known.

Reports of internal efforts at the CIA to address detainee abuse by agents are less than encouraging. After completing a raview in spring 2004 of CIA detention and interrogation procedures in Afghanistan and Iraq, the CIA Inspector General made 10 recommendations for changes, including more safeguards against abuse, to CIA Director Porter Goss.[82] Eight of the 10 have been "accepted,"[83] but the changes did not apparently prevent consideration of a proposal for handling deaths of detainees in CIA custody. According to the *Washington Post*: "One proposal circulating among mid-level officers calls for rushing in a CIA pathologist to perform an autopsy and then quickly burning the body."[84]

PROFILE: HOMICIDE

Abdul Jameel

Lieutenant Colonel Abdul Jameel, a former officer in the Iraqi army, was detained at a Forward Operating Base near Al Asad, Iraq, and died there on January 9, 2004.[85] He was 47 years old.[86]

According to Pentagon documents obtained by the *Denver Post,* Jameel had been kept in isolation with his arms chained to a pipe in the ceiling.[87] During an interrogation by Army Special Forces soldiers, he allegedly lunged and grabbed the shirt of one soldier and was then beaten.[88] Three days later, Jameel escaped from his cell, but was recaptured.[89] During a subsequent interrogation session, Jameel refused his interrogators' orders to stay quiet, and was put in a "stress position": he was tied by his hands to the top of his cell door, then gagged.[90] Within five minutes, he was dead.[91] A "senior Army legal official" admitted that Jameel had been "lifted to his feet by a baton held to his throat," causing a throat injury that "contributed" to his death.[92]

According to an autopsy conducted by the U.S. Armed Forces Medical Examiner's Office and reviewed by Human Rights First, Jameel's death was a homicide caused by "Blunt Force Injuries and Asphyxia"[93] – a lack of oxygen.[94] The autopsy found "[t]he severe blunt force injuries, the hanging position, and the obstruction of the oral cavity with a gag contributed to [his] death."[95] The autopsy detailed evidence of additional abuse Jameel suffered: a fractured and bleeding throat, more than a dozen fractured ribs, internal bleeding, and numerous lacerations and contusions all over his body.[96]

Among the findings of the Army's criminal investigators was that Jameel "was shackled to the top of a door-frame with a gag in his mouth at the time he lost consciousness and became pulseless."[97] Criminal investigators found probable cause to recommend prosecution of 11 soldiers – including members of the 3rd Armored Cavalry Regiment (the same Regiment involved in the death of Iraqi Major General Mow-houshi), as well as the Special Forces personnel – for charges including negligent homicide, assault, and lying to investigators.[98] The investigation into Jameel's death also examined CIA involvement.[99] The Army Special Forces Command declined to follow the recommendations, and investigation findings of any CIA involvement have not been publicly released.[100] Upon reviewing the case, Army commanders decided that the soldiers' actions were at all points a lawful response to Jameel's "misconduct."[101] The reasons for the commanders' decisions are unclear. The same person, Colonel David A. Teeples, was commander of the 3rd Armored Cavalry at the time of Jameel's death and also that of Iraqi Major General Abed Mowoush.[102] Because the killing was found to be justified, no disciplinary action was taken.[103]

PROFILE: HOMICIDE

Fashad Mohammed

The Armed Forces Medical Examiner's report on autopsy number ME 04-309 reads: "This approximately 27 year-old male civilian, presumed Iraqi national, died in US custody approximately 72 hours after being apprehended. By report, physical force was required during his initial apprehension during a raid. During his confinement, he was hooded, sleep deprived, and subjected to hot and cold environmental conditions, including the use of cold water on his body and hood."[104] Although the autopsy described "multiple minor injuries, abrasions and contusions" and "blunt force trauma and positional asphyxia,"[105] it found both the cause of death and manner of death "undeter-mined."[106]

The autopsy, which was not conducted until three weeks after Mohammed's death,[107] is a drier version of accounts pieced together in subsequent inquiries.

Mohammed was apparently apprehended by members of Navy SEAL Team 7, which was operating with the CIA, in northern Iraq on or about April 2, 2004.[108] The SEALS then brought Mohammed to an Army base outside Mosul.[109] The Navy SEALS who interrogated Mohammed subjected him to hooding, sleep deprivation, and exposure to extreme temperatures—all methods that deviate from the techniques described in the Army Field Manual on Intelligence Interrogation FM 34-52, but that were approved by the Secretary of Defense for use at Guantanamo,[110] and later authorized in part by Lt. Gen. Ricardo S. Sanchez for use in Iraq.[111] A Pentagon official relates that after an interrogation, the SEALS let Mohammed sleep. He never woke up.[112]

We know very little about Mohammed's last hours and the military has released even less information about its investigation into his death and charges brought against those responsible. The most recent press reports indicate that as many as three Navy SEALS were charged with abusing Mohammed; charges included assault with intent to cause death and serious bodily harm, assault with a dangerous weapon, maltreatment of detainees, obstruction of justice, and dereliction of duty. Murder or manslaughter charges were not brought, reportedly because of lack of evidence.[113] Human Rights First asked the Department of Defense on January 26, 2006 for an update on the status and outcome of any prosecutions in Mohammed's case; as of February 10, 2006 we had received no response.

PROFILE: HOMICIDE

Asphyxia is what he died from – as in a crucifixion.

Dr. Michael Baden, Chief Forensic Pathologist, New York State Police, giving his opinion of the cause of Manadel al-Jamadi's death[114]

Charles Graner next to the corpse of Manadel al-Jamadi

Manadel al-Jamadi

According to press accounts, Manadel al-Jamadi, an Iraqi citizen of unknown age, was captured and tortured to death in Abu Ghraib by Navy SEALS and CIA personnel working closely together; he died on November 4, 2003.[115] The SEAL and CIA team that captured al-Jamadi took turns punching, kicking and striking him with their rifles after he was detained in a small area in the Navy camp at Baghdad International Airport known as the "Romper Room."[116] A CIA security guard later told CIA investigators that after al-Jamadi was stripped and doused with water a CIA interrogator threatened him, saying: "I'm going to barbecue you if you don't tell me the information."[117] A Navy SEAL reported that the CIA interrogator leaned into al-Jamadi's chest with his forearm, and found a pressure point, causing al-Jamadi to moan in pain.[118] A government report states that another CIA security guard "recalled al-Jamadi saying, 'I'm dying. I'm dying,' translated by the interpreter, to which the interrogator replied, 'I don't care,' and, 'You'll be wishing you were dying.'"[119]

When al-Jamadi was taken to Abu Ghraib, he was not entered on the prison rolls – he was a "ghost" detainee.[120] The intelligence agents took him to the shower room where, military police testified, a non-covert CIA interrogator (identified as Mark Swanner by *The New Yorker*) ordered them to shackle al-Jamadi to a window about five feet from the floor, in a posture known as the "Palestinian hanging," making it impossible for him to kneel or sit without hanging from his arms in pain.[121] Less than one hour later, Swanner summoned guards to re-position al-Jamadi, claiming the detainee was not cooperating.[122] When the guards arrived they found al-Jamadi's corpse, hooded with a sandbag and with his arms handcuffed behind his back and still shackled to the window – which was now above his head.[123] According to one of the guards, blood gushed from al-Jamadi's mouth as the guards released him and his arms were almost coming out of their sockets.[124] A CIA supervisor requested that al-

Jamadi's body be held overnight and stated that he would call Washington about the incident.[125] The next morning the "body was removed from Abu Ghraib on a litter, to make it appear as if he were only ill, so as not to draw the attention of the Iraqi guards and detainees."[126] Al-Jamadi's death became public during the Abu Ghraib prisoner-abuse scandal, after photographs of prison guards giving the thumbs-up over his body were released.[127]

U.S. forces did not release al-Jamadi's body to the International Committee of the Red Cross ("ICRC") until February 11, 2004, more than three months after his death.[128] The ICRC delivered the body to Baghdad's mortuary the same day, but one expert from Baghdad's main forensic medico-legal institute said that the refrigeration of al-Jamadi's body for that period made it difficult for the Iraqis to establish the real cause of death by autopsy.[129] An autopsy conducted by the U.S. military five days after al-Jamadi's death had found that the cause of death was "Blunt Force Injuries Complicated by Compromised Respiration."[130] The autopsy report noted al-Jamadi had six broken ribs and a gunshot wound to the spleen.[131] A medical examiner who later examined the autopsy report at the request of a lawyer for one of the SEALS and was informed of al-Jamadi's shackling position gave the opinion that the likely cause of his death was the hanging position, rather than beatings inflicted prior to his arrival at Abu Ghraib.[132] According to Dr. Michael Baden, New York State police chief forensic pathologist, "asphyxia is what he died from – as in a crucifixion."[133] Dr. Edmund Donahue, the president of the American Academy of Forensic Scientists, who reviewed the autopsy at the request of National Public Radio, gave a similar opinion, saying: "When you combine [the hanging position] with having a hood over your head and having the broken ribs, it's fairly clear that this death was caused by asphyxia because he couldn't breathe properly."[134]

During a later court martial proceeding, one Navy SEAL testified that he and his fellow SEALS were not trained to deal with Iraqi prisoners.[135] Although Navy lawyers testified they trained the SEALS to treat detainees humanely, one SEAL stated: "The briefing I remember is that these [prisoners] did not fall under the Geneva Convention because they were not enemy combatants."[136]

Of the 10 Navy personnel – 9 SEALS and one sailor – accused by Navy prosecutors of being involved in al-Jamadi's death,[137] nine were given nonjudicial punishment.[138] In contrast to a general court martial, which is a criminal felony conviction, nonjudicial or administrative punishment is usually imposed by an accused's commanding officer for minor disciplinary offenses, and does not include significant jail time.[139] The only person formally prosecuted in the case was Navy SEAL Lieutenant Andrew K. Ledford, the commander of the SEAL platoon, who was charged with dereliction of duty, assault, making a false statement to investigators, and conduct unbecoming an officer.[140] At court-martial, Ledford was acquitted of all charges.[141] The decision whether to prosecute CIA personnel for possible wrongdoing is pending,[142] but government officials have indicated that charges are unlikely to be brought.[143] The interrogator, Mark Swanner, continues to work for the CIA.[144] To date, no U.S. official has been punished criminally in connection with al-Jamadi's death. Human Rights First asked the Department of Defense on January 26, 2006 the status of the al-Jamadi case; as of February 10, we had received no response.

PROFILE: HOMICIDE

Nagem Sadoon Hatab

Nagem Sadoon Hatab, a 52-year-old Iraqi, was killed in U.S. custody at a Marine-run temporary holding camp close to Nasiriyah.[145] Soon after his arrival at the camp in June 2003, a number of Marines beat Hatab,[146] including allegedly "karate-kicking" him while he stood handcuffed and hooded.[147] A day later, Hatab reportedly developed severe diarrhea, and was covered in feces.[148] Once U.S. forces discovered his condition, Hatab was stripped and examined by a medic, who thought that Hatab might be faking sickness.[149] At the base commander's order, a clerk with no training in handling prisoners dragged Hatab by his neck to an outdoor holding area, to make room for a new prisoner.[150]

The clerk later testified to the ease with which he was able to drag the prisoner: Hatab's body, covered by sweat and his own feces, slid over the sand.[151] Hatab was then left on the ground, uncovered and exposed in the heat of the sun. He was found dead sometime after

midnight.[152] A U.S. Army medical examiner's autopsy of Hatab found that he had died of strangulation – a victim of homicide.[153] The autopsy also found that six of Hatab's ribs were broken and his back, buttocks, legs and knees covered with bruises.[154]

The guards at the detention center to which Hatab had been brought were ill-prepared for their duty at best. The previous commander of the facility, Major William Vickers, would later testify that none of the approximately 30 Marines at the camp had been trained to run a jail before their assignment: "Not then or even after."[155] Most were reservists and according to Major Vickers' testimony, the Marines, members of the 2nd Battalion, 25th Marine Regiment, were assigned to the guard role after Army and other Marine units refused it.[156] The base commander at the time, Major Clarke Paulus, had been in that position for a week before Hatab's death, and had spent only a day observing the prison operations before taking command.[157] His predecessor, Major Vickers, added that the camp had originally been designated a temporary holding facility, where Marines would interrogate prisoners for a day or two before their release or transfer.[158] Instead, prisoners were kept for longer, resulting in overcrowding and a strain on guards.[159]

The treatment of Hatab's body did not improve after his death. A Navy surgeon, Dr. Ray Santos, testified that when Hatab's body arrived at the morgue: "It kept slipping from my hands so I did drop it several times."[160] The U.S. Army Medical Examiner, Colonel Kathleen Ingwersen, who performed the autopsy, reportedly acknowledged that Hatab's body had undergone decomposition because it was stored in an unrefrigerated drawer before the autopsy.[161] In fact, testimony at a later court martial indicated that a container of Hatab's internal organs was left exposed on an airport tarmac for hours; in the blistering Iraqi heat, the organs were destroyed.[162] Hatab's ribcage and part of his larynx were later found in medical labs in Washington, D.C. and Germany, due to what the Medical Examiner, Colonel Ingwersen, described as a "miscommunication" with her assistant.[163] Hatab's hyoid bone – a U-shaped throat bone located at the base of the tongue[164] – was never found,[165] and Colonel Ingwersen testified that she couldn't recall whether she removed the bone from the body during the autopsy or not.[166] The bone was a key piece of evidence, because it supported the Army Medical Examiner's finding that Hatab died of strangulation.[167]

Although eight Marines were initially charged in the case, only two were actually court-martialed.[168] Major Paulus, who ordered Hatab dragged by his neck and permitted him to lie untreated in the sun, was originally charged with a number of offenses, including negligent homicide, while Sergeant Gary P. Pittman was charged with five counts of assault for beating prisoners (including Hatab) and two counts of dereliction of duty.[169] Neither was sentenced to any prison time, however, in part because of the lax handling of the medical evidence.[170] The judge in the court martial proceedings, Colonel Robert Chester, ruled that the autopsy findings and other medical evidence – evidence which was also Hatab's remains – could not be considered, because it had been lost or destroyed and thus could not be examined by the defense.[171] The judge's decision eliminated the possibility that prosecutors could win conviction on the most serious charges they had brought. In addition, at Sergeant Pittman's court martial, prosecutors acknowledged that the military had either lost or destroyed photos of Hatab being interrogated in the days before his death.[172]

As a result, prosecutors were unable to win conviction on any charges relating to culpability for Hatab's death: Paulus was convicted of dereliction of duty and maltreatment for ordering a subordinate to drag Hatab by the neck, and for allowing Hatab to remain unmonitored in the sun.[173] Sergeant Pittman was acquitted of abusing Hatab, though he was sentenced for assaulting other detainees.[174] Charges against Lance Corporal Christian Hernandez (who dragged Hatab by the neck), including negligent homicide, were dropped, and the cases against the other Marines similarly did not proceed to trial.[175] One Marine, William Roy, accepted a reduction in rank from a lance corporal to a private first class in exchange for his testimony. But because the demotion was a non-judicial punishment, and the basis for it is not public, the precise contours of his culpability remain unclear.[176]

PROFILE: HOMICIDE

Abdul Wali

On June 18, 2003, Abdul Wali turned himself in to soldiers at an Army firebase in Asadabad, Afghanistan, after he learned they were looking for him.[177] The son of the governor of the province where the base is located accompanied Wali and initially acted as his interpreter during interrogation.[178] According to this interpreter, the U.S. interrogator was so aggressive in questioning Wali that the interpreter left in disgust.[179] Three days later, on June 21, Wali was dead.[180]

The man who interrogated Abdul Wali was not a soldier; David Passaro was a former Army Ranger who had been hired as a civilian contractor by the CIA.[181] Reportedly convinced that Wali had information about weapons that would be used to attack U.S. personnel, Passaro questioned Wali on June 19 and 20.[182] At each of these sessions, the U.S. government alleges, Passaro beat Wali, both with his hands and with a flashlight.[183] According to prosecutors, Passaro kicked Wali in the groin "on at least one occasion."[184] Wali, who apparently suffered from poor health, did not survive to see a third such interrogation.[185]

Army criminal investigators looked into Wali's death, found that no Army personnel were implicated and referred the case to the Department of Justice for possible prosecution of Passaro.[186] In June 2004, a federal grand jury in the Eastern District of North Carolina indicted Passaro on four counts of assault.[187] As of February 2006, the case against Passaro was moving toward trial, with the government and defense engaged in arguments about the defenses that would be allowed, and which witnesses would testify in the proceedings.[188] According to his lawyer, Passaro's position at trial will be that abusive questioning techniques were not criminal because they were consistent with authorized interrogation policies, and that his actions were legally justified under a series of Executive Branch memos that appear to permit aggressive interrogation techniques.[189]

No one has been charged with murder or manslaughter in connection with Wali's death. Human Rights First asked the Department of Defense on January 26, 2006 for any update on the status of Wali's case; as of February 10, 2006 we had received no response.

PROFILE: HOMICIDE

Habibullah

Habibullah died on the night of December 3, 2002, because of abuses inflicted upon him by U.S. soldiers at the Bagram detention facility in Afghanistan.[190] Habibullah was captured by an Afghan warlord and, according to detailed reporting by the *New York Times*, was brought to the Bagram detention facility on the last day of November, 2002.[191] Members of the 377th Military Police Company at that facility reportedly subjected detainees held at the base to peroneal strikes – a knee strike aimed at a cluster of nerves on the side of the thigh, meant to quickly disable an escaping or resistant prisoner.[192] One soldier stated that he gave Habibullah five peroneal strikes for being "noncompliant and combative."[193]

Immediately upon his arrival, Habibullah was placed in an isolation cell and shackled to the ceiling by his wrists.[194] During one interrogation, an interrogator allowed him to sit on the floor because his knees would not bend enough for him to sit on a chair; as Habibullah coughed up phlegm, soldiers laughed at his distress.[195] One day later, Habibullah was found hanging from the ceiling and unresponsive.[196] One soldier thought that he felt the almost-incapacitated prisoner spit on him; the soldier yelled and began beating Habibullah while he was still chained to the ceiling.[197] The next time anyone checked on Habibullah, he was dead.[198]

The U.S.-conducted autopsy found that Habibullah had died of an embolism – a blood clot, almost certainly the product of the repeated beatings, had traveled through

his bloodstream and clogged the arteries leading to his lungs;[199] the autopsy determined the manner of death to be homicide.[200] The Army Criminal Investigation Command looked into the death, and initially recommended closing the case.[201] According to criminal investigators' findings it was impossible to determine who was responsible for Habibullah's injuries because so many were involved.[202] Investigators also failed to maintain critical evidence in the case. A sample of Habibullah's blood was kept in the butter dish of investigators' office refrigerator until the office was closed.[203]

Press interest in Habibullah's death—and that of Dilawar, another detainee who died a week later at the same facility—sparked renewed progress in the criminal investigation, resulting in charges against the soldiers allegedly responsible.[204] In October 2004, almost two years after Habibullah's death, criminal investigators recommended that charges be brought against 27 soldiers for their roles in the death of Dilawar and against 15 of the same soldiers for the death of Habibullah, including "two captains, the military intelligence officer in charge of the interrogation group, and the reservist commander of the military police guards."[205] The recommended charges ranged from dereliction of duty to involuntary manslaughter.[206] The soldiers included members of the 377th Military Police Company and interrogators from the 519th Military Intelligence Battalion.[207]

To date, less than half of the soldiers against whom charges were recommended –12 out of 27– have actually been prosecuted for their roles in the deaths of Habibullah and Dilawar.[208] Eleven cases have been concluded.[209] Apart from demotions and some discharges, only four of these individuals were given sentences that included confinement, and the sentences ranged from 60 days to five months.[210] In January 2006, after a pre-trial inquiry, the Army dropped its criminal case against the only officer charged (with lying to investigators and dereliction of duties) in connection with the deaths, Military Police Captain Christopher M. Beiring.[211]

Lieutenant Colonel Thomas J. Berg, the Army judge who oversaw the pretrial inquiry, criticized the prosecution for not presenting sufficient evidence to support their charges against him.[212] Berg added that the military policy company had not been adequately trained before deployment for its mission at the Bagram detention facility: [213] "Little of the training focused on the actual mission that the 377th [Military Police Company] anticipated that it would assume upon arrival in theater . . . . Much of the 377th's training was described as 'notional' in that soldiers were asked to imagine or pretend that they had the proper equipment for training exercises."[214] As of January 2006, the trial of Sergeant Alan J. Driver is pending.[215] Notably, no soldier has yet been charged with murder or voluntary manslaughter for either of the deaths of Habibullah or Dilawar.[216]

PROFILE: HOMICIDE

Dilawar

Dilawar was the second detainee killed in a week at the Bagram detention facility in Afghanistan.[217] A 22-year-old Afghan citizen whose case similarly became the focus of *New York Times* investigative reports, Dilawar was driving his taxi past U.S. Camp Salerno when he was stopped and his car searched by a local Afghan commander working with the Americans.[218] Dilawar was then taken into custody as a suspect in a rocket attack.[219] The commander of the Afghan soldiers was later suspected of having launched the attack himself.[220]

Dilawar was brought to the Bagram detention facility on December 5, 2002.[221] The 122-pound taxi driver was labeled a "noncompliant" detainee by U.S. soldiers, and was subjected to the same kind of peroneal strikes that eventually contributed to the death of Habibullah.[222] During one of the beatings by soldiers, Dilawar cried "Allah" when he was hit.[223] According to a U.S. soldier, U.S. military personnel found these cries funny and hit Dilawar repeatedly to hear him cry out.[224] Over a 24-hour period, one soldier estimated that Dilawar was

Dilawar

struck over 100 times by soldiers.[226]

According to an interpreter, during his fourth interrogation session on December 8, Dilawar was unable to comply with commands to keep his hands above his head, leading one soldier to push his hands back up.[226] During the same interrogation, two interrogators shoved Dilawar against a wall when he was unable to sit in a "chair" position against the walls because of the injuries to his legs.[227] At the end of the interrogation, one of the soldiers ordered Dilawar to be chained to the ceiling.[228] During his final interrogation session on December 10, Dilawar could not obey the orders the interrogators gave him to stand in stress positions and kneel.[229] Dilawar died that day.[230]

The official autopsy, conducted three days after his death, showed that Dilawar's legs had suffered "extensive muscle breakdown and grossly visible necrosis with focal crumbling of the tissue."[231] The damage was "nearly circumferential," from below the skin down to the bone. The manner of death was found to be homicide.[232] Despite this conclusion, the military initially said that Dilawar had died of natural causes.[233]

Criminal investigation into his death, and that of Habibullah had been at a "virtual standstill,"[234] and only accelerated after the *New York Times* reported in new detail how both men died in U.S. custody.[235] The renewed investigation also cast into stark relief the flaws in the original investigative efforts: agents had not interviewed the commanders of the soldiers responsible for the deaths, failed to interview an interrogator who had witnessed most of Dilawar's questioning during his detention, and mishandled critical evidence.[236] It was only during the subsequent investigation – and at the individual initiative of at least one soldier – that investigators finally took statements.[237] The statements revealed that witnesses who had previously been overlooked had crucial information, including an eyewitness account of an interrogator apparently choking Dilawar by pulling on his hood, and that "most [soldiers at the base] were convinced that [Dilawar] was innocent."[238]

The status of prosecutions of the soldiers responsible for Dilawar's death is described above.

PROFILE: HOMICIDE

Sajid Kadhim Bori al-Bawi

Sajid Kadhim Bori al-Bawi, an Iraqi actor, was shot and killed in his home in Baghdad early in the morning of May 17, 2004.[239] According to his family, U.S. and Iraqi soldiers raided the house by crashing through the gate in a Humvee.[240] Al-Bawi's brother, uncle, and nephew were bound and held on their knees and the women and children were kept in the living room while he was interrogated in a bedroom.[241] While they were waiting, the family heard shots ring out.[242] The troops left an hour after they arrived.[243] According to the family, the troops took with them a robed and hooded man, and told the family that they were arresting al-Bawi.[244] But when the family went into the room where he had been questioned, they found al-Bawi's corpse, stuffed behind a refrigerator and hidden under a mattress.[245] He had been shot five times: in the leg, throat, armpit, and chest.[246]

An administrative investigation[247] into al-Bawi's death found the shooting to be justified.[248] The military reported in its initial public statements about the shooting that al-Bawi had grabbed a U.S. soldier's pistol, switched the safety off, and the soldier then fired five shots in self-defense.[249] But the military's statements became the subject of dispute. An Iraqi medical examiner who examined the body found that the shots had been fired from two different directions; al-Bawi's family reported that they found two kinds of casings in the room where he died.[250] Army criminal investigators only began their investigation a month after al-Bawi's death, when an investigation was requested by the military's Detainee Assessment Task Force, based on a *Washington Post* article detailing al-

Sajid Kadhim Bori al-Bawi's son holds a portrait of his father

Bawi's family's allegations.[251] Despite the contradictions between the findings of the administrative investigation and allegations by al-Bawi's family and the medical examiner,[252] the criminal investigating agent spent a scant four hours reviewing the findings of the administrative investigation, did not attempt any independent verification, and then forwarded the case for closure.[253] News reports detailing the family's allegations were included in the file, but the only change the criminal investigator made to the initial probe was to correct the spelling of al-Bawi's name.[254] The criminal probe restated the conclusion that the killing was justified and recommended no charges be brought.[255]

The lack of any independent investigation into al-Bawi's family's allegations – or any investigation beyond a review of the administrative findings – is troubling. At a minimum, there is a disconnect between the administrative finding that one soldier fired all the shots with one weapon,[256] and the family's allegations that al-Bawi was shot from two directions with two different calibers of bullet.[257]

Al-Bawi's family reportedly was offered $1,500 in compensation by military officials, conditioned on their agreeing that the United States has no responsibility for al-Bawi's death.[258] The family has refused the money.[259]

PROFILE: HOMICIDE

Obeed Hethere Radad

Obeed Hethere Radad was shot to death on September 11, 2003, in his detention cell in an American forward operating base in Tikrit, Iraq.[260] Both criminal and administrative investigations were conducted into his death.[261] The soldier accused of the shooting, Specialist Juba Martino-Poole, stated during the administrative investigation that he had shot Radad without giving any verbal warning because Radad was "fiddling" with his hand restraints and standing close to the wire at the entrance to his cell.[262]

The administrative investigation found "sufficient cause to believe" Martino-Poole violated the Army's use of force policy and the base's particular directives on the use of deadly force with which Radad could be charged; the administrative investigation recommended a criminal investigation be initiated to determine offenses.[263] But the investigation also determined that there was inadequate clarity on the use of weapons and force with regard to detainee operations at the base, and noted in particular the lack of any written standard operating procedures.[264] The investigation also criticized the location of weapons within the detention facilities, and the insufficient numbers of guards assigned to guard detainees.[265] A military lawyer who later reviewed the administrative investigation found it legally insufficient, apparently because it failed to determine what, if any, briefing on the use of force guards received.[266]

Army criminal investigators were only notified of the death after the administrative investigation concluded.[267] And before the criminal investigation was over, Martino-Poole had sought a military discharge in lieu of a court martial for manslaughter.[268] Martino-Poole's commander, Major General Raymond T. Odierno, approved the request for discharge without waiting for criminal investigative agents to conclude their investigation and forward their findings.[269] A little more than a week later, criminal investigators found probable cause to charge Martino-Poole with murder.[270]

The Radad case was reviewed along with all detainee deaths in custody after the revelations at Abu Ghraib, and the reviewer noted flaws in both the criminal and the administrative investigations, but decided against reopening the criminal investigation because "further investigation would not change the outcome."[271] Martino-Poole later accused his commanders of wanting to avoid disclosure of the lax security practices at the base – practices that would likely have come to light in a court martial proceeding.[272]

PROFILE: HOMICIDE

Mohammed Sayari

Mohammed Sayari was in the custody of members of the U.S. Army Special Forces when he was killed near an Army firebase on August 28, 2002 in Lwara, Afghanistan.[273] According to Army investigative records reviewed by Human Rights First, an Army staff sergeant from the 519th Military Intelligence Battalion who was supporting the Special Forces team was dispatched to the site of the shooting of a "suspected aggressor" on a road just outside the firebase, to take photographs documenting the scene.[274] When he arrived, the members of the Special Forces unit told the sergeant they had stopped Sayari's truck because he had been following them.[275] The soldiers ordered the passengers traveling in Sayari's truck to leave the area and then, they said, they disarmed Sayari.[276] According to their later testimony, the soldiers neglected to restrain Sayari's hands, and left his AK-47 weapon ten feet from him.[277] When a soldier turned away for a moment, they said, Sayari lunged for the rifle and managed to point it at the Special Forces soldiers before they shot him in self-defense.[278]

Sayari's body was fingerprinted and turned over to his family.[279] The Military Intelligence sergeant (whose name is redacted in the records Human Rights First reviewed) then instructed other military personnel to transfer DNA evidence taken at the scene and other photographs to the Bagram Collection Point.[280] On September 24, 2002 the captain of the Special Forces group that shot Sayari told the sergeant that a member of the Staff Judge Advocate General's Corps would be coming as part of the administrative investigation to take statements from Special Forces soldiers involved in the shooting.[281] The captain then asked the sergeant for the photographs he had taken.[282] After reviewing the photographs, the Special Forces captain told the sergeant to include only certain of the photographs in the investigation and ordered him to delete all the other crime-scene photographs.[283] The administrative investigation would eventually find Sayari's shooting to be justified.[284]

The following day, the sergeant contacted criminal investigators to report "a possible war crime."[285] According to one criminal investigation agent's report, the sergeant had not reported his concerns to criminal authorities earlier because he had waited to see the results of the administrative investigation and he had feared for his safety while working with the Special Forces team.[286] The sergeant told the agents that several details at the scene made him question the veracity of the Special Forces soldiers' story. He said that Sayari had been shot five or more times – in the torso and head – but all the entry wounds appeared to be in the back of the body, which made it unlikely that he had been facing the soldiers and pointing his rifle at them when he was shot.[287] One of Sayari's sleeves had brain matter on it, suggesting that his hands were on or over his head when he was shot.[288] When the sergeant first arrived, he had noticed that Sayari's corpse still clutched a set of prayer beads in the right hand, which was inconsistent with the Special Forces soldiers' report that he had picked up and pointed an assault rifle at them.[289] Among the photos that the Special Forces captain instructed the sergeant to delete was one showing Sayari's right hand clenched around the prayer beads and another depicting bullet holes in Sayari's back. [290] The AK-47 could not be found.[291]

Criminal investigators eventually found probable cause to recommend charges of conspiracy and murder against the four members of the Special Forces unit; they also recommended dereliction of duty charges against three of them, and a charge of obstruction of justice against the captain.[292] Finally, they recommended that a fifth person, a chief warrant officer, be charged as an accessory after the fact.[293]

After consultation with their legal advisors, however, commanders decided not to pursue any of the recommended charges in a court martial.[294] To date, the only action commanders have taken in response to the criminal investigators' recommendations is to reprimand the captain for destroying evidence.[295] The captain was disciplined – he had inarguably destroyed evidence – but received only a letter of reprimand.[296] No further action was taken against the soldiers.[297] The commanders who declined to report Sayari's death – and who later declined to prosecute the soldiers involved – received similar leniency; they have received no disciplinary action for their conduct. Human Rights First asked the Department of Defense on January 20 and 26, 2006 for an update on the status of Sayari's case; as of February 10, 2006, we had received no response.

PROFILE: HOMICIDE

Zaidoun Hassoun

Zaidoun Hassoun, (also known as Zaydoon Fadhil), a 19-year-old Iraqi civilian, and his cousin Marwan were arrested by members of the 1st Battalion, 8th Infantry Regiment, 3rd Brigade, 4th Infantry Division in January 2004 on the streets of Samarra, in Iraq, at or around an 11 p.m. curfew time.[298] Army Lieutenant Jack Saville then ordered his platoon to take the two Iraqis to a 10-foot-high bridge over the Tigris River and force the two to jump.[299] Three soldiers, Sergeant ("Sgt.") Alexis Rincon, Specialist Terry Bowman and Sgt. Reggie Martinez, complied with the order.[300] Saville and Staff Sgt. Tracy Perkins had earlier that night stated that "someone was going to get wet tonight" and "someone is going for a swim."[301] Marwan surfaced and swam to the shore.[302] Zaidoun, who had proposed to his fiancée three weeks previously and planned on starting a family once he graduated from high school, did not.[303] According to his cousin, he was sucked into the current near an open dam gate and was unable to escape.[304] Criminal charges initially filed against Saville alleged that he had also pushed another Iraqi into the Tigris in Balad the previous month.[305]

The platoon's three immediate commanders, Lt. Col. Nathan Sassaman, the battalion commander, Captain Matthew Cunningham, a company commander, and Major Robert Gwinner, the deputy battalion commander, did not report the incident to criminal investigators, based on the assumption that there was no proof Hassoun had drowned.[306]

Sgt. Irene Cintron, a criminal investigative agent assigned to the case, suspected, however, "that the whole chain of command was lying to [her]."[307] During the criminal investigation into Hassoun's death, agents administered a polygraph test to a member of the squad that allegedly pushed him into the river.[308] The soldier told agents that his chain of command had ordered him to deny soldiers had forced Hassoun into the river, and not to cooperate with criminal investigators.[309] After the criminal investigation was underway, Lt. Col. Sassaman, the battalion commander, informed Major General Raymond Odierno, the commander of the Fourth Infantry Division, of the truth; soldiers had in fact forced Hassoun to jump into the Tigris.[310] According to the official investigative report, which Human Rights First reviewed, the officer who conducted a subsequent Article 32 hearing—analogous to a grand jury proceeding[311] – also found the commanders had "coach[ed]" their soldiers on what to say to the investigating agents.[312] The three commanders – Lt. Col. Sassaman, Captain Cunningham, and Major Gwinner – obtained grants of immunity from prosecution, and admitted at the soldiers' trial that the allegations were true.[313]

Zaidoun Hassoun

The commanders testified that they thought the investigation into Hassoun's death was the result of "a personal vendetta" between Sassaman and the brigade commander, motivated by personal antipathy and jealousy.[314] They also maintained their belief that Hassoun had not actually drowned as a justification for their refusal to cooperate with investigators; Cunningham protested that "[they] were not covering up anything that injured anybody."[315] Saville plead guilty to a reduced charge of assault and received 45 days in prison and Perkins was convicted of the same charge and sentenced to six months.[316] Two other soldiers, Sergeant Reggie Martinez (originally charged with involuntary manslaughter) and Sergeant Terry Bowman (originally charged with assault), received non-judicial punishment.[317] The three commanders received reprimands for obstruction of justice but were not relieved of their command.[318]

III. Death by Officially Unknown, "Natural" or Other Causes

The autopsy findings in this 27-year-old man seem insufficient to explain his death. The fact that they seem to have found pulmonary edema, water in the lungs, is very unusual in a man of this age without heart disease. The available information is insufficient to explain his death. A full investigation report that describes the circumstances preceding his death and the manner in which the body was found shortly before any attempt at resuscitation is needed to explain the cause of death and to rule out a homicide which seems more likely than not in a 27-year-old man who suddenly died in captivity.

Dr. Steven Miles
Professor and Bioethicist, University of Minnesota Medical School on autopsy of Fashad Mohamed, died in U.S. custody, April 5, 2004[319]

For close to half of the deaths Human Rights First has analyzed – 48 out of 98 – the cause of death remains officially undetermined or unannounced.[320] The military classified another 15 deaths as due to natural causes and one as accidental. But a significant number of all of these deaths occurred under suspicious circumstances and may more appropriately be considered homicides themselves; 17% of the deaths in which the official cause of death is unknown or due to natural causes either followed severe injuries consistent with, or occurred in circumstances suggesting, physical abuse or harsh conditions of detention.[321] This chapter briefly reviews the facts of some of these cases and the consequences – or not – for those involved. Given the passage of time since each of these deaths, and flaws in the investigations that have already taken place, it is now unlikely that the facts of their deaths will ever be known. If there has been wrongdoing, no one will be punished.

PROFILE: UNDETERMINED CAUSE

[Bringing in an Iraqi physician to treat detainees] would decrease the perception of our involvement or cover-up in events similar to this.

Department of the Army, 101st Airborne Division, Administrative Investigation into the Death of Abu Malik Kenami[322]

Abu Malik Kenami

Abu Malik Kenami (also referred to as Abdureda Lafta Abdul Kareem), a 44-year-old Iraqi man, died on December 9, 2003, in a U.S. detention facility in Mosul, Iraq.[323] According to the findings of an administrative investigation, Kenami had arrived at the facility four days earlier, and according to the soldiers who interrogated him upon his arrival, he said he did not suffer from any pre-existing medical conditions.[324] On the night of December 8, Kenami allegedly talked out loud in the presence of guards, and tried to look out

from underneath his hood to see what was happening.[325] That earned him what had become a standard form of punishment: "up and downs" – an exercise in which detainees were made to stand up, then sit down, over and over again for periods of up to twenty minutes.[326]

Kenami had been subjected repeatedly to "up and downs" during his detention, but this night turned out to be different.[327] Following the forced workout, soldiers flexicuffed Kenami's hands behind his back and covered his head with a sandbag hood.[328] Kenami was then ordered to lie down among other detainees in his overcrowded cell; built for 30 prisoners, it housed 66.[329] When a guard attempted to rouse the prisoners in the morning, Kenami, still bound and hooded, was dead.[330]

The Army's initial criminal investigation into Kenami's death could not determine the cause of death because no autopsy was ever conducted.[331] It was only five months later, after the revelations from Abu Ghraib, that the Army reviewed this case and it became clear how troubling the original criminal investigation had been.[332] In the words of the military police forensic science officer who reviewed the initial criminal investigation: "it was weak in Thoroughness and Timeliness."[333] In addition to the lack of an autopsy, the review determined that important interviews were not conducted of the interrogators, medics, or detainees present at the scene of the death, and that key details were omitted from the report.[334] The file "[did] not mention the presence, or lack of, signs of a struggle, or of blood or body fluids," "the crime scene sketch… [did] not document where guard personnel found the deceased," and "records of medical treatment of the deceased were not collected and reviewed."[335] The Army's administrative investigation had recommended that an Iraqi physician be brought in to treat the detainees, noting that among other benefits, "[i]t would [also] decrease the perception of our involvement or cover-up in events like these."[336]

According to military records made public to date, the cause of Kenami's death remains officially undetermined.[337] But there could be a more troubling conclusion. Dr. Steven Miles is a professor and bioethicist at the University of Minnesota Medical School, who has reviewed the Army's records related to Kenami's death. Kenami's body "had bloodshot eyes, lacerations on his wrists from the plastic ties, unexplained bruises on his abdomen and a fresh bruised laceration on the back of his head," Miles explains, expressing particular concern that "Army investigators noted that the body did not have defensive bruises on his arms, an odd notation given that a man cannot raise bound arms in defense."[338] Based on his analysis, Dr. Miles found: "It is likely that Mr. Kenami suffocated because of how he was restrained, hooded and positioned. Positional asphyxia looks just like death by a natural heart attack except for those telltale bloodshot, [conjunctival hemorrhage] eyes."[339] Human Rights First asked the Department of Defense on January 20 and 26, 2006 for comments on Dr. Miles' findings; as of February 10, 2006, we had received no response.

The Army has taken no punitive or disciplinary action in the case.[340]

PROFILE: UNKNOWN CAUSE

Dilar Dababa

Dilar Dababa, an approximately 45-year-old Iraqi civilian detainee, died on June 13, 2003 at Camp Cropper, after being subjected to what press accounts of unreleased Army investigation records describe as "physical and psychological stress" and restraint in a chair during interrogation.[341] Military investigation documents cite an autopsy finding that Dababa died from a "hard, fast blow to the head."[342] The Armed Forces Medical Examiner's autopsy report on Dilar Dababa does not use the same language, but states that "[p]hysical force was required to subdue the detainee, and during the restraining process, his forehead hit the ground."[343] Twelve hours later, he was dead.[344]

The medical examiner's autopsy lists the cause of Dababa's death as a "Closed Head Injury with a Cortical Brain Contusion and Subdural Hematoma."[345] The autopsy describes a litany of injuries in technical detail, and makes clear that Dababa was subjected to physical violence.[346] Dababa's body was covered with at least 22 bruises,[347] and at least 50 abrasions.[348] His head and neck suffering the most significant abuse, resulting in hemorrhaging throughout his brain.[349] He also had a fractured rib.[350] A military official stated in May 2004 that Army criminal investigators were looking into Dababa's death, but there has been no documentation of any charges being brought against those responsible for the death.[351] The military has not publicly provided an official cause of death. Human Rights First asked the Department of Defense on January 20 and 26, 2006 for the status of any investigation or prosecution in Dababa's case; as of February 10, 2006 we had received no response.

PROFILE: UNDETERMINED CAUSE

Hadi Abdul Hussain Hasson al-Zubaidy (Hasson)

All that is known about Hadi Abdul Hussain Hasson al-Zubaidy (Hasson) is his name, his identification number and the fact that he died in Iraq, at Camp Bucca, some time between April and September 2003.[352] His death went officially unnoticed until nearly a year after it happened,[353] when Army investigators conducted a review of all detainee deaths following the public Abu Ghraib scandal.[354] Despite later attempts to determine what happened to Hasson – including when and how he died – investigators were only able to determine that Hasson had been treated on board a U.S. Navy hospital ship.[355]

In the end, investigators closed the Hasson case without being able to determine whether his death was due to natural causes or homicide.[356] The investigators' report notes that inadequate record-keeping made it impossible for them to learn anything more: "All efforts disclosed there as [sic] virtually no documentation in reference to Mr. HASSON's manner, cause, or circumstances of death."[357] A U.S. Mortuary Affairs officer told an investigator that "the documentation on deceased Detainees was very limited . . . the majority of the time prior to earlier this year [2004], when the Mortuary received the remains of a deceased Detainee they would only know that the deceased was a detainee, and would not have any other info on the remains, so they would have a list of the remains as unknown John Doe."[358]

PROFILE: NATURAL CAUSE

Nasef Ibrahim

Nasef Ibrahim

Nasef Ibrahim was 63 at the time of his death of what an initial autopsy report called "atherosclerotic cardiovascular disease." He died at Abu Ghraib in January 2004 – a death the Army attributes to natural causes.[359] Army criminal investigators on the case attended the autopsy and interviewed a number of soldiers who stated that Ibrahim's son, detained with him, brought his collapse to the attention of prison guards.[360] After the special agent in charge determined that pursuing the case further would be of little value, and that remaining leads were not significant, the criminal investigation was closed.[361]

The case was re-examined on May 19, 2004, as part of the Army's review of detainee death and abuse cases following the revelations from Abu Ghraib. This time, the Army found several grounds for criticism. The initial investigation had not included a visit to the scene of the death, interviews of the witnesses who found the victim, or any "effort … to interview the alleged … son of the victim who [was] reportedly at the prison at the time of death."[362] Ibrahim's son, who was with him when he died, says that his father's death came only after his father suffered extensive abuse.[363] The son alleges that the abuses Ibrahim suffered included being beaten, menaced by dogs, repeatedly doused with cold water during the height of winter, being left naked outside for days and deprived of food to the point of fainting, and left on his stomach with hands tied above his head for hours.[364]

The May 2004 Army review indicated that "[t]he investigation has not yet received the final autopsy report."[365] The May review asked that a "supplemental ROI"—an additional report of investigation—be submitted as soon as the final autopsy was received.[366] Government documents to date regarding the investigation reviewed by Human Rights First do not indicate whether this request was ever acted upon, or if there was any further action taken. Human Rights First asked the Department of Defense on January 20 and 26, 2006 for the status of the investigation and any prosecution in Ibrahim's case; as of February 10, 2006, we had received no response.

PROFILE: NATURAL CAUSE

Abed Mohammed Najem

Evidentiary failures pervaded the investigation into the death of Abed Mohammed Najem, who died at Abu Ghraib in August 2003.[367] According to accounts in an original criminal investigation, Najem began a hunger strike on August 6 (during the hottest part of the Iraqi year) and refused food, water, and even his diabetes medication;[368] on August 8, Najem took a double dose of his prescription, which appears to have precipitated a fatal heart attack.[369] The official criminal investigation found Najem died of "natural causes."[370] But the true cause of death may never be known. Investigators' later review of the original criminal investigation found that there had been no crime scene examination; no interviews of anyone who was with Najem at the time of his death; no interview of an Iraqi medical professional listed in the original investigation as having pertinent information; no medical records or interviews to substantiate claims that Najem had a preexisting condition; and no copies of autopsy reports.[371]

PROFILE: UNKNOWN CAUSE

Jassim Al-Obodi

The evidence collected in the investigation into the death of Jassim Al-Obodi on August 3, 2003 is fragmentary.[372] Al-Obodi, a 38-year-old Iraqi male, collapsed in Camp Cropper in Iraq, and criminal investigation interviews of other detainees indicate he had "not been feeling well" earlier in the day.[373] But no medical records were collected, and no autopsy included in the file; the investigating agent was told that an autopsy would be conducted in the United States, but he apparently failed to request the results.[374] When the agent's supervisor reviewed the file four months later and noticed the omission, the investigator attempted to collect the evidence he had missed, but perhaps due to the delay, could not locate any medical records, the autopsy report, or even a death certificate.[375] The investigation results state that it "failed to prove the cause or manner of death"; among other things, investigators could not determine if an autopsy had been done or even to whom the body had been released.[376] In a note in the file, the supervisor warned the agent not to "get so focused on your opinion that you want to do a stat and close this [sic] keep you from being thorough."[377]

PROFILE: UNDETERMINED CAUSE

Mohammad Munim al-Izmerly

Mohammad Munim al-Izmerly, a 65-year-old Iraqi chemist, was detained at the Camp Cropper facility, where high-value detainees were kept, in April 2003; his family was allowed to visit him once.[378] Within a few weeks of their visit in January 2004, al-Izmerly was dead.[379] The only autopsy ever performed on the body was conducted by the Director of Baghdad Hospital's Department of Forensics, Dr. Faik Amin Baker, at the request of al-Izmerly's family.[380] Dr. Baker found that al-Izmerly died from a "sudden hit to the back of his head," and that the cause of the death was blunt trauma.[381] According to Dr. Baker, al-Izmerly "died from a massive blow to the head."[382]

U.S. forces retained al-Izmerly's body for 17 days after his death, and did not inform Army criminal investigators that al-Izmerly had died in U.S. custody until after his body was released.[383] Al-Izmerly's family only learned of his death after U.S. forces delivered his body to an Iraqi hospital, accompanied by a death certificate stating that al-Izmerly had died of a "sudden brainstem compression"; the certificate had no explanation of the compression's cause.[384] An initial, inconclusive investigation into the case only appears to have been reopened after press accounts of al-Izmerly's death.[385] The Army's Criminal Investigation Command records have not been publicly released, but according to published reports, the records list al-Izmerly's death as of "undetermined cause" – because the body was released and no U.S. autopsy was performed.[386]

Al-Izmerly's family reportedly filed a wrongful death claim for $10,000, but the Army dismissed it, saying the family had presented no evidence of wrongdoing by U.S. personnel.[387] The re-opened investigation into al-Izmerly's death remains pending; to date, no charges have been brought.[388] Human Rights First asked the Department of Defense on January 20 and 26, 2006 the status of the investigation and any prosecution in al-Izmerly's case; as of February 10, we had received no response.

Death by Heart Attacks or Other Natural Causes

Many prisoners suffered "natural" deaths from heart attacks or atherosclerotic cardiovascular disease. None of the forensic investigation of these "heart attacks" explores the possibility that these men died of stress-induced heart attacks. Threats, beatings, fear, police interrogation, and arrests are known to cause "homicide by heart attack" or life-threatening heart failure. People with pre-existing heart disease, dehydration, hyperthermia, or exhaustion are especially susceptible.

Dr. Steven Miles, Professor and Bioethicist, University of Minnesota Medical School[389]

The military's classification of a number of deaths as "natural" gives Human Rights First cause for concern. Of the nearly 100 deaths Human Rights First reviewed, official records indicate more than a fifth involved instances in which heart attack or heart disease was determined to be part or all of the cause of death.[390] A number of the victims were surprisingly young: the youngest detainee alleged to have died from heart disease is 25; those apparently dead from heart attacks also include men aged 30, 31, and 43.

In part, concern about the accuracy of the "natural causes" label comes from the Army's track record of having publicly labeled torture-related deaths "natural," only to have to revise that assessment when case facts came to light. This was the pattern in the cases, discussed above, of Iraqi Major General Mowhoush, and Afghan detainees Habibullah and Dilawar.

Another reason for concern was identified in the recent testimony of Maj. Michael Smith, U.S. Army Forensic Pathologist, on Jan. 19, 2006, during the trial of a junior officer for Mowhoush's death. "The forensic pathologist, who does not gather information on the circumstances of a death, will invariably miss homicides and suicides. It is incumbent on the pathologist to look at the circumstances of a death. Otherwise, a homicide or a suicide may appear like a natural death. "

Additional concern about the accuracy of deaths deemed "natural causes" flows from the inadequacy of investigations into many of these deaths. Army investigators themselves criticized the investigation into the death of one of these men: a subsequent Army review of the original investigation into the death of Abed Najem, who allegedly died due to heart disease complicated by diabetes, found the investigation "operationally insufficient and administratively insufficient."[391] The reviewers noted that "[t]hough U.S. Army medical personnel alleged the victim had a preexisting medical condition aggravated by a self imposed hunger strike, the investigation did not obtain any medical records or conduct interviews to substantiate the information."[392]

Other findings of detainee deaths by "natural causes" have been rejected as outright impossible by surviving families. An Army criminal investigation attributed the death of Nasef Jasem Ibrahim to a compression of the heart often associated with heart attacks.[393] Army investigators closed the case finding "[f]urther investigation would be little or no value."[394] But Ibrahim's son, who was with Ibrahim in detention, was not interviewed as part of the investigation into Ibrahim's death.[395] The family has since alleged in a lawsuit that Ibrahim died as a result of abusive detention conditions.[396]

Finally, medical personnel told have told military investigators of confusion about the proper standard of care to apply to detainees. According to the Army Inspector General: "Coalition Provisional Authority treatment policy... reportedly dictated that U.S. medical care was only available to detainees to prevent loss of life, limb, or eyesight," which conflicted with the governing Army regulation.[397] The Army Surgeon General found "the use of different classifications for detained personnel (Enemy Prisoner of War (EPW), detainees, Retained Personnel (RP), Civilian Internees (CI)) that, under Department of Defense (DoD) and Department of the Army (DA) guidance, receive different levels care."[398] Similar confusion over novel detainee classifications detached from the Geneva Conventions was a contributing factor in incidents of detainee abuse.

PROFILE: UNKNOWN CAUSE

Sher Mohammed Khan

Sher Mohammed Khan

The circumstances of Sher Mohammed Khan's death remain unclear despite an Army criminal investigation. An Afghan citizen, Khan was arrested on September 24, 2004, in his home in the village of Lakan, Khost province, Afghanistan.[399] Khan was subsequently taken to the nearby Salerno Firebase, which doubled as a temporary detention facility for U.S. forces, and placed in a holding cell. The next evening, the U.S. military says that he complained to guards that a snake had entered his cell and bitten him; medical personnel examined him, but could find no punctures in the skin, and no action was taken, though a medic was detailed to check on Khan throughout that night. During one such check, the medic found that Khan had stopped breathing.[400]

Immediately after Khan's death, Army officials informed the governor of Khost province that a man in U.S. custody had died of a heart attack, an explanation on which Department of Defense officials continued to insist publicly until January 2005, when details of the snake-bite story were reported in the press.[401] Adding to the uncertainty, Khan's family has said that his body was bruised when they picked it up from the Salerno base,[402] and alleges that he appeared to have been beaten in custody.[403]

In January 2005, more than three months after Khan's death, the commander of the U.S. troops who detained Khan said that he had not yet received a final autopsy report.[404] An Army criminal investigation has reportedly found "no signs of abuse or trauma" on Khan's body; yet neither details of the investigation nor a death certificate listing the official cause of death has been released.[405] No disciplinary action has been taken.[406] Human Rights First asked the Department of Defense on January 20 and 26, 2006 the status of the investigation and any prosecution in Khan's case; as of February 10, we had received no response.

PROFILE: UNKOWN CAUSE

Jamal Naseer

Jamal Naseer

Jamal Naseer was an 18-year-old Afghan soldier who died in the custody of U.S. Special Forces soldiers in March 2003.[407] An investigation into his case, begun some nine months after his death, had been closed due to a lack of leads.[408] It was reopened when a *Los Angeles Times* journalist investigated the case independently, and wrote a feature-length article about Naseer's death, alleging that Naseer had been tortured, and that the Afghan government had conducted a detailed investigation into the death.[409]

According to these accounts, Naseer was arrested by U.S. forces as a result of a complicated series of feuds between the local governor, a warlord, and local military commanders.[410] The governor labeled Naseer's entire unit as Taliban agents, and U.S. forces, acting on the tip, arrested the detachment and imprisoned them in a forward operating base near Gardez – a base named in claims by a number of former detainees interviewed by Human Rights First who have described suffering torture and serious abuse.[411] Details of what was done to Naseer are scarce, but seven Afghan soldiers detained with him attest to an extended period of interrogation and abuse.[412] According to the soldiers, they were questioned about their relationship with Al Qaeda; when they denied any involvement, they were subjected to severe abuse, including beatings with fists and cables – sometimes while suspended upside-down (allegations that again echo those of other Afghan detainees held by U.S. forces in Gardez).[413] They were immersed in cold water and exposed to the winter weather, sometimes being forced to lie in the snow.[414] Some say they were electrocuted.[415] On a particularly cold day in March, Naseer collapsed and died.[416]

After Naseer's death, U.S. commanders allegedly relied on local authorities to transfer the body to his family rather than doing so themselves.[417] Afghan police entered a local hospital and ordered an ambulance to go to the U.S. base to get Naseer's body; according to a doctor, no driver could be found, and the police began to beat the "frightened" medical personnel with their rifle butts.[418] Neither U.S. personnel nor the local doctors performed an autopsy; according to a hospital

administrator, "none of the [local] doctors wanted to look into the cause of death because they were afraid that they would be beaten again by the police."[419] It appears that the only contact any U.S. military personnel had with Naseer's family was when an officer apologized to Naseer's brother – who had been detained with Naseer – while the brother was still held at the Gardez facility.[420]

The Army initiated a criminal investigation based on a tip about the incident, but later determined the tip was "unfounded," because investigators were unable to find any documentation confirming the death or identifying witnesses.[421] Record-keeping remained a problem even after the *Los Angeles Times* journalist uncovered many previously unknown details – including the existence of a hundred-page investigation into Naseer's death launched by Afghan military prosecutors, which contained the names of and interviews with several witnesses.[422] Army criminal investigators reportedly could not even determine which Special Forces unit had been assigned to the firebase at which Naseer died: according to one criminal investigator, "[t]here are no records. The reporting system is broke across the board."[423] The criminal investigation remains ongoing; no charges have been announced.[424] Human Rights First asked the Department of Defense on January 20 and 26, 2006 the status of the investigation and any prosecution in Naseer's case; as of February 10, we had received no response.

IV. Failures in Investigation

[T]he President has been pretty clear on that, that while we have to do . . . what is necessary to defend the country against terrorists attacks and to win the war on terror, the President has been very clear that we're going to do that in a way that is consistent with our values. And that is why he's been very clear that the United States will not torture. The United States will conduct its activities in compliance with law and international obligations . . . . And to the extent people do not meet up, measure up to those principles, there will be accountability and responsibility.

National Security Advisor Stephen Hadley
Remarks at Press Briefing, November 2, 2005[425]

There is an old Army aphorism: the unit does what the commander checks . . . . If rigorous adherence to humane treatment had been deemed important, someone wearing stars would have required a thorough, impartial investigation of every death of a detainee.

Brigadier General David R. Irvine, U.S. Army (Ret.)
Interview with Human Rights First, October 14, 2005

When conducted according to the military's own rules, the U.S. Armed Forces' procedures for investigating the deaths of detainees can effectively uncover the underlying facts through interviews and evidence gathering, and determine whether to seek accountability. But the handling of death cases to date shows internal government mechanisms to secure accountability were badly dysfunctional during a time when torture and abuse in U.S. custody was at its worst.[426] Commanders failed to convey that detainee deaths were to be taken seriously.[427] Detainee death investigations were fundamentally flawed, and often did not meet the Army's own regulations. The result has been a pattern of impunity for the worst violations, with punishment for bad behavior too little and too late, and a still incomplete picture of what really went wrong. This chapter highlights the major investigative failures in the range of cases involving detainee deaths in U.S. custody.[428]

How An Investigation Should Work

Military regulations require that the death of a detainee in the custody of the U.S. Armed Forces must be investigated by the criminal investigation command of the service that held the detainee.[429] The Army may conduct two types of investigations in a case involving a detainee death. The first is the mandatory criminal investigation by the Army Criminal Investigation Division.[430] The criminal investigation is governed by a detailed set of regulations,[431] including rules on how evidence must be gathered and maintained: victims and eyewitnesses should be interviewed within 24 hours of the event, evidence collected within a single duty day,[432] and requests for lab-work and coordination with other branches or agencies should be sent out within five duty days.[433] Army commanders in the field also have the discretion to order an administrative investigation governed by its own set of regulations.[434] An administrative investigation may be conducted before, during, or after, any other investigation, including a criminal one.[435] Thus, while a criminal investigation is absolutely required into any death in custody,[436] it is not uncommon to see an administrative investigation into that death also. The rules of evidence applicable to trials or other court proceedings generally do not apply to administrative investigations. The Army's Judge Advocate General Corps provides legal oversight and advice on both criminal and administrative investigations.[437] Military commanders have the discretion to determine whether and how an offender should be charged after an investigation, criminal or administrative, has taken place.[438] Commanders' options include taking no action, initiating non-judicial action (which can range from counseling to a reprimand to correctional custody to discharge),[439] and referring the case for court martial.[440] Punishment by court martial can, depending on the crime, include punitive discharges and confinement, including in certain types of murder cases, life imprisonment or death.[441]

No Evidence for the Prosecution

I would have directed the death of any detainee to be thoroughly investigated. Any poor medical care should have been thoroughly investigated. The absence of autopsies, body parts, and evidence is really just astonishing.

Brigadier General Stephen N. Xenakis, U.S. Army (Ret.)
Former Commanding General of the Southeast Regional Army Medical Command[442]

Accountability for detainee deaths caused by criminal misconduct is impossible if evidence is never collected, or not catalogued, stored, or maintained following its collection. For these reasons, the Army's Manual on Legal Guidance to Commanders emphasizes: "[t]he most difficult form of evidence to collect and preserve is also the most important – testimonial evidence."[443] If evidence is missing or mishandled, it becomes useless in any subsequent judicial proceeding.[444] Of critical importance is the autopsy, which was not required until after the revelations of Abu Ghraib, when the Defense Department clarified policies for handling detainee deaths.[445]

Yet in case after case, before and after the Abu Ghraib photos were released in 2004, Army criminal investigators did not interview those most likely to have witnessed a death, or the events leading up to it. Physical evidence was not collected, and evidence that was collected was at times grossly mishandled. Autopsies were not conducted, and bodies themselves were treated carelessly. In some of these cases, the omissions were not crucial; where agents have interviewed half a dozen bystanders, any remaining similarly situated witnesses are unlikely to add much new information.[446] But in others, deaths that appear to have been caused by abusive detention or interrogation practices were not fully investigated, and charges could not be brought.

Human Rights First found 16 cases in which investigators appear to have failed to collect useable evidence and/or did not maintain evidence; flaws ranged from a failure to adequately examine a crime scene to the failure to properly collect and maintain a decedent's body organs, or weapons used.[447] The result of many of these failures: no accountability for U.S. forces responsible for the deaths.

The case of Nagem Sadoon Hatab, detailed above, is illustrative. Because of a series of errors, the medical evidence necessary to substantiate the prosecutors' case for death by strangulation was destroyed or missing: Hatab's body was allowed to partially decompose before autopsy; some of his organs were destroyed in heat; body parts were stored on different

continents;[448] and a neck bone was never found. Partly as a result of these errors, six of the soldiers initially charged in his death were never court-martialed, and others had their charges reduced or were acquitted.[449]

In another case, criminal investigators were unable to determine the cause of Abu Malik Kenami's death because no autopsy was performed; Kenami died after he was cuffed and hooded in a crowded cell.[450] Criminal investigators also failed to interview key witnesses, including detainees, other interrogators and medics who treated Kenami.[451] As a consequence, no one has been held accountable.

In more than a dozen cases, Human Rights First also found a failure to interview key witnesses, ranging from other detainees who witnessed the death, to military personnel with possible knowledge of the circumstances of the death.[452] For example, in the case of Nasef Ibrahim, the failure to interview the decedent's son, who was with his father at his death,[453] meant that investigators never learned that abusive detention practices may have contributed to the death. The investigation into the death of Abed Mohammed Najem was similarly scant; a subsequent Army review itself criticized the original investigators' failure to interview witnesses to a death allegedly due to hunger strike.[454]

No Reporting, Underreporting, and Delayed Reporting of Deaths in Custody

Apart from being a regulatory requirement, it is common sense that an investigation into an alleged crime should begin as soon as possible after its discovery. Delay in reporting can reduce the evidentiary value of both physical evidence and witness statements.[455] The Army's own Legal Guide for Commanders explains: "As time passes, witnesses may forget, develop a biased view of the facts, hesitate to give statements, or become difficult to find. The scene of the incident may also change, perhaps due to repairing damaged property or moving evidence."[456] For this reason, Army regulations require commanders to report the deaths of detainees in their custody within 24 hours of the incident.[457]

The standards governing command behavior in response to a death in custody are particularly stringent. Commanders are required to report criminal incidents[458] and cooperate in any ensuing investigation;[459] they may release "accurate and timely" information to the public,[460] but may not release information "concerning ongoing [criminal] investigations."[461] Once an investigation is completed, the commander must review the case and, in consultation with military lawyers, determine what disciplinary action to take.[462] While a criminal investigation is ongoing, a commander may not take actions that could affect or pre-empt the investigation, in order to allow it to reach an unbiased result.[463] Indeed: "Commanders are prohibited from interfering with the investigations or impeding the use of investigative techniques."[464]

The Impact of Public Attention

After the prolonged public exposure of the Abu Ghraib torture scandal, the Army's Criminal Investigation Division Headquarters initiated an operational review of all detainee abuse and death cases, in Iraq and Afghanistan, which were then on file.[465] Army criminal investigators assessed the quality of the investigation report based on the file; they did not conduct an independent investigation. The reviewers' findings were appended to the investigation reports, some of which have been publicly released. Of the 42 criminal or administrative investigations into the detainee deaths Human Rights First reviewed, seven include notes from this operational review.[466] Army reviewers found two of the original investigations to be adequate, but identified flaws in the others.[467] The reviewers also found eight investigations to be incomplete because autopsy reports had not been included in the original investigation reports.[468] It was only after these files were reviewed in May 2004 that autopsy reports were sent for eight deaths that had occurred as far back as August of 2003.[469] In July 2004, investigators at the Army Criminal Investigation Division headquarters also reviewed rosters of prison deaths, and discovered what appeared to be four previously unreported deaths.[470] They opened investigations into at least two of these deaths, one of which had occurred in 2003[471] and the other in April 2004.[472]

Too often these reviews have come only after public exposure of a death. The fact that the subsequent reviews have repeatedly shown circumstances worse than those originally found raises serious questions about the quality of investigative practice when the cameras are not focused squarely upon investigations. And they raise questions about the validity of the investigations into more than 60 deaths that are still listed as of unknown nature or of natural causes. These questions underscore the importance of building in more robust, independent checks of prisoner abuse and death.

Yet the possibility of accountability in at least 17 cases examined by Human Rights First was compromised from the beginning as a result of delays in reporting a death, failure to report a death at all, and in one case, commanders' deliberate attempt to conceal the death of a detainee.[473] Delays in reporting of incidents of deaths in custody were neither isolated nor limited to a handful of cases. An Army tally of criminal investigations into prisoner abuse as of November 2004 suggests that as many as 17 detainee deaths were not reported through proper channels. (The Army's tally is heavily redacted, but based on dates of deaths, eight of the Army's cases overlap with those Human Rights First identified).[474] Our examples include:

- The death of an unnamed Afghan, killed while being questioned by Army Special Forces in January 2003, was not reported to criminal investigators at all. Instead, the "[b]asic allegation [was] discovered during the conduct of another CID investigation" and an investigation was opened only in September 2004,[475] over one and a half years after the death occurred.
- The death of Hamza Byaty in Iraq on August 7, 2003 was not reported until over two weeks after it occurred.[476] Army criminal investigators had difficulty finding witnesses,[477] and perhaps as a result of this delay, the autopsy could only find that he had died of an "undetermined atraumatic cause."[478]
- Army criminal investigators were not informed of Iraqi detainee Mohammed al-Izmerly's death until 17 days after it occurred on January 31, 2004. By that time, the body had been released to al-Izmerly's family and Army investigators could not conduct an autopsy.[479]
- Four deaths that occurred during riots at Abu Ghraib prison in Iraq on November 24, 2003 were not reported to Army criminal investigators until December 2, 2003. As a result, investigators were not able to examine the body of one of the victims, which had already been taken away from the prison.[480]
- Hadi Abdul Hussain Hasson al-Zubaidy (Hasson) died in at Camp Bucca in Iraq in the middle of 2003, but Army investigators did not learn of Hasson's death until a year after it occurred.[481] The resulting investigation could not determine a cause of death or any other information about circumstances.

Criminal Investigations

The Army's CID is the sole agency responsible for investigating felony crimes that involve Army personnel and that carry a maximum punishment of one or more years of confinement.[482] CID agents—approximately 2000 soldiers and civilians and 900 special agents[483]— are deployed worldwide and are concentrated in combat zones.[484] For every investigation, CID agents are required to maintain detailed records of their investigation plans and the outcomes of any investigation.[485] The final investigation report includes the findings of the agents,[486] pending leads,[487] chronological summaries of the investigative proceedings,[488] and any other relevant documents (such as medical reports or crime lab results).[489] Drafts are reviewed by a Special Agent in Charge[490] and, once completed, the official report is forwarded to the local JAG unit for legal review, including whether the facts warrant prosecution and the charges that may be brought.[491] After the legal review, the final report is forwarded to CID Headquarters at Fort Belvoir, Virginia,[492] where the case is reviewed again to determine if it merits further investigation or if it may be closed.[493] Based on the report of the investigating CID agent, the commander of the soldier's unit will consult with the commander's assigned JAG officer to decide whether or not to follow the recommendations. The decision to press charges is at the discretion of the unit's commanders.[494]

Overlapping Investigations

The effectiveness of internal investigations was also undermined in a number of instances by careless use of the Army's multiple-investigative-avenues structure – one in which commanders have the option to request both administrative and criminal investigations that may run on parallel tracks. In some instances, an administrative investigation may be an effective means of conducting an investigation into wrongdoing. Major General Antonio Taguba's investigation into the detention and internment operations of the 800th Military Police Brigade in the context of the Abu Ghraib abuse scandal, for example, is a model of an administrative investigation conducted with objectivity and thoroughness.[495]

But review of the individual deaths that were subjects of both criminal and administrative investigations indicates that the existence of both investigative procedures, each with their own reporting and evidentiary standards, has sometimes functioned to reduce accountability for unlawful acts.[496] In one case, a subsequent criminal investigator simply served to

"rubber stamp" a prior administrative investigation.[497] In at least one other case, administrative investigators failed to observe the standards of evidence collection required in criminal investigations and, as a result, the possibility of prosecution for what turned out to be a criminal offense was limited.[498]

The "rubber stamp" problem is in part structural: under a policy memorandum issued on April 3, 2002, Army criminal investigators were authorized to decide that an administrative investigation into allegations of felonies or war crimes committed against detainees was adequate and close the case without independent investigation.[499]

An example of the problem is the investigation into the death of Sajid Kadhim Bori al-Bawi, the Iraqi actor who was shot and killed in his Baghdad home. The administrative investigation found the shooting to be justified; it concluded that al-Bawi had grabbed at a U.S. soldier's rifle, switched the safety off, and that the soldier then fired his pistol five times in self-defense.[500] Public statements about the killing made by the military were consistent with these findings.[501] But subsequent articles in the *Washington Post* and the *Boston Globe* detailed the family's allegations of wrongdoing by U.S. forces.[502] These articles were in the criminal investigation file;[503] despite this, the criminal investigating agent spent an hour and a half reviewing the administrative investigation, and did not attempt any independent verification before requesting approval from his unit's Staff Judge Advocate to close the case.[504] The criminal investigators concurred in the administrative investigation's finding that the killing was in self-defense.[505]

Another example is the criminal investigation report into the shooting death of an Iraqi detainee at Camp Cropper, Akel Abedal Hussein Jabar; the criminal investigation report also references an attached administrative investigation into the detainee's death.[506] Jabar, an Iraqi detainee, was ostensibly killed during a riot. The file contains an "Outstanding Leads Worksheet," which lists 17 items for follow-up, including such basic investigation tasks as completing the crime scene examination, sending evidence to a lab for forensic evaluation, interviews of soldiers and detainee witnesses to the death, collection of the weapon and shell casings used to shoot Jabar, and conduct of an autopsy.[507] None of the leads was followed and the criminal investigating agent, the Special Agent in Charge, and the Staff Judge Advocate concluded the administrative investigation adequately supported a finding of justifiable homicide.[508]

Administrative Investigations

Administrative investigations, or so-called "Army Regulation 15-6 investigations," are standard procedures for administrative fact-finding in the Army[509] and "may be used as a general guide for investigations"[510] into anything from a series of broken air-conditioners, to a missing soldier, to a death in custody.[511] At its inception, the appointing commander designates whether the administrative investigation will be formal or informal,[512] and assigns an investigating officer who need not be a professional investigator or lawyer.[513] Procedural guidelines and documentation standards depend on whether an investigation is formal (more stringent requirements; require proceedings to be documented) or informal (not required to meet specific guidelines; no documentation of proceedings required).[514] On completion, the report of an administrative investigation must be submitted to the appointing commander's JAG officer for legal review,[515] then provided to the appointing commander, who determines what action, if any, should be brought.[516] In making that determination, the appointing commander is "neither bound nor limited by the findings or recommendations of an investigation."[517] Administrative investigations can only be used to investigate an incident or individual within the appointing commander's chain of command, in other words, the investigator cannot investigate wrongdoing at the level of, or higher than, the commander who initiated the investigation.[518]

Inadequate Record Keeping

One of the fundamental tenets of the laws of war is that full and adequate records regarding the capture and treatment of detainees must be kept;[519] a host of Department of Defense and Army regulations codify this requirement.[520] Yet in more than a dozen cases, these regulations were not followed, and investigations into most of these detainee deaths appear to have been undermined as a result.[521]

The Army's medical record-keeping was particularly poor, with detainees' medical records often left incomplete or entirely missing. Thus, although Army investigations found that fourteen detainees died of natural causes because of pre-existing conditions,[522] at least five case files do not include records documenting these conditions.[523] In some instances, this appears to have been an administrative oversight by criminal investigators who may not have requested records.[524] In others, however, there were simply no medical records to be found. For example, although it was policy at Iraq's Camp Warhorse that a record of a

detainee's intake medical screening be attached to his detainee file, the officer who investigated Hassan Ahmed's death found that there was "no documentation of a medical screening . . . in his file."[525] This was also certainly the case in the deaths of at least two "ghost" detainees[526] killed in American custody – prisoners whose names were unlawfully kept off the prison's rolls in an effort to keep the International Committee of the Red Cross from knowing about them.[527] It was also at times a matter of policy. For example, until mid-August 2004, at Camp Warhorse, no records had been kept of "sick call" treatment given to detainees.[528] The administrative officer who investigated the death of an unidentified detainee at that facility recommended that "[a]ll medical information and encounters… [be] documented," because such record keeping was "standard of care throughout the world."[529]

For criminal investigators, the absence of medical records can be pivotal. Inadequate records kept in the cases of Hadi Abdul Hussain Hasson al-Zubaidy and Jassim Al-Obodi made determining the cause of death impossible.[530] Without basic records, there was no basis in either of these cases to determine or substantiate the cause of death, let alone seek any accountability for it.

Medical Records

The Army Surgeon General's April 2005 Report on Detainee Medical Operations in Iraq, Afghanistan, and Cuba found "wide variability in medical records generation at level I and II [non-hospital] facilities. In some cases, no records were generated . . . . In others cases, care was documented on Field Medical Cards . . . only."[531] Further, "[m]edical care, including screenings, at or near the time of interrogation, was neither consistently documented nor consistently included in detainee medical records."[532] Notable among omissions from detainees' records, medical personnel "did not consistently nor uniformly document [actual or suspected detainee] abuse in the medical record," and the Surgeon General's investigating team "discovered no DoD, Army, or theater policies requiring that actual or suspected abuse be documented in a detainee's medical records."[533] Even if those policies existed, they may not have been followed because "less than 3% of medical personnel surveyed from the AC [active component] and 7% from the RC [reserve component] . . . reported receiving training on detainee medical records."[534]

V. Failure of Accountability

Command is a sacred trust. The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority. . . .Our society and the institution look to commanders to make sure that missions succeed, that people receive the proper training and care, that values survive. On the one hand, the nation grants commanders special authority to be good stewards of its most precious resources: freedom and people. On the other hand, those citizens serving in the Army also trust their commanders to lead them well.

U.S. Department of the Army Field Manual on Leadership 22-100

There are surprisingly few detainee death cases in which anyone has been identified as responsible; there are fewer still in which someone accused of wrongdoing has been punished. Of the 34 homicide cases surveyed in this report,[535] investigators recommended criminal charges in fewer than two thirds,[536] and charges were actually brought in less than half.[537] In the end, we know of only 12 detainee deaths that have resulted in punishment of any kind for any individual.[538] The punishments in eight of the 12 cases appear strikingly lenient.[539] Critically, only half of the cases of detainees tortured to death have resulted in punishment; the steepest sentence for anyone implicated in a torture-related death has been five months in jail.[540]

While it is difficult to assess the systemic adequacy of punishment when the deliberations of juries and commanders remain largely unknown, two things are clear: (1) command has played a key role in undermining chances for full accountability, and (2) investigative and evidentiary failures have limited accountability up and down the chain of command.

The Role of Command

Command failures to provide clear guidance and lawful instruction on interrogation and detention rules appear to have played a role in limiting accountability, especially in cases involving torture. Punishments for torture-related deaths have been much less severe than punishments meted out for homicides involving, for example, a wrongful shooting. In part, evidence of command's responsibility in the torture cases may have caused military juries or judges to award lenient sentences or accept lesser pleas for lower ranking troops; if troops received guidance that appeared to justify (or turn a blind eye to) harsh or torturous treatment, or if they received no guidance, it could seem unfair to hold them solely or fully accountable for a death.

Indeed, inadequate or unlawful guidance has been raised as an issue in at least four detainees' deaths.[541] For example:

- In court martial proceedings against Chief Warrant Officer Lewis Welshofer, for the murder of Iraqi detainee General Abed Hamed Mowhoush, Welshofer claimed that he was "not at all" trained for the interrogation of captured detainees.[542] He understood he was authorized to force Mowhoush

into a sleeping bag based in part on a memorandum from General Ricardo Sanchez, the highest-ranking military official in Iraq at the time.[543] In that memorandum, General Sanchez authorized harsh interrogation techniques, including sleep and environmental manipulation, the use of aggressive dogs, and stress positions – even as Sanchez acknowledged that other countries might view these techniques as inconsistent with the Geneva Conventions.[544] That memorandum was the only in-theater guidance Welshofer testified he received.[545] The use of the sleeping bag technique was also authorized by Welshofer's Company Commander, Major Jessica Voss.[546] Welshofer was charged with murder but found guilty of negligent homicide, for which he received a reprimand, a $6,000 fine, and confinement to his home, base, or place of worship for 60 days.[547] Voss was not criminally charged.

- Lieutenant Colonel Thomas J. Berg, the Army judge who oversaw a pretrial inquiry in the death of two Afghan detainees Dilawar and Habibullah, noted that the Military Police Company responsible for detainees at the Bagram detention facility had not been adequately trained before deployment for its mission; Berg recommended that charges be dropped against the accused officer, Captain Christopher M. Beiring.[548]
- An administrative investigation into the death of Iraqi Obeed Hethere Radad, shot to death in his detention cell by Army Specialist Juba Martino-Poole, found that Martino-Poole violated the Army's use of force policy.[549] The investigation also found that there were no written standard operating procedures and that there was inadequate clarity on the use of force with regard to detainee operations at the base.[550] Martino-Poole was discharged by his commander before a criminal investigation could be completed; the investigation ultimately found probable cause to charge him with murder.[551]

Authorization and training are also at issue in cases implicating the CIA. Recently, the judge in a federal criminal case against CIA contractor David Passaro ruled that Passaro can present evidence that he was following orders in his interrogation of Abdul Wali, an Afghan detainee.[552] The government alleges that in the two days before Wali died, Passaro beat Wali with his fists and a flashlight.[553] As of February 2006, the case is proceeding toward trial.

Of all Deaths, Only 12 Have Resulted in Punishment

Punishment & Defense	Deaths involving torture (four)[554]	Deaths not involving torture (eight)[555]
People charged with any offense related to these deaths-	28[557]	25[558]
People who received any kind of punishment	20[559]	15[560]
Highest rank punished for a death	Major[561]	Major[562]
Convictions with jail time	4[563]	6[564]
Defendants asserting at court-martial their lack of training or that actions were authorized as a defense.	6[565]	1[566]
Highest punishment	**5 months in prison and a bad-conduct discharge[567]**	25 years in prison[568]
Lowest punishment	**Reprimand[569]**	**Reprimand [570]**

Who was charged?	Deaths involving torture	Deaths not involving torture
Officers charged	6[571]	9[572]
Officers punished	**5 [573]**	**6[574]**
Enlisted personnel charged	21[575]	16[576]
Enlisted personnel punished	15[577]	9[578]
Civilian contractors charged	1[579]	0
Civilian contractors punished	0 (trial pending)	0

In addition to the failure to provide clear guidance, commanders have in some cases exercised their discretion to lessen the punishment subordinates are given following investigations in which troops are found responsible for wrongdoing.

- In the case of Mohammed Sayari, an Afghan allegedly shot to death by U.S. Special Forces, criminal investigators found probable cause to recommend charges of conspiracy and murder

against four members of the Special Forces unit and dereliction of duty charges against three of the four.[580] Among these, investigators recommended a captain be charged with murder, conspiracy, dereliction of duty, and obstruction of justice (likely because the captain ordered a subordinate to destroy evidence).[581] Criminal investigators also recommended that a fifth, a chief warrant officer, be charged as an accessory after the fact.[582] Yet the commander of the 2/3 Special Forces Group, based in Fort Bragg, decided not to pursue any of the recommended charges in a court martial.[583] Instead, the captain was given only received a written reprimand for destruction of evidence; charges against other Special Forces soldiers were dropped.[584] The reasoning behind the commander's decisions is unknown.

- After their subordinates ordered two Iraqis to jump into the Tigris River, resulting in the death of one, Zaidoun Hassoun, three Army commanders failed to inform criminal investigators of the incident.[585] The commanders – Lt. Col. Nathan Sassaman, the battalion commander, Captain Matthew Cunningham, a company commander, and Major Robert Gwinner, the deputy battalion commander – allegedly ordered subordinates to deny the incident occurred, to resist cooperation with criminal investigators,[586] and they "coach[ed]" their soldiers on what to say to investigators.[587] The three later obtained grants of immunity from prosecution, and admitted at their subordinates' trial that their subordinates had forced Hassoun to jump into the Tigris.[588] Sassaman, Cunningham and Gwinner received reprimands for obstruction of justice but were not relieved of their command.[589] Four of their subordinates were charged in connection with Hassoun's death, two were acquitted of manslaughter but received punishment for assault,[590] and two others received non-judicial punishment, details of which have not been disclosed.[591] The highest punishment any of the four junior soldiers received was six months imprisonment, reduction in rank, and a fine of $2,004.[592]
- By the time criminal investigators completed their work and found cause to charge Army Specialist Juba Martino-Poole with murder in the death of Iraqi Obeed Hethere Radad, Martino-Poole's commander, Major General Raymond T. Odierno, had already given Martino-Poole a discharge.[593] Martino-Poole did not, therefore, have to face the possible harsher punishment of a criminal proceeding. The reasons for Major General Odierno's decision are unknown.

Perhaps most significant, commanders themselves continue to escape accountability almost entirely. Again, this has been particularly striking in torture-related deaths, where command guidance and policy have been directly implicated; in these cases, enlisted personnel have been punished at a rate three times greater than those in command.

Both U.S. and international law provide that commanders are responsible for the acts of their subordinates; this law of command responsibility was discussed in detail by the U.S. Supreme Court since in a landmark case following World War II.[594] Commanders are liable for the acts of their subordinates in the chain of command if commanders: (1) exercised effective control over those subordinates; (2) knew or had reason to know of their subordinates' unlawful conduct; and (3) despite that knowledge, failed to take reasonable and necessary measures to prevent their subordinates' conduct.[595]

Despite this longstanding rule, no civilian official or officer above the rank of major responsible for interrogation and detention policies or practices has been charged in connection with any death of a detainee in U.S. custody, including the deaths of detainees by torture or abuse. Consider these examples.

- Only 28% of the individuals charged in connection with a death in custody and 31% of those who received any kind of punishment are officers; the majority of those charged and punished are non-commissioned personnel.
- The highest ranking officer to be held responsible for detainee death is a Major: Major Clarke Paulus was convicted of dereliction of duty and maltreatment for ordering a subordinate to drag Iraqi detainee Hatab by the neck, and for allowing Hatab to remain unmonitored for hours in the blazing Iraqi sun; he was discharged but received no prison time.[596] Major Jessica Voss received a reprimand for her failure to provide adequate supervision in the death of Iraqi General Mowhoush; she was not charged in the death.[597]
- Lt. Col. Nathan Sassaman, Captain Matthew Cunningham, and Major Robert Gwinner, the three commanders who attempted to cover up Iraqi detainee Hassoun's death and who instructed their subordinates not to cooperate with investigators, were not punished in connection with the death. They received only reprimands for obstruction of justice.[598]

- Captain Carolyn Wood was the commander in charge of the 519th Military Intelligence Battalion, members of which were involved in the killing of Afghan detainees Habibullah and Dilawar. Within weeks of those killings, Wood was awarded the first of two Bronze Star medals for "exceptionally meritorious service."[599] She was subsequently assigned to the Army's Intelligence Center in Fort Huachuca, Arizona.[600] Human Rights First sought to verify whether Captain Wood was an instructor for new interrogators but was told by a Fort Huachuca representative that the information could not be disclosed.[601]
- No action has been taken to discipline or otherwise hold accountable Colonel David A. Teeples, commander of the 3rd Armored Cavalry, on whose watch two senior members of the Iraqi military, General Mowhoush and Lieutenant Colonel Jameel, died of abuse.[602]
- Lt. Gen. Ricardo S. Sanchez, U.S. Army Commander of the Coalition Joint Task Force in Iraq in 2003 and 2004, who authorized the use of sleep and environmental manipulation, aggressive dogs, and stress positions against detainees,[603] was promoted to head the Army's V Corps in Europe.[604] Chief Warrant Officer Welshofer pointed to one of Sanchez's memoranda as a basis for his belief that he could use a sleeping bag technique that lead to the death of Iraqi General Mowhoush.[605] General Sanchez recently indicated plans to retire early.[606]
- In 2005, three members of the 82nd Airborne Division came forward to describe abuse of detainees by members of their Division in both Afghanistan and Iraq; they specifically described systematic and recurrent torture and other abuse of Iraqi detainees from September 2003 to April 2004, during their deployment.[607] Major General Charles H. Swannack, Commander of the 82nd Airborne, has not been held accountable for the acts of his subordinates.[608]

Failures of Investigation and Evidence

As the case stories reviewed in this report make clear, repeated failures to adequately investigate, document, or pursue cases in the face of allegations of wrongdoing or abuse have been central contributing factors in creating the accountability gap. While a few non-torture-related homicides have resulted in stiff sentences,[609] more have led to no punishment at all, or to sentences that seem strikingly lenient compared to the severity of the offense.

Examples of cases in which investigative failures or a lack of action have undermined accountability include:

- In the death of Hatab, key evidence (the detainee's body) was destroyed, and partly as a result, charges of negligent homicide against a soldier could not be supported and were reduced to assault and battery.[610]
- In a prosecution against an officer for the deaths of Habibullah and Dilawar, the hearing officer in an article 32 proceeding (analogous to a grand jury proceeding) criticized the prosecution in part for not presenting sufficient evidence to support their charges before recommending that the case be dismissed.[611]
- Mohammad Munim al-Izmerly, a 65-year-old Iraqi chemist who died in January 2004, was found by the Director of Baghdad Hospital's Department of Forensics, Dr. Faik Amin Baker, to have "died from a massive blow to the head"[612] The investigation into al-Izmerly's death was re-opened after press attention, and, two years since his death, remains pending.[613]
- The Army autopsy of the death of Dilar Dababa, reviewed by Human Rights First, describes a number of injuries in detail, indicating he was the recipient of numerous beatings.[614] Dababa's body was covered with at least 22 bruises,[615] and at least 50 abrasions,[616] with his head and neck suffering the most significant harm, resulting in hemorrhaging throughout his brain.[617] Dababa died in June 2003. Since then, there has been no documentation of the outcome of the investigation into his death or of charges being brought against those responsible.[618]
- Fashad Mohammed died in April 2004.[619] According to the Army Medical Examiner's autopsy report, "he was hooded, sleep deprived, and subjected to hot and cold environmental conditions, including the use of cold water on his body and hood."[620] The report found multiple abrasions and contusions,[621]

> and although the cause of death was listed as undetermined, the report explicitly did not rule out asphyxia "from various means" as a possible contributing factor.[622] It does not appear that any murder or manslaughter charges were brought as a result of Mohammed's death. Although three Navy SEALS have been charged with assault and other lesser charges, the status of the charges has not been publicly disclosed.[623]

In addition to highlighting other systemic defects, investigative and evidentiary lapses themselves raise concerns about command's failure to police the rules governing how crimes should be investigated and evidence maintained. At all stages in the investigation of deaths or other abuses, from investigation to (if justified) prosecution and punishment, command has significant work to do – work that to date has gone too often undone.

VI. The Path Ahead

I was part of a three-man Army JAG officer team sent by the Judge Advocate General's School in Charlottesville, at the time of the Vietnam War, to lecture on our obligations under the Geneva Conventions. The interest shown in Geneva's requirements by our toughest fighters, and their perceptive questions, was a revelation to me. That is because they wanted to know that they were doing the right thing. I am sure that our fighting men and women still do . . . . If we do not yet understand what has been lost by disregarding these rules, at least it is beginning to permeate the collective understanding that by failing to live up to them we are placing our own people in constant danger of retaliation. At the same time, of course, we are helping a determined enemy to recruit more volunteers against us.

William S. Shepard, U.S. Army Reserve, Judge Advocate General's Corps (Ret.)
Interview with Human Rights First, November 9, 2005

Addressing the accountability gap documented in this report is critical both in the interest of justice and also as a matter of national security for the United States. The fear and suspicion that abusive interrogation and detention practices have engendered among Muslim populations have undermined U.S. efforts to gather intelligence, and to fight virulent insurgencies now underway. The persistent lack of clarity on the rules governing detainee interrogation and detention has exposed front-line soldiers to needless risk, and increased the threat of harm for all U.S. officials overseas. And the secrecy that still permeates the system – including information about investigations, prosecutions, and steps toward accountability – raises the likelihood that torture and abuse will continue.

Human Rights First urges the United States to develop and implement a zero-tolerance policy for commanders who fail to provide clear guidance to their subordinates, and who allow unlawful conduct to persist on their watch. The key elements of such a policy include the following.

- The President should move immediately to fully implement the ban on cruel, inhuman and degrading treatment passed overwhelmingly by the U.S. Congress and signed into law on December 30, 2005. Full implementation requires first and foremost that the President clarify his commitment to abide by the ban.
- The President should instruct all relevant military and intelligence agencies involved in detention and interrogation operations to review and revise internal rules and legal guidance to make sure they are in line with the McCain statutory mandate and existing constitutional and treaty obligations. The President should issue regular reminders to command that abuse will not be tolerated, and commanders should regularly give troops the same, serious message.
- The Defense Department, CIA and other relevant agencies should evaluate and update training for all U.S. officials engaged in human intelligence and detention operations to ensure they have a full practical understanding of the implications of the bans on torture and cruel, inhuman or degrading treatment – and the consequences of violating it. Personnel in each of the military and intelligence agencies charged with investigating crimes by U.S. soldiers and agents must also receive regular, high

quality training, so that when commanders do order investigations those processes are thorough and complete.

- The Defense Department, CIA and other relevant agencies should take steps to welcome independent oversight – by Congress and civil society – by immediately disclosing with specificity the status of all investigations into, and prosecution of cases concerning, detainee deaths, torture and abuse. Going forward, these agencies should establish a centralized, up-to-date, and publicly available collection of information about the status of investigations and prosecutions (including trial transcripts, documents, and evidence presented), and all incidents of abuse.
- The Departments of Defense and Justice should move forward promptly with long-pending actions against those involved in cases of wrongful detainee death or abuse, and state the basis of decisions not to prosecute.
- The U.S. military should make good on the obligation of command responsibility by developing, in consultation with congressional, military justice, human rights, and other advisors, a public plan for holding *all* those who engage in wrongdoing accountable. Such a plan could include the implementation of a single, high-level convening authority across the branches of the military for allegations of detainee torture and abuse. The convening authority would: review and make decisions about whom to hold responsible; take critical decisions about whether and when to charge troops with crimes out of the hands of individual commanders in the field; bring uniformity, certainty, and more independent oversight to the process of discipline and punishment; and make the punishment of commanders themselves more likely. An accountability plan might also include, for example, an increase in the maximum allowable punishments for maltreatment, dereliction of duty, and other offenses under the Uniform Code of Military Justice that are applicable in cases of abuse.
- Congress should implement a check on officer promotions – such as those put in place for the Navy following the Tailhook scandal – by requiring that each branch of the military certify, for any officer whose promotion requires Senate confirmation, that the officer was not involved in any case of detainee death, torture or abuse.
- Congress should at long last establish an independent, bipartisan commission to review the scope of U.S. detention and interrogation operations worldwide in the "war on terror." Such a commission could investigate and identify the systemic causes of failures that lead to torture, abuse, and wrongful death, and chart a detailed and specific path of recommendations going forward to make sure those mistakes never happen again.

The "accountability gap" documented in this report is about more than just a failure to correct past mistakes. It is about how the United States is conducting detention and interrogation operations today, and whether officials up and down the chain of command – and in every U.S. agency – recognize and answer for the consequences that come with breaking the law. The United States will not be successful at ending torture and abuse until it has an established system designed to prevent abuse before it happens, punish it when it does, and deter any who might think it is possible to get away with abuse.

VII. Appendices

Appendix A

The Numbers

Visual breakdown of Human Rights First's findings.

http://www.humanrightsfirst.info/pdf/06217-etn-app-a-hrf-dic.pdf

Appendix B

Secretary Rumsfeld authorizes coercive interrogation techniques

On December 2, 2002, Secretary of Defense Donald Rumsfeld personally approved a list of interrogation techniques for use on detainees at Guantanamo. Many of these techniques were not consistent with international and U.S. law and contrary to the established rules and military standards governing detention and interrogation as set forth in Army Field Manual 34-52. They included the use of "stress positions," 20-hour interrogations, the removal of clothing, the use of dogs, isolation, and sensory deprivation. Although approved for Guantanamo, the techniques were later used by subordinates in Afghanistan and Iraq. Some of the techniques were later rescinded, and Secretary Rumsfeld personally approved a new list in April 2003, which still included dietary manipulation, sensory deprivation and "false flag" (leading detainees to believe that they have been transferred to a country that permits torture). He also made clear that harsher techniques could be used with his personal authorization. Appendix B contains the December 2, 2002 authorization and list of techniques. **The handwritten notation by Secretary Rumsfeld, on the first page, reads: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?"**

http://www.humanrightsfirst.org/us_law/etn/pdf/dod-memos-120202.pdf

Appendix C

General Sanchez authorizes harsh interrogation techniques, including stress positions

On September 10, 2003, a memo from Lt. Gen. Ricardo S. Sanchez, then U.S. Army Commander of the Coalition Joint Task Force in Iraq, authorized such harsh interrogation techniques as sleep and environmental manipulation, the use of aggressive dogs, and the use of stress positions. The memo, discussed for the first time as evidence in the January 2006 trial of a Chief Warrant Officer accused of involvement in a detainee's murder, is at Appendix C. It underscores both the confusion in the military over the applicability of Geneva Convention protections in Iraq and commanders' recognition that techniques could violate law: **General Sanchez authorized harsh techniques even as he recognized that other countries might view them as inconsistent with the Geneva Conventions.**

http://www.humanrightsfirst.info/pdf/06124-etn-sep-10-sanchez-memo.pdf

Appendix D

Junior officer claims use of "sleeping bag technique" that caused detainee death was authorized stress position

Human Rights First's analysis of deaths in U.S. custody includes the case of Iraqi Major General Abed Hamed Mowhoush, who suffocated to death after two soldiers forced him inside a sleeping bag, wrapped him in an electric cord, sat on him, and blocked his airways. Chief Warrant Officer Lewis Welshofer faced a murder charge at court martial. At an initial stage in the investigation, Chief Welshofer was given a letter of reprimand by his commanding officer, General Charles H. Swannack, commander of the 82nd Airborne Division. Both in a written rebuttal to Swannack's reprimand and as part of his defense at court martial, Chief Welshofer argued that he understood "the sleeping bag technique" was authorized by General Sanchez's September 10, 2003 memo, which specifically authorized the use of stress positions. Chief Welshofer was found guilty of negligent homicide and negligent dereliction of duty, and received punishment of a reprimand, a $6,000 fine, and movement restricted to his home, base, and place of worship. Appendix D contains Chief Welshofer's rebuttal to his reprimand. **The handwritten notation at the top, from his superior officer, General Swannack, reads: "Death was from asphyxiation! I expect better adherence to standards in the future!"**

http://www.humanrightsfirst.info/pdf/mem-dic021104.pdf

Appendix E

Record keeping failure means cause of death may never be known

Among the investigation flaws identified in Human Rights First's review of deaths in U.S. custody are military investigators' belated efforts to find out what happened to some detainees whose deaths were never reported and whose cases simply slipped through the cracks. Hadi Abdul Hussain Hasson al-Zubaidy (Hasson) is one of those cases. Appendix E is an extract from the Army's October 2004 investigation report into Mr. Hasson's death. As it describes, the Army's eventual efforts to find out what happened to Mr. Hasson went nowhere because U.S. record-keeping about detainees was so poor. According to a U.S. Mortuary Affairs officer: **"the documentation on deceased Detainees was very limited . . . the majority of the time prior to earlier this year [2004], when the Mortuary received the remains of a deceased Detainee they would only know that the deceased was a detainee, and would not have any other info on the remains, so they would have a list of the remains as unknown John Doe."**

http://www.humanrightsfirst.info/pdf/06216-etn-dic-app-e.pdf

Appendix F

Army recommendation to lessen perception of cover up

Abu Malik Kenami died after he was subjected to extreme exercise – made to stand up, then sit down, over and over again – then cuffed, hooded and returned to a crowded cell. The investigation into his death is an example of other flaws Human Rights First identified: investigators failed to conduct interviews of critical witnesses and did not gather and maintain physical evidence. The Army's own subsequent review of the investigation into Mr. Kenami's death found "it was weak in Thoroughness and Timeliness." Appendix F contains two excerpts from the Kenami investigation records. The first is the Army's review of the initial criminal investigation, and lists that investigation's inadequacies. The second is an **excerpt from the Army's administrative investigation, which recommends that an Iraqi physician be brought in to treat detainees because, among other benefits, "[i]t would [also] decrease the perception of our involvement or cover-up in events like these."**

http://www.humanrightsfirst.info/pdf/06216-etn-dic-app-f.pdf

Appendix G

No criminal investigation: shooting death of allegedly elderly and disabled man

Among the deaths for which the official cause is unknown but which Human Rights First identifies as a possible homicide is an unnamed man, killed in Balad, Iraq, on January 3, 2004. The only publicly-available record of his death is in Appendix F, in which his family's claim for compensation is considered by U.S. forces – and denied. Human Rights First found no indication that the man's death was criminally investigated and has requested that information from the Department of Defense. According to Appendix G, U.S. forces allege that the man, whom they describe as a suspected insurgent, reached for a pistol while detained during a raid on his home. On the second page of Appendix G is what the Army document describes as a "verbatim transcription" of the man's family's claims. The family asserted that their father was shot without cause and attach medical records to support their assertion that **the father "was [a] physically disabled retired old man, walking only through the aid of crutches due [to] peripheral neuropathy and muscular atrophy caused by long standing disease of Diabetes Mellitus and hypertension . . ."**

http://www.humanrightsfirst.info/pdf/06216-etn-dic-app-g.pdf

Appendix H

List of Human Rights First Freedom of Information Act Requests

Lists the Freedom of Information Act requests Human Rights First has filed in connection with deaths in U.S. custody.

Appendix A – G (pages 47 – 98) are available online and in the printed version.

Appendix H

Human Rights First's Freedom of Information Act Requests Relating to Deaths in Custody

1. June 11, 2004, Request to the U.S. Army Crime Records Center [CID] for all records and reports of criminal investigations by the Army Criminal Investigation Command of possible misconduct against detainees in Iraq and Afghanistan since January 2002.
2. June 11, 2004, Request to the Central Intelligence Agency for all records concerning investigations by the Office of the Inspector General of the Central Intelligence Agency of deaths of three detainees in Iraq and Afghanistan in 2003 – Manadel al-Jamadi, Abid Hamid Mowhoush, and Abdul Wali.
3. June 18, 2004, Request to the Department of Justice for all records concerning the Department of Justice's criminal investigation of alleged homicide of a detainee in Iraq or Afghanistan by a contractor employed by the Central Intelligence Agency.
4. July 20, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to the Army Criminal Investigation Command (CID) investigation into the death of Sher Mohammed Khan.
5. July 21, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0011-04-CID469-79630 (drowning death of Zaidoun Hassoun).
6. July 21, 2005, Request to NCIS Headquarters for all documents related to the Naval Criminal Investigative Service (NCIS) investigation into the death of Nagem Sadoon Hatab.
7. July 21, 2005, Request to the 5th Special Forces Group for all documents related to the Commander's Inquiry conducted, pursuant to AR 15-6, into the death of Sajid Kadhim Bori al-Bawi on May 17th, 2004, in Baghdad, Iraq.
8. July 21, 2005, Request to the U.S. Army Medical Command for all medical records pertaining to the care of Sher Mohammed Khan, including his autopsy.
9. July 21, 2005, Request to the 4th Infantry Division for all records relating to the Commander's Inquiry conducted pursuant to AR 15-6 to investigate the shooting death of Obeed Hethere Radad.
10. July 22, 2005, Request to NCIS Headquarters for all documents relating to the Naval Criminal Investigative Service (NCIS) investigation into the deaths of Hamaady Kareem and Tahah Ahmead Hanjil.
11. July 22, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation into the death of Lt. Col. Abdul Jameel.
12. July 22, 2005, Request to Marine Corps Base Camp Lejeune for investigation reports and supporting or otherwise related materials for all commander's inquiries commenced on or after January 1, 2002 within the 2nd Battalion of the 2nd Marine Regiment regarding incidents occurring outside the territorial United States and involving bodily injury or death.
13. July 22, 2005, Request to Marine Corps Base Camp Pendleton for investigation reports and supporting or otherwise related materials for all commander's inquiries investigations commenced on or after January 1, 2002 within the 3rd Battalion of the 1st Marine Regiment regarding incidents

occurring outside the territorial United States and involving bodily injury or death.

14. July 22, 2005, Request to the 301st Military Police for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 301st Military Police regarding incidents occurring outside the territorial United States and involving bodily injury or death.

15. July 22, 2005, Request to the 5th Special Forces Group for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within 5th Special Forces Group regarding incidents occurring outside the territorial United States and involving bodily injury or death.

16. July 22, 2005, Request to the 4th Infantry Division for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 1/8th Infantry Battalion of the 3rd Brigade of the 4th Infantry Division regarding incidents occurring outside the territorial United States and involving bodily injury or death.

17. July 22, 2005, Request to the 4th Infantry Division for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 4th Forward Support Battalion of the 4th Infantry Division regarding incidents occurring outside the territorial United States and involving bodily injury or death.

18. July 22, 2005, Request to Marine Corps Base Camp Lejeune for investigation reports and supporting or otherwise related materials for all commander's inquiries commenced on or after January 1, 2002 within the 2nd Regiment Combat Team of the 2nd Marine Expeditionary Brigade regarding incidents occurring outside the territorial United States and involving bodily injury or death.

19. July 22, 2005, Request to the XVIII Airborne Corps for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 7th Special Forces Group regarding incidents occurring outside the territorial United States and involving bodily injury or death.

20. July 22, 2005, Request to the 3rd Armored Cavalry Regiment for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 3rd Armored Cavalry Regiment regarding incidents occurring outside the territorial United States and involving bodily injury or death.

21. July 22, 2005, Request to the 1st Cavalry Division for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 1st Battalion of the 41st Infantry Regiment of the 1st Cavalry Division regarding incidents occurring outside the territorial United States and involving bodily injury or death.

22. July 22, 2005, Request to the XVIII Airborne Corps for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 519th Military Intelligence Battalion regarding incidents occurring outside the territorial United States and involving bodily injury or death.

23. July 22, 2005, Request to the 20th Special Forces Group for investigation reports and supporting or otherwise related materials for all Army Regulation 15-6 investigations commenced on or after January 1, 2002 within the 20th Special Forces Group regarding incidents occurring outside the territorial United States and involving bodily injury or death.

24. July 25, 2005, Request to NCIS Headquarters for all records relating to a Naval Criminal Investigative Service (NCIS) investigation into the death of Manadel al-Jamadi.

25. July 25, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation into the death of Manadel al-Jamadi.

26. July 26, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0174-04-CID259, an investigation into a death which occurred at an unknown location, probably in Iraq or Afghanistan, on September 13th, 2003.

27. July 27, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0233-04-CID789, an investigation into the possible death of a detainee at Abu Ghraib, Iraq, in June of 2004, as the result of a blood transfusion of the wrong type.

28. July 28, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0537-04-CID034, an investigation into a death which occurred at an unknown location, probably in Iraq or Afghanistan, on December 1st, 2003.
29. August 1, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation into the killing of Naser Ismail.
30. August 2, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation into the killing of Jamal Naseer.
31. August 3, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0239-04-CID259, an investigation into a death which occurred at Camp Bucca, Iraq, on an unknown date.
32. August 5, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0326-04-CID056, an investigation into a death which occurred at an unknown location, probably in Iraq or Afghanistan, on an unknown date.
33. August 8, 2005, Request to the U.S. Army Crime Records Center [CID] for all records relating to an Army Criminal Investigation Command (CID) investigation with sequence number 0035-03-CID259-61144, an investigation into the death of an Iraqi Army Private.
34. August 10, 2005, Request to the Department of Defense for all records relating to the detention, treatment, and transfer of Hadi Abdul Hussain Hasson al-Zubaidy, an Iraqi citizen, treated aboard the USNS Comfort in 2003.

VIII. Endnotes

[1] Human Rights First Telephone Interview with Hossam Mowhoush, son of Iraqi Maj. Gen. Abed Hamed Mowhoush (Sept. 22, 2005) (transcription on file with Human Rights First).

[2] The total number of deaths in custody analyzed by Human Rights First is 98. *See* research compilation on file with Human Rights First, based on documents released under the Freedom of Information Act, press reports, and Human Rights First interviews ("DIC Table"). Unless otherwise specified, supporting citations in footnotes to a detainee's last name refer to the entries concerning that detainee's death in the DIC Table, which is available upon request from Human Rights First. The DIC Table is organized chronologically by date of death. In a number of instances, the name of a detainee is not known, although the date and location of death is; such detainees have been sequentially numbered (Unknown 1, Unknown 2, etc.), based on date of death and are referred to in this Report by the sequential number.

This Report focuses on deaths that implicate interrogation or detention policy or practice and Human Rights First includes in its count of 98 deaths any death caused by one or more members of the U.S. Armed Forces or other official U.S. governmental agency while the person was under U.S. control, including a death at a detainee's home, a death during an alleged escape attempt, and death at the point of capture but after a person's surrender. The 98 deaths also include ten deaths about which only minimal information, such as name or a date of death is publicly available, and for which there is no publicly available information on cause or circumstances of death. For the purposes of this Report, Human Rights First has not included in its analysis deaths in situations where U.S. custody is open to question (including deaths allegedly caused at check-point stops where circumstances of the stop or surrender are unclear), or deaths allegedly caused at a later point in time by injuries sustained during combat (including alleged "mercy" killings).

The total number of deaths Human Rights First counts is 141; this number includes 38 detainees who died when their detention facilities were struck by mortar attacks, and five deaths of detainees killed in U.S. custody by other detainees. While these latter 43 deaths are of concern – and appear to be in part a reflection of poor operational decisions, noted by former Defense Secretary James Schlesinger, to house detainees in areas of active danger – they were not a function of interrogation or detention policy or practice. *See* FINAL REPORT OF THE INDEP. PANEL TO REVIEW DOD DETENTION OPERATIONS, Aug. 2004, at 63, 77.

[3] We use the same definition of "homicide" as the Army's Criminal Investigation Division: "Death resulting from the intentional (explicit or implied) or grossly reckless behavior of another person or persons." As the Army itself points out, this definition is different from murder, which, like manslaughter, is a legal term that requires a judge or jury to find that the intent behind the death had a degree of maliciousness. Dep't of the Army, Criminal Investigation Division, *Frequently Asked Questions*, http://www.cid.army.mil/faqs.htm (accessed Feb. 3, 2006) (citing to Title 18, U.S. Code definition of "Murder" as "the unlawful killing of a human being with malice aforethought."). *See* DIC Table: There are 20 homicides in which investigators found unjustified homicide or in which there were prosecutions for a death and 14 that investigators found justifiable. The 20 unjustified homicides are: Sayari (criminal investigators found probable cause for conspiracy to murder); Dilawar and Habibullah (probable cause for crimes ranging from involuntary manslaughter to lying to investigators); Unknown 2 (murder charge); Hatab (charges initially brought included voluntary manslaughter; commanders later dropped the charge), Wali (federal criminal assault charges in connection with death); Radad (criminal investigators found probable cause for murder); F. Mohammed (prosecutors brought charges including assault with intent to cause death); al-Jamadi (pathologist ruled case a homicide; court martial for assault and battery); Mowhoush (court martial brought on murder charge); Hassoun (two soldiers charged with manslaughter, one other charged with involuntary manslaughter); Ismail (soldier charged with murder, but acquitted); Jameel (criminal investigators recommended charges including negligent homicide); Kadir (manslaughter conviction); Kareem and Hanjil (criminal investigators recommended, and commanders considered but ultimately dropped, murder charges); Unknowns 18 and 19 (two soldiers court-martialed for murders, received 25 and 5 years in jail, respectively); T. Ahmed (soldier guilty of murder); Unknown 22 (soldier charged with murder). The 14 deaths found by the military to be justified homicides are: al-Haddii; Jabar; A. Hassan; Unknown 7; Sayar; Salman; Shalaan; Thawin; Amir; Farhan; K. Mahmood; al-Bawi; Ghafar and Habib.

[4] *See* 18 U.S.C. §2340 (1998) ("'torture' means 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"). *See* DIC Table: The detainees tortured to death are: Habibullah; Dilawar; Naseer; Abdul Wali; Unknown 1 (detainee killed at the "Salt Pit" facility in Afghanistan); al-Jamadi; Mowhoush; and, Jameel. In addition, the publicly-available evidence and circumstances surrounding the deaths of Dababa, F. Mohammed, Hatab and al-Izmerly raise concerns that they may also have been subjected to torture.

[5] Dep't of the Army, CID, *CID Report of Investigation – Initial/Final SSI – 0037-04-CID201-54050* (Nov. 16, 2004), *available at* http://www.aclu.org/torturefoia/released/042105/9290_9388.pdf, at 68-69 (accessed Feb. 3, 2006). Throughout this Report, page number citations for PDF files of records released by the military and other government agencies refer to the physical number of pages in the files and may not correspond to agency-assigned page number stamps.

[6] Human Rights First Telephone Interview with Mohammed Mowhoush, son of Iraqi Major General Abed Hamed Mowhoush (Nov. 9, 2005) (transcription on file with Human Rights First).

[7] Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A1 [hereinafter White, *Brutal Improvisation*].

[8] Monte Morin and Alissa Rubin, *Abuse Suspected in Iraqi General's Death*, L.A. TIMES, May 23, 2004, at A9; GlobalSecurity.org, Iraq Facilities, FOB Tiger, Al Qaim, *available at* http://www.globalsecurity.org/military/world/iraq/al-qaim.htm (accessed Feb. 3, 2006).

[9] GlobalSecurity.org, Iraq Facilities, FOB Tiger, Al Qaim, *available at* http://www.globalsecurity.org/military/world/iraq/al-qaim.htm (accessed Feb. 3, 2006).

[10] Human Rights First notes from observation of Welshofer court martial, Day Four, Jan. 20, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006); Eric Schmitt, *Army Interrogator Is Convicted of Negligent Homicide in 2003 Death of Iraqi General*, N.Y. TIMES, Jan. 23, 2006, at A16.

[11] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[12] *Id.*

[13] *Id.*; Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2.

[14] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[15] While the Administration had issued guidance stating that the Geneva Conventions would apply in Iraq (Department of Defense News Release, Briefing on Geneva Convention, EPW's and War Crimes, (Apr. 7, 2003), *available at*, http://www.defenselink.mil/t/transcripts/2003/t04072003_t407genv.html (accessed Feb. 3, 2006)), this guidance conflicted with other public statements. Secretary of Defense Donald Rumsfeld said, "technically unlawful combatants do not have any rights under the Geneva Conventions." Dep't of Defense News Briefing, Secretary of Defense Donald Rumsfeld and Joint Chiefs of Staff Chairman General Richard Myers (Jan. 11, 2002), *available at* http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html (accessed Feb. 3, 2005); *See also* Human Rights First, ENDING SECRET DETENTIONS, (June 2004) at 11–12, *available at* http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (accessed Feb. 3, 2005) (describing changes in designations for detainees in Iraq). It also conflicted with how detainees were classified and held throughout Iraq in practice. Dep't of the Army, The Inspector General, DETAINEE OPERATIONS INSPECTION (July 21, 2004) at 76, *available at* http://www.humanrightsfirst.org/us_law/PDF/abuse/mikolashekdetaineereport pdf (accessed Feb. 3, 2006) ; MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, Aug. 2004, at 11-12, *available at* http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf (accessed Feb. 3, 2006) [hereinafter FAY REPORT]. ("In addition to EPWs [enemy prisoners of war] and compliant, non-hostile CIs [civilian internees], units in OEF [Operation Enduring Freedom] and OIF [Operation Iraqi Freedom] were confronted with capturing … other classifications of detainees, such as non-state combatants and non-compliant CIs,"); *see also*, Douglas Jehl & Neil Lewis, *U.S. Said to Hold More Foreigners in Iraq Fighting*, N.Y. TIMES, Jan. 8, 2006, at A1.

[16] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[17] Michael Howard, *Ex-Iraqi general dies in US custody*, THE GUARDIAN, Nov. 28, 2003, *available at* http://www.guardian.co.uk/Iraq/Story/0,2763,1094984,00.html (accessed Feb. 7, 2006).

[18] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, art. 4 ("[p]risoners of war are persons who fall into enemy hands and belong to one of the following categories: "(1) Members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) They are commanded by a person responsible for his subordinates (b) They have a fixed distinctive sign recognizable at a distance; (c) They carry arms openly; and (d) They conduct their operations in accordance with the laws and customs of war"); *see also*, Memorandum from Colin Powell for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020126_Powell_WH%20.pdf (accessed Feb. 3, 2006).

[19] Memorandum from General Ricardo Sanchez to Combined Joint Task Force Seven and the Commander, 205th Intelligence Brigade (Sept. 10, 2003), *available at* http://www.humanrightsfirst.info/pdf/06124-etn-sep-10-sanchez-memo.pdf (accessed Feb. 3, 2006).

[20] *Id.*

[21] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[22] *Id.*

[23] White, *Brutal Improvisation, supra* note 7.

[24] Human Rights First Telephone Interview with Hossam Mowhoush, son of Iraqi Maj. Gen. Abed Hamed Mowhoush (Oct. 10, 2005) (transcription on file with Human Rights First).

[25] *Id.*

[26] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006).

[27] Human Rights First notes from observation of Welshofer court martial, Day Four, Jan. 20, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006).

[28] White, *Brutal Improvisation*, *supra* note 7.

[29] White, *Brutal Improvisation*, *supra* note 7.

[30] White, *Brutal Improvisation*, *supra* note 7; Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006).

[31] White, *Brutal Improvisation*, *supra* note 7; Arthur Kane, *Guardsman: CIA Beat Iraqis with Hammer Handles*, DENVER POST, July 27, 2005, at A9; Arthur Kane, *Iraqi General Beaten Two Days Before Death*, DENVER POST, Apr. 5, 2005, at A1; Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006).

[32] The three soldiers were Sergeant Gerold Pratt (*see* Matthew D. LaPlante, *Utah G.I. Exposed Abuses at Prison*, SALT LAKE TRIB., July 31, 2005, at A1; Human Rights First notes from observation of Welshofer court martial, In Their Own Words, Jan. 19, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906d.asp (accessed Jan. 31, 2006)), Chief Warrant Officer Jefferson Williams (*see* Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A02; Human Rights First notes from observation of Welshofer court martial, In Their Own Words, Jan. 19, 2006, *excerpts available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906d.asp (accessed Jan. 31, 2006)), and Specialist Jerry Loper (*see* Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2; Human Rights First notes from observation of Welshofer court martial, Day Four, Jan. 20, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006)).

[33] Arthur Kane, *Guardsman: CIA Beat Iraqis with Hammer Handles*, DENVER POST, July 27, 2005, at A9; Arthur Kane, *Iraqi General Beaten Two Days Before Death*, DENVER POST, Apr. 5, 2005, at A1.

[34] Human Rights First notes from observation of Welshofer court martial, Day Two, Jan. 18, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011806.asp (accessed Feb. 3, 2006).

[35] Human Rights First notes from observation of Welshofer court martial, Day Four, Jan. 20, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006).

[36] Office of the Armed Forces Med. Exam'r, *Autopsy Examination Report, Autopsy No. ME03-571* (Dec. 18, 2003) [Autopsy, Mowhoush], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 93-100 (accessed Feb. 3, 2006) [hereinafter Autopsy, Mowhoush], Arthur Kane, *Iraqi General Beaten 2 Days Before Death*, DENVER POST, Apr. 5, 2005, at A1.

[37] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[38] M. Gregg Bloche and Jonathan H. Marks, *Doing Unto Others as They Did Unto Us*, N.Y. TIMES, Nov. 14, 2005, at A21.

[39] Jane Mayer, *The Experiment: The military trains people to withstand interrogation. Are those methods being misused at Guantanamo?*, THE NEW YORKER, July 11, 2005, *available at* http://www.newyorker.com/fact/content/articles/050711fa_fact4 (accessed Feb. 7, 2006); M. Gregg Bloche and Jonathan H. Marks, *Doing Unto Others as They Did Unto Us*, N.Y. TIMES, Nov. 14, 2005, at A21.

[40] *See, e.g.*, Jane Mayer, *The Experiment: The military trains people to withstand interrogation. Are those methods being misused at Guantanamo?*, THE NEW YORKER, July 11, 2005, *available at* http://www.newyorker.com/fact/content/articles/050711fa_fact4 (accessed Feb. 7, 2006); *see also* Memorandum for Commander 82nd ABN DIV, re: CW3 Welshofer, Lewis E. Rebuttal to General Letter of Reprimand (Feb. 11, 2004), at 2, *available at* http://www.lchr.org/pdf/mem-dic021104.pdf (accessed Feb. 3, 2006); *see also* Memorandum, Dep't of Defense, JTF GTMO "SERE" Interrogation SOP DTD (Dec. 10, 2002), *available at* http://www.aclu.org/projects/foiasearch/pdf/DOD045202.pdf (accessed Feb. 3, 2006).

[41] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[42] *Id.*

[43] *Id.*; Human Rights First notes from observation of Welshofer court martial, In Their Own Words, Jan. 19, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011905d.as (accessed Feb. 3, 2006).

[44] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[45] *Id.*

[46] Human Rights First Telephone Interview with Mohammed Mowhoush, son of Iraqi Maj. Gen. Abed Hamed Mowhoush (Nov. 9 and Nov. 14, 2005) (transcription on file with Human Rights First).

[47] *Id.*

[48] White, *Brutal Improvisation*, *supra* note 7; Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006, (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006); Memorandum for Commander 82nd ABN DIV, re: CW3 Welshofer, Lewis E. Rebuttal to General Letter of Reprimand (Feb. 11, 2004), *available at* http://www.lchr.org/pdf/mem-dic021104.pdf (accessed Feb. 3, 2006).

[49] Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2; Human Rights First notes from observation of Welshofer court martial, In Their Own Words, Jan. 19, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906d.as (accessed Feb. 3, 2006).

[50] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[51] White, *Brutal Improvisation, supra* note 7; Arthur Kane, *Iraqi General Beaten Two Days Before Death*, DENVER POST, Apr. 5, 2005, at A1; Matthew D. LaPlante, *Utah G.I. Exposed Abuses at Prison*, SALT LAKE TRIB., July 31, 2005, at A1; Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006). .

[52] Human Rights First notes from observation of Welshofer court martial, Day Four, Jan. 20, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006m.asp (accessed Feb. 3, 2006).

[53] Autopsy, Mowhoush, *supra* note 36, at 93–100.

[54] Press Release, Multi-National Force, Iraq, Combined Joint Task Force 7, Iraqi General Dies of Natural Causes, No. 31127a (Nov. 27, 2003). The release has since been removed from military websites, but an archived copy is available at http://web.archive.org/web/20041128154754/http://www.cjtf7.army.mil/media-information/november2003/031127a.htm (accessed Feb. 3, 2006).

[55] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006); Erin Emery, *Carson Soldier Takes the Stand*, DENVER POST, Jan. 20, 2006, *available at* http://www.denverpost.com/news/ci_3419775.

[56] *See* Human Rights First notes from observation of Welshofer court martial, In Their Own Words, Jan. 19, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906d.asp (accessed Feb. 3, 2006); Nicholas Riccardi, *Interrogator Convicted in Iraqi's Death*, L.A. TIMES, Jan. 22, 2006, *available at* http://www.latimes.com/news/printedition/la-na-interrogate22jan22,1,81943.story (accessed Feb. 3, 2006); Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2.

[57] Human Rights First notes from observation of Welshofer court martial, Day Three, Jan. 19, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906m.asp (accessed Feb. 3, 2006); Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2.

[58] White, *Brutal Improvisation, supra* note 7 (quoting Army memo dated May 10, 2004).

[59] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[60] Nicholas Riccardi, *Interrogator Convicted in Iraqi's Death*, L.A. TIMES, Jan. 22, 2006, *available at* http://www.latimes.com/news/printedition/la-na-interrogate22jan22,1,81943.story (accessed Feb. 3, 2006); Erin Emery, *Carson GI Convicted in Death of Detainee*, DENVER POST, Jan. 21, 2006, *available at* http://www.denverpost.com/search/ci_3426219 (accessed Feb. 3, 2006).

[61] Jon Sarche, *Jury Orders Reprimand, No Jail for Soldier*, ASSOC. PRESS, Jan. 24, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/24/AR2006012400177.html (accessed Jan. 27, 2006); Josh White, *Army Interrogator Reprimanded in Iraqi's Death*, WASH. POST, Jan. 24, 2006, at A2.

[62] Dick Foster, *Army Drops Murder Charges*, ROCKY MOUNTAIN NEWS, Jan. 13, 2006, at 17A.

[63] Arthur Kane, *Lesser Charges Urged in Death of Iraqi*, DENVER POST, May 11, 2005, at B3; Dick Foster, *Army Drops Murder Charges*, ROCKY MOUNTAIN NEWS, Jan. 13, 2006, at 17A.

[64] Douglas Jehl and Tim Golden, *C.I.A. Is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, at A6; Press Release, Army Criminal Investigation Command, Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Enduring Freedom, Operation Iraqi Freedom, (Mar. 25, 2005), *available at* http://www.cid.army.mil/Documents/CIF-OEF%20Homicides.pdf, at 2 (accessed Feb. 8, 2006) [hereinafter Criminal Investigators Outline 27 Homicides].

[65] *Lawyers: Army Backed Interrogation Methods*, ASSOC. PRESS, Apr. 1, 2005, *available at* http://www.newsmax.com/archives/articles/2005/3/31/205753.shtml (accessed Feb. 3, 2006), Arthur Kane and Miles Moffeit, *U.S. General Backed Lightest Penalty in Interrogation Death*, DENVER POST, May 10, 2005, at A6.

[66] Dep't of the Army, Blood and Steel: The History, Customs, and Traditions of the 3d Armored Cavalry Regiment (2002), at. 35, 73, *available at* http://www.carson.army.mil/UNITS/3RD%20ACR/main%20pages/3d%20ACR%20History.pdf (accessed Feb. 12, 2006).

[67] Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A1.

[68] Miles Moffeit and Arthur Kane, *Army charges 4 in death*, DENVER POST, Oct. 5, 2004, at A1.

[69] Dep't of the Army, Criminal Investigative Division, CID's Mission – In Depth, http://www.cid.army.mil/mission2.htm (accessed Feb. 3, 2006).

[70] Criminal Investigators Outline 27 Homicides, *supra* note 64 at 7.

[71] *See, e.g.*, Dep't of the Army, CID, *CID Report of Investigation-Corrected/Initial/Final/SSI-0171-04-CID259-80223-/5H6* (Aug. 7, 2004) [Criminal Investigation, al-Bawi], *available at* http://www.aclu.org/torturefoia/released/4894_4927.pdf, at 2, 5, 16 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, al-Bawi].

[72] Criminal Investigation, al-Bawi, *supra* note 71, at 2, 8. "(S)" next to the listing of the administrative investigation denotes it as "secret." *See* Defense Security Service Internet Web Site, Security Related Acronyms, Abbreviations, And Basic Security Forms, (Mar. 2001), at 9, http://www.dss.mil/training/acro.pdf (accessed Feb. 3, 2006).

[73] U.S. Dep't of State, Second Periodic Report of the United States of America to the Committee Against Torture, Annex I, Part Two, III(B)(2) (May 6, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm (accessed Feb. 3, 2006).

[74] *See* DIC Table: The eight cases of deaths in which the involvement of the CIA, Special Forces and/or Navy SEALS is alleged are: Unknown 1 (detainee killed at "Salt Pit" facility in Afghanistan in Nov. 2002) (CIA), Unknown 2 (detainee killed in Wazi village, Afghanistan between Jan. 1 and Jan. 13, 2003) (Special Forces), Abdul Wali (CIA), al-Jamadi (CIA and Navy SEALS), Mowhoush (CIA and Special Forces), Jameel (Special Forces/CIA), Fashad Mohamed (Navy SEALS), Jameel Naseer (Special Forces).

[75] Exec. Order No. 12333 §1.7, U.S. Intelligence Activities, 46 Fed. Reg. 59941, 59945 (Dec. 4, 1981).

[76] *See* DIC Table: These are the deaths of Unknown 1, Wali, al-Jamadi, Mowhoush, and Jameel.

[77] White, *Brutal Improvisation, supra* note 7.

[78] White, *Brutal Improvisation, supra* note 7.

[79] Transcript from *United States v. CW2 Williams, Sgt. 1st Class Sommer and Spc. Loper*, Article 32 investigation, at 14-16 (in the prosecution arising from the death of Mowhoush, ability to produce a verbatim transcript of trial proceedings complicated by requirement for keeping certain information secret) (Dec. 2, 2004); White, *Brutal Improvisation, supra* note 7 ("Determining the details of [Mowhoush's] demise has been difficult because the circumstances are listed as 'classified' on his official autopsy, court records have been censored to hide the CIA's involvement in his questioning, and reporters have been removed from a Fort Carson courtroom when testimony relating to the CIA has surfaced."); Jane Mayer, *A Deadly Interrogation*, THE NEW YORKER, Nov. 14, 2005, at 44 [hereinafter Mayer, *A Deadly Interrogation*] (regarding death of al-Jamadi, CIA officials protested questions asked by lawyers in court-martial; individual CIA personnel might have destroyed evidence; an apparent refusal to inform pathologists as to circumstances of a detainee's death might have led to an incorrect finding); Andrea Weigl, *Passaro Says Assault Charges Political*, NEWS & OBSERVER, Oct. 20, 2005, at B1 (in prosecution of CIA contractor in connection with the Wali death, evidence provided to defendant was severely censored, reducing his ability to mount "an adequate defense").

[80] Mayer, *A Deadly Interrogation, supra* note 79.

[81] Douglas Jehl and Tim Golden, *CIA Is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, at A6.

[82] Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, Mar. 3, 2005, at A1.

[83] Douglas Jehl, *Report Warned CIA about Interrogations*, N.Y. TIMES, Nov. 9, 2005, at A1.

[84] Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1.

[85] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 7; Douglas Jehl, *Pentagon Will Not Try 17 GIs Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1; *Intel GIs to be Charged in Death*, ASSOC. PRESS, June 24, 2004, *available at* http://www.cbsnews.com/stories/2004/06/25/iraq/main626121.shtml (accessed Feb. 3, 2006). Jameel's last name is sometimes given as "Jaleel."

[86] Office of the Armed Forces Med. Exam'r, *Final Autopsy Report, Autopsy No. ME04-14* (Apr. 30, 2004) [Autopsy, Jameel], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 108 (accessed Feb. 3, 2006) [hereinafter Autopsy, Jameel].

[87] Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] Douglas Jehl, *Pentagon Will Not Try 17 GIs Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1.

[93] Autopsy, Jameel, *supra* note 86, at 108.

[94] MedLine Plus: Medical Dictionary, http://www.nlm.nih.gov/medlineplus/mplusdictionary.html (accessed Feb. 3, 2006).

[95] Autopsy, Jameel, *supra* note 86, at 114.

[96] Autopsy, Jameel, *supra* note 86, at 108-114.

[97] Autopsy, Jameel, *supra* note 86, at 114.

[98] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 7.

[99] Arthur Kane and Miles Moffeit, *Memos: Abuse rife in Iraq Interrogation techniques banned at Guantanamo*, DENVER POST, June 27, 2004, at A25.

[100] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 7; Douglas Jehl, *Pentagon Will Not Try 17 GIs Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1.

[101] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 7; Douglas Jehl, *Pentagon Will Not Try 17 GIs Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1.

[102] *See* Mowhoush case profile, *supra* text accompanying note 66.

[103] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 7; Douglas Jehl, *Pentagon Will Not Try 17 GIs Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1.

[104] Office of the Armed Forces Med. Exam'r, *Final Autopsy Report, Autopsy No.: ME 04-309* (Nov. 22, 2004) [Autopsy, F. Mohammed], *available at* http://www.defenselink.mil/pubs/foi/detainees/army_previous_releases/eighth_release/, at 96 [hereinafter Autopsy, F. Mohammed].

[105] Autopsy, F. Mohammed, *supra* note 104, at 96; Criminal Investigators Outline 27 Homicides, *supra* note 64, at 3-4.

[106] Autopsy, F. Mohammed, *supra* note 104, at 96.

[107] Office of the Armed Forces Med. Exam'r, *Preliminary Autopsy Report ME 04-309* (June 23, 2004), *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 133 (accessed Feb. 7, 2006) [Preliminary Autopsy, F. Mohammed].

[108] Josh White, *3 More Navy SEALs Face Abuse Charges*, WASH. POST, Sept. 25, 2004, at A16.

[109] Eric Schmitt, *Navy Charges 3 Commandos With Beating of Prisoners*, N.Y. TIMES, Sept. 24, 2004, at A7.

[110] *See* App. A, Memorandum from William J. Haynes, II, Action Memo: Counter-Resistance Techniques (Nov. 27, 2002) (approved by Secretary of Defense Rumsfeld on Dec. 2, 2002, with hand-written notation: "However, I stand for 8-10 hours a day. Why is standing

limited to 4 hours?"). Haynes' memo attaches a memo from General James Hill (Oct. 25, 2002); a memo from Maj. Gen. Michael Dunlavey (Oct. 11, 2002), a memo (legal review) by Lt. Col. Diane Beaver (Oct. 11, 2002) and a Request for Approval for Counter-Resistance Strategies from Lt. Col. Jerald Phifer (Oct. 11, 2002); *see also* Memorandum from Donald Rumsfeld to Commander, US Southern Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/mem_20030416_Rum_IntTec.pdf (accessed Feb. 7, 2006).

[111] Memorandum from Ricardo S. Sanchez to Commander, U.S. Central Command (Sept. 14, 2003) (attaching Combined Joint Task Force-7 interrogation policy), *available at* http://www.humanrightsfirst.org/us_law/etn/pdf/sanc-%20memo-091403.pdf (accessed Feb. 7, 2006).

[112] Josh White, *3 More Navy SEALS Face Abuse Charges*, WASH. POST, Sept. 25, 2004, at A16.

[113] Eric Schmitt, *Navy Charges 3 Commandos With Beating of Prisoners*, N.Y. TIMES, Sept. 24, 2004, at A7.

[114] Mayer, *A Deadly Interrogation*, *supra* note 79.

[115] Mayer, *A Deadly Interrogation*, *supra* note 79; David S. Cloud, *Navy Officer Found Not Guilty in Death of an Iraqi Prisoner*, N.Y. TIMES, May 28, 2005 at A6; Office of the Armed Forces Med. Exam'r, *Final Autopsy Report, Autopsy No. ME03-504* (Jan. 9, 2004) [Autopsy, al-Jamadi], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 85 (accessed Feb. 3, 2006) [hereinafter Autopsy, al-Jamadi].

[116] Mayer, *A Deadly Interrogation*, *supra* note 79; Seth Hettena, *Navy SEAL: CIA Roughed Up Iraqi Prisoner*, ASSOC. PRESS, Nov. 1, 2004, *available at* http://www.phillyburbs.com/pb-dyn/news/1-11012004-393371.html (accessed Feb. 3, 2006).

[117] John McChesney, *All Things Considered: The Death of an Iraqi Prisoner* (National Public Radio broadcast, Oct. 27, 2005) [hereinafter McChesney, *Death of an Iraqi Prisoner*].

[118] McChesney, *Death of an Iraqi Prisoner*, *supra* note 117.

[119] McChesney, *Death of an Iraqi Prisoner*, *supra* note 117.

[120] Sworn Statement of Col. Thomas Pappas, May 14, 2004, *available at* http://www.aclu.org/torturefoia/released/030905/DOD616_653.pdf, at 15 (accessed Feb. 3, 2006), FAY REPORT, *supra* note 15, at 53 – 55, 75 – 76; *see also* Mayer, *A Deadly Interrogation*, *supra* note 79.

[121] Mayer, *A Deadly Interrogation*, *supra* note 79; Seth Hettena, *Iraqi Died While Hung From Wrists*, ASSOC. PRESS, Feb. 17, 2005, *available at* http://www.commondreams.org/headlines05/0217-09.htm (accessed Feb. 3, 2006) [hereinafter Hettena, *Hung From Wrists*]. *But see* McChesney, *Death of an Iraqi Prisoner*, *supra* note 117 (reporting that one of the MP guards maintains that there was enough slack to allow al-Jamadi to kneel).

[122] Mayer, *A Deadly Interrogation*, *supra* note 79; Hettena, *Hung From Wrists*, *supra* note 121.

[123] Mayer, *A Deadly Interrogation*, *supra* note 79; McChesney, *Death of an Iraqi Prisoner*, *supra* note 117; Hettena, *Hung From Wrists*, supra note 121.

[124] Mayer, *A Deadly Interrogation*, *supra* note 79; McChesney, *Death of an Iraqi Prisoner*, *supra* note 117; Hettena, *Hung From Wrists*, *supra* note 121.

[125] FAY REPORT, *supra* note 15, at 76.

[126] FAY REPORT, *supra* note 15, at 53.

[127] Mayer, *A Deadly Interrogation*, *supra* note 79; Hettena, *Hung From Wrists*, *supra* note 121.

[128] Luke Harding, *How Abu Ghraib Torture Victim Faces Final Indignity: An Unmarked Grave*, THE GUARDIAN, June 1, 2004, at 4.

[129] *Id.*

[130] Autopsy, al-Jamadi, *supra* note 115, at 85.

[131] Autopsy, al-Jamadi, *supra* note 115, at 86.

[132] Mayer, *A Deadly Interrogation*, *supra* note 79.

[133] *Id.*

[134] McChesney, *Death of an Iraqi Prisoner*, *supra* note 117.

[135] T.R. Reid, *Trial Starts in Abu Ghraib Death: Navy SEAL Faces Charges; CIA Agents Not Named in Case*, WASH. POST, May 25, 2005, at A2.

[136] Tony Perry, *SEALs Instructed to Treat Prisoners Well*, L.A. TIMES, May 26, 2005, at A29.

[137] Hettena, *Hung From Wrists*, *supra* note 121; David S. Cloud, *SEAL Officer Hears Charges in Court Martial in Iraqi's Death*, N.Y. TIMES, May 25, 2005, at A8.

[138] Douglas Jehl and Tim Golden, *CIA is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, at A6; Hettena, *Hung From Wrists*, *supra* note 121; David S. Cloud, *SEAL Officer Hears Charges in Court Martial in Iraqi's Death*, N.Y. TIMES, May 25, 2005, at A8.

[139] *See* Dep't of Defense, *Victim and Witness Assistance*, Military Justice Overview, http://www.defenselink.mil/vwac/military.html (accessed Feb. 3, 2006); U.S. Navy Judge Advocate General, *NonJudicial Punishment*, http://www.jag.navy.mil/html/NLSOGlakesNonjudicial_punishment.htm (accessed Feb. 3, 2006); Military.com, *Benefits and Resources, Legal Matters, NonJudicial Punishment*, http://www.military.com/Resources/ResourcesContent/0,13964,30901--1,00.html (accessed Feb. 3, 2006).

[140] David S. Cloud, *Navy Officer Retracts Confession in Death of Iraqi Prisoner*, N.Y. TIMES, May 27, 2005, at A18; Tony Perry, *Navy Lieutenant Denies Assaulting Iraqi Prisoner*, L.A. TIMES, May 27, 2005, at A31.

[141] David S. Cloud, *Navy Officer Found Not Guilty in Death of an Iraqi Prisoner*, N.Y. TIMES, May 28, 2005, at A6; Seth Hettena, *Navy SEAL Acquitted of Abusing Iraqi Prisoner who Later Died*, ASSOC. PRESS, May 28, 2005, *available at* http://abcnews.go.com/US/wireStory?id=798587 (accessed Feb. 3, 2006).

[142] David S. Cloud, *Navy Officer Found Not Guilty in Death of an Iraqi Prisoner*, N.Y. TIMES, May 28, 2005, at A6; Seth Hettena, *Navy SEAL Acquitted of Abusing Iraqi Prisoner who Later Died*, ASSOC. PRESS, May 28, 2005, *available at* http://abcnews.go.com/US/wireStory?id=798587 (accessed Feb. 3, 2006).

[143] Douglas Jehl and Tim Golden, *CIA is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, at A6.

[144] Mayer, *A Deadly Interrogation*, *supra* note 79.

[145] Alex Roth, *Marine Guilty in Death of Iraqi*, SAN DIEGO UNION-TRIB., Nov. 11, 2004 at B1.

[146] Office of the Armed Forces Med. Exam'r, *Final Autopsy Report*, *Autopsy No. A03-51* (Oct. 22, 2003) [Autopsy, Hatab], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 37 (accessed Feb. 3, 2006) [hereinafter Autopsy, Hatab]; Alex Roth, *Marine Guilty in Death of Iraqi*, SAN DIEGO UNION-TRIB., Nov. 11, 2004 at B1.

[147] Alex Roth, *Trial Starts for Marine in Iraqi's Jail Death; Prosecutor Paints Reservist as Rogue*, SAN DIEGO UNION-TRIB., Aug. 25, 2004 at NC-1; Alex Roth, *Iraqi Prisoner Called Thug for Hussein*, SAN DIEGO UNION-TRIB., Aug. 27, 2004 at NC-1. One of the accused denied during his court martial proceedings that he had abused Hatab or any other detainee. Alex Roth, *Never Abused Iraqi Prisoners, Marine Says At Court-Martial*, SAN DIEGO UNION-TRIB., Sept. 2, 2004 at NC-1.

[148] Deborah Hastings, *The Death of Iraqi Prisoner No. 0310337*, ASSOC. PRESS, July 31, 2004, *available at* http://www.dailytimes.com.pk/default.asp?page=story_2-8-2004_pg7_40 (accessed Feb. 3, 2006); David Hasemyer, *Marine Says He was Ordered to Grab Prisoner's Neck*, SAN DIEGO UNION-TRIB., Nov. 4, 2004, at B2.

[149] Philip Sherwell and Colin Freeman, *Iraqi Prisoner 'was beaten, kicked, and left to die by Marines.'* TELEGRAPH, May 23, 2004, at 24; Jeff McDonald, *Behavior of Detainee Who Died is at Issue; Was Iraqi Ill or Just Belligerent*, SAN DIEGO UNION-TRIB., Nov. 5. 2004, at NC-1.

[150] Alex Roth, *Marine Guilty In Death of Iraqi*, SAN DIEGO UNION-TRIB., Nov. 11, 2004, at B1; David Hasemyer, *Marine Says He was Ordered to Grab Prisoner's Neck*, SAN DIEGO UNION-TRIB., Nov. 4, 2004, at B2.

[151] David Hasemyer, *Marine Says He was Ordered to Grab Prisoner's Neck*, SAN DIEGO UNION-TRIB., Nov. 4, 2004, at B2.

[152] Autopsy, Hatab, *supra* note 146, at 37 (Hatab pronounced dead at 12:30 a.m.); David Hasemyer, *Marine Says He was Ordered to Grab Prisoner's Neck*, SAN DIEGO UNION-TRIB., Nov. 4, 2004, at B2; Alex Roth, *Marine Guilty in Death of Iraqi*, SAN DIEGO UNION-TRIB., Nov. 11, 2004, at B1.

[153] Seth Hettena, *Court Martial Begins in Iraq Prison Death*, ASSOC. PRESS, Nov. 2, 2004, *available at* http://msnbc.msn.com/id/6394480/ (accessed Feb. 3, 2006). Three medical experts retained by the different defendants in subsequent courts-martial disputed this finding. Alex Roth, *Heart Failure Caused Death of Prisoner, Witness Says; Defense Expert Testifies at Marine's Court-Martial*; SAN DIEGO UNION-TRIB., Sept. 1, 2004, at NC-1. One expert gave the opinion that Hatab likely died of natural causes, probably heart failure. *Id.* Two experts stated that he likely died of asthma or pneumonia. *Id.* According to one of the experts, it was hard to pinpoint the cause of death because Hatab's body was left for four days in extreme heat before the autopsy. *Id.*

[154] Alex Roth, *Trial starts for Marine in Iraqi's Jail Death; Prosecutor Paints Reservist as Rogue*, SAN DIEGO UNION-TRIB., Aug. 25, 2004, at NC-1 (quoting prosecutor in court martial of one of the Marines charged in connection with Hatab's death).

[155] David Hasemyer, *Marine Says He was Ordered to Grab Prisoner's Neck*, SAN DIEGO UNION-TRIB., Nov. 4, 2004, at B2 (quoting Major William Vickers).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*.

[160] Alex Roth, *Heart Failure Caused Death of Prisoner, Witness Says; Defense Expert Testifies at Marine's Court-Martial*, SAN DIEGO UNION-TRIB., Sept. 1, 2004, at NC-1 (describing pathologist's testimony).

[161] *Id.*

[162] Seth Hettena, *Military Loses Key Evidence in Iraqi Death*, ASSOC. PRESS, Sept. 9, 2004, *available at* http://68.166.163.242/cgi-bin/readart.cgi?ArtNum=65771 (accessed Feb. 3, 2006).

[163] Seth Hettena, *Army Pathologist Concedes Errors in Prisoner-Abuse Case*, Assoc. Press, Oct. 14, 2004, available at http://www.usatoday.com/news/nation/2004-10-14-errors-abuse_x.htm (accessed Feb. 3, 2006) (rib cage found at Armed Forces Institute of Pathology, Washington D.C.; part of larynx found at Landstuhl military base in Germany).

[164] Dep't of the Army, Field Manual 19-20, Law Enforcement Investigations (Nov. 1985), at 200.

[165] Seth Hettena, *Court Martial Begins in Iraq Prison Death*, ASSOC. PRESS, Nov. 2, 2004, *available at* http://msnbc.msn.com/id/6394480/ (accessed Feb. 3, 2006).

[166] Alex Roth, *Iraqi's Body May Be Dug Up Again in Abuse Case*, SAN DIEGO UNION-TRIB., Oct. 15, 2004, at B3.

[167] Autopsy, Hatab, supra note 146, at 37; Seth Hettena, *Army Pathologist Concedes Errors in Prisoner-Abuse Case*, Assoc. Press, Oct. 14, 2004, available at http://www.usatoday.com/news/nation/2004-10-14-errors-abuse_x.htm (accessed Feb. 3, 2006).

[168] Alex Roth, *Marines Involved in Iraqi Abuse Frustrated After Their Convictions*, SAN DIEGO UNION-TRIB., Dec. 13, 2004, at A1.

[169] Jonathan Heller, *8 Marine Reservists Charged in Beating Death of Iraqi POW*, SAN DIEGO UNION-TRIB., Oct. 19, 2003, at A2.

[170] Seth Hettena, *Court Martial Begins in Iraq Prison Death*, ASSOC. PRESS, Nov. 2, 2004 *available at* http://msnbc.msn.com/id/6394480/ (accessed Feb. 3, 2006) ("most of the Marines had their cases dismissed in large part because of the breakdown in forensic evidence that has marred the case"); Alex Roth, *Reservist Convicted of Assault on Inmates; Sergeant Acquitted in Iraqi's Death at Camp*, SAN DIEGO UNION-TRIB., Sept. 3, 2004, at A1.

[171] Seth Hettena, *Court Martial Begins in Iraq Prison Death*, ASSOC. PRESS, Nov. 2, 2004, *available at* http://msnbc.msn.com/id/6394480/ (accessed Feb. 3, 2006); Jeff McDonald, *Behavior of Detainee Who Died Is at Issue; Was Iraqi Ill or Just Belligerent*, SAN DIEGO UNION-TRIB., Nov. 5, 2004, at NC-1.

[172] Alex Roth, *Reservist's Court Martial Postponed: Defense in Iraqi Death Gets More Prep Time*, SAN DIEGO UNION-TRIB., July 29, 2004, at NC-1.

[173] Gidget Fuentes, *Major Convicted, Avoids Jail Time in Abuse Trial*, MARINE CORPS TIMES, Nov. 22, 2004, at 11; Alex Roth, *Marine Guilty in Death of Iraqi*, SAN DIEGO UNION-TRIB., Nov. 11, 2004, at B1.

[174] Alex Roth, *Judge Postpones a Court-Martial, Rips Prosecutors*, SAN DIEGO UNION-TRIB. Sept. 10, 2004, at B1; Tony Perry, *Marine Sentenced for Beating Iraqi Captives*, L.A. TIMES, Sept. 4, 2004, at B6.

[175] Katie Thomas, *Marines on Trial*, N.Y. NEWSDAY, Aug. 30, 2004, at A4; John J. Lumpkin, *Details about deaths of prisoners in U.S. custody in Iraq, Afghanistan*, ASSOC. PRESS, May 8, 2004, *available at* http://www.signonsandiego.com/news/world/iraq/20040508-1007-theprisonersdeaths.html (accessed Feb. 7, 2006); Jonathan Heller, *8 Marine Reservists Charged in Beating Death of Iraqi POW*, SAN DIEGO UNION-TRIB., Oct. 19, 2003, at A2.

[176] Gidget Fuentes, *Major Convicted, Avoids Jail Time in Abuse Trial*, MARINE CORPS TIMES, Nov. 22, 2004, at 11; Robert Jablon, *Witness: Marines Hit Iraq Inmate Who Died*, ASSOC. PRESS, Aug. 26, 2004, *available at* http://www.prisonplanet.com/articles/august2004/260804marineshit.htm (accessed Feb. 7, 2006).

[177] R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee who Died*, WASH. POST, Apr. 13, 2005, at A7; Susan Schmidt and Dana Priest, *Civilian Charged in Beating Death of Afghan Detainee*, WASH. POST, June 18, 2004, at A1.

[178] *Doubt Cast Over Defense Claim in Afghan Abuse*, ASSOC. PRESS, June 20, 2004, *available at* http://www.msnbc.msn.com/id/5234259/ (accessed Feb. 3, 2006); Susan Schmidt and Dana Priest, *Civilian Charged in Beating Death of Afghan Detainee*, WASH. POST, June 18, 2004, at A1.

[179] *Doubt Cast Over Defense Claim in Afghan Abuse*, ASSOC. PRESS, June 20, 2004, *available at* http://www.msnbc.msn.com/id/5234259/ (accessed Feb. 3, 2006).

[180] *Id.*; R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee who Died*, WASH. POST, Apr. 13, 2005, at A7.

[181] *U.S. Indicts CIA Contractor in Afghanistan Prison Death*, CNN, June 22, 2004, *available at* http://www.cnn.com/2004/LAW/06/17/afghan.indictment/ (accessed Feb. 3, 2006); Andrea Weigl, *Room Designed to Keep Secrets*, NEWS AND OBSERVER, Mar. 29, 2005, at B1.

[182] R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee who Died*, WASH. POST, Apr. 13, 2005, at A7.

[183] Indictment of David Passaro, *U.S. v. Passaro*, No. 5:04-CR-211-1, June 17, 2004, *available at* http://news.findlaw.com/hdocs/docs/torture/uspassaro61704ind.html (accessed Feb. 3, 2006); R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee who Died*, WASH. POST, Apr. 13, 2005, at A7.

[184] Andrea Weigl, *Trial's Weight Hinges on Ruling*, NEWS AND OBSERVER, Dec. 16, 2005, at B1.

[185] *Doubt Cast Over Defense Claim in Afghan Abuse*, ASSOC. PRESS, June 20, 2004, *available at* http://www.msnbc.msn.com/id/5234259/ (accessed Feb. 7, 2006).

[186] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 3.

[187] Indictment of David Passaro, *U.S. v. Passaro*, No. 5:04-CR-211-1, June 17, 2004, *available at* http://news.findlaw.com/hdocs/docs/torture/uspassaro61704ind.html (accessed Feb. 3, 2006).

[188] *See U.S. v. Passaro*, No. 04 CR 211-1, E.D.N.C., Order, Dec. 30, 2005.

[189] R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee who Died*, WASH. POST, Apr. 13, 2005, at A7; Andrea Weigl, *Trial's Weight Hinges on Ruling*, NEWS AND OBSERVER, Dec. 16, 2005, at B1.

[190] Tim Golden, *In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 [hereinafter Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*].

[191] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[192] Tim Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190; Tim Golden, *Abuse Cases Open Command Issues at Afghan Prison*, N.Y. TIMES, Aug. 8, 2005, at A1.

[193] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[194] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[195] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[196] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[197] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[198] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[199] Office of the Armed Forces Med. Exam'r, *Final Report of Postmortem Examination*, (Dec. 6-8, 2002) [Autopsy, Habibullah], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at 19-28 [hereinafter Autopsy, Habibullah].

[200] Autopsy, Habibullah, *supra* note 199, at19-28.

[201] Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. Times, May 22, 2005, at A1.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190; Tim Golden, *Abuse Cases Open Command Issues at Afghan Prison*, N.Y. TIMES, Aug. 8, 2005, at A1.

[206] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[207] Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, Jan. 8, 2006, N.Y. TIMES, at A13.

[208] *See* DIC Table. They are Private First Class ("Pfc.") Willie Brand (assault, maiming, maltreatment, false statement), Specialist ("Spc.") Brian Cammack (assault, two counts of false statement), Spc. Glendale Walls (dereliction, assault), Sergeant ("Sgt.") Anthony Morden (assault, two counts of dereliction), Sgt. Selena Salcedo (dereliction, assault), Sgt. Joshua Claus (maltreatment, assault), Sgt. Christopher Greatorex (assault, maltreatment, false statement), Sgt. Darin Broady (assault, maltreatment, false statement), Sgt. James Boland (maltreatment, dereliction, assault), Sgt. Alan Driver (assault, maltreatment), Staff Sergeant ("Staff Sgt.") Brian Doyle (dereliction, maltreatment), and Captain ("Capt.") Christopher Beiring (dereliction, false statement).

[209] *See* DIC Table: Pfc. Brand (convicted, demoted to Private ("Pvt.")), Spc. Cammack (pled guilty, 3 months confinement, demoted to Pvt., bad-conduct discharge), Spc. Walls (pled guilty, 2 months confinement, demoted to Pvt., bad-conduct discharge), Sgt. Morden (pled guilty, 75 days confinement, demoted to Pvt., bad-conduct discharge), Sgt. Salcedo (pled guilty, fined $1,000, demoted to Spc. or Corporal, reprimanded), Sgt. Claus (pled guilty, 5 months confinement, demoted to Pvt., bad-conduct discharge), Sgt. Greatorex (acquitted, faces administrative reprimand), Sgt. Broady (acquitted), Sgt. Boland (charges dropped, reprimanded for dereliction); Staff Sgt. Doyle (acquitted in connection with Habibullah's death); Capt. Beiring (charges dropped, reprimanded).

[210] *Id.*

[211] Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. TIMES, Jan. 8, 2006, at A13.

[212] *Id.*

[213] *Id.*

[214] Rowan Scarborough, *Senior Prison Officer Cleared*, WASH. TIMES, Dec. 23, 2005, *available at* http://www.washingtontimes.com/national/20051223-121235-3444r.htm (accessed Feb. 13, 2006).

[215] *A Look at the Soldiers Charged in the Afghanistan Abuse Investigation*, ASSOC. PRESS, Oct. 5, 2005, *available at* http://www.kxan.com/Global/story.asp?S=3942230 (accessed Feb. 3, 2006); Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. TIMES, Jan. 8, 2006, at A13.

[216] *A Look at the Soldiers Charged in the Afghanistan Abuse Investigation*, ASSOC. PRESS, Oct. 5, 2005, *available at* http://www.kxan.com/Global/story.asp?S=3942230 (accessed Feb. 3, 2006); *see also* DIC Table. A charge of involuntary manslaughter was initially brought against Pfc. Brand, but it was dropped before trial. Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1.

[217] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[218] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[219] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[220] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[221] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[222] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[223] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[224] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[225] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[226] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[227] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[228] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[229] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[230] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[231] Office of the Armed Forces Med. Exam'r, *Autopsy Examination Report, A0295* (Dec. 13, 2002) [Autopsy, Dilawar], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at 29-36 [hereinafter Autopsy, Dilawar].

[232] Autopsy, Dilawar, *supra* note 231, at 29-36.

[233] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190.

[234] Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

[235] *Id.*; Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 4, 2003, at A14.

[236] Tim Golden, *Army Faltered on Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

[237] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190; Tim Golden, *Army Faltered on Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

[238] Golden, *Brutal Details Of 2 Afghan Inmates' Deaths*, *supra* note 190; Tim Golden, *Army Faltered on Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

[239] Dep't of the Army, CID, *CID Report of Investigation-Corrected/Initial/Final/SSI-0171-04-CID259-80223-/5H6* (Aug. 7, 2004) [Criminal Investigation, al-Bawi], *available at* http://www.aclu.org/torturefoia/released/4894_4927.pdf, at 1 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, al-Bawi]; Jackie Spinner, *Family Seeks Justice in Case Of Iraqi Slain by U.S. Troops*, WASH. POST, June 15, 2004, at A13.

[240] Jackie Spinner, *Family Seeks Justice in Case Of Iraqi Slain by U.S. Troops*, WASH. POST, June 15, 2004, at A13; Liz Sly, *Family Prods Military on Iraqi's Death*, CHI. TRIB., July 6, 2004, at 4.

[241] Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1.

[242] *Id.*

[243] Jackie Spinner, *Family Seeks Justice in Case Of Iraqi Slain by U.S. Troops*, WASH. POST, June 15, 2004, at A13; Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1.

[244] Jackie Spinner, *Family Seeks Justice in Case Of Iraqi Slain by U.S. Troops*, WASH. POST, June 15, 2004, at A13; Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1.

[245] Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1; Liz Sly, *Family Prods Military on Iraqi's death*, CHI. TRIB., July 6, 2004, at 4.

[246] Jackie Spinner, *Family Seeks Justice in Case Of Iraqi Slain by U.S. Troops*, WASH. POST, June 15, 2004, at A13; Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1.

[247] For a description of administrative investigations, *see infra* p. 33.

[248] Criminal Investigation, al-Bawi, *supra* note 239, at 5.

[249] Liz Sly, *Family Prods Military on Iraqi's Death*, CHI. TRIB., July 6, 2004, at 4 (quoting portions of military's statements).

[250] *Id.*; Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1.

[251] Criminal Investigation, al-Bawi, *supra* note 239, at 16.

[252] The Army's subsequent criminal investigation into al-Bawi's death also found that it was a rifle, not a pistol, that al-Bawi allegedly tried to grab from a soldier. Criminal Investigation, al-Bawi, *supra* note 239, at 1.

[253] Criminal Investigation, al-Bawi, *supra* note 239, at 5.

[254] Criminal Investigation, al-Bawi, *supra* note 239, at 33.

[255] Criminal Investigation, al-Bawi, *supra* note 239, at 1.

[256] Criminal Investigation, al-Bawi, *supra* note 239, at 5; *see also* Liz Sly, *Family Prods Military on Iraqi's Death*, CHI. TRIB., July 6, 2004, at 4 (military statement alleging that all shots fired by one soldier).

[257] Liz Sly, *Family Prods Military on Iraqi's Death*, CHI. TRIB., July 6, 2004, at 4.

[258] *Id.*

[259] *Id.*

[260] Dep't of the Army, CID, *CID Report of Investigation – Final (C) – 0149-03-CID469-60209-5H1A* (Nov. 23, 2003) [Criminal Investigation, Radad], *available at* http://www.aclu.org/torturefoia/released/DOA_1053_1082.pdf, at 2, 15 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Radad].

[261] Criminal Investigation, Radad, *supra* note 260, at 2.

[262] Criminal Investigation, Radad, *supra* note 260, at 15.

[263] Dep't of the Army, *Informal Investigation of Shooting of Obeed Hethere Radad* (Sept. 13, 2003), *available at* http://www.aclu.org/projects/foiasearch/pdf/DOD044873.pdf at 23 (accessed Feb. 3, 2006) [hereinafter Administrative Investigation, Radad].

[264] Administrative Investigation, Radad, *supra* note 263, at 22.

[265] Administrative Investigation, Radad, *supra* note 263, at 22.

[266] Memorandum for Commander, 4th Infantry Division (Mechanized), FOB Ironhorse, Tikrit, Iraq, AR 15-5 Investigation – Legal Review, Obeed Hethere Radad (Sept. 14, 2003), at 1 (on file with Human Rights First).

[267] Criminal Investigation, Radad, *supra* note 260, at 2-3 (incident reported on September 15; administrative investigation dated September 14 attached).

[268] Memorandum from Spec. Juba Martino-Poole to Commander, 4th Infantry Division, Request for Discharge in Lieu of Trial by Court Martial (Oct. 16, 2003), *available at* http://www.aclu.org/torturefoia/released/041905/6768_7065.pdf, at 45-46 (accessed Feb. 3, 2006).

[269] Criminal Investigation, Radad, *supra* note 260, at 2; Memorandum from Maj. Gen. Raymond T. Odierno for Commander, 502d Personnel Service Battalion, Request for Discharge in Lieu of Trial by Court-Martial, *available at* http://www.aclu.org/torturefoia/released/041905/6768_7065.pdf, at 53 (accessed Feb. 3, 2006).

[270] Criminal Investigation, Radad, *supra* note 260, at 2.

[271] Criminal Investigation, Radad, *supra* note 260, at 29.

[272] Miles Moffeit and Arthur Kane, *Iraq GIs Allowed to Avoid Trial*, DENVER POST, Aug. 22, 2004, at A1.

[273] Dep't of the Army, CID, *CID Report of Investigation – Final – 0114-02-CID369-23525 -5H1A*, Part 1 (May 23, 2003) [Criminal Investigation, Sayari], *available at* http://www.aclu.org/torturefoia/released/745_814.pdf, at 11-12, 27 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Sayari].

[274] Criminal Investigation, Sayari, *supra* note 273, at 11-12, 27.

[275] Criminal Investigation, Sayari, *supra* note 273, at 27-28.

[276] Criminal Investigation, Sayari, *supra* note 273, at 28.

[277] Criminal Investigation, Sayari, *supra* note 273, at 38-46. The criminal investigators found probable cause to charge three members of the squad with the crime of Dereliction of Duty for their failure to abide by standard operating procedures for detaining captives. Criminal Investigation, Sayari, *supra* note 273, at 12.

[278] Criminal Investigation, Sayari, *supra* note 273, at 28.

[279] Criminal Investigation, Sayari, *supra* note 273, at 28.

[280] Criminal Investigation, Sayari, *supra* note 273, at 28.

[281] Criminal Investigation, Sayari, *supra* note 273, at 28.

[282] Criminal Investigation, Sayari, *supra* note 273, at 28.

[283] Criminal Investigation, Sayari, *supra* note 273, at 27-28, 65-66. The sergeant complied, although the photos were not lost because he had previously made another copy. Criminal Investigation, Sayari, *supra* note 273, at 64.

[284] Criminal Investigation, Sayari, *supra* note 273, at 19.

[285] Criminal Investigation, Sayari, *supra* note 273, at 19, 28.

[286] Dep't of the Army, CID, *CID Report of Investigation – Final – 0114-02-CID369-23525 -5H1A*, Part 4 (May 23, 2003) [Criminal Investigation, Sayari, Part 4], *available at* http://www.aclu.org/torturefoia/released/908_963.pdf, at 16 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Sayari, Part 4].

[287] Criminal Investigation, Sayari, *supra* note 273, at 27, 31, 64; *see also* Criminal Investigation, Sayari, Part 4, *supra* note 286, at 15.

[288] Criminal Investigation, Sayari, *supra* note 273, at 27, 31, 64; *see also* Criminal Investigation, Sayari, Part 4, *supra* note 286, at 15.

[289] Criminal Investigation, Sayari, *supra* note 273, at 27; *see also* Criminal Investigation, Sayari, Part 4, *supra* note 286, at 15.

[290] Criminal Investigation, Sayari, *supra* note 273, at 27-28, 65-66.

[291] Criminal Investigation, Sayari, *supra* note 273, at 29.

[292] Criminal Investigation, Sayari, *supra* note 273, at 11.

[293] Criminal Investigation, Sayari, *supra* note 273, at 11.

[294] Criminal Investigation, Sayari, *supra* note 273, at 1-10.

[295] Criminal Investigation, Sayari, *supra* note 273, at 1-10; *Army: Soldiers Shouldn't be Charged*, ASSOC. PRESS, Jan. 24, 2005, *available at* http://www.msnbc.msn.com/id/6863659/ (accessed Feb. 3, 2006).

[296] Criminal Investigation, Sayari, *supra* note 273, at 1; *Army: Soldiers Shouldn't be Charged*, ASSOC. PRESS, Jan. 24, 2005, *available at* http://www.msnbc.msn.com/id/6863659/ (accessed Feb. 3, 2006).

[297] Criminal Investigation, Sayari, *supra* note 273, at 1-10.

[298] Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES MAG., Oct. 23, 2005, at 52 [hereinafter Filkins, *Warrior King*]; Hamza Hendawi, *Iraqi: U.S. Soldiers Laughed at Drowning*, ASSOC. PRESS, July 6, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-07/07/content_346293.htm (accessed Feb. 3, 2006).

[299] Filkins, Warrior King, supra note 298; U.S. Soldier Goes on Trial for Allegedly Drowning Iraqi Civilian, Xinhua General News Service, Jan. 5, 2005 available at http://english.people.com.cn/200501/05/eng20050105_169731.html *(accessed Feb. 7, 2006)*.

[300] Filkins, *Warrior King*, *supra* note 298.

[301] Information Paper on Samarra Bridge Incident, July 15, 2004, *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 47 (accessed Feb. 3, 2006).

[302] Hamza Hendawi, *Iraqi: U.S. Soldiers Laughed at Drowning*, ASSOC. PRESS, July 6, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-07/07/content_346293.htm (accessed Feb. 3, 2006); Filkins, *Warrior King*, *supra* note 298.

[303] Hamza Hendawi, *Iraqi: U.S. Soldiers Laughed at Drowning*, ASSOC. PRESS, July 6, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-07/07/content_346293.htm (accessed Feb. 3, 2006).

[304] *Id.*; Filkins, *Warrior King*, *supra* note 298.

[305] *G.I. Gets 45 Days for Assault of Iraqis*, ASSOC. PRESS, Mar. 15, 2005, *available at* http://www.msnbc.msn.com/id/7200520/ (accessed Feb. 3, 2006). *See also*, Charge Sheet, *available at* http://action.aclu.org/torturefoia/released/063005/11950_12130PartB.pdf , at 80-81 (accessed Feb. 3, 2006).

[306] Filkins, *Warrior King*, *supra* note 298; *Cover-up of Iraq Bridge Incident Admitted*, ASSOC. PRESS, July 30, 2004, *available at* http://www.msnbc.msn.com/id/5560805/ (accessed Feb. 3, 2006).

[307] Filkins, *Warrior King*, *supra* note 298.

[308] Information Paper on Samarra Bridge Incident, July 15, 2004, *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 47 (accessed Feb. 3, 2006).

[309] *Id.*

[310] Filkins, *Warrior King*, *supra* note 298.

[311] U.S. Navy Judge Advocate General's Corps, Article 32 Investigations, http://www.jag.navy.mil/html/NLSOGlakesArticle_32_investigations.htm (accessed Feb. 3, 2006) ("grand jury indictment is expressly inapplicable to the Armed Forces. In its absence, Article 32 of the Uniform Code of Military Justice ... requires a thorough and impartial investigation of charges").

[312] Investigating Officer's Report of Charges Under Article 32, Aug. 19, 2004, *available at* http://action.aclu.org/torturefoia/released/063005/11950_12130PartB.pdf, at 99-100 (accessed Feb. 3, 2006).

[313] *Cover-up of Iraq Bridge Incident Admitted*, ASSOC. PRESS, July 30, 2004, *available at* http://www.msnbc.msn.com/id/5560805/ (accessed Feb. 3, 2006).

[314] *Id.*; *see also* Filkins, *Warrior King*, *supra* note 298.

[315] *Cover-up of Iraq Bridge Incident Admitted*, ASSOC. PRESS, July 30, 2004, *available at* http://www.msnbc.msn.com/id/5560805/ (accessed Feb. 3, 2006).

[316] Filkins, *Warrior King*, *supra* note 298; Suzanne Goldenberg, *45 Days Jail for U.S. Officer Who Had Cousins Thrown Into Tigris*, THE GUARDIAN, Mar. 16, 2005, at Home Pages 2.

[317] Dick Foster, *Case Against 4 GI's Waning; 2 Won't Face Charges in Alleged Drowning*, ROCKY MOUNTAIN NEWS, Sept. 9, 2004, at 6A; Dick Foster, *Soldier: Iraqis Told to Jump; Several Issues Cloud Army's Case Against GIs in Drowning*, ROCKY MOUNTAIN NEWS, July 29, 2004, at 4A; Dick Foster, *Fort Carson Soldiers May Use Drug Defense in Courts-Martial*, ROCKY MOUNTAIN NEWS, July 28, 2004, at 5A.

[318] Filkins, *Warrior King*, *supra* note 298; Information Paper on Samarra Bridge Incident, July 15, 2004, *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 47 (accessed Feb. 3, 2006).

[319] Human Rights First Email Interview with Dr. Steven Miles, Professor, University of Minnesota Medical School (Nov. 4, 2005) (transcription on file with Human Rights First); for date of death, *see* Eric Schmitt, *Navy Charges 3 Commandos with Beating of Prisoners*, N.Y. TIMES, Sept. 25, 2004, at A7.

[320] *See* DIC Table: The military officially ruled five deaths as due to undetermined causes after investigation (Hasson, al-Obodi, Kenami, F. Mahmood, and F. Najem). Forty-three other deaths have either not been investigated, or the results of any investigation have not been publicly announced or are unclear (Unknown 1, Naseer, el-Gasharne, Dababa, Unknown 3, Unknown 4, Unknown 5, Unknown 6, Unknown 8, Unknown 9, Unknown 10, Unknown 11, Unknown 12, Unknown 13, Unknown 14, Unknown 15, al-Izmerly, Unknown 16, Unknown 17, Sher Mohammed Khan, Mohammed Nahar, Unknown 20, Unknown 21, Unknown 23, Unknown 24, Unknown 25, Unknown 26, Unknown 27, Unknown 28, Unknown 29, Sumaidaie, Unknown 30, Unknown 31, Unknown 32, Unknown 33, Unknown 34, Unknown 35, Unknown 36, Unknown 37, Unknown 38, Hamza al-Zubaidi, Unknown 39, Unknown 40).

[321] *See* DIC Table: Unknown 1 (died in November 2002 in Afghanistan "Salt Pit" prison of hypothermia after being chained to the floor and left without blankets; official cause of death not released); Naseer (allegedly tortured to death by Army Special Forces soldiers in Mar. 2003; official investigation findings not released); al-Sumaidae (unarmed 21-year-old student allegedly killed in cold blood in June 2005 by Marine during a search of his home; case referred to Navy criminal investigators 10 days after death); Dababa (June 2003 autopsy indicates body covered by bruises and at least 50 abrasions, with head and neck suffering the most significant abuses, resulting in hemorrhaging throughout his brain; official cause of death not announced); Kenami (death after detainee subjected to extreme exercise, cuffed, hooded and left in overcrowded cell; cause officially undetermined); al-Izmerly (chief of forensics at Baghdad Hospital found January 2004 death was due to "massive blow" to head; investigation pending); Unknown 15 (U.S. forces allege male shot during home raid while reaching for a pistol; family alleges he was a physically disabled old man and reportedly provides medical records indicating a spinal condition or degeneration; no criminal investigation or any other action appears to have been initiated); Naseif Ibrahim (military ruled death due to natural causes; son, with him at the time, filed lawsuit alleging death from abuse); Khan (military initially stated death due to heart attack, until press reports of snakebite; family alleges abuse; no medical or other investigation records released since death in September 2004); A. Najem (military ruled death from natural causes after hunger strike, but no medical records or interviews in support); Zaid (U.S.-conducted autopsy stated accidental death from heat stroke; army official stated possibility that Zaid was not given enough water or proper care). Human Rights First asked the Department of Defense on January 20 and 26, 2006 the status of the investigations and any prosecutions in the following cases for which, as of February 10, we had received no response: Naseer; al-Sumaidae; Dababa; Kenami [sought comment on medical expert finding that death caused by suffocation]; al-Izmerly; Ibrahim; Khan; Zaid.

[322] Dep't of the Army, *AR 15-6 Investigation Into the Death of Abu Malik Kenami* (Dec. 28, 2003), *available at* http://www.aclu.org/torturefoia/released/032505/1281_1380.pdf, at 2, (accessed Feb. 3, 2006) [hereinafter Administrative Investigation, Kenami].

[323] Dep't of the Army, CID, *CID Report of Investigation – Final – 0140-03-CID389-61697-5H9B* (Jan. 1, 2004) [Criminal Investigation, Kenami], *available at* http://www.aclu.org/torturefoia/released/DOA_1205_1234.pdf, at 1 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Kenami].

[324] Administrative Investigation, Kenami, *supra* note 322, at 1.

[325] Administrative Investigation, Kenami, *supra* note 322, at 16; Criminal Investigation, Kenami, *supra* note 323, at 5 – 6.

[326] Administrative Investigation, Kenami, *supra* note 322, at 4, 16; Criminal Investigation, Kenami, *supra* note 323, at 19, 26.

[327] Administrative Investigation, Kenami, *supra* note 322, at 4-5.

[328] Administrative Investigation, Kenami, *supra* note 322, at 4-5; Criminal Investigation, Kenami, *supra* note 323, at 5-6, 11.

[329] Administrative Investigation, Kenami, *supra* note 322, at 5.

[330] Administrative Investigation, Kenami, *supra* note 322, at 5-6.

[331] Criminal Investigation, Kenami, *supra* note 323, at 2.

[332] Criminal Investigation, Kenami, *supra* note 323, at 13.

[333] Criminal Investigation, Kenami, *supra* note 323, at 13.

[334] Criminal Investigation, Kenami, *supra* note 323, at 13.

[335] Criminal Investigation, Kenami, *supra* note 323, at 13.

[336] Dep't Administrative Investigation, Kenami, *supra* note 322, at 1, 2. The administrative investigation made a number of recommendations: 1) that a physical exam be conducted on all detainees, preferably by an Iraqi physician; 2) that facilities be provided for remote audio/video monitoring of the detainee area by an Arabic speaker; 3) that autopsy facilities be created at Mosul.

[337] Criminal Investigation, Kenami, *supra* note 323, at 1.

[338] STEVEN MILES, OATH BETRAYED: MILITARY MEDICINE AND THE WAR ON TERROR, (forthcoming 2006) (Homicides Chapter, at 15, manuscript on file with Human Rights First).

[339] *Id.*

[340] Criminal Investigation, Kenami, *supra* note 323, at 1.

[341] Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (quoting military investigative report); Office of the Armed Forces Med. Exam'r, *Autopsy Examination Report, Autopsy No. ME03-273* (May 11, 2004) [Autopsy, Dababa], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 56 (accessed Feb. 3, 2006) [hereinafter Autopsy, Dababa]; *New Probes of Prison Deaths*, ASSOC. PRESS, June 30, 2004, *available at* http://www.cbsnews.com/stories/2004/07/02/iraq/main627244.shtml (accessed Feb. 3, 2006); Spreadsheet of Military Investigations, (Nov. 5, 2004), *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 12 (accessed Feb. 3, 2006) (reporting two detainee deaths on June 13, 2003, one at Camp Cropper, the other at Camp Vigilant, a compound at Abu Ghraib. The death at Abu Ghraib is that of Alla Hassan, *see* Dep't of the Army, CID, *Report of Investigation – Final/SSI – 0145-04-CID146-71444-5H9C2 / 5H6 / 5Y3* (Oct. 26, 2004) [Criminal Investigation, Hassan], *available at* http://www.aclu.org/torturefoia/released/4193_4332.pdf (accessed Feb. 3, 2006).

[342] Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1.

[343] Autopsy, Dababa, *supra* note 341, at 56.

[344] Autopsy, Dababa, *supra* note 341, at 56.

[345] Autopsy, Dababa, *supra* note 341, at 56.

[346] Autopsy, Dababa, *supra* note 341, at 58-61.

[347] Autopsy, Dababa, *supra* note 341, at.58-61.

[348] Autopsy, Dababa, *supra* note 341, at 58-61.

[349] Autopsy, Dababa, *supra* note 341, at 59.

[350] Autopsy, Dababa, *supra* note 341, at 60.

[351] John Lumpkin, *9 Prisoner Deaths in Iraq, Afghanistan Probed as Homicides*, ASSOC. PRESS, May 23, 2004, *available at* http://www.news-star.com/stories/052304/New_31.shtml (accessed Feb. 3, 2006).

[352] Dep't of the Army, CID, *CID Report of Investigation – Final/SSI – 0237-04-CID259-80273-5H9B* (Oct. 18, 2004) [Criminal Investigation, Hasson], *available at* http://www.aclu.org/torturefoia/released/4153_4192.pdf , at 2 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Hasson].

[353] Criminal Investigation, Hasson, *supra* note 352, at 1-2.

[354] Criminal Investigation, Hasson, *supra* note 352, at 6.

[355] Investigators contacted the current and former Detainee Operations officers for the camp, the U.S. field hospital staff, officials at a British hospital, and requested searches of Military Police, Military Intelligence, and medical databases. Criminal Investigation, Hasson, *supra* note 352, at 4, 8..

[356] *See generally*, Criminal Investigation, Hasson, *supra* note 352.

[357] Criminal Investigation, Hasson, *supra* note 352, at 1-2.

[358] Criminal Investigation, Hasson, *supra* note 352, at 19.

[359] Dep't of the Army, CID, *CID Report of Investigation Final Supplemental /SSI Report -0007-04-CID259-80133-5H9A* (Aug. 23, 2004) [Criminal Investigation, Ibrahim], *available at* http://www.aclu.org/torturefoia/released/DOA_1443_1479.pdf, at 1 (accessed Feb. 7, 2006) [hereinafter Criminal Investigation, Ibrahim].

[360] Criminal Investigation, Ibrahim, *supra* note 359, at 7 – 8.

[361] Criminal Investigation, Ibrahim, *supra* note 359, at 4.

[362] Criminal Investigation, Ibrahim, *supra* note 359, at 9.

[363] Third Amended Complaint, *Saleh v. Titan Corp.*, No. 1:05-CV-1165 (U.S. District Court for the District of Columbia, filed Sept. 12, 2005), ¶¶135-139. *See also* Tom Squitieri, *Documents Give Different Explanation for Inmate's Death*, USA TODAY, June 28, 2004, at 2A.

[364] Third Amended Complaint, *Saleh v. Titan Corp.*, No. 1:05-CV-1165 (U.S. District Court for the District of Columbia, filed Sept. 12, 2005), ¶¶135-139. *See also* Tom Squitieri, *Documents Give Different Explanation for Inmate's Death*, USA TODAY, June 28, 2004, at 2A.

[365] Criminal Investigation, Ibrahim, *supra* note 359, at 9.

[366] Criminal Investigation, Ibrahim, *supra* note 359, at 9.

[367] Criminal Investigation, Najem, *supra* note 391.

[368] Criminal Investigation, Najem, *supra* note 391.

[369] Criminal Investigation, Najem, *supra* note 391.

[370] Criminal Investigation, Najem, *supra* note 391, at 4.

[371] Criminal Investigation, Najem, *supra* note 391.

[372] Dep't of the Army, CID, *CID Report of Investigation-Final(C)- 0025-03-CID919-63733*, at 41-43 (Feb. 4, 2004) [Criminal Investigation, al-Obodi], *available at* http://www.aclu.org/torturefoia/released/DOA_1727_1780.pdf (accessed Feb. 7, 2006) [hereinafter Criminal Investigation, al-Obodi].

[373] Criminal Investigation, al-Obodi, *supra* note 372, at 7.

[374] Criminal Investigation, al-Obodi, *supra* note 372, at 41-43.

[375] Criminal Investigation, al-Obodi, *supra* note 372, at 35-36.

[376] Criminal Investigation, al-Obodi, *supra* note 372, at 1.

[377] Criminal Investigation, al-Obodi, *supra* note 372, at 48.

[378] Charles Hanley, *Heat on U.S. Over Iraqi Weapons Scientists*, ASSOC. PRESS, July 21, 2005; Sinan Salaheddin, *Family of Iraqi Scientist Welcomes Probe*, ASSOC. PRESS, Mar. 27, 2005, *available at* http://www.armytimes.com/story.php?f=1-292925-745460.php (accessed Feb. 3, 2006) [hereinafter Salaheddin, *Family Welcomes Probe*]; Luke Harding, *I Will Always Hate You People*, THE GUARDIAN, May 24, 2004, at Home Pages 1.

[379] Salaheddin, *Family Welcomes Probe*, *supra* note 378; Luke Harding, *I Will Always Hate You People*, THE GUARDIAN, May 24, 2004, at Home Pages 1.

[380] Luke Harding, *I Will Always Hate You People*, THE GUARDIAN, May 24, 2004, at Home Pages 1.

[381] *Id.*

[382] *Id.*; Salaheddin, *Family Welcomes Probe*, *supra* note 378.

[383] Salaheddin, *Family Welcomes Probe*, *supra* note 378; Charles Hanley, *Heat on U.S. Over Iraqi Weapons Scientists*, ASSOC. PRESS, July 21, 2005.

[384] Luke Harding, *Family's Fury at Mystery Death*, THE GUARDIAN, May 24, 2004, at Home Pages 1; Salaheddin, *Family Welcomes Probe*, *supra* note 378.

[385] Salaheddin, *Family Welcomes Probe*, *supra* note 378 ("Now the Army's Criminal Investigation Command in Washington, after an inquiry by The Associated Press, says it has reopened an investigation into what it calls a previously closed case."); Charles Hanley, *Heat on U.S. Over Iraqi Weapons Scientists*, ASSOC. PRESS, July 21, 2005.

[386] Salaheddin, *Family Welcomes Probe*, *supra* note 378; Charles Hanley, *Heat on U.S. Over Iraqi Weapons Scientists*, ASSOC. PRESS, July 21, 2005.

[387] Salaheddin, *Family Welcomes Probe*, *supra* note 378.

[388] Charles Hanley, *Experts Urge Release of Iraq Scientists*, ASSOC. PRESS, July 17, 2005.

[389] STEVEN MILES, OATH BETRAYED: MILITARY MEDICINE AND THE WAR ON TERROR, (forthcoming 2006) (Homicides Chapter, at 15, manuscript on file with Human Rights First).

[390] *See* DIC Table: Deaths likely caused by heart attack: Mahmood (age unknown, death certificate reportedly identified cardiac arrest, but cause of death officially undetermined); Mohammed Hamza al-Zubaidi (age 67, death reportedly by heart attack but no investigative findings); Unknown 3 (age 60; administrative investigation discussed but didn't rule on heart attack as cause); Unknown 17 (age unknown; death reportedly by heart attack but investigative findings unknown); Unknown 23 (age 31; death reportedly by heart attack but investigative findings unknown); Unknown 29 (age 30 reportedly by heart attack but investigative findings unknown); Unknown 33 (age 65, reportedly by heart attack but investigative findings unknown); Unknown 36 (age 43; reportedly by heart attack but investigative findings unknown); Unknown 38 (age 65 reportedly by heart attack but no investigative findings); Unknown 11 (age unknown; death reportedly by heart attack, but investigative findings unknown).

Deaths likely caused by heart disease: A. Najem (age approx. 50; death from heart disease, criminal investigation found death from natural causes); Mihdy (age unknown; death from arteriosclerotic cardiovascular disease; criminal investigation found death from natural causes); Spah (age approx. 50; death from arteriosclerotic cardiovascular disease after hunger strike; criminal investigation found death from natural causes); Taleb (age approx. 40; death from arteriosclerotic cardiovascular disease; criminal investigation found death from natural causes); Ibrahim (age 63, death from atherosclerotic cardiovascular disease; criminal investigation determined further investigation would be of little value); al-Hussen (age 25; death from myocarditis; criminal investigation found death from natural causes); Ahmed (age 61; death from atherosclerotic cardiovascular disease; criminal investigation found death from natural causes); Abbas (age 55; death from atherosclerotic cardiovascular disease; criminal investigation found probable death from the disease); Alfia (age: approx. 65; atherosclerotic cardiovascular disease; criminal investigation found death from natural causes); al-Razak (age 52; atherosclerotic cardiovascular disease; criminal investigation found death from natural causes); Unknown 35 (age 60; heart failure after surgery; investigative findings unknown or not available).

Of these 21 deaths, military investigators determined: eight were due to natural causes; the probable cause in one was heart disease; in one the cause is officially undetermined; in one investigators found further investigation would not be helpful. Of the remaining 11 deaths, official investigative findings are not known or not publicly available.

[391] Dep't of the Army, CID, *Report of Investigation-Final Supplemental- 0136-03-CID259-61187-5H9A* (June 4, 2004) [Criminal Investigation, Najem], *available at* http://www.aclu.org/torturefoia/released/24TF.pdf, at 1, 34 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Najem].

[392] Criminal Investigation, Najem, *supra* note 391, at 34.

[393] Criminal Investigation, Ibrahim, *supra* note 359, at 1, 3.

[394] Criminal Investigation, Ibrahim, *supra* note 359, at 4.

[395] Criminal Investigation, Ibrahim, *supra* note 359, at 29.

[396] Third Amended Complaint, *Saleh v. Titan Corp.*, No. 1:05-CV-1165 (U.S. District Court for the District of Columbia, filed Sept. 12, 2005), ¶¶135-139. *See also* Tom Squitieri, *Documents Give Different Explanation for Inmate's Death*, USA TODAY, June 28, 2004, at 2A (reporting allegation that Ibrahim had been doused with cold water over three days; he then became ill and died three days later).

[397] Dep't of the Army, the Inspector General, DETAINEE OPERATIONS INSPECTION (July 21, 2004), at 76, *available at* http://www.humanrightsfirst.org/us_law/PDF/abuse/mikolashekdetaineereport.pdf (accessed Feb. 3, 2006).

[398] *Id.* at 1-3.

[399] *Rights Group Puts Rumsfeld on Spot over Afghan Deaths*, REUTERS, Dec. 14, 2004, *available at* http://www.commondreams.org/headlines04/1214-02.htm (accessed Feb. 7, 2006).

[400] *Afghan who died in U.S. custody complained of snake bite, American commander says*, ASSOC. PRESS, Jan. 3, 2005, *available at* http://www.fox23news.com/news/world/story.aspx?content_id=B22E7E94-260B-4D5A-9AE5-D194D5F59C4F (accessed Feb. 7, 2006).

[401] *U.S. Investigates 8 Afghan Prison Deaths*, ASSOC. PRESS, Dec. 13, 2004; *Rights Group Puts Rumsfeld on Spot over Afghan Deaths*, REUTERS, Dec. 14, 2004, *available at* http://www.commondreams.org/headlines04/1214-02.htm (accessed Feb. 7, 2006); *Afghan who died in U.S. custody complained of snake bite, American commander says*, ASSOC. PRESS, Jan. 3, 2005, *available at* http://www.fox23news.com/news/world/story.aspx?content_id=B22E7E94-260B-4D5A-9AE5-D194D5F59C4F (accessed Feb. 7, 2006).

[402] *Afghan who died in U.S. custody complained of snake bite, American commander says*, ASSOC. PRESS, Jan. 3, 2005, *available at* http://www.fox23news.com/news/world/story.aspx?content_id=B22E7E94-260B-4D5A-9AE5-D194D5F59C4F (accessed Feb. 7, 2006).

[403] R. Jeffrey Smith, *Army Reprimand Reported in Slaying*, WASH. POST, Dec. 14, 2004, at A24; Letter from Human Rights Watch to Secretary Rumsfeld (Dec. 13, 2004), *available at* http://hrw.org/english/docs/2004/12/10/afghan9838_txt.htm (accessed Feb. 7, 2006).

[404] *Afghan Who Died in U.S. Custody Complained of Snake Bite, American Commander Says*, ASSOC. PRESS, Jan. 3, 2005, *available at* http://www.fox23news.com/news/world/story.aspx?content_id=B22E7E94-260B-4D5A-9AE5-D194D5F59C4F (accessed Feb. 7, 2006).

[405] *Id.*; *U.S. Army Acknowledges Eight Deaths in Military Custody in Afghanistan*, AGENCE FRANCE-PRESSE, Dec. 14, 2004, *available at* http://www.keepmedia.com/pubs/AFP/2004/12/13/682161 (accessed Feb. 7, 2006); Human Rights First submitted a Freedom of Information Act request for the criminal investigation into Khan's death to the Crime Records Center on July 25, 2005, and a request to the Army Medical Command for Khan's final autopsy report on July 21, 2005. The autopsy request was denied on Oct. 31, 2005 based on privacy grounds, while the criminal investigation request remains pending as of February 2006.

[406] *Afghan Who Died in U.S. Custody Complained of Snake Bite, American Commander Says*, ASSOC. PRESS, Jan. 3, 2005, *available at* http://www.fox23news.com/news/world/story.aspx?content_id=B22E7E94-260B-4D5A-9AE5-D194D5F59C4F (accessed Feb. 7, 2006); Adrian Levy and Cathy Scott-Clark, *'One Huge U.S Jail'*, THE GUARDIAN, Mar. 19, 2005, *available at* http://www.guardian.co.uk/afghanistan/story/0,1284,1440836,00.html (accessed Feb. 3, 2005).

[407] Craig Pyes and Mark Mazzetti, *U.S. Probing Alleged Abuse of Afghans*, L.A. TIMES, Sept. 21, 2004, at A1.

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] *Id.*; Craig Pyes, *A Torture Killing by U.S. forces in Afghanistan*, Crimes of War Project, Sept. 20, 2004, *available at* http://www.crimesofwar.org/special/afghan/news-tortureafghan.html (accessed Feb. 3, 2006); *see also* Amended Complaint, *Ali, et al., v. Rumsfeld, et al.* No. 05-CV-1377 (D.D.C., filed Jan. 5, 2006), ¶¶172-188.

[412] Craig Pyes, *A Torture Killing by U.S. forces in Afghanistan*, Crimes of War Project, 9/20/04, *available at* http://www.crimesofwar.org/special/afghan/news-tortureafghan.html (accessed Feb. 3, 2006).

[413] *Id.; see also* Amended Complaint, *Ali, et al., v. Rumsfeld, et al.* No. 05-CV-1377 (D.D.C., filed Jan. 5, 2006), ¶174.

[414] Craig Pyes, *A Torture Killing by U.S. forces in Afghanistan*, Crimes of War Project, 9/20/04, *available at* http://www.crimesofwar.org/special/afghan/news-tortureafghan.html (accessed Feb. 3, 2006).

[415] *Id.*

[416] Craig Pyes and Mark Mazzetti, *U.S. Probing Alleged Abuse of Afghans*, L.A. TIMES, Sept. 21, 2004, at A1.

[417] Craig Pyes for the Crimes of War Project, *A Torture Killing by U.S. Forces in Afghanistan*, Sept. 20, 2004, *available at* http://www.crimesofwar.org/special/afghan/news-tortureafghan.html (accessed Feb. 3, 2006).

[418] *Id.*

[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] *Id.*

[423] *Id.*

[424] *Id.*

[425] Press Briefing with National Security Advisor Stephen Hadley, Office of the Press Secretary (Nov. 2, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/11/20051102-10.html (accessed Feb. 3, 2006).

[426] *See, e.g.*, Criminal Investigation, Radad, *supra* note 260, at 29 (investigation was "not completely thorough (i.e. [failure to collect] the weapon [allegedly used in the killing] for fingerprint analysis)"); Dep't of the Army, CID, *CID Report of Investigation – 3D Final Supplemen-*

tal - 0013-04-CID789-83982 (Aug. 24, 2004), *available at* http://www.aclu.org/torturefoia/released/DOA_1480_1541.pdf, at 55 (accessed Feb. 7, 2006) (review "disclosed the investigation was weak in the areas of thoroughness and documentation" because, *inter alia*, "the photographs … were not taken consistent with the requirements or protocols of a homicide investigation," the decision not to request an autopsy "should [have been] explained somewhere in the report," and "agents should have conducted a thorough investigation of detainee's remains."); Criminal Investigation, Ibrahim, *supra* note 359, at 29 ("investigation did not conduct a crime scene examination … did not conduct interviews of those witnesses who found the victim … no effort [was] made to interview the alleged brother and son of the victim."); Dep't of the Army, CID, *CID Report of Investigation – Final – 0140-03-CID389-61697-5H9B* (Jan. 1, 2004) [Criminal Investigation, Kareem], *available at* http://www.aclu.org/torturefoia/released/DOA_1206_1234.pdf, (accessed Feb. 3, 2006) (investigation "was weak in Thoroughness and Timeliness … no documentation … explaining the lack of an autopsy … [n]o interrogators were interviewed … [the file] does not mention the presence, or lack of, signs of a struggle, or of blood or body fluids.").

[427] The term "commander" is a functional one, used by the U.S. Armed Forces to refer to a variety of top officers: brigades, battalions, regiments, and companies all have commanding officers, and each exercises broad discretion over the soldiers in their command. *See* Army Regulation 600-20, Army Command Policy, §1-5, (Feb. 1, 2006), *available at* http://www.army.mil/usapa/epubs/pdf/r600_20.pdf at 7-8 (accessed Feb. 8, 2006) ("[t]he key elements of command are authority and responsibility…. The commander is responsible for establishing leadership climate of the unit and developing disciplined and cohesive units…. The commanding officer… assigns appropriate duties [to soldiers].."). Army regulations regularly use the blanket term to set out broad policy directives. *See, e.g.* Army Regulation 360-1, The Army Public Affairs Program, §1-5, Oct. 15, 2000 (assigning responsibilities to "[a]ll commanders," "Major Army Commander commanders," "installation commanders," and "local commanders."). In the context of the death investigations discussed here, "commander" refers to officer-rank personnel with authority over subordinate enlisted soldiers and, as applicable, over other officers.

[428] *See* DIC Table: The findings in this chapter are based on a review of the administrative and criminal investigation records of 41 deaths; the records of any investigations into the remaining 57 deaths in custody have not been made publicly available. Of these 41 deaths for which military investigation records have been publicly released, 32 are records of Army criminal investigations, covering 37 deaths. These records cover the deaths of: Kenami, Spah, al-Obodi, Abbas, Kadir, Sayari, Zaid, Byaty, Taleb, A. Najem, Mihdy, al-Haddii, al-Juwadi, H. Ahmed, Basim, F. Mahmood, Amir, [Salman, Shalaan, Sayar, Thawin], al-Bawi, Fadil, Altia, Ibrahim, Abdullah, [K. Mahmood, Farhan], Jabar, al-Hussen, al-Razak, Hasson, A. Hassan, F. Najem, [Habib, Ghafar], Radad (square brackets denote multiple deaths covered in a single investigation). The Army has also publicly released nine administrative investigations (described below). For six of the administrative investigations (which cover nine deaths, Radad, Kenami, H. Ahmed, [Salman, Shalaan, Sayar, Thawin], Jabar, A. Hassan) criminal investigation records were also released. For another three administrative investigations, each covering a single death (Unknown 3, Unknown 4 and Unknown 5), no corresponding criminal investigation records have been released. Only one Navy criminal investigation, into the death of Hemdan Haby Heshfan el-Gashame, has been publicly released. No details of investigations into CIA involvement in any of the deaths have been released.

[429] Depending on the service, investigations may be conducted by the Army Criminal Investigation Division (CID), the Naval Criminal Investigative Service (NCIS), or the Air Force Office of Special Investigations. *See, respectively*, Army Regulation 195-1, Army Criminal Investigation Program (Aug. 12, 1974), *available at* http://www.army.mil/usapa/epubs/pdf/r195_1.pdf (accessed Feb. 8, 2006); SECNAV Instruction 5520.3B, Criminal and Security Investigations and Related Activities Within the Dep't of the Navy (Jan. 4, 1993), *available at* http://neds.daps.dla.mil/Directives/5520b3.pdf (accessed Feb. 8, 2006); Army Regulation 195-7/AFR 124-19, Criminal Investigative Support to the Army and Air Force Exchange Service (AAFES) (Apr. 25, 1986), *available at* http://www.army.mil/usapa/epubs/pdf/r195_7.pdf (accessed Feb. 8, 2006).

[430] The Army's Criminal Investigation Division is required to investigate any death in which a member of the Armed Forces is involved, including both U.S. soldiers and their prisoners or detainees, as prescribed in Army Regulation 195-2, Criminal Investigation Activities, Appendix B (Oct. 30, 1985), *available at* http://www.army.mil/usapa/epubs/pdf/r195_2.pdf (accessed Feb. 8, 2006).

[431] Two series of military regulations detail the investigative procedures that Army CID must follow: Army Regulation Series 195, which is publicly available (*see* Official Dep't of the Army Administrative Publications, 195 Series Collection, *available at* http://www.army.mil/usapa/epubs/195_Series_Collection_1.html (accessed Feb. 8, 2006); and CID Regulation Series 195, which is not publicly available. Human Rights First attempted to obtain copies of the CID Regulation series both from CID Headquarters and from the Department of Defense. According to the Department of Defense Public Affairs Office, the CID Regulation Series 195 is "a non-releasable document and is protected under a law enforcement exemption." Email from Maj. Wayne Marotto, Public Affairs Staff Officer, Dep't of the Army, to Human Rights First, Feb. 10, 2006 (on file with Human Rights First).

[432] A single duty day is the equivalent of a single business day in the Army. *See, e.g.*, Dep't of the Army, 121st Signal Battalion, Policy Memorandum 15 (June 24, 2003), *available at* http://www.1id.army.mil/1ID/Units/121sig/Policy_Letters/121%20Bn%20Policy%2015-%20Battalion%20Rhythm.pdf (accessed Feb. 8, 2006).

[433] *See, e.g.*, Dep't of the Army, CID, *CID Report of Investigation – Initial/SSI - 0040-04-CID469-79638-5H1A*, (Apr. 30, 2004) [Criminal Investigation, Kadir], *available at* http://www.aclu.org/torturefoia/released/5399_5486.pdf at 49 (accessed Feb. 8, 2006) [hereinafter Criminal Investigation, Kadir].

[434] Army Regulation 15-6, Procedure for Investigating Officers and Board of Officers (Sept. 30, 1996), *available at* http://www.usma.edu/EO/regspubs/r15_6.pdf (accessed Feb. 8, 2006) [hereinafter AR 15-6].

[435] AR 15-6, *supra* note 434, at § 1-4(d).

[436] Army Regulation 195-2, Criminal Investigation Activities, Appendix B (Oct. 30, 1985), *available at* http://www.army.mil/usapa/epubs/pdf/r195_2.pdf (accessed Feb. 8, 2006). (CID is required to investigate the death of anyone in which the Armed Forces were involved, including both soldiers and detainees, as prescribed in Appendix B.).

[437] Each Army command unit is assigned a Staff Judge Advocate office, which is required to provide legal services to the command. Dep't of the Army, Field Manual 27-100, Legal Support to Operations, 2.1.7 (Mar. 1, 2000), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-100/index.html (accessed Feb. 3, 2006).

[438] *See, e.g.*, Staff Judge Advocate of the Commandant of the Marine Corps , Military Justice Fact Sheets, Reporting Crime and First Stages of Investigation in the Military, http://sja.hqmc.usmc.mil/JAM/MJFACTSHTS.htm (accessed Feb. 3, 2006) ("[t]o help commanders

decide how to resolve charges, commanders must make a "preliminary inquiry" into any allegations against a member of the command under military procedural Rules for Courts-Martial (R.C.M.) found in the Manual for Courts-Martial…The commander can conduct this inquiry himself, appoint someone else in his command to do it, or, as happens in very serious cases, request assistance from civilian or military criminal investigative agencies….When the commander finishes the preliminary inquiry, he must make a decision on how to resolve the case. Unlike civilian communities, where a district attorney decides whether or not to "press" charges, in the military, commanders make that decision.")

[439] *See, e.g., id.* ("The commander could decide that no action at all is warranted. Or he could take administrative action, such as an admonition or reprimand, or making an adverse comment in performance evaluations, or seeking discharge of the member from the service. The commander also possesses nonjudicial punishment authority under the procedures of Article 15, UCMJ. The commander may also determine that criminal charges are appropriate. The "preferral" of charges, similar to "swearing out a complaint" in civilian jurisdictions, initiates the court martial process").

[440] *See, e.g., id.* There are three different levels of court martial – summary, special and general – with general court martial, the military's highest level trial court, used for the most serious offenses, including charges of murder or manslaughter. *See* Uniform Code of Military Justice, Subchapter IV: Court Martial Jurisdiction, § 816, Art. 816, *available at* http://www.au.af.mil/au/awc/awcgate/ucmj.htm#SUBCHAPTER%20IV.%20COURT-MARTIAL%20JURISDICTION (accessed Feb. 3. 2006), Military.com, Benefits and Legal Matters, Legal Matters: Courts-Martial, http://www.military.com/Resources/ResourcesContent/0,13964,30902--1,00.html (accessed Feb. 3, 2006). Manual for Courts-martial, United States (2005 Edition), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf (accessed Feb. 3, 2006).

[441] *See* Uniform Code of Military Justice, Subchapter VIII: Sentences, § 858a, Art. 58, *available at* http://www.au.af.mil/au/awc/awcgate/ucmj.htm#SUBCHAPTER%20IV.%20COURT-MARTIAL%20JURISDICTION (accessed Feb. 3. 2006); Uniform Code of Military Justice, Subchapter VIII: Sentences, § 852, Art. 52(2), *available at* http://www.au.af.mil/au/awc/awcgate/ucmj.htm#SUBCHAPTER%20IV.%20COURT-MARTIAL%20JURISDICTION (accessed Feb. 3. 2006) ("[n]o person may be sentenced by life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members at the time the vote is taken"). Manual for Courts-martial, United States (2005 Edition), Rule 1003, *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf (accessed Feb. 3, 2006), at 173 – 177.

[442] Human Rights First Telephone Interview with Brigadier General Stephen N. Xenakis, USA (Ret.), Former Commanding General of the Southeast Regional Army Medical Command (Nov. 10, 2005) (notes on file with Human Rights First).

[443] Dep't of the Army, Field Manual 27-1, Legal Guide for Commanders, Chapter 8 (Jan. 13, 1992), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-1/Ch8.htm (accessed Feb. 3, 2006). The same is true for physical evidence. As the Army Field Manual for Law Enforcement Investigations states, "physical evidence is one of [an investigator's] most valuable investigative assets." Dep't of the Army, Field Manual 19-20, Law Enforcement Investigations (Nov. 25, 1985), *available at* https://134.11.61.28/CD7/Publications/DA/FM/FM%2019-20%2019851125.pdf, at 9 (accessed Feb. 3, 2006); *see also* Dep't of the Army, Field Manual 19-20, Law Enforcement Investigations, (Nov. 25, 1985), at 10 ("[t]o achieve the maximum benefit from physical evidence, you must be not only skilled in its collection, but careful in your handling of it to preserve it for laboratory examination and/or for presentation in court. You must retain the item's evidential integrity by *keeping the item as nearly as possible in its original condition*.") (emphasis in original).

[444] Recognizing these dangers, Army Regulation 195-5 sets out 28 pages of detailed procedures on the proper handling and storage of physical evidence. Army Regulation 195-5, Evidence Procedures (Aug. 28, 1992).

[445] Memorandum from the Secretary of Defense for Secretaries of the Military Departments, Procedures for Investigation into Deaths of Detainees in the Custody of the Armed Forces of the United States (June 9, 2004), *available at* http://www.aclu.org/torturefoia/released/navy3797.3798.pdf (accessed Feb. 3, 2006).

[446] Dep't of Army, CID, *CID Report of Investigation – Corrected Final – (C) 0264-03-CID259-61231*/5H6 (Aug. 7, 2004) [Criminal Investigation, Salman, Shalaan, Sayar, and Thawin], *available at* http://www.aclu.org/torturefoia/released/DOA_1902_1950.pdf at 29 (accessed Feb. 8, 2006) [hereinafter Criminal Investigation, Salman, Shalaan, Sayar, and Thawin] (reporting that "due to the daily operations at the Abu Ghraib Prison, every soldier in the incident could not be located and/or were on duty"), *but see id.*, at 2-3 (listing as attachments around ten sworn statements as well as canvass interviews); *see also* Dep't of the Army, CID, *CID Report of Investigation – Final Supplemental - 0004-04-CID789-83980-5H6-5Y3*, (July 22, 2004) [Criminal Investigation, Amir], *available at* http://www.aclu.org/torturefoia/released/DOA_2156_2205.pdf, at 16–18 (accessed Feb. 8, 2006) (noting difficulty interviewing detainee witness to a riot shooting death, but agents spoke to medical personnel, the shooters, and numerous other witnesses).

[447] *See* DIC Table: Habibullah (victim's blood stored in the butter dish of investigating agents' refrigerator, records and logs lost during the course of investigation), Dilawar (records lost during the course of the investigation); Hatab (medical evidence lost and destroyed due to lax handling); Jabar (no evidence collected from scene, including weapon and shells); al-Obodi (no fingerprints of deceased taken), A Najem (no crime scene examination, no photographs); Radad (investigators did not collect weapon used in the killing), Kenami (crime scene examination incomplete); Ibrahim (no crime scene investigation conducted); Amir (crime scene investigation not conducted); Farhan and K. Mahmood (no crime scene examination conducted, photographs of victim and scene inadequate, no death certificates collected); al-Bawi (criminal investigator failed to collect any evidence supporting the conclusions of a prior investigation); F. Mahmood (no crime scene exam conducted); Ghafar and Habib (no crime scene investigation conducted).

[448] Seth Hettena, *Army Pathologist Concedes Errors in Prisoner-Abuse Case*, Assoc. Press, Oct. 14, 2004, available at http://www.usatoday.com/news/nation/2004-10-14-errors-abuse_x.htm (accessed Feb. 3, 2006) (rib cage found at Armed Forces Institute of Pathology, Washington D.C., part of larynx found at Landstuhl military base in Germany).

[449] Alex Roth, *Marines involved in Iraqi abuse frustrated after their convictions* THE SAN DIEGO UNION-TRIB., Dec. 13, 2004, at A1.

[450] Criminal Investigation, Kenami, *supra* note 323, at 2.

[451] Criminal Investigation, Kenami, *supra* note 323, at 13.

[452] *See* DIC Table: Habibullah (investigators failed to interview commanders and guards in original investigation); Dilawar (investigators failed to interview commanders and guards in original investigation, as well as an interrogator who later came forward to describe abuse); Jabar (7 interview-related leads remained open when case was closed); Hussain (witnesses, including other detainees, were not interviewed); Byaty (medics who tended to detainee not interviewed); Najem (no interviews with any witnesses to the death, nor with an Iraqi who had provided medical care to the detainee); Unknown 4 (no interviews of other detainees); Zaid (medical personnel not interviewed); Kenami (no interviews conducted with interrogators, doctor who filled out death certificate, one medic, guards, or other detainees); Ibrahim (no interviews with witnesses present at death, including son of detainee who later alleged detainee was abused); Abdullah (no interviews of other detainee witnesses); F. Mahmood (some medical personnel not interviewed); al-Bawi (no interviews of any person conducted); Fadil (no interview of possible medical witness).

[453] Criminal Investigation, Ibrahim, *supra* note 359, at 7, 23-25, 29.

[454] Criminal Investigation, Najem, *supra* note 391, at 34.

[455] *See, e.g.*, Dep't of the Army, Field Manual 19-20, Law Enforcement Investigations (Nov. 1985), *available at* https://134.11.61.26/CD7/Publications/DA/FM/FM%2019-20%2019851125.pdf, at 174 (evidentiary value of some medical evidence may be reduced by delayed examination), 176 (physical evidence may be destroyed if not secured promptly), 243 (delaying interviews allows suspects to coordinate their testimony and destroy evidence) (accessed Feb. 3, 2006).

[456] *See* Dep't of Army, Field Manual 27-1, Legal Guide for Commanders, Chapter 8 (Jan. 13, 1992), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-1/) (accessed Feb. 3, 2006).

[457] Army Regulation 190-40, Serious Incident Report (Jun. 15, 2005), *available at* http://www.usapa.army.mil/pdffiles/r190_40.pdf (accessed Feb. 8, 2006). Appendix C-1(g) lists "all prisoner deaths" as Category-2 Reportable Serious Incidents, Section 3-2(b) mandates the same 24-hour reporting period, and Section 3-5(a) also includes the Army's Criminal Investigation Command (CID) as an addressee of the report. The revised version of this regulation, issued June 15, 2005, contains identical requirements (section 2-3(g) lists "all prisoner deaths" as Category-2 Reportable Serious Incidents; 3-2(b) requires that Category-2 incidents be reported within 24 hours; 3-5(a) requires that all Serious Incident Reports be sent to CID); *see also* Memorandum from the Secretary of Defense for Secretaries of the Military Departments, Procedures for Investigation into Deaths of Detainees in the Custody of the Armed Forces of the United States (June 9, 2004), *available at* http://www.aclu.org/torturefoia/released/navy3797.3798.pdf (accessed Feb. 3, 2006) (the June 7, 2004 memorandum modifies an Army CID Regulation that is not publicly available; it is not, therefore, clear what was the prior requirement of this specific regulation); Dep't of the Army, CID, *CID Report of Investigation – Initial/Final SSI – 0037-04-CID201-54050* (Nov. 16, 2004), *available at* http://www.aclu.org/torturefoia/released/042105/9290_9388.pdf, at 68-69 (accessed Feb. 3, 2006); United States Marine Corps, Military Police in Support of the MAGTF [Marine Air-Ground Task Force], MCWP 3-34. §1,5-4 ("[u]pon receiving information concerning alleged war crimes committed by Marines, commanders must immediately notify the nearest CID field office.").

[458] Army Regulation 95-1, Army Criminal Investigation Program, §3(b) (Aug. 12, 1974) (commanders "will insure that known or suspected criminal activity is reported to the military police and, when appropriate, to CID for investigation.").

[459] Army Regulation 195-2, Criminal Investigation Activities, §1-4(d) (Oct. 30, 1985).

[460] Army Regulation 190-45, Law Enforcement Reporting, §3-1(a) (Jun. 6, 2005).

[461] Army Regulation 360-1, The Army Public Affairs Program, §5-45, (Oct. 15, 2000).

[462] Army Regulation 600-20, Army Command Policy, §5-8(1)(a) (July 15, 1999) (after a report of investigation has been forwarded to a commander, "the case will be disposed of at the lowest level having authority consistent with the gravity of the case.").

[463] *See* Dep't of Army Field Manual 27-1, Legal Guide for Commanders, Chapter 3 (Jan. 13, 1992), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-1/) (accessed Feb. 3, 2006) ("Investigators must always remain impartial. A one-sided investigation may result in an injustice to the accused and an embarrassment to the command"); United States Marine Corps, Military Police in Support of the MAGTF [Marine Air-Ground Task Force], MCWP 3-34.1, §5-4 (Oct. 13, 2000) ("Commanders are prohibited from interfering with the investigations or impeding the use of investigative techniques.")

[464] United States Marine Corps, Military Police in Support of the MAGTF [Marine Air-Ground Task Force], MCWP 3-34.1, §5-4 (Oct. 13, 2000).

[465] *See* Criminal Investigation, Radad, *supra* note 260, at 28.

[466] *See supra* note 428 for details of the number of military criminal and administrative investigation records released.

[467] *See, e.g.*, Radad (review found that failure to collect evidence jeopardized any possible prosecution), Criminal Investigation, Radad, *supra* note 260, at 28–29); Taleb (review found that autopsy report had not been received, Dep't of the Army, CID, *Report of Investigation – Final Supplemental – 0147-03-CID259-61195-5H9A* (June 3, 2004) [Criminal Investigation, Taleb], *available at* http://www.aclu.org/torturefoia/released/23TFa.pdf, at 5 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Taleb]); Abed Najem (review found that "the investigation was operationally insufficient and was administratively insufficient" due to lack of interviews and records, Criminal Investigation, Najem, *supra* note 391, at 34).

[468] *See* criminal investigation reports for: Ibrahim (Criminal Investigation, Ibrahim, *supra* note 359; Abdullah (Dep't of the Army, CID, *CID Report of Investigation- Corrected Final (C)/SSI- 0036-04-CID259-80151* (Aug. 20, 2004) [Criminal Investigation, Abdullah] *available at* http://www.aclu.org/torturefoia/released/DOA_1872_1901.pdf, at 1-2, 6-7 (accessed Feb. 8, 2006) [hereinafter Criminal Investigation, Abdullah]); Byaty (Criminal Investigation Byaty *supra* note 476); Mihdy (Dep't of the Army, CID, *CID Report of Investigation Final Supplemental – 0239-03-CID259-61189-5H9A*, (Jun. 4, 2004) [Criminal Investigation, Mihdy] *available at* http://www.aclu.org/torturefoia/released/DOA_1542_1582.pdf (accessed Feb. 8, 2006) [hereinafter Criminal Investigation, Mihdy]); Najem (Criminal Investigation, Najem, *supra* note 391), Taleb (Criminal Investigation, Taleb, *supra* note 467); Zaid (Dep't of the Army CID, *CID Report of Investigation – Initial/Final C/SSI – 0168-04-CID899-81718-5H8*, (May 31, 2004) [Criminal Investigation, Zaid] *available at* http://www.aclu.org/torturefoia/released/DOA_2206_2216.pdf (accessed Feb. 8, 2006)); al-Hussen (Dep't of the Army CID, *CID Report of Investigation – Final Supplemental 0012-04-CID259-80136-5H9A*, (Sept. 3, 2004) [Criminal Investigation, al-Hussen] *available at* http://www.aclu.org/torturefoia/released/DOA_1837_1871.pdf (accessed Feb. 8, 2006) [hereinafter Criminal Investigation, al-Hussen]).

[469] The earliest death in this group was that of Byaty, which occurred on August 7, 2003. Criminal Investigation, Byaty *Infra* note 476, at 1.

[470] Dep't of the Army, CID to Commander, Request for Investigation 0370-04-CID001, (Sept. 7, 2004) ("A review of unclassified military intelligence files revealed a spreadsheet titled 'PMO Detainee Not in Camp Roster' which documented eight detainee deaths, four of which were previously documented under a CID Report of Investigation."). Army CID was not the only agency to initiate such a review in May 2004. When the Abu Ghraib abuses became public, the FBI sent a request to all of its agents who had served in Guantanamo Bay for information related to prisoner abuses. *See* E-mail from Steven C. McGraw to multiple redacted recipients, Subject GTMO (July 7, 2004, 02:10 PM EST) *available at* http://www.aclu.org/torturefoia/released/FBI_3944_3947.pdf (accessed Feb. 3, 2006). Several previously unreported incidents – later substantiated by an official Pentagon investigation – came to light as a result. Dep't of the Army, *Army Regulation 15-6. Final Report: Investigation Into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba, Detention Facility*, (Jun. 9, 2005) *available at* http://www.defenselink.mil/news/Jul2005/d20050714report.pdf, at 2 (accessed Feb. 3, 2006).

[471] Criminal Investigation, Hasson, *supra* note 352, at 2.

[472] Dep't of the Army, CID, *CID Report of Investigation – Final/SSI – 0236-04-CID259-80272-5H9B*, (Aug. 3, 2004) [Criminal Investigation, Mashnadane] *available at* http://www.aclu.org/torturefoia/released/5000_5014.pdf (accessed Feb. 8, 2006). CID agents later found that Mashnadane's death had previously been investigated. This was a death caused by mortar attack, so although it is included in our total count of deaths in U.S. custody, it is not included in the sample analyzed in the DIC Table. *See supra* note 1.

[473] *See* DIC Table: Sayari (death not reported to criminal investigators by Special Forces commanders; criminal investigation began only after sergeant reported possible war crime to investigators); Unknown 2 (case does not appear to have been reported, came to light during the course of another criminal investigation 20 months after the death); Jabar (allegedly shot and killed during escape attempt; death not reported by commanders and investigation did not begin until a year later); Hassan (shooting of detainee during prison riot not reported; investigation not begun until 13 months after death); Byaty (investigation does not appear to have begun until nine months after death; reason unknown); Naseer (allegedly tortured to death by Special Forces; initial criminal investigation opened nine months after death, closed for lack of leads, reopened a year and a half after death); Hasson (death not reported; criminal investigation opened one year after death of detainee for whom no records but name, identification number and location of death were known); Radad (death not reported to criminal investigators until after administrative investigation); Unknown 6 (criminal investigation appears only to have opened 10 months after death, following ICRC report of death); al-Izmerly (criminal investigators not informed of death of high-value detainee until after body had been released, precluding a U.S. autopsy); Hassoun (commanders attempted to conceal detainee's death by drowning); Unknown 15 (death of man military claims was shot when he reached for a pistol does not appear to have been criminally investigated; family claims the man was elderly and disabled); al-Bawi (death does not appear to have been reported to criminal investigators, only administrative investigation originally conducted), Salman, Sayar, Shalaan, Thawin (deaths during prison riot not reported to criminal investigators for at least a week by which time body of one decedent had been taken away and could not be examined).

[474] Among documents produced by the military in response to FOIA litigation is a spreadsheet dated November 5, 2004, listing cases of alleged abuse and deaths under investigation. The spreadsheet contains a "Rpt. by" column, in which the entries for 17 of the deaths include "Taguba report," "AFIP [Armed Forces Institute of Pathology]," and "ICRC [International Committee of the Red Cross] Report" – i.e. entities other than the unit commanders who are obligated to report deaths to criminal investigators. Spreadsheet of Military Investigations (dated Nov. 5, 2004), *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 11-21 (accessed Feb. 7, 2006).

[475] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 5.

[476] Dep't of the Army, CID, *CID Report of Investigation – Initial/Final C/SSI – 0167-04-CID899-81717* (May 31, 2004) [Criminal Investigation, Byaty], *available at* http://www.aclu.org/torturefoia/released/535_544.pdf, at 5 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, Byaty].

[477] Criminal Investigation Byaty *supra* note 476, at 29, 48.

[478] Office of the Armed Forces Med. Exam'r, *Autopsy Examination Report, ME03-385*, (Sept. 29, 2003) [Autopsy, Byaty], *available at* http://www.aclu.org/torturefoia/released/041905/m001_203.pdf, at 77 (accessed Feb. 3, 2006).

[479] Salaheddin, *Family Welcomes Probe*, *supra* note 378.

[480] Criminal Investigation, Salman, Shalaan, Sayar, and Thawin, *supra* note 446, at 10.

[481] Criminal Investigation, Hasson, *supra* note 352, at 1-2.

[482] Army Regulation 195-2, Criminal Investigation Activities, § 1-5a (Oct. 30, 1985), *available at* http://www.army.mil/usapa/epubs/pdf/r195_2.pdf (accessed Feb. 8, 2006); Dep't of the Army, Field Manual 19-10, Military Police Law and Order Operations, Ch 14: MPI and USACIDC (Sept. 30, 1987), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/19-10/index.html (accessed Feb. 8, 2006).

[483] Dep't of the Army, CID, General Questions About CID, How many people are in CID?, http://www.cid.army.mil/faqs.htm#faq2 (accessed Feb. 8, 2006).

[484] Dep't of the Army, CID, General Questions About CID, What is CID's mission?, http://www.cid.army.mil/faqs.htm#faq1 (accessed Feb. 8, 2006).

[485] *See, e.g.*, Criminal Investigation, Radad, *supra* note 260, at 23. Throughout the investigative process, the investigating agents draw up drafts of what will be, at the completion of the investigation, a final Report of Investigation. A Report of Investigation is defined as "an official written record of all pertinent information and facts obtained in a criminal investigation." Army Regulation 195-2, Criminal Investigation Activities (Oct. 30, 1985), *available at* http://www.army.mil/usapa/epubs/pdf/r195_2.pdf (accessed Feb. 8, 2006).

[486] *See, e.g.*, Criminal Investigation, Radad, *supra* note 260, at 2.

[487] *See, e.g.*, Dep't of the Army, CID, *CID Report of Investigation-Final Supplemental/SSI- 0071-04-CID065-62019* (Sept. 2, 2004) [Criminal Investigation, Jabar], *available at* http://www.aclu.org/torturefoia/released/DOA_1121_1144.pdf, at 12 (accessed Jan. 30, 2006) [hereinafter Criminal Investigation, Jabar].

[488] *See, e.g.*, Criminal Investigation, Radad, *supra* note 260, at 12.

[489] Criminal Investigation, Sayari, *supra* note 273, at 12–17.

[490] *See, e.g.*, Criminal Investigation, Radad, *supra* note 260, at 22.

[491] *See, e.g.*, Criminal Investigation, Salman, Shalaan, Sayar, and Thawin, *supra* note 446, at 8 – 9.

[492] *See, e.g.*, Dep't of the Army, CID, *CID Report of Investigation-Final Supplemental- 0016-04-CID789-83983*, (July 22, 2004) [Criminal Investigation, F. Mahmood], *available at* http://www.aclu.org/torturefoia/released/DOA_1181_1205.pdf, at 2 (accessed Feb. 3, 2006) [hereinafter Criminal Investigation, F. Mahmood].

[493] *See, e.g.*, Criminal Investigation, F. Mahmood, *supra* note 492, at 24.

[494] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 1 ("it is important to note that CID does not charge persons with a crime, that is the responsibility of the appropriate commanders and their legal staffs") (emphasis in original).

[495] Maj. Gen. Antonio Taguba, AR 15-6, INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, Feb. 2004, *available at* http://www.humanrightsfirst.org/us_law/800th_MP_Brigade_MASTER14_Mar_04-dc.pdf (accessed Feb. 3, 2006) [hereinafter TAGUBA REPORT].

[496] *See supra* note 428 for details of the number of military criminal and administrative investigation records released. Based on references in the 32 publicly-released criminal investigation reports, press accounts, and reports of administrative investigations that have been publicly released, Human Rights First has identified 12 cases of overlap, covering 15 detainee deaths. *See* DIC Table. The deaths are those of Kenami, H. Ahmed, Sayar, Salman, Shalaan, Thawin , Jabar, A. Hassan, Radad, Kadir, Sayari, al-Bawi, Mowhoush, Dilawar, and Habibullah. Based on a review of the publicly released investigation reports, administrative and criminal investigations were concurrent in three cases: Mowhoush, Kenami and Hassan Ahmed.

[497] Criminal Investigation, al-Bawi, *supra* note 71, at 5.

[498] Criminal Investigation, Radad, *supra* note 260, at 29.

[499] Dep't of the Army, CID,*CID Report of Investigation – Initial/Final SSI-0037-04-CID201-54050*, (Nov. 16, 2004), *available at* http://www.aclu.org/torturefoia/released/042105/9290_9388.pdf, at 70 (accessed Feb. 3, 2006) (stipulating that if "an AR 15-6 investigation or equivalent" was conducted "prior to notifying CID of an allegation … the supporting CID element will obtain a copy of and review the inquiry to determine if it thoroughly and fairly investigated the incident(s) … if further investigative efforts are deemed appropriate, the supporting CID element will initiate an ROI to continue the investigation.").

[500] Criminal Investigation, al-Bawi, *supra* note 71, at 5.

[501] Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1; Liz Sly, *Family Prods Military on Iraqi's Death*, CHI. TRIB., July 5, 2004, at 4.

[502] Jackie Spinner, *Family Seeks Justice in Case of Iraqi Slain by U.S. Troops*, WASH. POST, June 15, 2004, at A13; Thanassis Cambanis, *Shooting Death Angers Iraqi Family*, BOSTON GLOBE, June 21, 2004, at A1..

[503] Criminal Investigation, al-Bawi, *supra* note 71, at 21 – 28.

[504] Criminal Investigation, al-Bawi, *supra* note 71, at 8.

[505] Criminal Investigation, al-Bawi, *supra* note 71, at 1.

[506] Criminal Investigation, Jabar, *supra* note 487, at 5. The administrative investigation report was released independent of the criminal investigation report, as one of the annexes to the report of Major General Taguba. TAGUBA REPORT, *supra* note 495.

[507] Criminal Investigation, Jabar, *supra* note 487, at 12.

[508] Criminal Investigation, Jabar, *supra* note 487, at 2, 14.

[509] AR 15-6, *supra* note 434, at 1-4a.

[510] AR 15-6, *supra* note 434, at 1-1.

[511] AR 15-6, *supra* note 434, at 2-1a(3).

[512] AR 15-6, *supra* note 434, at 1-4b, 2-1b.

[513] AR 15-6, *supra* note 434, at 2-1c..

[514] AR 15-6, *supra* note 434, at 5.

[515] AR 15-6, *supra* note 434, at 2-3.

[516] AR 15-6, *supra* note 434, at 2-3b.

[517] AR 15-6, *supra* note 434, at 2-3a..

[518] AR 15-6, *supra* note 434, at 2-1a.

[519] *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, arts. 70 (requiring prisoners of war be allowed to send a card to their families with details of their capture and health), 122 (requiring states to set up an information bureau to gather and transmit information on the identity, health, and death of all prisoners of war) , *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68 (accessed Feb. 3, 2006); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, 75 U.N.T.S. 287, arts. 106 (requiring civilian internees be allowed to send a card to their families with details of their capture and health), 136, 136 (requiring states to set up an information bureau to gather and transmit information on the identity, health, and death of civilian internees), *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5 (accessed Feb. 3, 2006).

[520] *See, e.g.*, Dep't of Defense, Directive No. 2310.1, Dep't of Defense Program for Enemy Prisoners of War and Other Detainees, D.2 (Aug. 18, 1994), *available at* http://www.fas.org/irp/doddir/dod/d2310_01.htm (accessed Feb. 3, 2006) ("[t]he Secretary of the Army [shall] … [d]evelop and provide policy and planning guidance for the treatment, care, accountability, legal status, and administrative procedures

to be followed about [detainees, and] ensure that a national-level information center exists that can fully serve to account for all persons who pass through the care, custody, and control of the U.S. Military Services"); see *also* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, 1-7 (Oct. 1, 1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf (accessed Feb. 3, 2006) (requiring that information on detainees be collected and stored, including "[c]apturing unit," "[c]ircumstances of capture," and "personal data [on]... state of health, and changes to this data"); Army Regulation 40-66, Medical Record Administration and Health Care Documentation, 1-4(h) (July 20, 2004), *available at* http://www.army.mil/usapa/epubs/pdf/r40_66.pdf (accessed Feb. 3, 2006) ("[h]ealth-care providers will promptly and correctly record all patient observations, treatment, and care").

[521] *See* DIC Table. Unknown 1 ("ghost" detainee was not on any agency's registry of prisoners; death was kept secret for two years prior to investigation), al-Jamadi ("ghost" detainee kept off prison records; body not released to ICRC until three months after his death), Naseer (lack of documentation of death, witnesses or even unit assigned to facility where death occurred stymied criminal investigation) , al-Haddii (two-month delay in criminal investigation into death because file was misplaced), Jabar (investigation into death failed to follow up on 17 outstanding leads, including interviews of relevant witnesses, crime scene examination and an autopsy; death was determined to be justifiable homicide), Unknown 3 (failure to do medical screening of detainee and lack of documentation prevented definitive determination of cause of death), Unknown 4 (cause of death could not be determined because of inadequate medical reporting and record keeping), Unknown 5 (determination of cause of death difficult to determine because of lack of medical monitoring of detainee), Taleb (cause of death undetermined due to lack of autopsy results until nine months after death when autopsy report was received), Kenami (cause of death could not be determined, in part, because of what the review characterized , as a criminal investigation "weak in thoroughness and timeliness" and faulted it for lack of autopsy; lack of interviews of pertinent witnesses, and a failure to collect records of medical treatment); al-Hussen (no medical records attached to investigation), H. Ahmed (failure to read medical intake records and to conduct witness interviews), Amir (investigation into death was reopened because of failure to obtain death certificate; few records regarding custody exist because of lack of clarity over whether detainee was in U.S. or Iraqi custody) ; al-Obodi (cause of death could not be determined because of failure to collect medical records including autopsy); al-Zubaidy (cause of death could not be determined because of almost no documentation, resulting in his death's going unreported for almost a year).

[522] Criminal Investigation, Abdullah, *supra* note 468, at 1-2, 6-7 (reporting detainee Abdullah died of a perforated ulcer); Abbas, Dep't of the Army, CID, *CID Report of Investigation- Final (C)- 0050-04-CID259-80155* (Mar. 16, 2004) [Criminal Investigation, Abbas], *available at* http://www.aclu.org/torturefoia/released/DOA_2097_2155.pdf, at 1, 6-7, 22 (accessed Feb. 8, 2006) (reporting detainee Abbas, who had suffered a number of heart attacks, died of cardiac arrest), Criminal Investigation, al-Obodi, *supra* note 372, at 1-2, 7-8 (reporting detainee al-Obodi "appeared extremely ill" and complained of feeling unwell prior to his death of an apparent heart attack); Basim, Dep't of the Army, CID, *CID Report of Investigation-Final Supplemental- 0014-03-CID919-63732* (July 21, 2004) [Criminal Investigation, Basim] *available at* http://www.aclu.org/torturefoia/released/DOA_2060_2096.pdf, at 1, 6 (accessed Feb. 8, 2006) (reporting detainee Basim was diagnosed with tuberculosis a day before his death); Criminal Investigation, Najem, *supra* note 391, at 1, 15 (reporting detainee Abed Najem died of heart attack arising from diabetes); Criminal Investigation, Mihdy, *supra* note 468, at 1, 11 (June 4, 2004) (reporting detainee Mihdy died of an apparent heart attack after telling medics that he had a prior heart condition); Criminal Investigation, al-Hussen, *supra* note 468, at 1, 26 (reporting detainee al-Hussen had been in medical hold when he died of myocarditis); Ahmed, Dep't of the Army, CID, *CID Report of Investigation-Final Supplemental- 0025-04-CID469-79635*, (July 14, 2004) [Criminal Investigation, Ahmed], at 1, 6 (reporting detainee Ahmed had been ill for "a couple" of days before his heart-attack death) *and* Dep't of the Army, *AR 15-6 Investigation of the Death Detainee [sic] # [redacted]*, p. 5 (Mar. 2, 2004) (detainee Ahmed suffered from diabetes, anemia, and kidney failure); Criminal Investigation, F. Mahmood, *supra* note 492, at 1, 12 (reporting detainee Mahmood died about 20 days after complaining of chest pains); al-Juwadi, Dep't of the Army, CID, *CID Report of Investigation-Final/SSI- 0032-04-CID789-83985*, (June 30, 2004) [Criminal Investigation, al-Juwadi] *available at* http://www.aclu.org/torturefoia/released/DOA_2222_2246.pdf, at 1, 3-4 (accessed Feb. 8, 2006) [hereinafter Criminal Investigation, al-Juwadi] (reporting detainee al-Juwadi, who had a history of high blood pressure and diabetes, died of a heart attack); Altia, Dep't of the Army, CID, *CID Report of Investigation-Final Supplemental- 0040-04-CID789-83990*, (Aug. 14, 2004) [Criminal Investigation, Altia] *available at* http://www.aclu.org/torturefoia/released/DOA_2578_2595.pdf, at 1, 5 (accessed Feb. 8, 2006) (reporting detainee Altia, who had a prior history of diabetes, died of a heart attack two days after complaining of chest pains); al-Razak, Dep't of the Army, CID, *CID Report of Investigation-Final/SSI- 0059-04-CID789-83991* (Oct. 15, 2004) [Criminal Investigation, al-Razak], *available at* http://www.aclu.org/torturefoia/released/021605/6022_6039.pdf, at 1, 3 (accessed Feb. 8, 2006) (reporting detainee Abd al-Razak, who had had previous heart problems, died of a heart attack several days after returning to the prison from a hospital); Unknown 3, Dep't of the Army, *15-6 Investigation [Into Death of an Unknown Detainee]* (July 26, 2003) [Administrative Investigation, Unknown 3], *available at* http://www.aclu.org/torturefoia/released/041905/6233_6312.pdf, at 5, (accessed Feb. 3, 2006). (noting unidentified detainee (listed in DIC Table as Unknown 3) was diagnosed with diabetes, angina, and coronary artery disease 20 days before his death); Unknown 4, Dep't of the Army, *Informal Investigation of Death of Iraqi Detainee [redacted]* (Aug. 24, 2003) [Administrative Investigation, Unknown 4], *available at* http://www.aclu.org/torturefoia/released/041905/6233_6312.pdf, at 3-4, (accessed Feb. 3, 2006) [hereinafter Administrative Investigation, Unknown 4] (noting unidentified detainee (listed in DIC Table as Unknown 4) complained to medics of various ailments the day before his death).

[523] Criminal Investigation, al-Obodi, *supra* note 372, at 2-3, 35-36 (no medical records or autopsy found for al-Obodi); Criminal Investigation, Najem, *supra* note 391, at 1-2, 10, 13 (no records confirming that Abed Najem had diabetes); Criminal Investigation, Mihdy, *supra* note 468, at 1-2, 8-9, 11, 16 (no medical records for Mihdy attached); Criminal Investigation, al-Hussen, *supra* note 468, at 1-4, 18 (no medical records for al-Hussen attached because attempts to locate them were unsuccessful); Administrative Investigation, Unknown 4, *supra* note 522, at 3- (records of intake screening, sick call, and treatment could not be found for unnamed detainee (listed in DIC Table as Unknown 4)).

[524] *See, e.g.*, Criminal Investigation, al-Obodi, *supra* note 372, at 1, 43-44 (CID informed immediately after detainee death, but results of autopsy not requested for eight months due to apparent administrative neglect).

[525] Criminal Investigation, al-Juwadi, *supra* note 522.

[526] *See* TAGUBA REPORT, *supra* note 495, at 26-27 (stating the "320th MP Battalion ... held a handful of 'ghost detainees' ... that they moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver

was deceptive, contrary to Army Doctrine, and in violation of international law"); *see also* Dep't of Defense, Directive No. 2310.1, Dep't of Defense Program for Enemy Prisoners of War and Other Detainees D.2.d (Aug. 18, 1994), *available at* http://www.fas.org/irp/doddir/dod/d2310_01.htm (accessed Feb. 3, 2006); U.N. Hum. Rts. Comm., General Comment No. 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7). 44th Sess., at ¶ 11 (1992), U.N. Doc. HRI/GEN/1/Rev.7 at 150 (2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf (accessed Feb. 3, 2006).

[527] The two are Manadel al-Jamadi and the "Salt Pit" detainee. *See* Eric Schmitt, *4 Navy Commandos are Charged in Abuse*, N.Y. TIMES, Sept. 4, 2004, at A6; Seth Hettena, *Reports Detail Abu Ghraib Prison Death*, ASSOC. PRESS, Feb. 17, 2005; Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, Mar. 3, 2005, at A1.

[528] Dep't of the Army, *AR 15-6 Investigation – Detainee Death at 2d BCT Detainment Facility* (Sept. 7, 2004), *available at* http://www.aclu.org/torturefoia/released/041905/6233_6312.pdf , at 52 (accessed Feb. 3, 2006).

[529] *Id. at* 54. *See* DIC Table Unknown 4.

[530] *See supra* notes 352-358 and accompanying text (case of Hasson) and *supra* notes 372-377 and accompanying text (case of al-Obodi).

[531] Dep't of the Army, Office of the Surgeon General, Army, ASSESSMENT OF DETAINEE MEDICAL OPERATIONS FOR OEF, GTMO, AND OIF, at 9 (1 – 4) (Apr. 13, 2005), *available at* http://www.globalsecurity.org/military/library/report/2005/detmedopsrpt_13apr2005.pdf (accessed Feb. 3, 2006).

[532] *Id.*

[533] *Id.* at 83 (15–1).

[534] *Id.* at 36 (6–1).

[535] As described above, *supra* note 3, these cases include 20 homicides that military investigators found to be unjustified or in which prosecutions were brought. They also include 14 cases in which investigators found the homicide to be justified. We include in our count homicides that investigators found justified because the classification of many of these deaths as justifiable is open to question. For example, in the death of al-Bawi, a criminal investigator only gave an administrative investigation finding of justified homicide a cursory review, without independent investigation, despite allegations by al-Bawi's family and an Iraqi medical examiner that called findings into question. *See supra* notes 247-255 and accompanying text. Another four of the deaths investigators classified as justified are those of Salman, Sayar, Shalaan and Thawin, killed during the same prison riot by U.S. guards. The ICRC has criticized the military for use of excessive force in the riot that lead to those deaths. International Committee of the Red Cross, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST INTERNMENT AND INTERROGATION, Feb. 2004, at 20, ¶46, *available at* http://www.humanrightsfirst.org/iraq/ICRC_Report.pdf (accessed Feb. 8, 2006). The ICRC's criticism is supported by the military's own findings. *See* TAGUBA REPORT, *supra* note 495, at 28-29 (finding that the riot was in protest of living conditions. Although use of deadly force was found to be authorized, contributing factors were "lack of comprehensive training of guards, poor or non-existent [standard operating procedures]… no rehearsals or ongoing training, the mix of less than lethal rounds with lethal rounds in weapons . . . [Rules of Engagement] not posted and not understood, overcrowding . . . poor communication between the command and Soldiers") (referencing Dep't of the Army, *15-6 Investigation on Riot and Shootings at Abu Ghurayb on (24 November 2003)*, Taguba Report Annex 8, *available at* http://www.defenselink.mil/pubs/foi/detainees/taguba/ANNEX_008_15-6_INVESTIGATION_24_NOV_2003.pdf (accessed Feb. 3, 2006)).

[536] *See* DIC Table: Criminal charges were recommended against U.S. personnel for the deaths of Sayari, Habibullah, Dilawar, Unknown 2, Hatab, Wali, Radad, Jamadi, Mowhoush, Hassoun, F. Mohammed, Ismail, Jameel, Kadir, Kareem, Hanjil, Unknown 18, Unknown 19, T. Ahmed, and Unknown 22.

[537] *See* DIC Table: Most cases involve multiple accused; in relation to any particular detainee death, proceedings against some individuals may be complete while others remain pending. Criminal charges have been brought in 14 cases: Habibullah, Dilawar, Hatab, Wali, Mowhoush, Jamadi, Hassoun, Kadir, Unknown 18, Unknown 19, Ismail, T. Ahmed, Unknown 22 and F. Mohammed. In another case, that of Unknown 2, killed while being questioned in a village in Afghanistan by Army Special Forces in January 2003, criminal charges were recommended but Human Rights First has been unable to determine whether they were eventually brought. Criminal Investigators Outline 27 Homicides, *supra* note 64, at 5. Criminal proceedings have not proceeded to completion in at least ten cases. Charges were recommended but no individual was ever punished for the deaths of Jameel, Kareem, and Hanjil because, in each of these cases, commanders decided not to proceed with either criminal or administrative punishment. There has been no public explanation of the reduction in charges in the Kareem or Hanjil cases, and a Human Rights First Freedom of Information Act request for case documents remains pending. In two cases (Sayari and Radad) criminal charges were recommended but commanders declined to bring them and punished the suspects administratively instead. Trials for some of the individuals charged in the deaths of Habibullah, Dilawar, and Wali are pending as of this writing. Finally, while the CIA has reportedly referred the cases of Mowhoush and al-Jamadi to the Department of Justice for possible prosecution, no further action has yet been taken. The status of the cases of Unknown 2 and Unknown 22 remains uncertain. Human Rights First sought from the Department of Defense on January 20 and 26, 2006 an update on the cases of Unknown 2 and 22; as of February 10, we had received no response.

[538] *See* DIC Table: The twelve cases resulting in punishment of any kind are: Sayari (administrative reprimand against one soldier for destruction of evidence), Habibullah and Dilawar (punishments include convictions and guilty pleas at court martial and administrative punishments), Hatab (criminal and administrative punishment), Radad (administrative punishment), al-Jamadi (administrative punishment), Mowhoush (criminal and administrative punishment), Hassoun (criminal and administrative punishment), Kadir (criminal punishment), Unknown 18 (criminal punishment), Unknown 19 (criminal punishment), and T. Ahmed (criminal punishment).

[539] *See* DIC Table: In eight out of twelve cases, punishments were disproportionately lenient: Sayari (commanders reduced charge against one accused to written reprimand, no action taken against four others); Dilawar and Habibullah (Three soldiers were charged with

offenses relating only to Habibullah; all three were acquitted of all charges. Two were charged with offenses relating only to Dilawar; both pled guilty and were sentenced to 5 months and 75 days in prison, respectively, among other punishments. Seven were charged with offenses relating to both detainees; two soldiers had their charges dismissed before being court-martialed and were reprimanded, one was convicted of assault and reduced in rank, three pled guilty – one received 3 months in prison and a second received 2 months, among other punishments, while the third was fined and reprimanded with no prison time – and the trial of one remains pending.); Hatab (charges against one accused were reduced to assault and battery, dereliction of duty, and maltreatment, and upon conviction on the latter two counts the punishment was discharge; another received nonjudicial punishment (reduction in rank) as part of plea agreement for testimony; another was acquitted of charges at court-martial, and the charges against all other accused were dismissed); Radad (commander authorized administrative discharge of only soldier accused; criminal investigators later found probable cause for murder); Hassoun (two soldiers acquitted of manslaughter (though convicted of other charges and given prison sentences of six months and 45 days), three commanders who had instructed subordinates not to cooperate with investigators received reprimands, two other soldiers received non-judicial punishment); Kadir (single accused charged with unpremeditated murder instead convicted of voluntary manslaughter and sentenced to three years in prison); Mowhoush (accused charged with murder convicted of negligent homicide and negligent dereliction of duty, fined $6,000, 60 days restricted duty, reprimanded).

[540] Of the eight deaths Human Rights First considers as involving torture, only four cases have resulted in any kind of punishment. *See* DIC Table: These are in the deaths of: Habibullah, Dilawar, Jamadi and Mowhoush. The most punishment in any of these cases to date is 5 months imprisonment and a bad conduct discharge for an Army Sergeant, for the death of Dilawar.

[541] Dilawar (*Army Reservist Sentenced to 75 Days in Prison*, ASSOC. PRESS, Aug. 31, 2005, *available at* http://abclocal.go.com/ktrk/story?section=state&id=3399051 (accessed Feb. 3, 2006, 2005); Alicia Caldwell, *Cincinnati Soldier Found Guilty in Death of Detainee*, ASSOC. PRESS, Aug. 18, 2005, *available at* http://news.cincypost.com/apps/pbcs.dll/article?AID=/20050818/NEWS01/508180382 (accessed Feb. 3, 2006)); Habibullah, (*Army Reservist Sentenced to 75 Days in Prison*, ASSOC. PRESS, Aug. 31, 2005, *available at* http://abclocal.go.com/ktrk/story?section=state&id=3399051 (accessed Feb. 3, 2006, 2005); Alicia Caldwell, *Cincinnati Soldier Found Guilty in Death of Detainee*, ASSOC. PRESS, Aug. 18, 2005, *available at* http://news.cincypost.com/apps/pbcs.dll/article?AID=/20050818/NEWS01/508180382 (accessed Feb. 3, 2006); Hatab (David Hasemyer, *Marine Says He Was Ordered to Grab Iraqi Prisoner's Neck*, SAN DIEGO UNION-TRIB., Nov. 4, 2004, at B2; Tony Perry, *Marine Convicted of Assault*, L.A. TIMES, Sept. 3, 2004, at B1); Mowhoush (Nicholas Riccardi, *Mild Penalties in Military Abuse Cases*, L.A. TIMES, Jan. 25, 2006, *available at* http://www.latimes.com/news/printedition/asection/la-na-abuse25jan25,1,6318208.story (accessed Feb. 3, 2006); Jon Sarche, *Jury Orders Reprimand, No Jail for Soldier*, ASSOC. PRESS, Jan. 24, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/24/AR2006012400177.html (accessed Feb. 3, 2006); Nicholas Riccardi, *Interrogator Convicted in Iraqi's Death*, L.A. TIMES, Jan. 22, 2006, *available at* http://www.latimes.com/news/printedition/la-na-interrogate22jan22,1,81943.story (accessed Feb. 3, 2006); Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006, excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006)).

[542] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006, excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[543] *Id.*

[544] Memorandum from General Ricardo Sanchez to Combined Joint Task Force Seven and the Commander, 205th Intelligence Brigade (Sept. 10, 2003), *available at* http://www.humanrightsfirst.info/pdf/06124-etn-sep-10-sanchez-memo.pdf (accessed Feb. 3, 2006).

[545] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006, excerpts *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[546] Josh White, *U.S. Army Officer Convicted in Death Of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2; Human Rights First notes from observation of Welshofer court martial, In Their Own Words, Jan. 19, 2006, *available at* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906d.as (accessed Feb. 3, 2006).

[547] Jon Sarche, *Army Officer Found Guilty In Iraqi's Death*, ASSOC. PRESS, Jan. 22, 2006, *available at* http://www.msnbc.msn.com/id/10950946/ (accessed Feb. 6, 2006).

[548] Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. TIMES, Jan. 8, 2006, at A13.

[549] Administrative Investigation, Radad, *supra* note 263, at 23.

[550] Administrative Investigation, Radad, *supra* note 263, at 22.

[551] Criminal Investigation, Radad, *supra* note 260, at 2; Memorandum from Maj. Gen. Raymond T. Odierno for Commander, 502d Personnel Service Battalion, *Request for Discharge in Lieu of Trial by Court-Martial*, *available at* http://www.aclu.org/torturefoia/released/041905/6768_7065.pdf, at 53 (accessed Feb. 3, 2006) accessed Feb. 3, 2006.

[552] *Operative in Abuse Case Can Blame Orders*, ASSOC. PRESS, Feb. 3, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/03/AR2006020302197.html. (accessed Feb. 6, 2006).

[553] *Id.*

[554] Of the eight deaths Human Rights First considers as involving torture, only four cases have resulted in any kind of punishment. These are for the deaths of: Habibullah, Dilawar, Jamadi and Mowhoush.

[555] These are the deaths by homicide of: Sayari, Hatab, Radad, Hassoun, Kadir, Unknown 18, Unknown 19, T. Ahmed.

[556] This includes both criminal and administrative charges.

[557] Death of Habibullah (Sgt. Greatorex, Sgt. Broady, Staff Sgt. Doyle charged, *supra* note 208); death of Dilawar (Sgt. Claus, Sgt. Morden charged, *supra* note 208); deaths of both Habibullah and Dilawar (Sgt. Salcedo, Sgt. Boland, Spc. Cammack, Pfc. Brand, Capt. Belring, Sgt. Driver, Spc. Walls charged, *supra* note 208), death of Wali (Passaro charged, *supra* text accompanying note 187); death of Jamadi (Lt. Ledford, 9 unnamed other Navy Personnel charged, *supra* text accompanying note 137); death of Mowhoush (Chief Warrant Officer

Welshofer charged, *supra* text accompanying note 60, Chief Warrant Officer Jefferson Williams charged, *supra* text accompanying note 62, Sgt. 1st Class Sommer charged, *supra* text accompanying note 63, Spc. Loper charged, *supra* text accompanying note 62, Maj. Voss charged, *supra* text accompanying note 65).

[558] Death of Sayari (Captain, name unknown, charged, *supra* text accompanying note 192); death of Hatab (Maj. Paulus, Sgt. Pittman charged, *supra* text accompanying note 169, Lance Cpl. Roy, Maj. Vickers, charged, *see* DIC Table, Lance Cpl. Hernandez charged, *supra* text accompanying note 175, Sgt. Rodriguez-Martinez, Lance Cpl. Mikholap, Lance Cpl. Rodney charged, *see* DIC Table); death of Radad (Spc. Martino-Poole charged, *supra* text accompanying note 270); death of Hassoun (Lt. Saville charged, *supra* text accompanying note 305, Staff Sgt. Perkins charged, *supra* text accompanying note 316, Lt. Col. Sassaman, Maj. Gwinner, Capt. Cunningham charged, *see* DIC Table, Sgt. Martinez, Sgt. Bowman charged, *supra* text accompanying note 317); death of Ismail (Staff Sgt. Werst charged, *see* DIC Table); death of Kadir (Pfc. Richmond charged, *see* DIC Table); deaths of Kareem and Hanjil (1st Lt. Pantano charged, *see* DIC Table): death of Unknown 18 (Sgt. Michael Williams charged, *infra* note 609, 2nd Lt. Anderson charged, *see* DIC Table); death of Unknown 19 (Sgt. Michael Williams charged, *infra* note 609, Spc. May charged, *see* DIC Table); death of T. Ahmed (Sgt. 1st Class Diaz charged, *see* DIC Table); death of Unknown 22 (Sergeant, name unknown, charged, *see* DIC Table).

[559] Death of Dilawar (Sgt. Claus, Sgt. Morden, *supra* note 209); deaths of Habibullah and Dilawar (Sgt. Salcedo, Sgt. Boland, Spc. Cammack, Pfc. Brand, Capt. Beiring, Spc. Walls, *supra*, note 209); death of al-Jamadi (9 unnamed Navy personnel other than Lt. Ledford *supra*, text accompanying note 138); death of Mowhoush (Chief Warrant Officer Welshofer, *supra* text accompanying note 61, Chief Warrant Officer Jefferson Williams, *supra* text accompanying note 62, Maj. Voss, *supra* text accompanying note 65).

[560] Death of Sayari (Captain, name unknown, *supra* text accompanying note 296); death of Hatab (Maj. Paulus, *supra* text accompanying note 173, Lance Cpl. Roy, *see* DIC Table); death of Radad (Spc. Martino-Poole, *supra* text accompanying note 269); death of Hassoun (Lt. Saville, Staff Sgt. Perkins, *supra* text accompanying note 316, Lt. Col. Sassaman, Maj. Gwinner, Capt. Cunningham, *infra* text accompanying note 589, Sgt. Martinez, Sgt. Bowman, *supra* text accompanying note 317); death of Kadir (Pfc. Richmond, *see* DIC Table); death of Unknown 18 (Sgt. Michael Williams, *infra* note 606); death of Unknown 19 (Sgt. Michael Williams, *infra* note 609, Spc. May, *see* DIC Table); death of T. Ahmed (Diaz, *see* DIC Table).

[561] Death of Mowhoush (Maj. Voss, *supra* text accompanying note 65).

[562] Death of Hatab (Maj. Paulus, *supra* text accompanying note 169).

[563] Death of Dilawar (Sgt. Claus, *supra* note 209, Sgt. Morden, *supra* note 209); deaths of Habibullah and Dilawar (Spc. Cammack, *supra* note 209, Spc. Walls, *supra* note 209).

[564] Death of Hassoun (Lt. Saville, *supra* text accompanying note 316, Staff Sgt. Perkins, *supra* text accompanying note 316); death of Kadir (Pfc. Richmond, *see* DIC Table), deaths of Unknown 18 and Unknown 19 (Spc. Williams, *infra* note 609, Sgt. May, *see* DIC Table), T. Ahmed (Sgt. 1st Class Diaz, *see* DIC Table).

[565] Death of Dilawar (Sgt. Morden, *see* DIC Table); deaths of Habibullah and Dilawar (Sgt. Salcedo, *see* DIC Table, Spc. Cammack, *see* DIC Table, Pfc. Brand, *see* DIC Table, Spc. Walls, *see* DIC Table); death of Mowhoush (Welshofer, *supra* text accompanying notes 10-22, 55-56, 542-547).

[566] Death of Hatab (Maj. Paulus, *see* DIC Table).

[567] Death of Dilawar (Sgt. Claus, *supra* note 209).

[568] Deaths of Unknowns 18 and 19 (Sgt. Michael Williams, *infra* note 609).

[569] Deaths of Dilawar and Habibullah (Capt. Beiring, *supra* note 209, Sgt. Boland, *supra* note 210); death of Mowhoush (Maj. Voss, *infra* text accompanying note 594).

[570] Death of Sayari (Captain, name unknown, *supra* note 538); death of Hassoun (Lt. Col. Sassaman, *infra*, text accompanying note 589, Maj. Gwinner, *infra* text accompanying note 589, Capt. Cunningham, *supra* text accompanying note 318).

[571] This number includes both criminal and administrative charges. Deaths of Habibullah and Dilawar (Capt. Beiring, *supra* text accompanying notes 211 and 548); death of al-Jamadi (Lt. Ledford, *supra* text accompanying note 80, one other SEAL Lieutenant, *see* DIC Table); death of Mowhoush (Chief Warrant Officer Welshofer, *supra* text accompanying note 60, Chief Warrant Officer Jefferson Williams, *supra* text accompanying note 62, Maj. Voss,* *supra* text accompanying note 65). *Denotes administrative charge only.

[572] This number includes both criminal and administrative charges. Death of Sayari (Captain, name unknown,* *supra* text accompanying note 293); death of Hatab (Maj. Paulus, *supra* text accompanying note 169, Maj. Vickers, *see* DIC Table); death of Hassoun (Lt. Saville, *supra* text accompanying note 305, Lt. Col. Sassaman,* *infra* text accompanying note 589, Maj. Gwinner,* *infra* text accompanying note 589, Capt. Cunningham,* *infra* text accompanying note 589); deaths of Kareem and Hanjil (1st Lt. Pantano, *see* DIC Table); death of Unknown 18 (2nd Lt. Anderson, *see* DIC Table). *Denotes administrative charge only.

[573] This number includes both criminal and administrative punishments. Deaths of Habibullah and Dilawar (Capt. Beiring,* *see* DIC Table); death of al-Jamadi (SEAL Lieutenant other than Lt. Ledford,* *see* DIC Table); death of Mowhoush (Chief Warrant Officer Welshofer, *supra* text accompanying note 60, Chief Warrant Officer Jefferson Williams,* *supra* text accompanying note 62, Voss,* *supra* text accompanying note 65). *Denotes administrative punishment only.

[574] This number includes both criminal and administrative punishments. Death of Sayari (Captain, name unknown,* *supra* text accompanying note 295); death of Hatab (Maj. Paulus, *supra* text accompanying note 173); death of Hassoun (Lt. Saville, *supra* text accompanying note 316, Lt. Col. Sassaman,* *infra* text accompanying note 589, Maj. Gwinner,* *infra* text accompanying note 589, Capt. Cunningham,* *infra* text accompanying note 589). *Denotes administrative punishment only

[575] This number includes both criminal and administrative charges. Death of Habibullah (Sgt. Greatorex, *supra* note 208, Sgt. Broady, *supra* note 208, Staff Sgt. Doyle, *supra* note 208); death of Dilawar (Sgt. Claus, *supra* note 208, Sgt. Morden, *supra* note 208); deaths of Habibullah and Dilawar (Sgt. Salcedo, *supra* note 208, Sgt. Boland, *supra* note 208, Spc. Cammack, *supra* note 208, Pfc. Brand, *supra* note 208, Sgt. Driver, *supra* note 208, Spc. Walls, *supra* note 208); death of al-Jamadi (eight unnamed enlisted Navy personnel, *supra* text accompanying notes 138-140); death of Mowhoush (Sgt. 1st Class Sommer, *supra* note 62, Spc. Loper, *supra* note 62).

[576] This number includes both criminal and administrative charges. Death of Hatab (Sgt. Pittman, *supra* text accompanying note 169, Lance Cpl. Roy, *supra* text accompanying note 176, Lance Cpl. Hernandez, *supra* text accompanying note 175, Sgt. Rodriguez-Martinez, *see* DIC Table, Lance Cpl. Mikholap, *see* DIC Table, Lance Cpl. Rodney, *see* DIC Table); death of Radad (Spc. Martino-Poole, *supra* text accompanying note 270); death of Hassoun (Staff Sgt. Perkins, *supra* text accompanying note 316, Sgt. Martinez, *supra* text accompanying note 317, Sgt. Bowman, *supra* text accompanying note 317); death of Ismail (Staff Sgt. Werst, *see* DIC Table); death of Kadir (Pfc. Richmond, *see* DIC Table); death of Unknown 18 (Sgt. Michael Williams, *infra* note 609); death of Unknown 19 (Sgt. Michael Williams, *infra* note 609, Spc. May, *see* DIC Table); death of T. Ahmed (Sgt. 1st Class Diaz, *see* DIC Table); death of Unknown 22 (Sergeant, name unknown, *see* DIC Table).

[577] This number includes both criminal and administrative punishments. Death of Dilawar (Sgt. Claus, *supra* note 209, Sgt. Morden, *supra* note 209), deaths of Habibullah and Dilawar (Sgt. Salcedo, *supra* note 209, Sgt. Boland,* *supra* note 209, Spc. Cammack, *supra* note 209, Pfc. Brand, *supra* note 209, Spc. Walls, *supra* note 209); death of al-Jamadi (eight unnamed enlisted Navy personnel,* *supra* text accompanying notes 138-140). *Denotes administrative punishment only

[578] This number includes both criminal and administrative punishments. Death of Hatab (Lance Cpl. Roy,* *supra* text accompanying note 176); death of Radad (SPC. Martino-Poole, *supra* text accompanying note 551); death of Hassoun (Staff Sgt. Perkins, *supra* text accompanying note 316, Sgt. Martinez,* *supra* text accompanying note 317, Sgt. Bowman,* *supra* text accompanying note 317); death of Kadir (Pfc. Richmond, *see* DIC Table); death of Unknown 18 (Sgt. Michael Williams, *infra* note 609), death of Unknown 19 (Sgt. Michael Williams, *infra* note 609, Spc. May, *see* DIC Table); death of T. Ahmed (Sgt. 1st Class Diaz, *see* DIC Table). *Denotes administrative punishment only

[579] Death of Wali (Passaro, *supra* text accompanying note 187).

[580] Criminal Investigation, Sayari, *supra* note 273, at 11.

[581] Criminal Investigation, Sayari, *supra* note 273, at 11.

[582] Criminal Investigation, Sayari, *supra* note 273, at 11.

[583] Criminal Investigation, Sayari, *supra* note 273, at 1-10.

[584] Criminal Investigation, Sayari, *supra* note 273, at 1; *Army: Soldiers Shouldn't be Charged*, ASSOC. PRESS, Jan. 24, 2005, *available at* http://www.msnbc.msn.com/id/6863659/ (accessed Feb. 3, 2006).

[585] Filkins, *Warrior King*, *supra* note 298; *Cover-up of Iraq Bridge Incident Admitted*, ASSOC. PRESS, July 30, 2004, *available at* http://www.msnbc.msn.com/id/5560805/ (accessed Feb. 3, 2006).

[586] Information Paper on Samarra Bridge Incident, July 15, 2004, *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 47 (accessed Feb. 3, 2006).

[587] Investigating Officer's Report of Charges Under Article 32, Aug. 19, 2004, *available at* http://action.aclu.org/torturefoia/released/063005/11950_12130PartB.pdf, at 99-100 (accessed Feb. 3, 2006).

[588] *Cover-up of Iraq Bridge Incident Admitted*, ASSOC. PRESS, July 30, 2004, *available at* http://www.msnbc.msn.com/id/5560805/ (accessed Feb. 3, 2006).

[589] Filkins, *Warrior King*, *supra* note 298; Information Paper on Samarra Bridge Incident, July 15, 2004, *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 47 (accessed Feb. 3, 2006).

[590] Filkins, *Warrior King*, *supra* note 298; Suzanne Goldenberg, *45 Days Jail for U.S. Officer Who Had Cousins Thrown Into Tigris*, GUARDIAN, Mar. 16, 2005, at Home Pages 2.

[591] Filkins, *Warrior King*, *supra* note 298; *Several Issues Cloud Army's Case Against GIs in Drowning*, July 29, 2004, at 4A; Dick Foster, *Fort Carson Soldiers May Use Drug Defense in Courts-Martial*, Rocky Mountain News, ROCKY MOUNTAIN NEWS, at 5A; *Charges Dropped Against U.S. Soldier in Iraqi Man's Death*, ASSOC. PRESS, Sept. 7, 2004, *available at* http://www.foxnews.com/story/0,2933,131717,00.html (accessed Feb. 8, 2006).

[592] Criminal Investigators Outline 27 Homicides, *supra* note 64, at 5; Filkins, *Warrior King*, *supra* note 298.

[593] Criminal Investigation, Radad, *supra* note 260, at 2 (accessed Feb. 3, 2006); Memorandum from Maj. Gen. Raymond T. Odierno for Commander, 502d Personnel Service Battalion, Request for Discharge in Lieu of Trial by Court-Martial, *available at*

http://www.aclu.org/torturefoia/released/041905/6768_7065.pdf, at 53 (accessed Feb. 3, 2006).

[594] *In re Yamashita*, 327 U.S. 1 (1946).

[595] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 U.N.T.S. 3 art. 86 (not ratified by United States), *available at* http://www.unhchr.ch/html/menu3/b/93.htm (accessed Feb. 8, 2006) ("knew, or had information which should have enabled them to conclude in the circumstances at the time"); Dep't of the Army, Field Manual 27-10, The Law of Land Warfare, Chapter 8, § 2, art. 501 ("if he has actual knowledge, or should have knowledge, through reports received by him or through other means"); Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (1993), art. 7(3), *available at* http://www.un.org/icty/basic/statut/statute.htm (accessed Feb. 8, 2006) ("knew or had reason to know"); Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 6(3) ("knew or had reason to know").

[596] Gidget Fuentes, *Major Convicted, Avoids Jail Time in Abuse Trial*, MARINE CORPS TIMES, Nov. 22, 2004, at 11; Alex Roth, *Marine Guilty in Death of Iraqi*, SAN DIEGO UNION-TRIB., Nov. 11, 2004, at B1.

[597] *Lawyers: Army Backed Interrogation Methods*, ASSOC. PRESS, Apr. 1, 2005, *available at* http://www.newsmax.com/archives/articles/2005/3/31/205753.shtml (accessed Feb. 3, 2006); Arthur Kane and Miles Moffeit, *U.S. General Backed Lightest Penalty in Interrogation Death*, DENVER POST, May 10, 2005, at A6.

[598] Filkins, *Warrior King*, *supra* note 298; Information Paper on Samarra Bridge Incident, July 15, 2004, *available at* http://www.aclu.org/torturefoia/released/051805/8055_8181.pdf, at 47 (accessed Feb. 3, 2006).

[599] Elise Ackerman, *Interrogators Linked to Prior Prison Abuse; Afghanistan-Iraq Pattern Cited: Army's Covering Up, Critics Say*, DETROIT FREE PRESS, Aug. 23, 2004.

[600] Elise Ackerman, *Only 2 Low-Ranking Reservists Face Punishment in Detainees' Deaths*, KNIGHT RIDDER, Mar. 8, 2005, *available at* http://www.commondreams.org/headlines05/0308-02.htm (accessed Feb. 9, 2006); *Several With Ties to Prison Abuse Linked to Fort*, ARIZ. DAILY STAR, July 31, 2005 *available at* http://www.dailystar.com/dailystar/news/86554.php (accessed Feb. 8, 2006).

[601] Human Rights First Telephone Conversation with Fort Huachuca representative (Feb. 9, 2006) (notes on file with Human Rights First).

[602] *See* Mowhoush case study, *supra* pp. 6-11 and Jameel case study, *supra* pp. 12-13.

[603] Memorandum from General Ricardo Sanchez to Combined Joint Task Force Seven and the Commander, 205th Intelligence Brigade (Sept. 10, 2003), *available at* http://www.humanrightsfirst.info/pdf/061124-etn-sep-10-sanchez-memo.pdf (accessed Feb. 3, 2006). *See also* Memorandum from General Ricardo Sanchez to the Commander, U.S. Central Command (Sept. 14, 2003), *available at* http://www.humanrightsfirst.org/us_law/etn/pdf/sanc-%20memo-091403.pdf (accessed Feb. 7, 2006); Memorandum from General Ricardo Sanchez to Combined Joint Task Force Seven and the Commander, 205th Intelligence Brigade (Oct. 12, 2003), *available at* http://www.aclu.org/FilesPDFs/october%20sanchez%20memo.pdf (accessed Feb. 7, 2006).

[604] *See* Cnn.com Specials, Forces: U.S & Coalition/Commanders, Gen. Ricardo S. Sanchez, http://www.cnn.com/SPECIALS/2003/iraq/forces/commanders/us.command/index.html (accessed Feb. 8, 2006).

[605] Human Rights First notes from observation of Welshofer court martial, Welshofer In His Own Words, Jan. 20, 2006 (on file with Human Rights First), excerpts *available* http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-012006d.asp (accessed Feb. 3, 2006).

[606] Eric Schmitt, *Career of General in Charge During Abu Ghraib May End*, N.Y. Times, Jan. 5, 2006, at A3.

[607] Human Rights Watch, LEADERSHIP FAILURE: FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE U.S. ARMY'S 82ND AIRBORNE DIVISION (Sept. 2005), *available at* http://hrw.org/reports/2005/us0905/ (accessed Feb. 13, 2006).

[608] Dep't of Defense, News Release, 82nd Airborne Division Commanding General's Briefing from Iraq (Mar. 10, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040310-1281.html (accessed Feb. 13, 2006).

[609] Sergeant Michael Williams was court-martialed for his involvement in the deaths of two detainees, shot during house searches, and received a life sentence (later reduced to 25 years). Williams agreed to testify against an officer in related proceedings as part of the plea deal; he later admitted he had falsely implicated the officer in order to get the lesser sentence. Gina Cavallaro, *Witnesses Defend Accused Lieutenant*, ARMY TIMES, Nov. 17, 2005, *available at* http://www.armytimes.com/story.php?f=1-292925-1307022.php (accessed Feb. 7, 2006); Michael Sangiacomo, *Soldier Will Fight New Murder Charges*, CLEVELAND PLAIN DEALER, Oct. 18, 2005; John Milburn, *Fort Riley Officer Faces Hearing on Murder Charges*, ASSOC. PRESS, Nov. 16, 2005, *available at* http://www.armytimes.com/story.php?f=1-292925-1304495.php (accessed Feb. 3, 2006); John Milburn, *Hearing for Accused Fort Riley Officer Concludes with Drama*, ASSOC. PRESS, Nov. 17, 2005, *available at* http://www.signonsandiego.com/news/military/20051117-2252-fortriley-officercharged.html (accessed Feb. 3, 2006).

[610] Rick Rogers, *Main Charge is Reduced in Court-Martial*, SAN DIEGO UNION-TRIB., Nov. 6, 2004, at NC-1; *Court Martial Begins in Iraq Prison Death*, ASSOC. PRESS, Nov. 2, 2004, *available at* http://msnbc.msn.com/id/6394480/ (accessed Feb. 3, 2006).

[611] Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. TIMES, Jan. 8, 2006, at A13.

[612] Luke Harding, *I Will Always Hate You People*, THE GUARDIAN, May 24, 2004, at Home Pages 1; Salaheddin, *Family Welcomes Probe*, *supra* note 378.

[613] Salaheddin, *Family Welcomes Probe*, *supra* note 378; Charles J. Hanley, *Experts Urge Release of Iraq Scientists*, ASSOC. PRESS, July 17, 2005, *available at* http://www.phillyburbs.com/pb-dyn/news/93-07172005-515623.html (accessed Feb. 3, 2006).

[614] Autopsy, Dababa, *supra* note 341, at 56-64.

[615] Autopsy, Dababa, *supra* note 341, at 58-61.

[616] Autopsy, Dababa, *supra* note 341, at 58-61.

[617] Autopsy, Dababa, *supra* note 341, at 59.

[618] John Lumpkin, *9 Prisoner Deaths in Iraq, Afghanistan Probed as Homicides*, ASSOC. PRESS, May 22, 2004, *available at* http://www.usatoday.com/news/world/iraq/2004-05-23-death-probe_x.htm (accessed Feb. 8, 2006).

[619] Autopsy, F. Mohammed, *supra* note 104, at 96.

[620] Autopsy, F. Mohammed, *supra* note 104, at 96.

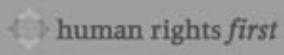
[621] Autopsy, F. Mohammed, *supra* note 104, at 99-100.

[622] Autopsy, Dababa, *supra* note 341, at 105.

[623] Josh White, *3 More Navy SEALs Face Abuse Charges*, WASH. POST, Sept. 25, 2004, at A16.

By the Numbers

Findings of the Detainee Abuse and Accountability Project



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Summary

Two years ago, revelations about the abuse of detainees in U.S. custody at Abu Ghraib prison in Iraq shocked people across the world. In response, U.S. government officials condemned the conduct as illegal and assured the world that perpetrators would be held accountable.

Two years later, it has become clear that the problem of torture and other abuse by U.S. personnel abroad was far more pervasive than the Abu Ghraib photos revealed—extending to numerous U.S. detention facilities in Afghanistan, Iraq, and at Guantánamo Bay, and including hundreds of incidents of abuse. Yet an analysis of alleged abuse cases shows that promises of transparency, investigation, and appropriate punishment for those responsible remain unfulfilled. U.S. authorities have failed to investigate many allegations, or have investigated them inadequately. And numerous personnel implicated in abuses have not been prosecuted or punished.

In order to collect and analyze allegations of abuse of detainees in U.S. custody in Afghanistan, Iraq, and at the Guantánamo Bay detention facility, and to assess what actions, if any, the U.S. government has taken in response to credible allegations, the Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and Human Rights First have jointly undertaken a **Detainee Abuse and Accountability Project** (DAA Project). The Project tracks abuse allegations and records investigations, disciplinary measures, or criminal prosecutions that are linked to them. (This briefing paper does not discuss allegations of torture or abuse at secret U.S. detention facilities in other countries, or allegations of torture following illegal rendition or other informal transfer to other countries.[1])

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[1] For information about secret detention facilities and allegations of torture occurring in them, see Human Rights First, "Ending Secret Detentions," June 2004, retrieved April 17, 2006, at http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf; Human Rights First, "Behind the Wire," March 2005, retrieved April 17, 2006, at http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf; Human Rights Watch "The United States' 'Disappeared': The CIA's Long-Term 'Ghost Detainees," October 2004, retrieved April 17, 2006, at http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf; see also Human Rights Watch, "List of Ghost Prisoners Possibly in CIA Custody," November 30, 2005, retrieved April 17, 2006, at http://hrw.org/english/docs/2005/11/30/usdom12109.htm; and NYU Center for Human Rights and Global Justice, "Fate and Whereabouts Unknown: Detainees in the 'War on Terror,'" December 2005, retrieved April 17, 2006, at http://www.nyuhr.org/docs/Whereabouts%20Unknown%20Final.pdf. For an analysis of the practice and legality of rendition, see NYU Center for Human Rights and Global Justice & New York City Bar Association, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Rendition,'" October 2004, at http://www.nyuhr.org/docs/TortureByProxy.pdf; NYU Center for Human Rights and Global Justice, "Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush," June 2005, at

This briefing paper presents the Project's preliminary conclusions based on data collected as of April 10, 2006. It also highlights a number of individual cases that illustrate the following **key findings**:

- Detainee abuse has been widespread. The DAA Project has documented over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees. These cases involve more than 600 U.S. personnel and over 460 detainees. Allegations have come from U.S. facilities throughout Afghanistan, Iraq and at Guantánamo Bay. (These numbers are conservative and likely lower than the actual number of credible allegations of abuse. See box, "Methodology and Sources of Information," opposite.)

- Only fifty-four military personnel—a fraction of the more than 600 U.S. personnel implicated in detainee abuse cases—are known to have been convicted by court-martial; forty of these individuals have been sentenced to prison time.

- Available evidence indicates that U.S. military and civilian agencies do not appear to have adequately investigated numerous cases of alleged torture and other mistreatment. Of the hundreds of allegations of abuse collected by the DAA Project, only about half appear to have been properly investigated. In numerous cases, military investigators appear to have closed investigations prematurely or to have delayed their resolution. In many cases, the military has simply failed to open investigations, even in cases where credible allegations have been made.

- DAA Project researchers found over 400 personnel have been implicated in cases investigated by military or civilian authorities, but only about a third of them have faced any kind of disciplinary or criminal action. And even in cases where U.S. military investigations have substantiated abuse, military commanders have often chosen to proceed with weaker non-judicial forms of disciplinary action instead of criminal prosecution.

- In cases where courts-martial have convened, only a small number of convictions have resulted in significant prison time. Many sentences have been for less than a year, even in cases involving serious abuse. Of the hundreds of personnel implicated in detainee abuse, only ten people have been sentenced to a year or more in prison.

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http://www.nyuhr.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf. See also Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture," April 2005, at http://hrw.org/reports/2005/eca0405/eca0405.pdf; Human Rights Watch, "Black Hole: The Fate of Islamists Rendered to Egypt," May 2005, at http://hrw.org/reports/2005/egypt0505/egypt0505.pdf.

- No U.S. military officer has been held accountable for criminal acts committed by subordinates under the doctrine of command responsibility. That doctrine provides that a superior is responsible for the criminal acts of subordinates if the superior knew or should have known that the crimes were being committed and failed to take steps to prevent them or to punish the perpetrators. Only three officers have been convicted by court-martial for detainee abuse; in all three instances, they were convicted for abuses in which they directly participated, not for their responsibility as commanders.

- The U.S. Central Intelligence Agency (CIA) has investigated several cases of abuse involving its personnel, and reportedly referred some individuals to the Department of Justice for prosecution. But few cases have been robustly investigated.

- The Department of Justice appears to have taken little action in regard to the approximately twenty civilians, including CIA agents, referred for criminal prosecution for detainee abuse by the military and the CIA, and has shown minimal initiative in conducting its own investigations into abuse cases. The Department of Justice has not indicted a single CIA agent for abusing detainees; it has indicted only one civilian contractor.

Methodology and Sources of Information

The DAA Project collects data on alleged detainee abuses in Afghanistan, Iraq and at Guantanamo Bay, occurring in the context of U.S. military and intelligence operations. The data are based primarily on documents released by the U.S. government itself, including tens of thousands of pages of internal government documents obtained under the Freedom of Information Act (FOIA) by the American Civil Liberties Union and other non-governmental groups. Additional sources include Human Rights Watch and Human Rights First interviews with witnesses and victims of abuse; the U.S. military's reports of investigations conducted into alleged abuse; legal documents relevant to abuse investigations and prosecutions, including court filings and transcripts from proceedings conducted at the Guantanamo Bay detention facility; detainee accounts recorded by other organizations or by the detainees' attorneys; reports from credible media sources; official U.S. military statements; and responses from the U.S. military and Department of Justice to questions from Project researchers.

The numbers presented in this report are likely an undercount. There are two reasons for this. First, U.S. military and intelligence agencies maintain a high level of secrecy with respect to detainee operations, allegations of abuse and ongoing investigations. Too often, instances of abuse come to light or are fully investigated only after media attention is focused on them.[3] In many cases, despite repeated requests, DAA Project researchers were not able to obtain more than the most basic information about alleged abuses from government agencies.[4] Second, the Project has taken a conservative approach, and included accounts of alleged abuse from non-governmental sources only if they are specific, detailed, and coherent. The Project has not included allegations about systemic abusive abuse – for instance, allegations that a particular military unit or set of soldiers systematically committed abuses, no matter how well supported – if these allegations did not include allegations about specific incidents, personnel, or detainees.

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[2] For a description of some of the official military investigations conducted and discussion of their shortcomings, see Human Rights First, "Getting to Ground Truth: Investigating U.S. Abuses in the War on Terror," September 2004, at http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf.

[3] See Human Rights First, "Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan," February 2006, p. 31, at http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf [hereinafter Human Rights First, *Command's Responsibility*] (discussing the impact of public attention on military investigations of detainee deaths in U.S. custody). See also "New Detainee Deaths Uncovered in Afghanistan," Human Rights Watch press release and letter to Secretary of Defense Donald Rumsfeld, December 13, 2004, at http://hrw.org/english/docs/2004/12/13/afghan9837.htm (information about deaths was updated after media attention to the letter).

[4] Project researchers made numerous letter, telephone, and e-mail inquiries to military and Department of Justice officials requesting information. In a few instances, military public affairs officers provided additional information about specific cases or general information about the military's record of investigating and prosecuting abuse. In most other cases, however, Project researchers were told that information requested is unavailable, or that it can only be obtained under FOIA. DAA Project Members have filed FOIA requests connected to several cases reviewed in this report; almost all of these requests are still pending.

Definitions and Explanations

For the purposes of the DAA Project, a "case" is defined as a set of events that took place at a particular time and location, involving a particular act of illegal perpetration and victim. A case may involve a single perpetrator abusing a single detainee or multiple perpetrators, victims, and acts of abuse.

A specific act illegally committed by a particular person against an individual detainee (for instance, a military guard beating a detainee) is an "act of abuse." For the purposes of this Project, separate acts by different perpetrators against detainees are considered separate acts of abuse (for instance, two military guards beating up a detainee in two acts of abuse). Project researchers classified conduct as acts of abuse only if the alleged conduct would violate provisions of the U.S. Uniform Code of Military Justice (UCMJ), applicable to U.S. servicemen and women, or federal criminal statutes, applicable to both civilians and military personnel.[5] Relevant violations of the UCMJ include homicide, assault, cruelty and maltreatment, and maiming;[6] relevant violations of U.S. federal law include homicide, assault, sexual abuse, and torture.[7] Please "Acts of abuse" are not equivalent to the individual criminal charges that prosecutors could seek under these provisions. Charges in criminal cases are decided by prosecutors on a case-by-case basis and can include several counts stemming from a single act.[8] Project researchers excluded from the count instances in which military investigators found evidence that justified or excused physical force, e.g., instances in which guards used arguably justified levels of force to subdue illegally, violent or unruly detainees.

A "detainee" is defined here as it is by the Army's criminal investigators concerned, as "any person captured or otherwise detained by an armed force."[9]

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[5] The Uniform Code of Military Justice is codified at Title 10, Chapter 47 of the U.S. Code (10 U.S.C. § 801 et seq.) [hereinafter UCMJ]. Crimes punishable under the UCMJ are found in articles 77–134 of the UCMJ (10 U.S.C. §§ 877-934). Federal crimes, applicable to both civilians and military personnel, are codified in Title 18 of the U.S. Code ("Crimes and Criminal Procedure").

[6] UCMJ arts. 118-119 (homicide), art. 128 (assault), art. 93 (cruelty and maltreatment), and art. 124 (maiming).

[7] 18 U.S.C. § 1111-1112 (homicide), 18 U.S.C. § 113 (assault), 18 U.S.C. § 109A (sexual abuse), and 18 U.S.C. § 2340A (torture).

[8] Department of the Army, Criminal Investigative Command (CID), *CID Report of Investigation – Initial/Final SSI – 0037-04-CID201-54050* (November 16, 2004), pp. 68-69, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/042105/9290_9388.pdf.

By the Numbers

The DAA Project has to date documented at least 330 cases in which U.S. military and civilian personnel are alleged to have abused detainees, ranging from beatings and assaults, to torture, sexual abuse, and homicide. Among the cases:

- At least 600 U.S. personnel are implicated (numerous cases involve more than one perpetrator). Military personnel comprise over 95 percent of those implicated (at least 570 people), and at least ten CIA or other intelligence personnel are implicated, and approximately twenty civilian contractors working for either the military or the CIA.

- At least 460 detainees have been subjected to abuse, including people held in Iraq, Afghanistan, and at Guantánamo Bay.

- The majority of the approximately 330 cases took place in Iraq (at least 220 cases), followed by Afghanistan (at least sixty cases), and Guantánamo Bay (at least fifty cases).

- DAA Project researchers found that authorities opened investigations into approximately 210 out of the 330 cases (about 65 percent).[9]

- In the remaining 35 percent of cases—approximately 120 cases—either no investigation was opened or the authorities have not publicly disclosed whether one took place. Over 70 percent of these 120 unresolved cases involve incidents that took place more than two years ago.

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[9] This count of "investigations" includes both criminal investigations carried out by the military or Department of Justice and other preliminary administrative or non-judicial investigations into specific cases conducted by the military. For a description of the different types of investigation that may be conducted by military authorities, see box on "Disciplinary Mechanisms: Criminal and Non-Judicial Proceedings," p. 13. The DAA Project did not count as investigations broader inquiries by military officials such as those conducted by Maj. Gen. Antonio Taguba and Gen. Anthony Jones and Gen. George Fay, since those inquiries were intended to examine systemic problems and failures in detainee operations and were not mandated to gather facts and evidence about particular cases. See, e.g., Maj. Gen. Antonio Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, April 2004, annex 26 [hereinafter Taguba Report] and Gen. Anthony R. Jones, *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade* and Gen. George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, August 2004 [hereinafter Fay-Jones Report], retrieved April 17, 2006, at http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf.

- The 210 cases in which there is evidence of an investigation involve at least 410 personnel (in many cases, more than one perpetrator is alleged to be involved in a case).

- Almost all of the military personnel who have been investigated are enlisted soldiers (approximately 95 percent of the total), not officers.

- Of the approximately 410 personnel implicated in cases that the military and civilian authorities have investigated, only about a third have faced any kind of disciplinary or criminal action. As of April 10, 2006, the DAA Project identified seventy-nine military personnel who were ordered by commanders for court-martial.[10] (This number includes summary courts-martial conducted abroad, for which thirty days' confinement is the maximum sentence.) Only one person, a civilian contractor, has been indicted in federal court.

- Of the seventy-nine courts-martial ordered by commanders, fifty-four resulted in conviction or a guilty plea. Another fifty-seven people have faced non-judicial proceedings in which punishments include no or minimal prison time. (See box below on "Parallel Disciplinary Mechanisms: Criminal and Non-judicial Proceedings.")[11]

- 75 percent of the cases in which investigations were conducted do not appear to have resulted in any kind of punishment (approximately 160 of the 210 investigated cases, involving approximately 260 accused personnel). The DAA Project found approximately 110 cases (involving approximately 190 accused personnel) were closed without punishment. And in at least fifty cases (involving at least seventy other people), the Project could not find any evidence that investigations had resulted in punishment and could not determine whether the case was still open.

- Researchers identified more than 1,000 individual criminal acts of abuse.

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[10] As noted in the box "What the Government Says" on page 16, a military Public Affairs official told DAA researchers in early April 2006 that "there have been 85 Courts-Martial" to date, but did not respond to requests for details on the names of the accused and the allegations that lead to the courts-martial, or provide an explanation on whether the number refers to courts-martial that commanders have ordered or ones that have actually been completed.

[11] The numbers of persons who have faced courts-martial or administrative proceedings should not be directly compared with the overall numbers of cases investigated because many cases involve more than one alleged perpetrator.

- The most common alleged types of abuse were assault (found in at least 220 cases), use of physical or non-physical humiliation (at least ninety cases), sexual assault or abuse (at least sixty cases), and use of "stress" techniques (at least forty cases).

Analysis

The numbers documented by the DAA Project reveal a general failure of accountability in detainee abuse cases, particularly with respect to commanders. Reasons include an apparent disinclination by commanding officers and civilian authorities to pursue meaningful punishment of serious offenses, and a series of general investigative failures, described in more detail below.

Criminal Punishments: Verdicts and Sentencing

Even though approximately 600 U.S. personnel are implicated in the cases of detainee abuse documented by the DAA Project, as of April 10, 2006, only seventy-nine military personnel are known to have been recommended for court-martial, and only sixty-four appear to have actually been court-martialed. (This number includes eleven summary courts-martial, in which the maximum sentence is thirty days of confinement, and thirteen special courts-martial, in which the maximum sentence is one year).[12] Ten courts-martial are still pending, and charges were dropped in the five other cases.

With respect to the sixty-four concluded courts-martial, the DAA Project found that:

- Approximately 85 percent—fifty-four of the sixty-four concluded courts-martial—resulted in guilty verdicts on at least one charge. (In at least five instances, the accused pled guilty before the verdict.) Ten defendants were acquitted of all charges or had verdicts overturned.

- Of the fifty-four guilty verdicts, forty resulted in sentences involving prison time (74 percent). In the other fourteen verdicts, defendants were sentenced to punishments not involving prison time, such as extra duty, discharge, or reduction in rank.

- In close to 75 percent of the sentences resulting in confinement (thirty out of forty instances), the punishment imposed was less than a year of prison time; the average sentence was about four months. The remaining ten personnel were sentenced to imprisonment for periods ranging from one year to one instance of life imprisonment; the average for the nine people sentenced to less than life was approximately four years.

[12] As noted above, another fifty-seven individuals faced non-judicial punishments.

While those cases actually brought to court-martial produced a relatively high rate of conviction, punishments that included prison time were not consistent. Substantial prison sentences were given in a few high profile cases covered by the media, but a number of other equally serious cases resulted in punishments far less severe. Examples of people sentenced to significant prison time include Charles Graner and Ivan Frederick, both convicted for assaults and other misconduct in the notorious photographed abuses at Abu Ghraib prison in late 2003, who were sentenced to ten and eight years respectively. Two other soldiers have received heavy sentences: Sgt. Michael P. Williams and Spec. Brent May were convicted of murder for the killings of two men they detained near Baghdad in August 2004. Williams was sentenced to life in prison; May was given five years.

However, other serious cases resulted in light punishments. Examples include:

- 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. He was found guilty of cruelty and maltreatment and sentenced to thirty days of hard labor without confinement, and a fine of $1,056.[13]

- In April 2004, three Marines in the 2nd Battalion, 2nd Marine Regiment in Iraq were alleged to have shocked a detainee "with an electric transformer" during an interrogation. According to investigation documents, 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. After court-martial, the first Marine was given one year of confinement and a dishonorable discharge; the second received eight months of confinement and a dishonorable discharge. The third Marine, the detainee's guard escort, was given sixty days of confinement.[14]

- In June 2003, two soldiers were charged in summary courts-martial with assault for beating an Iraqi detainee. The investigation determined that one of the soldiers punched the detainee in the face several times and fractured his jaw, and that the other soldier also hit the detainee. Both soldiers were convicted of assault and were reduced in rank, ordered to forfeit pay, and were sentenced to sixty and forty-five days imprisonment, respectively.

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[13] See United States Marine Corps, *USMC Alleged Detainee Abuse Cases Since 11 Sep 01*, August 5, 2004, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/navy3740.3749.pdf.
[14] See ibid.

(Two other soldiers and a lieutenant were found guilty of assault in a non-judicial hearing and given punishments not involving prison time.)

- Two homicide cases from December 2002, in Afghanistan, have resulted in only minor punishments for the personnel prosecuted. (See appendix B: Sentencing in the December 2002 Bagram Homicides.)

Officers' Liability Under the Command Responsibility Doctrine

The vast majority of the courts-martial cases detailed here (95 percent) involved enlisted personnel, not officers.

Under the doctrine of command responsibility, a long-recognized principle of U.S. domestic and international law, commanders can be held criminally liable as principals for the criminal acts of their subordinates, if they knew or should have known about criminal activity, but did not take steps to prevent it or to punish the perpetrators. For example, if prosecutors demonstrate that commanders knew their troops were committing abuses, but failed to stop them, the commanders can be charged as though they committed the crimes themselves.[15]

Not a single U.S. military officer serving in Iraq, Afghanistan, or Guantánamo Bay has been criminally charged under the doctrine of command responsibility for detainee abuses committed by his or her subordinates. The DAA Project found no evidence that the military has even sought to prosecute officers under the doctrine of command responsibility.

As of April 10, 2006, only five officers had been criminally charged in connection with the cases of abuse detailed in this report, and none under the doctrine of command responsibility. Christopher Beiring, an Army captain, was charged for dereliction of duty in a case involving the death of two detainees in Afghanistan in December 2002; charges against him were

[15] For a discussion of the concept of command responsibility in U.S. law, see In Re Yamashita, 327, U.S. 1, 16 (1946) and decisions under the Torture Victim Protection Act of 1991 (28 U.S.C. § 1350) applying the doctrine of command responsibility: Hilao v. Estate of Ferdinand Marcos, 103. F. 3d 767, 777-78 (9th Cir.1996); Kadic v. Karadzic, 70 F. 3d 232, 239, 242 (2d Cir. 1995); Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 171-172 (D. Mass. 1995). In a recent decision, Ford v. Garcia, 289 F. 3d 1283 (11th Cir. 2002), family members of victims of atrocities committed by members of the Salvadoran National Guard filed a case in a Florida federal court against a general and the former minister of defense. The judge directed that the two generals could be held responsible for the crimes of their subordinates if the defendants were in "effective command" and if they "knew or should have known" that persons under their effective command were committing such crimes.

dropped.[16] Andrew Ledford, a Navy lieutenant, was charged with assault and dereliction of duty, among other counts, for his involvement in the November 2003 interrogation at Abu Ghraib of Manadel al-Jamadi, an Iraqi detainee who died in custody; Ledford too was acquitted.[17] Three other officers—a lieutenant, a captain, and a major—were convicted at court-martial for their involvement in detainee abuse; in all three cases the officers were charged for direct participation in the criminal acts, and had taken part in abuses themselves or had ordered troops to commit abuses.[18] One was sentenced to only two months in prison, another to forty-five days, and the third was discharged and received no prison sentence.[19]

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[16] Tim Golden, "Years After 2 Afghans Died, Abuse Case Falters," *New York Times*, February 13, 2006.

[17] Marty Graham, "U.S. Navy commando cleared in Abu Ghraib case," Reuters, May 27 2005.

[18] One case involved Lieutenant Jack Saville, who ordered troops to throw two Iraqi detainees into the Tigris River (one drowned); Saville was sentenced to 2 months of prison time. See "U.S. soldier gets 45 days for Iraqi assaults," Reuters, March 15 2005. The second case involved Capt. Shawn Martin, who was convicted of three counts of assault against detainees, including two assaults he carried out himself and a case in which he ordered a detainee to dig his own grave and then fired shots next to the detainees head in a mock execution. Martin was sentenced to 45 days prison time and a fine of $1,000 per month for twelve months. See Erin Emery, "Officer sentenced to prison Convicted Army captain gets 45 days, cut in salary," *Denver Post*, March 18, 2005. The third case involved Maj. Clarke Paulus, who was convicted of ordering troops to drag a detainee out of his cell by his neck, strip him naked and leave him outside; Paulus was not sentenced to prison time but simply discharged from the military. See Seth Hettena, "Marine is sentenced in abuse of Iraqi prisoner," Associated Press, November 12, 2004.

[19] See preceding note.

Reliance on Non-judicial Hearings and Punishment

Parallel Disciplinary Mechanisms: Criminal and Non-judicial Proceedings

The U.S. military may conduct two types of investigations in a case involving alleged abuse: criminal or administrative. The procedures for each type of investigation are different. Generally, administrative investigations are less strict about evidentiary issues, while criminal investigations are geared toward collecting evidence of specific criminal acts.[20] After a military investigation—criminal or administrative—is completed, commanders decide whether and how an offender (if one is identified) is to be charged.[21] Commanders options include taking no action, initiating non-judicial disciplinary proceedings, or referring the case for a court-martial.[22]

If the commander decides that no action will be taken, the case is closed. If the commander decides on non-judicial proceedings, he or she holds a hearing to adjudicate the matter and decide what punishment, if any, is to be imposed. Non-judicial proceedings are disciplinary mechanisms that have lesser evidentiary standards than courts-martial, and carries small or criminal punishment.[23] Non-judicial punishments include reprimands, pay and rank reductions, extra duties, discharges from the military, or short-term confinement. Commanders can also impose other administrative disciplinary measures outside of the non-judicial punishment system.

If the commander decides to refer the case to court-martial (also, to criminal prosecution in the civilian system), there are three types that may be used: summary, special, and general.[24] General courts-martial, the military's highest-level trial court, are meant for serious criminal offenses. Punishment for court-martial can, depending on the crime, include punitive discharges and imprisonment, including life imprisonment, or death in murder cases. Special and summary courts-martial are usually used for less serious crimes. The maximum punishment in special courts-martial is one year of imprisonment, while summary courts-martial can only order thirty days.[25]

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[20] For details on regulations governing criminal and administrative investigations, see Army Regulation 15-6, Procedure for Investigating Officers and Board of Officers, September 30, 1996, retrieved April 17, 2006, at http://www.usma.edu/EO/regspubs/r15_6.pdf; Department of the Army, *Administrative Publications, 195 Series Collection*, retrieved April 17, 2006, at http://www.army.mil/usapa/epubs/195_Series_Collection_1.html. For additional information, see Human Rights First, *Command's Responsibility*, p. 30 and fns. 429-441. A criminal investigation is required after the death of any detainee in U.S. custody.

[21] As noted in *Command's Responsibility*, p. 30, administrative investigations, unlike criminal investigations, can only be used to investigate an incident or individual within the appointing commander's chain of command. In other words, investigators cannot investigate wrongdoing at the level of, or higher than, the commander who initiated the investigation.

[22] See RCM 306.

[23] See ibid. If a commander orders a general court-martial, a pre-trial hearing must be held (known as an article 32 hearing, roughly similar to a civilian grand jury).

[24] UCMJ art. 15.

[25] See UCMJ arts. 18-20.

[26] See RCM 201(f)(2) and RCM 1301(d)(1).

Under U.S. military law, commanders have broad discretion to hold non-judicial hearings in lieu of criminal prosecution.[27]

Even though non-judicial hearings are meant to adjudicate minor offenses and can result only in relatively weak penalties like reprimands,[28] in practice, commanders in Iraq, Afghanistan, and at Guantánamo Bay have used these hearings in numerous cases that warranted criminal prosecution. DAA Project researchers found that in over seventy instances, commanders who were faced with evidence that supported criminal prosecution chose instead to impose non-judicial punishments or to use non-punitive administrative actions.[29] (In addition to non-judicial punishments, commanders can impose administrative disciplinary measures.) Many of the personnel punished were implicated in serious abuses, including over ten personnel implicated in homicide cases, and approximately twenty personnel implicated in assault cases. Little is known about the results of non-judicial proceedings and other administrative processes, because the military refuses to release information about them.

The following are some of the stories behind the numbers:

- An Army criminal investigation in January 2004 revealed that an Army specialist in the 300th Military Police Company in Iraq physically abused a detainee and subjected him to a "mock execution" during a search operation in late 2003. The specialist took the detainee into a field away from other detainees and guards, "head-butted" the detainee, placed the barrel of his unloaded M-4 automatic weapon in the detainee's mouth, and "dry-fired" the weapon. The specialist then put a round into the weapon and fired the round into the dirt next to the detainee.

  Criminal Investigators concluded that the specialist had committed aggravated assault, assault/battery, and negligent discharge of a firearm, and found probable cause to bring

[27] See UCMJ, art. 15.

[28] See ibid. See also Rules for Courts-Martial (RCM) [hereinafter RCM], 306(c)(3), contained in the U.S. Manual for Courts-Martial (MCM), United States (2005 ed.) [hereinafter MCM]; and MCM pt. V, ¶ 5(b).

[29] The DAA Project identified 57 cases in which non-judicial article 15 hearings were used, and at least twenty other cases in which other administrative disciplinary measures were imposed. Military public affairs officials told DAA Project researchers in April 2006 that the military has used non-judicial punishments against ninety-three personnel, but it is unclear which of these cases overlap with the cases recorded by Project researchers, because military officials have refused to identify the cases individually. See box on page 16, "What the Government Says."

charges. Commanders instead ordered a non-judicial hearing, and the specialist received a punishment of two months of extra duty, restriction to base, reduction of rank, and a fine.[30]

- In a case detailed in the military investigation report of Maj. Gen. George Fay and Lieut. Gen. Anthony Jones, three soldiers in the 519th Military Intelligence Battalion sexually assaulted a female detainee in Iraq in 2003.[31] The Fay-Jones report described the assault:

  > First, the group took her out of her cell and escorted her down the cellblock to an empty cell. [Unnamed Soldier] stayed outside the cell while another held her hands behind her back, and the other forcibly kissed her. She was escorted downstairs to another cell where she was shown a naked male detainee and told the same would happen to her if she did not cooperate. She was then taken back to her cell and forced to kneel and raise her arms while one of the soldiers removed her shirt. She began to cry, and her shirt was given back as the soldier cursed at her and said they would be back.

  During the Army's criminal investigation, the victim identified the three soldiers from a photograph lineup provided by military investigators. Two months later, the criminal investigation was closed. Instead of a court-martial, commanders chose to punish the soldiers involved in this case non-judicially. The three soldiers each received one month of confinement and one of the soldiers was fined $500, while the other two were fined $750.

- As Human Rights First documented in a February 2006 report, non-judicial punishment, in lieu of prosecution, was taken against nine Navy personnel implicated in the November 2003 homicide death of Manadel al-Jamadi at Abu Ghraib prison in Iraq. In another case, the first reported death of a detainee in U.S. custody in Afghanistan, occurring in August 2002, commanders used non-judicial punishment even after criminal investigators found probable cause to recommend charges of murder and conspiracy against four members of a Special Forces unit who captured the detainee (a civilian non-combatant) and later shot him. The troops' commander declined to order a court-martial and instead ordered that one of the soldiers simply be discharged from the military. (These cases are discussed in greater detail in Appendix B.)

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[30] See Department of the Army, CID, *CID Report of Investigation*, January 30, 2004, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/28TF.pdf.

[31] See Fay-Jones Report, case No. 2, p. 71. See also Department of the Army, *Commanders Report of Disciplinary or Adminstrative Action* and *Army Investigation* (documents), retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/22TFa.pdf (commander's report) and http://www.aclu.org/torturefoia/released/22TFb.pdf (investigation notes). See also, Elise Ackerman, "Abu Ghraib Interrogators Involved in Afghan Case," Knight-Ridder, August 22, 2004.

What the Government Says

The DAA Project has repeatedly sought clarification from Pentagon and Department of Justice officials on the numbers and status of investigations into detainee abuse, largely without success. In response to queries, Pentagon officials have claimed that the Army has investigated "over one hundred allegations of abuse."[32] According to the Department of Justice, twenty cases have been referred to it by the Department of Defense or the CIA's Inspector General.[33] But neither the Pentagon nor the Department of Justice have provided information on what these numbers include, or on the status of specific cases.

For example, DAA Project researchers sought to clarify with military officials whether the figure of 600 refers to investigations into events (e.g., one incident into 600 different cases), or cases (e.g., investigations into 600 specific bad acts), or people (investigations into 600 suspects). Researchers also sought to clarify whether the figure of 600 is a tally of criminal investigations, administrative investigations, or both. Military spokespersons have not provided answers to these queries.

On the subject of investigations, Army Public Affairs officials told DAA Project researchers that 230 abuse cases have been resolved as of April 2006, in the following manner: "there have been 85 Courts Martial, 99 Non-Judicial Punishments, and 81 administrative actions." (In other words, a total of 171 individuals did not face criminal prosecution.) DAA Project researchers have repeatedly requested from Public Affairs officials details about these non-judicial and administrative measures, but have been told that the results and proceedings are sealed.

Justice Department officials told DAA Project researchers in April 2006 that one of the twenty persons referred to the Justice Department for prosecution was indicted. David Passaro, a CIA contractor indicted for assault in the case of an Afghan detainee beaten to death in eastern Afghanistan in June 2003. Officials said that seventeen other individuals were still being investigated and that the department had decided not to prosecute two others. Officials said that could not discuss any of the cases individually or provide further details about their status.

[32] This figure was provided by Army Public Affairs officials in e-mails to Project researchers in April 2006.

[33] See letter from William E. Moschella, Assistant Attorney General, to Senator Richard Durbin, January 17, 2006, retrieved April 17, 2006, at http://www.aclu.org/images/asset_upload_file606_23910.pdf.

Investigative Failures

Both the U.S. military and the Justice Department have the necessary resources and procedures to investigate abuse allegations, document the facts, and determine whether prosecutions are warranted. Yet the DAA Project found numerous cases in which authorities failed to initiate investigations, delayed in initiating investigations (often adversely affecting their outcome), or failed to follow basic investigative techniques, including interviewing victims and witnesses and gathering physical evidence.

The following are examples of cases in which authorities either failed to investigate credible allegations of abuse, or failed to conduct adequate or timely investigations of such allegations:

- On January 2, 2004, U.S. forces in Iraq arrested Reuters cameraman Salem Ureibi, photographer Ahmad Mohammad Hussein al-Badrani, and driver Sattar Jabar al-Badrani, along with NBC cameraman Ali Muhammed Hussein al-Badrani. The arrests took place near Fallujah, where the journalists were trying to film the wreckage of a downed U.S. helicopter.[34] The four were taken to Forward Operating Base Volturno and interrogated by members of the U.S. 82nd Airborne Division. After three days, the men were sent to Forward Operating Base St. Mere and released.

  Immediately after their release, the four men told their employers that they had been tortured and otherwise physically abused during their three days of detention. Ureibi and Ahmad al-Badrani alleged that they were repeatedly kicked and hit (with enough force to be knocked over) between and during interrogation sessions, subjected to sleep deprivation, and forced to perform difficult and humiliating physical motions or hold painful stress positions for hours at a time (including kneeling with their arms in the air, forced standing overnight, and standing up-and-down repeatedly). Both say they were forced to drink large quantities of water until they felt sick. Sattar al-Badrani and Ahmed al-Badrani also alleged acts of degradation and humiliation: Ahmad was forced to put his middle finger in his anus and then lick it, while Sattar was forced to put a finger in his anus and then smell it. Ureibi, who says he was separated from the others, also alleged that he was forced to crawl around on the floor with his head between another detainee's legs. He reported that an object

[34] The description of this case is based on multiple sources, including: interviews with Salem Ureibi, Ahmad Mohammad Hussein al-Badrani, and Sattar Jabar al-Badrani, by Reuters correspondent Andrew Marshall, Baghdad, January 8, 2004; Human Rights Watch interview with Salem Ureibi, Baghdad, March 22, 2006; U.S. Army, "Reuters/NBC Employee Detention" (Unclassified Executive Summary), January 29, 2004; Letter from David Schlesinger (Reuters Global Managing Editor) to Lawrence Di Rita (special assistant to the secretary of defense), February 3, 2004; letter from Lt. Gen. Ricardo Sanchez to David Schlesinger, March 5, 2004.

(possibly a shoe) was put in his mouth and that soldiers said they would rape him and his wife. Ali, who gave an account to NBC officials, also said that he was beaten and kicked, and that he was subjected to sleep deprivation, stress positions, and forced exercises.

An unclassified executive summary of the Army investigation into the case, dated January 29, 2004, reviewed statements obtained from soldiers involved in the detention and stated that the detainees were "purposefully and carefully put under stress, to include sleep deprivation, in order to facilitate interrogation; they were not tortured." The summary then dismissed the allegations of abuse by the four detainees as not credible. In a February 3, 2004, letter to Pentagon officials, Reuters called the Army investigation "woefully inadequate," noting that investigators had only taken statements from soldiers and not from the alleged victims of the abuse. Reuters requested that investigators speak with the journalists themselves, but investigators never did so. In a March 2004 letter to Reuters, Lt. Gen. Ricardo Sanchez (then commander of U.S. operations in Iraq) stated that the military would not reopen the case, and wrote that the "conclusions and findings of the Investigating Officers are sound." Even after the Abu Ghraib scandal broke in late April 2004, the military refused to reopen the investigation. In August 2004, the military again confirmed to Reuters that the investigation was closed.

- On May 11, 2004, the *Los Angeles Times* published an article by reporter Tracy Wilkinson including allegations of abuse of women detainees at Abu Ghraib. These included five women who said they were beaten, one who alleged she was raped, and another who said she had been forced to take off her clothes in front of male guards.[35] The allegations were based on the accounts of Iraqi lawyers who visited the detainees and complained on their behalf. Internal Army documents, disclosed later in 2004, indicated that an Army Criminal Investigation Command (known as "CID") investigation into the claims was initiated in late May 2004.[36] But the military's own files show that the agents' efforts to investigate the allegations were minimal, and mostly limited to a review of case files or records at Abu Ghraib.[37] In fact, officials repeatedly recommended closing the case on the dubious grounds

[35] Tracy Wilkinson, "A Double Ordeal for Female Detainees," *Los Angeles Times*, May 11, 2004, p. A1.
[36] Army Criminal Investigative Command investigation notes and memorandum on the *Los Angeles Times* case, April-August 2004, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/1209_1247.pdf.
[37] See ibid. The investigators' efforts, with few exceptions, appear to have been focused on recording these few investigatory efforts made and then recommending the case be closed. A June 23, 2004 investigation report noted that the female attorney mentioned in the *Los Angeles Times* article visited Abu Ghraib in March 2004, interviewed five detainees, and reviewed the files for those five detainees. (It is unclear why agents assumed this visit, in March 2004, would have bearing on the allegations, which were reportedly raised by detainees in May 2004.) The investigation report concluded: "This office coordinated with the originating Case Agent, who advised to close this RFA." A month later, a notation dated July 20, 2004, reads: "Pending one coordination w/|ith| Mr. || to locate Ms. ||. If he is unable to locate her, then close this down. All females

that another investigation suggested that two other women detainees at Abu Ghraib were believed to have made false allegations about abuse. The final investigation report closed the case because the investigation "failed to produce any identifiable subjects, all investigative leads were exhausted in attempts to identify and interview the alleged victims. . . ."[38] Yet there are few signs that leads were pursued let alone exhausted. According to the investigation records, investigators were unable to identify the alleged victims. But the records show that investigators did not interview Tracy Wilkinson, the author of the article, or the Iraqi attorneys who visited the detainees and were identified in the article.

- According to detainee accounts from Abu Ghraib, a civilian interpreter working for the contractor company Titan raped a juvenile male detainee at Abu Ghraib in November 2003.[39] These accounts were judged "credible" by, and contained in, the U.S. military's own investigation into the abuses at Abu Ghraib, conducted by Major General Antonio Taguba and issued in April 2004. A detainee witness told General Taguba's investigators that he heard and saw a male civilian interpreter rape a male juvenile detainee, and saw a female U.S. soldier taking pictures. The detainee witness identified the civilian as a man named Abu Hamid, of Egyptian ethnicity. Hamid's identity as a Titan interpreter is corroborated by the military's own criminal investigators as well as by a plaintiff in a U.S. civil suit against Titan.[40] But, according to military records, U.S. criminal investigators "did not develop sufficient evidence to prove or disprove [the witness'] allegations." (The documents also note that the delay in initiation of the investigation precluded gathering physical evidence.) An undated email from an FBI official to FBI director Robert Mueller suggests that the

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except for two, who we already titled for False Swearing in 0106-04-[illegible], have been released. According to their custom, the females are forbidden to discuss these allegations." On August 3, 2004, another entry cited the failure to locate the victims and the allegation that two other women had, according to investigators, been found to have made false allegations, and concluded: "close this." The files discuss the fact that another investigation identified a separate sexual abuse claim, but no further efforts to investigate the case appear to have been made. The notes contain additional notations about how the limited steps already taken should be better documented, and then on August 26, 2004, the case is closed.

[38] Department of the Army, CID, *CID Report of Investigation – Final (C)/SSI-0123-04-CID259-80248* (Aug. 26, 2004), retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/1209_1247.pdf.

[39] For details about this case, see the Taguba Report, annex 26; and records of Army criminal investigators released under FOIA litigation, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/FBI.121504.4311.pdf and http://www.aclu.org/torturefoia/released/294_334.pdf. See also, Joel Brinkley, "9/11 Set Army Contractor on Path to Abu Ghraib," *New York Times,* May 19, 2004, p. A13; Joel Brinkley, "Translator Questioned by Army in Iraq Abuse," *New York Times,* May 23, 2004, p. A12; Osha Gray Davidson, "Contract to Torture," *Salon.com,* August 9, 2004 [online], retrieved April 17, 2006, at: http://dir.salon.com/story/news/feature/2004/08/09/abu_ghraib/index.html.

[40] See Second Amended Complaint, Saleh v. Titan Corp, No. 04 CV 1143 (U.S. District Court for the Southern District of California, filed July 30, 2005), retrieved April 17, 2006, at http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf.

investigation may have been transferred to the Violent Crimes Section of the Department of Justice, or alternatively to a Department of Justice task force working in the Eastern District of Virginia.[41] DAA Project researchers requested information and updates on this case from Department of Justice officials in April 2006; as of April 14, 2006 they had received no response.

- The military and Department of Justice have not adequately investigated numerous cases of detainee homicides, as recently documented in a February 2006 report by Human Rights First,[42] including: the December 2005 death of Abu Malik Kenami (also referred to as Abdureda Lafta Abdul Kareem), a 44-year-old Iraqi man, at a U.S. detention facility in Mosul, Iraq in December 2003; the November 2003 death of detainee Manadel al-Jamadi, during an interrogation by CIA interrogator Mark Swanner, at the Abu Ghraib prison in Iraq; and the December 2002 death of an Afghan detainee during a CIA interrogation a facility near Kabul, Afghanistan. (See Appendix B.)

- Numerous abuses allegedly committed at Abu Ghraib prison in late 2003 by Steven Stefanowicz, a civilian interrogator then employed by the corporation CACI, are documented both in an Army investigation conducted by Maj. Gen. George Fay and other Army documents obtained by Human Rights Watch.[43] Fay's investigation report contains allegations that Stefanowicz conspired with Army Sgt. Mike Eckroth and dog handler Michael Smith to use dogs to intimidate a detainee during an interrogation on or around December 18, 2003. The Fay Report concludes that it is "highly plausible that [Stefanowicz] used dogs without authorization and directed the abuse in this incident as well as others related to this detainee" and that "It appeared CIVILIAN-21 [Stefanowicz] was encouraging and even directing the MP abuse with dogs; likely a 'softening up' technique for future interrogations." The Fay Report details another instance in which "[Stefanowicz] bragged and laughed about shaving a detainee and forcing him to wear red women's underwear." The same detainee told Army investigators that Stefanowicz tied him to his cell window with his hands behind his back, a position so painful that the detainee lost consciousness. (Charles Graner, himself found guilty of detainee abuse, has testified that Stefanowicz instructed him not to give the same detainee any pain medication, in order to "break" him.) DAA Project researchers asked Department of Justice officials about the Stefanowicz case in April 2006, but they refused to confirm whether it was among Department of Justice detainee abuse cases still being investigated.

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[41] Email message from FBI official Chris Swecker to FBI Director Robert Mueller, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/FBI_4882_4885.pdf.

[42] Human Rights First, *Command's Responsibility.*

[43] Information here is derived from the Fay-Jones Report, cases No. 15, 24 and 25; and from un-redacted documents from the Fay-Jones investigation with the names of implicated personnel, on file with Human Rights Watch.

- In December 2002, a CIA officer working at a facility near Kabul, Afghanistan, allegedly ordered an Afghan detainee to be stripped naked, dragged around naked on rocky ground, and then restrained overnight, naked, in the cold.[44] The detainee died that night—presumably from hypothermia. An internal CIA investigation into the death resulted in a criminal referral to the Department of Justice, but the Department of Justice has yet to bring criminal charges. The officer implicated in the death was promoted. Department of Justice officials refused to provide DAA Project researchers with any details about whether this case was among detainee abuse cases still being investigated.

[44] For details about the case discussed here, see Dana Priest, "CIA Avoids Scrutiny of Detainee Treatment," *Washington Post*, March 3, 2005.

Recommendations

Hundreds of credible allegations of abuses against detainees in U.S. custody abroad have not been adequately investigated or prosecuted.

In order to remedy the serious problems documented here, the DAA Project makes the following recommendations:

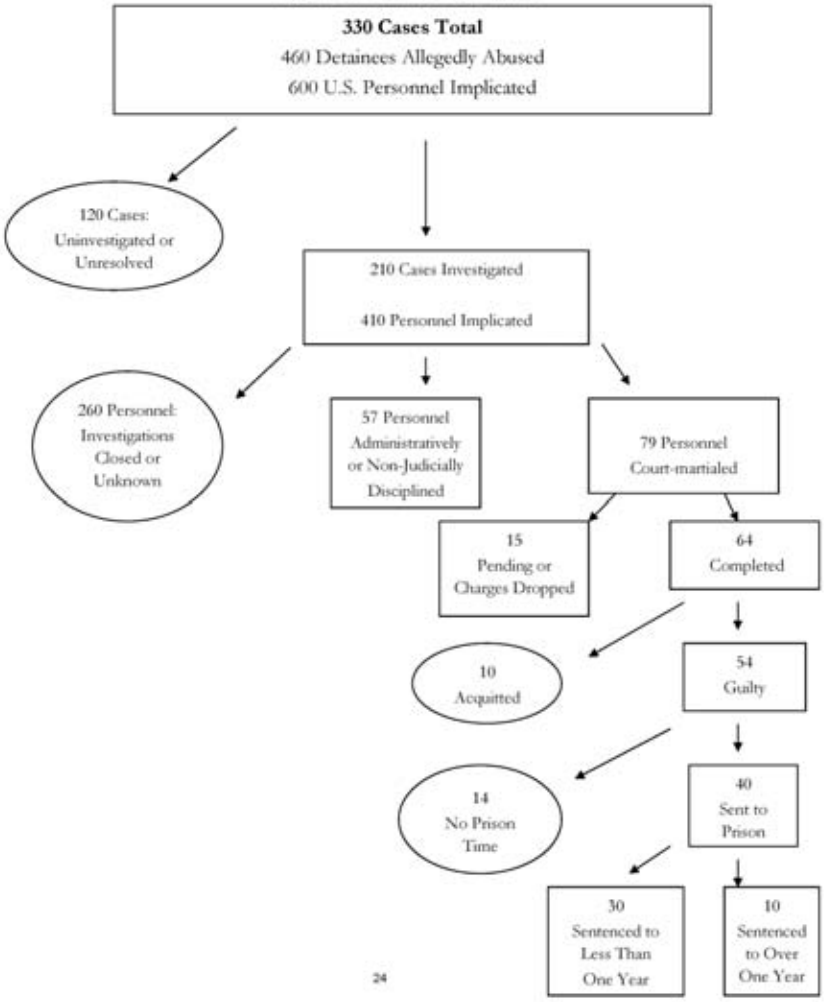
- Congress should appoint an independent commission to review U.S. detention and interrogation operations worldwide in the "war on terror." Such a commission should identify and analyze the systemic failures that have lead to widespread torture and abuse, and make detailed and specific recommendations to ensure that reforms are instituted.

- The Secretary of Defense and Attorney General should order their departments to move forward promptly with investigations of allegations of torture and other abuse of detainees in U.S. custody abroad, to initiate prosecutions where evidence is uncovered, and to instruct relevant authorities to ensure that appropriate criminal action be undertaken against all persons implicated in killings, torture, and other abuse, whatever their rank or position.

- The Secretary of Defense should appoint a single, high-level, centralized convening and prosecuting authority (i.e., a single authority who can convene and prosecute courts-martial) across the branches of the military to investigate all U.S. military personnel—no matter their rank—who participated in, ordered, or bear command responsibility for war crimes or torture, or other prohibited mistreatment of detainees in U.S. custody. The creation of this authority should be designed to bring uniformity, certainty, and a greater degree of independent oversight to the process of discipline and punishment in the military; it should allow for investigations and punishments of abuses at all levels of the military. The Secretary of Defense should also issue instructions down the military chain of command specifying that commanders should not use administrative investigations or non-judicial hearings for detainee cases in which claims of serious abuses including homicide, torture, aggravated assault, or sexual abuse have been substantiated.

- Congress should implement a check on officer promotions, by requiring that each branch of the military certify, for any officer whose promotion requires Senate confirmation, that the officer is not implicated in any case of detainee torture, abuse, or other mistreatment, including through the doctrine of command responsibility.

Appendix A: Chart of Key Statistics



Appendix B: Sample Homicide Cases Documented by Human Rights First

Investigation Problems, Failures to Prosecute and Inappropriate Uses of Non-judicial Punishment

- In December 2003, Abu Malik Kenami (also referred to as Abdureda Lafta Abdul Kareem), a 44-year-old Iraqi man, died in a U.S. detention facility in Mosul, Iraq.[45] U.S. military personnel who examined him when he first arrived at the facility determined that Kenami had no pre-existing medical conditions. As a disciplinary measure for talking, however, Kenami was required to do extreme amounts of exercise, after which his hands were cuffed behind his back with plastic handcuffs, he was hooded, and was forced to lie down among other detainees in an overcrowded cell. Kenami was found dead the next morning, still bound and hooded. No autopsy was ever conducted in connection with an initial administrative investigation into Kenami's death. Without an autopsy, no official cause of death was determined. An internal review of the Kenami case was initiated after the Abu Ghraib scandal became public. Army reviewers criticized the initial criminal investigation for failing to conduct an autopsy, failing to interview the interrogators, medics, or detainees present at the scene of the death, and failing to collect physical evidence. The Army has taken no punitive or disciplinary action in the case.

- In November 2003, Mark Swanner, a CIA interrogator, nine Navy special forces personnel, and a sailor, were implicated in the interrogation death of a "ghost" detainee named Manadel al-Jamadi at Abu Ghraib prison.[46] (Pictures of Abu Ghraib personnel Charles

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[45] Department of the Army, *AR 15-6 Investigation Into the Death of Abu Malik Kenami* (Dec. 28, 2003), p. 2, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/032505/1281_1380.pdf; Dep't of the Army, CID, *CID Report of Investigation – Final – 0140-03-CID389-61697-5H9B* (Jan. 1, 2004), p. 1, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/DOA_1206_1234.pdf.

[46] "Ghost" detainees are those who were held off the books and hidden from the International Committee of the Red Cross. For details about the case discussed here, see Human Rights First, *Command's Responsibility*, p. 11. See also Jane Mayer, "A Deadly Interrogation," *The New Yorker*, November 14, 2005; John McChesney, "The Death of an Iraqi Prisoner," All Things Considered, National Public Radio broadcast, October 27, 2005; Douglas Jehl and Tim Golden, "CIA is Likely to Avoid Charges in Most Prisoner Deaths," *New York Times*, October 23, 2005, p. A6; David S. Cloud, "Navy Officer Found Not Guilty in Death of an Iraqi Prisoner," *New York Times*, May 28, 2005, p. A6; David S. Cloud, "SEAL Officer Hears Charges in Court Martial in Iraqi's Death," *New York Times*, May 25, 2005, p. A6; Seth Hettena, "Iraqi Died While Hung From Wrists," Associated Press, February 17, 2005; Seth Hettena, "Navy SEAL: CIA Roughed Up Iraqi Prisoner," Associated Press, November 1, 2004; Office of the Armed Forces Medical Examiner, *Final Autopsy Report, Autopsy No. AL03-504*, January 9, 2004), [hereinafter Autopsy, al-Jamadi], p. 85, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/041905/m001_203.pdf.

Graner and Sabrina Harman posing with al-Jamadi's body were among some of the most notorious of the Abu Ghraib photographs published in April 2004.) U.S. forces did not release al-Jamadi's body to the International Committee of the Red Cross until February 11, 2004, more than three months after his death. The ICRC delivered the body to Baghdad's mortuary the same day, but an expert from Baghdad's main forensic institute said that the refrigeration of al-Jamadi's body for that period made it difficult for the Iraqis to establish the real cause of death by autopsy. An autopsy conducted by the U.S. military five days after al-Jamadi's death had found that the cause of death was "Blunt Force Injuries Complicated by Compromised Respiration."[47]

Of the ten Navy personnel accused by prosecutors of being involved in al-Jamadi's death, nine were given non-judicial punishment, including rank reductions and letters of reprimand. A tenth was acquitted. After an investigation, the CIA referred the case to the Department of Justice for possible criminal prosecution of CIA personnel involved, but no charges have been brought. DAA Project researchers requested information and updates on the case from Department of Justice officials in April 2006, but as of April 14, 2006, they had received no response.

- In the first reported death of a detainee in U.S. custody in Afghanistan, occurring in August 2002, an Army CID investigation found probable cause to recommend charges of murder and conspiracy against four members of a Special Forces unit who captured a detainee (a civilian non-combatant) and later shot him.[48] Investigators also recommended dereliction of duty charges against three of them and a charge of obstruction of justice against the highest-ranking, a captain. After consultation with legal advisors, however, commanders decided not to order a court-martial, and the case was closed. To date, the only action commanders have taken in response to the criminal investigators' recommendations is to reprimand the captain for destroying evidence. The captain was disciplined—he had admittedly destroyed evidence—but he received only a letter of reprimand. No further action was taken against the four soldiers.

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[47] Autopsy, al-Jamadi, p. 85.

[48] For details about the case discussed here, see Human Rights First, *Command's Responsibility*, p. 11; Department of the Army, CID, *Criminal Investigative Command Report of Investigation–Final (C)/SSI-0114-02-CID369-23525 -5H1A* (May 23, 2003), Part 1, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/745_814.pdf, and Part 4, retrieved April 17, 2006, at http://www.aclu.org/torturefoia/released/908_963.pdf. See also John J. Lumpkin, "Army Overturns Afghan Death Finding," Associated Press, January 24, 2005.

Sentences in the December 2002 Bagram Homicide Cases

The accountability record has been particularly poor in a set of cases in Afghanistan involving two detainees who died at the Bagram airbase in December 2002 after suffering extensive beatings and mistreatment by military intelligence and military police. The events surrounding the killings were investigated by Army criminal investigators, who recommended that at least twenty-seven different personnel, including military police, be criminally charged, both for crimes relating to the deaths and for other abuses of detainees at Bagram that were documented during the investigation.

As of April 2006, most of the soldiers and officers implicated in connection with the killings have avoided punishment, and none of the four who have been convicted were sentenced to more than a few months in prison (the sentences were two months, two-and-a-half months, three months, and five months, respectively).[49]

One of the military police not sentenced to prison time got a particularly light sentence: Willie Brand, who admitted to kicking and striking one of the detainees over thirty times, and who was initially charged with homicide and ultimately found guilty of cruelty and maltreatment, assault, maiming, and making a false official statement—crimes that carried a potential sixteen-year prison sentence—was only punished with a rank reduction and received an honorable discharge.[50]

Another soldier directly involved in beating the detainees and found guilty of assault and dereliction of duty was merely fined $1000 (payable in four monthly installments of $250) and given a letter of reprimand.[51]

Moreover, though evidence was uncovered during the investigation that commanders up the chain of command had authorized harsh interrogation methods at the time of the beatings, no senior officers have even been investigated for criminal liability under the command responsibility doctrine. The one officer charged for command failures was charged for dereliction of duty in failing to properly train his troops—and he was acquitted. No officer has been charged in this case as a principal in the commission of any crime.

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[49] This case is discussed in more detail in Human Rights First, *Command's Responsibility*, pp. 14-15.
[50] See ibid.
[51] See "A Look at the Soldiers Charged in the Afghanistan Abuse Investigation," Associated Press, October 5, 2005.

By the Numbers

Findings of the Detainee Abuse and Accountability Project

The Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and Human Rights First have jointly undertaken a Detainee Abuse and Accountability Project (DAA Project) to collect and analyze allegations of abuse of detainees in U.S. custody in Afghanistan, Iraq, and at the Guantánamo Bay detention facility, and to assess what actions, if any, the U.S. government has taken in response to credible allegations. The DAA Project tracks credible abuse allegations and records any resulting criminal investigations, disciplinary measures, and prosecutions under the military or civilian justice systems. This briefing paper presents the project's preliminary conclusions based on information collected as of April 2006.

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