

International Law and the War on Terror

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One week after 9/11, when Congress approved the Authorization for the Use of Military Force (AUMF) (PL 107–40) against those who planned or aided the 9/11 attacks, it unwittingly laid the foundation upon which the President would construct an illegal framework for torture, endless detention, inhuman assassinations, and other violations of international law. The Iraq War Resolution a year later allowed the continued expansion of those activities.

Hundreds of thousands of individuals have been detained in the ten years since 9/11, with 83,000 detained in only the first four years of the war effort, and over 100,000 in Iraq alone.¹² Many were determined to be innocent and some were released, but their unjust detention and treatment helped embed mistrust towards the United States across an entire region. Additionally, anti-American sentiment will likely linger for another generation in the children who observed their fathers, brothers, uncles and cousins taken away without trial.

The War on Terror

Stating that his administration would not distinguish between terrorist organizations and the nations that harbor them, President George W. Bush (with Congress' Authorization for the Use of Military Force) launched Operation Enduring Freedom against Afghanistan to oust the Taliban government and shut down the “safe haven” for Al Qaeda. While coalition forces ousted the Taliban regime soon after the October 7, 2001 invasion, the war quickly evolved into an ongoing, complex counterinsurgency effort.

Two years later, on March 20, 2003, the U.S. invaded Iraq, ostensibly because Saddam Hussein possessed weapons of mass destruction, but for many, as a response to the attacks of 9-11 (reports suggest that Defense Secretary Donald Rumsfeld began planning the Iraq invasion within minutes of the 9-11 attacks).³ The bipartisan 9-11 commission found that Iraq had no connection to the 9-11 attacks, but the Bush Administration insisted that Iraq and Al Qaeda were linked, and the war was sold and justified to the American public, in part, by invoking 9-11.⁴

¹ U.S. has Detained 83,000 in Anti-Terror Effort, MSNBC, Nov. 16, 2005, available at http://www.msnbc.msn.com/id/10071594/ns/us_news-security/

² Amit R. Paley, *In Iraq, 'a Prison Full of Innocent Men,'* Washington Post, Dec. 6, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/05/AR2008120503906.html>

³ Joel Roberts, *Plans for Iraq Began On 9/11,* CBS News, September 4, 2002, available at <http://www.cbsnews.com/stories/2002/09/04/september11/main520830.shtml>

⁴ Dana Milbank, *Bush Defends Assertions of Iraq-Al Qaeda Relationship,* Washington Post, June 18, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A50679-2004Jun17.html>; Peter Baker, *9/11 Linked to Iraq, in Politics, if Not in Fact,* Washington Post, September 12, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/11/AR2007091102316.html>

Indeed, as the war began, a New York Times/CBS poll showed that 45 percent of Americans believed Hussein was "personally involved" in Sept. 11; 44 percent of respondents in a January 2003 Knight-Ridder poll reported that "most" or "some" of the hijackers were Iraqi citizens.⁵ To the extent that the war was justified for purposes of promoting democracy, Francis Fukuyama has argued that "the Iraq war and the close association it created between military invasion and democracy promotion tarnished the latter."⁶

Most recently, the U.S. has been expanding the Afghan war across the border into Pakistan, primarily through the use of aerial drone strikes. President Obama ordered as many attacks in his first nine months as President George W Bush did in his final three years.⁷ Lack of access to conflict areas has hindered independent verification of the numbers of civilian killed,⁸ but the New America Foundation's analysis of English-language news accounts estimates between 1,374 and 2,189 individuals have been killed between 2004 and January 2011, with one in five being civilians.⁹ The Brookings Institute, on the other hand, calculates a 10:1 civilian-to-militant ratio.¹⁰ Pakistani authorities report a nearly 50:1 civilian-militant ratio for strikes between January 2006 and April 2009.¹¹ In any case, 59% of Pakistanis see the U.S. as an enemy, 67% were opposed to U.S. military operations in their country, and President Obama had lower ratings in Pakistan than any other country in the world in 2010.¹² Those figures have likely become even more negative in the aftermath of the May 2, 2011 U.S. operation that killed Osama bin Laden in Pakistani territory.

Detention

As the expansion of the war into Pakistan suggests, the "battlefield" in this war on terror can be anywhere and everywhere. If an individual is deemed an "enemy combatant," the U.S. government asserts, they can be detained on the street in Milano or in New York's JFK airport, then sent to be tortured in secret prisons, or detained indefinitely without a chance to challenge their captivity. As the "war on terror" began, the George W. Bush administration was careful to label persons captured and detained as "unlawful enemy combatants" (rather than "prisoners of

⁵ Linda Feldman, The Impact of Linking 9/11 and Iraq, The Christian Science Monitor, available at <http://www.csmonitor.com/2003/0314/p02s01-woiq.html>

⁶ Francis Fukuyama, US Democracy Has Little to Teach China, Financial Times, January 17, 2011, available at <http://www.ft.com/cms/s/0/cb6af6e8-2272-11e0-b6a2-00144feab49a.html#axzz1CpmGynwo>

⁷ Mehdi Hasan, U.S. Drone Strikes are no Laughing Matter, Mr. Obama, *The Guardian*, December 28, 2010, available at <http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/28/us-drone-attacks-no-laughing-matter>

⁸ Human Rights Watch, World Report 2011: Pakistan, available at <http://www.hrw.org/en/world-report-2011/pakistan>

⁹ The Year of the Drone, An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011, New America Foundation, available at <http://counterterrorism.newamerica.net/drones>

¹⁰ Hasan, *The Guardian*, supra note ()

¹¹ Hasan, *The Guardian*, supra note ()

¹² Pew Research Center, Concern About Extremist Threat Slips in Pakistan, July 29, 2010, available at pewglobal.org/files/pdf/Pew-Global-Attitudes-2010-Pakistan-Report.pdf

war”) to evade requirements under the Geneva Conventions and other international treaties, as well as U.S. domestic law. The Bush Administration’s assertion that they can sidestep international treaties resulted in routine mistreatment of prisoners and the absence of basic legal process.

Afghanistan

As the United States invaded Afghanistan in 2001, thousands of persons were swept up and detained as potential terrorists; some were captured by coalition forces on actual fields of battle, but many others were turned over to the U.S. by the Northern Alliance or tribal groups, often in exchange for payments or other benefits. In the first three years of the war, the U.S. detained 50,000 people, holding up to 11,000 at one time during the peak of the insurgency in March 2004.¹³ Human Rights First has said that the U.S. has operated approximately 25 detention facilities in Afghanistan since the war began in 2001.

The most famous of these prisons, the Bagram Theater Internment Facility, was an old Soviet warehouse converted into a detention facility with cages for prisoners; it was at this facility that two unarmed Afghan prisoners were murdered by U.S. armed forces.¹⁴ Documents released in 2010 suggest that over 3,000 prisoners had been held there since 2001, and many of those were subjected to torture and mistreatment including beatings, sleep deprivation, sexual humiliation, shackling to ceilings, and threats with guard dogs.¹⁵ Detainees have had no access to lawyers and have been unable to challenge their detention. In 2009, Marine Major General Douglas Stone filed a 700 page report on the facility, finding that 400 of the 600 detainees (many of whom had been imprisoned for several years without trial) were innocent and should be released.¹⁶

In August 2009, the Obama Administration informed International Committee of the Red Cross of an already-existing second prison located at Bagram,¹⁷ and many other reports have emerged of additional “black jails” in Afghanistan where detainees were secretly held without the International Red Cross oversight required by the Geneva Conventions. Sites such as the “Salt Pit” located north of Kabul’s business district were designated as Afghan “host- nation facilities” but were reportedly financed entirely by CIA funds.¹⁸

¹³ *Final Report of the Independent Panel to Review DOD Detention Operations* at 11. Aug. 24, 2004

¹⁴ Tim Golden, “In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths,” *New York Times*, May 20, 2005, available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?ex=1274241600&en=4579c146cb14cfd6&ei=5088>.

¹⁵ *Id.*

¹⁶ Tom Bowman, Steve Inskeep and Renee Montagne, U.S. Gen. Urges Release of Bagram’s Detainees, *National Public Radio*, Aug. 20, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=112051193>

¹⁷ Hilary Andersson, Red Cross Confirms ‘Second Jail’ at Bagram, Afghanistan, *BBC News*, May 11, 2010.

¹⁸ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *Washington Post*, Nov. 2, 2005

Guantanamo

After the Justice Department advised the Bush administration that the Guantanamo Bay detention camp was beyond the reach of U.S. legal protections, the first twenty captives were transferred from Afghanistan to the facility on January 11, 2002. The administration quickly drew criticism for asserting that Guantanamo detainees were neither entitled to rights guaranteed by the Geneva Conventions nor those of the U.S. criminal justice system. Less than a month after the facility opened, though, the reserve officer selected to lead Guantanamo's intelligence operation, Major General Michael Dunlavey, was told soon after his arrival that as many as half of the initial detainees were thought to be of little or no intelligence value.¹⁹ Despite this, "enhanced interrogation techniques" otherwise known as torture were approved by Defense Secretary Donald Rumsfeld, and the detainees not only continued to be held without trial, but were tortured.²⁰ And despite the U.S. knowing that it was not adequately screening prisoners to determine whether they actually posed a threat or possessed intelligence, the administration continued transferring terrorism suspects to the base, and processed nearly 800 individuals through Guantanamo between January 2002 and March 2008.²¹ Despite the Obama administration's efforts to shut down the facility, 174 remain as of November 2010, mostly because of diplomatic troubles rather than out of concern they would pose a security threat if freed.²²

Efforts to detain prisoners without trial were contested in American courts, and in 2004, the U.S. Supreme Court ruled that prisoners held at Guantanamo had a right to challenge their detention in the U.S. judicial system, rejecting the administration's argument that the prison camp was outside U.S. jurisdiction because it was in Cuba.²³ A 2006 Supreme Court decision struck down the military tribunals established by the administration to try detainees as violative of the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.²⁴ In 2008, the Court found that tribunals created through legislation passed in response to the earlier decisions were also an unconstitutional suspension of the right to habeas corpus.²⁵

In July 2005, 242 detainees were moved out of Guantánamo, including 173 that were released without charge, and 69 transferred to the governments of other countries, according to the U.S.

¹⁹ Tim Golden, *Tough Justice – A Policy Unravels; Administration Officials Split over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, available at <http://www.nytimes.com/2004/10/25/international/worldspecial2/25gitmo.html>

²⁰ Id.

²¹ Carol J. Williams, *Guantanamo Military Procedures at a Standstill*, Los Angeles Times, Nov. 3, 2010, available at <http://articles.latimes.com/2010/nov/03/nation/la-na-gitmo-20101103>

²² Id.

²³ *Rasul v. Bush*, 542 U.S. 466 (2004) (finding that the degree of control over the facility at Guantanamo Bay is sufficient to trigger habeas corpus rights); see also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding that U.S. citizens designated as enemy combatants by the president have a right to challenge their detention under the Constitution's Due Process Clause).

²⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

²⁵ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Department of Defense.²⁶ In November 2005, the Administrative Review Board (later found unconstitutional by the Supreme Court) heard petitions from the remaining detainees; of these, 3% were granted and were awaiting release, 20% were to be transferred, 37% were to be further detained at Guantánamo, and no decision was made in 40% of the cases.²⁷ By 2009, 530 detainees had been transferred to other countries or released from custody.²⁸

President Barack Obama's efforts to shut down Guantanamo and try its prisoners in U.S. courts has been met with considerable political opposition. The conviction of former Guantanamo detainee Ahmed Ghailani in a federal court in New York for his role in conspiring to bomb embassies in Kenya and Tanzania resulted in a life sentence, but critics claimed that Ghailani's acquittal on 284 murder charges is proof that military commissions, not U.S. courts, should try terrorists.²⁹ U.S. federal courts have convicted over 400 terrorism cases since 9/11 (for both domestic and international incidents), where the military commissions resumed by the Obama administration in 2009 have produced only five convictions (at a cost of hundreds of millions of dollars).³⁰

Two of the five convicted by military commissions have already been released, and trials that do happen are not without political influences, such as the 2007 plea deal that freed Australian David Hicks to help the Prime Minister's attempt at reelection. Politics also may have influenced the prosecution of Omar Khadr, the former child soldier held at Guantanamo who admitted to throwing a grenade at a U.S. soldier.³¹ Despite Khadr's strong connections to Al Qaeda, the U.S. gave him a plea deal offering one more year of U.S. imprisonment and up to seven more once he is sent home to Canada; he could have faced life in prison for war-crimes charges if he had not taken the plea. Some have speculated the U.S. wanted to avoid the embarrassment of prosecuting a child soldier and facing international criticism.

Republican Guantanamo boosters have continued to insist that the facility holds the "worst of the worst" and that shutting it down is ill-advised. Dick Cheney, for example, has repeated the Pentagon's misleading January 2009 claim that 61 of about 520 released detainees had once

²⁶ Department of Defense press release, Eight More Guantanamo Detainees Released or Transferred, July 20, 2005, available at <http://www.america.gov/st/washfile-english/2005/July/20050720174600adynned0.488476.html>

²⁷ Guantanamo Review Task Force Final Report, Departments of Justice, Defense, State, Homeland Security, National Intelligence, and Joint Chiefs of Staff, January 15, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>

²⁸ *Id.*

²⁹ Warren Richey, *Ahmed Ghailani Gets Life Sentence for Al Qaeda Bombing of US Embassies*, Christian Science Monitor, Jan. 25, 2011, available at <http://www.csmonitor.com/USA/Justice/2011/0125/Ahmed-Ghailani-gets-life-sentence-for-Al-Qaeda-bombing-of-US-embassies>

³⁰ Mimi Hall, Kevin Johnson, and David Jackson, *Detainee's Acquittals Spark Debate Over Civilian Trials*, USA Today, Nov. 19, 2011, available at http://www.usatoday.com/printedition/news/20101119/terrortrials19_st.art.htm

³¹ *Eight Year Sentence for Gitmo's Former "Child Soldier,"* MSNBC, Nov. 1, 2010, available at http://www.msnbc.msn.com/id/39945319/ns/us_news-security/

again become involved in terror activities, a recidivism rate of 11%.³² However, the Pentagon admitted 43 of those 61 were merely “suspected” of recidivism, and according to commentators like Seton Hall Law School professor Mark Denbeaux and CNN national security analyst Peter Berger, the Pentagon’s claims have scant support, former detainees have been branded as recidivists for merely criticizing the U.S., and the known recidivism rate is most likely closer to 1%.³³

Iraq

While prisoners at Guantanamo attracted the most attention, more than 100 times as many prisoners have been held at prisons in Iraq, with fewer legal rights and more reports of severe mistreatment and torture.³⁴ Over 100,000 prisoners passed through the American-run detention system in Iraq with no formal way to challenge their detention.³⁵ The International Red Cross estimated in 2004 that between 70 and 90% of those detained were actually innocent.³⁶ In the run-up to Iraq’s first elections in 2005, U.S. forces were arresting between 50 and 70 people every day.³⁷ In the first years of the war, many detainees were processed through the notorious Abu Gharaib prison facility, which housed over 8,000 prisoners at its peak in 2004; it was also in 2004 that accounts of physical, psychological, and sexual abuse, including torture, rape, sodomy, and homicide of Abu Gharaib prisoners came to public attention.³⁸ Iraqi security chiefs have said the U.S. prisons actually strengthened Al Qaeda, and blamed the American prison system for an increase in violence in 2010.³⁹ As Abu Gharaib and other Iraqi prisons became symbols of U.S. abuses, and it and other U.S.-run prisons have been steadily turned over to Iraqi control since 2006.⁴⁰ Prison conditions under Iraqi control, though, have been described as “miserable,” hidden facilities continue to emerge (undermining rule of law), and have not complied with International Red Cross requests for site visits.⁴¹

³² See David S. Cloud, *Dems Angered by Cheney Warnings*, POLITICO, Feb. 5, 2009, available at <http://dyn.politico.com/printstory.cfm?uuid=487B9A48-18FE-70B2-A848DA0D6121CCE2>

³³ See *Politico Falsely Reported that 61 Former Guantanamo Detainees “Have Been Found to Have Returned to Terrorism,”* Feb. 06, 2009, available at <http://mediamatters.org/research/200902060002>

³⁴ Paley, *In Iraq, ‘a Prison Full of Innocent Men,’* Washington Post, Dec. 6, 2008, *supra* note ().

³⁵ Id.

³⁶ 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 8, available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

³⁷ Jackie Spinner, U.S. Prisons in Iraq Nearly Full with Rise in Insurgent Arrests, Washington Post, Jan. 21, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A24875-2005Jan20.html>

³⁸ Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light*, Wash. Post, May 11, 2004,

³⁹ Martin Chulov, Iraq Prison System Blamed for Big Rise in Al Qaeda Violence, The Guardian, May 23, 2010, available at <http://www.guardian.co.uk/world/2010/may/23/iraq-prison-al-qaida-violence>

⁴⁰ Associated Press, U.S. Military Hands Over Prison to Iraq, CBS News, March 15, 2010, available at <http://www.cbsnews.com/stories/2010/03/15/world/main6300657.shtml>

⁴¹ Human Rights Watch, *Iraq: Secret Jail Uncovered in Baghdad*, Feb. 1, 2011, available at <http://www.hrw.org/en/news/2011/02/01/iraq-secret-jail-uncovered-baghdad&ie=UTF-8&oe=UTF-8>

Other Detention Sites

In terms of human rights and due process, prisoners held by the U.S. have been offered minimal protections, despite their detention being subjected to some level of public scrutiny. Nonetheless, the U.S. has found it necessary to secretly steal away persons to CIA-run hidden prisons (also known as “black sites”) or render them to foreign countries with more lax human rights standards to be interrogated using particularly “enhanced” techniques. The human rights group Reprieve has also accused the U.S. of operating as many as 17 “floating prisons” on ships such as the USS Bataan and USS Peleliu.⁴²

While the U.S. government had never officially confirmed the number or locations of CIA- or military- run secret prisons, published data suggests facilities have been located in over 28 countries.⁴³ Similarly, the U.S. government has never released the numbers of persons subjected to “extraordinary rendition,” but a 2007 resolution by the Council of Europe found that the CIA had operated 1,245 flights, many to locations where prisoners could face torture.⁴⁴

Torture

The U.S. not only “outsourced” torture, but practiced it. In a series of memos from 2002, Bush Administration lawyers (playing the role of advocates, not arbiters) redefined the legal threshold for torture and crafted legal arguments for why the U.S. and the Bush Administration should be exempted from human rights requirements enshrined in the U.N. Convention on Human Rights and the Geneva Conventions, as well as federal anti-torture laws.⁴⁵ While the so-called “torture memos” only officially approved “enhanced interrogation techniques” for use by the CIA on detainees at Guantanamo Bay, the techniques otherwise known as torture quickly migrated, and persons around the world held by America were tortured by U.S. military forces, contractors, and allies.

In February of 2002, the reserve officer selected by Defense Secretary Donald Rumsfeld to lead the Guantanamo intelligence operation was told that as many as half of the initial detainees were of little or no intelligence value, and intelligence officers told White House counsel Alberto

⁴² Duncan Campbell and Richard Norton-Taylor, *US Accused of Holding Terror Suspects on Prison Ships*, The Guardian, Jun. 2, 2008, available at <http://www.guardian.co.uk/world/2008/jun/02/usa.humanrights>

⁴³ Sherwood Ross, *Rendition and the “Global War on Terrorism: 28 Nations Have Supported the US in the Detention and Torture of “Suspects,”* Global Research, Apr. 1, 2010, available at <http://www.globalresearch.ca/index.php?context=va&aid=18419> (According to the report, countries with secret U.S. prisons include: Algeria, Azerbaijan, Bosnia, Djibouti, Egypt, Ethiopia, Gambia, Israel, Jordan, Kenya, Kosovo, Libya, Lithuania, Mauritania, Morocco, Pakistan, Poland, Qatar, Romania, Saudi Arabia, Syria, Somalia, South Africa, Thailand, United Kingdom, Uzbekistan, Yemen, and Zambia.)

⁴⁴ *EU Endorses Damning Report on CIA*, BBC News Online, Feb. 14, 2007, available at <http://news.bbc.co.uk/2/hi/europe/6360817.stm>

⁴⁵ The so-called “torture memos” include three documents, the “Standards of Conduct for Interrogation under 18 U.S.C. sections 2340-2340A” and “Interrogation of al Qaeda” drafted by then Assistant Attorney General Jay Bybee, and an untitled letter from Deputy Assistant Attorney General John Yoo to Alberto Gonzales (then Counsel to the President).

Gonzales that they could not even fill out one-page forms certifying the president's "reason to believe" detainees were involved with terrorism.⁴⁶ Regardless, Secretary Rumsfeld explicitly authorized 24 "enhanced interrogation techniques" for use at Guantanamo, four of which were considered severe enough to require his explicit approval; the order noted that "some nations may view application" of some of the techniques "to be inhumane" or "inconsistent with Geneva," but only said "consideration should be given to these views" rather than prohibiting interrogators from using the techniques.⁴⁷ Reports emerged of captives at Guantanamo being subjected to religious humiliation (including flushing the Qur'an down the toilet), sexual humiliation, extremes of temperature and extremely loud music, pairs of detainees being chained hand and foot in a fetal position to the floor for between 18 and 24 hours and urinating and defecating on one another, and severe psychological stresses (with reports of detainees tearing out their own hair).⁴⁸ U.S. military trainers at Guantánamo in December 2002 based an entire interrogation class on a chart copied directly from a 1957 Air Force study of torture techniques used by Chinese Communists during the Korean War to obtain false confessions from U.S. troops.⁴⁹ The FBI was concerned about techniques used by military interrogators, and the CIA even ordered their agents to keep away from particularly harsh military interrogations.⁵⁰⁵¹ In 2009, Lawrence Wilkerson, former Chief of Staff to then-Secretary of State Colin Powell, described the Bush Administration as aware that many Guantanamo detainees were innocent and should have been released, but refused to "admit to their further errors at Guantanamo Bay" to avoid a "black mark on their leadership."⁵² (In 2006 the U.S. Supreme Court rejected the Bush Administration's claim that Guantanamo detainees were not entitled to Geneva Convention protections)

⁴⁶ Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, NY Times, Oct. 25, 2004, available at <http://www.nytimes.com/2004/10/25/international/worldspecial/25gitmo.html?pagewanted=print&position=> After Defense Department officials received word that the Guantanamo detainees had little provable intelligence information, they indicated that the prisoners would be held indefinitely as "enemy combatants" in a war against the U.S. Id.

⁴⁷ Memorandum from Donald Rumsfeld, Sec. of Defense, to Commander, U.S. Southern Command, Counter-Resistance Techniques in the War on Terrorism, Jan. 15 / Apr. 16, 2003, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf> ("Use of these techniques is limited to interrogations of unlawful combatants held at Guantánamo Bay, Cuba." Techniques included "convincing the detainee that individuals from a country other than the United States are interrogating him," "attacking or insulting the ego of a detainee," "dietary manipulation," "altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell)," "adjusting the sleep times of the detainee," and "isolating the detainee from other detainees.")

⁴⁸ "Detainees Positive Responses," FBI FOIA Document, available at <http://foia.fbi.gov/guantanamo/detainees.pdf> See also Mark Tran, *FBI Files Detail Guantanamo Torture Tactics*, The Guardian, Jan. 3, 2007, available at <http://www.guardian.co.uk/world/2007/jan/03/guantanamo.usa>

⁴⁹ Scott Shane, *China Inspired Interrogations at Guantanamo*, NY Times, Jul. 2, 2008, available at http://www.nytimes.com/2008/07/02/world/americas/02iht-02detain.14154569.html?_r=1

⁵⁰ "Detainees Positive Responses," FBI FOIA Document, *supra* note ().

⁵¹ Douglas Jehl, *C.I.A. Order on Detainees Shows Its Role Was Curbed*, N.Y. Times, Dec. 14, 2004, available at <http://www.nytimes.com/2004/12/14/politics/14intel.html?pagewanted=print&position=>

⁵² Lawrence Wilkerson, *Some Truths About Guantanamo Bay*, Washington Note, Mar. 17, 2009, available at http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/?ref=fp2

The so-called “Enhanced Interrogation Techniques” (EITS) did not stop at Guantanamo, as is noted in a 2004 report on Department of Defense (DOD) detention operations: “Interrogators and lists of techniques circulated from Guantánamo and Afghanistan to Iraq. . . . It is important to note that techniques effective under carefully controlled conditions at Guantánamo became far more problematic when they migrated and were not adequately safeguarded.”⁵³

In Iraq, the 2004 revelations of torture at Abu Gharaib prison at the hands of U.S. soldiers and contractors attracted public attention within the U.S., particularly with the release of graphic photos depicting American soldiers smiling and posing next to tortured or murdered Iraqi prisoners. President Bush insisted that the acts were isolated incidents at the hands of a few “bad apples,” and punishment was limited to court-martialing eleven U.S. soldiers and demoting the commander in charge of Iraq detention facilities. Many disputed the administration’s claim that the incidents were isolated, including the International Red Cross, who had been calling out abuse of prisoners for over a year: a February 2004 report found “serious violations of International Humanitarian Law” and “that persons deprived of their liberty face the risk of being subjected to a process of physical and psychological coercion, in some cases tantamount to torture.”⁵⁴ In May 2004, the Operations Director of the International Red Cross stated that their visits to Iraq detention centers did “not allow us to conclude that what we were dealing with ... were isolated acts of individual members of coalition forces. What we have described is a pattern and a broad system,” and that some of the incidents observed were “tantamount to torture.”⁵⁵

The migration may be blamed, in part, on Army Major General Geoffrey Miller, who had been the commander of Guantanamo. According to the 2004 DOD report, Miller reportedly brought that facility’s techniques with him when he was sent to Iraq in August 2003 to develop guidance for interrogation policy.⁵⁶ Miller recommended consolidating Iraq’s detention facilities at Abu Gharaib, and Lt. Gen. Ricardo Sanchez, the commander of U.S. forces in Iraq, issued a guidance for interrogation policy based on Miller’s recommendation.⁵⁷ Sanchez wrote that his policy was “modeled on the one implemented for interrogations conducted at Guantanamo Bay, but modified for applicability in a theater of war in which the Geneva Conventions apply.”

The DOD report also suggests that military soldiers may have learned techniques from CIA interrogators, as “the CIA was allowed to operate under different rules” from those that applied to military interrogators, and “the CIA’s detention and interrogation practices contributed to a loss of accountability at Abu Ghraib.”

⁵³ Final Report of the Independent Panel to Review DOD Detention Operations, Aug. 24, 2004 [hereinafter DOD Report], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>,

⁵⁴ See Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War, *supra* note (), Feb. 2004.

⁵⁵ Red Cross Saw Widespread Abuse, BBC News, May 8, 2004, available at <http://news.bbc.co.uk/2/hi/americas/3694521.stm>

⁵⁶ DOD Report, *supra* note ()

⁵⁷ Frontline, *Chronology: The New Rules of War*, PBS, available at <http://www.pbs.org/wgbh/pages/frontline/torture/paper/cron.html>

The “migration” of interrogation techniques to Afghanistan was confirmed in a review of DOD interrogation operations by the Naval Inspector General.⁵⁸ In 2002, two Afghan detainees at Bagram airbase were chained to the ceiling and beaten to death; what makes the deaths even more horrific is that most interrogators believed at least one was entirely innocent.⁵⁹ Secret CIA “black jails” like as the infamous “Salt Pit” also operated in Afghanistan, where prisoners from Pakistan, Tanzania, Yemen, Saudi Arabia and elsewhere were interrogated and tortured.⁶⁰ Khaled El-Masri, for example, was an innocent German citizen arrested in Macedonia, transferred to the “Salt Pit,” then tortured and sodomized for four months. The U.S. held him for an additional five months after realizing they had mistaken him for another person,⁶¹ then released him at night on a desolate road in Albania, without apology, or funds to return home.⁶²

El-Masri was removed from Macedonia and sent to Afghanistan in the process known as “extraordinary rendition.” While the practice of seizing a person and rendering him to justice was used in the Clinton Administration, it expanded dramatically following 9-11. Without approval of Congress, President Bush signed a classified Presidential Finding in the days following 9-11 granting the CIA authority for new covert activity.⁶³ CIA documents obtained by the ACLU describes the rendition process, starting with “capture shock,” where the detainee is “in the complete control of the Americans,” stripped naked and shaved, then placed on a flight where they are shackled and deprived of sight and sound through the use of blindfolds, earmuffs and hoods. Before turning detainees over to third countries for further interrogation and even more severe torture, U.S. forces subject the detainees to techniques such as walling (slamming a prisoner's head against the wall, with some protective measures to avoid severe injuries), water dousing, the use of the stress position, wall standing, cramped confinement, sleep deprivation, and nutrition manipulation.⁶⁴

⁵⁸ Vice Adm. Albert T. Church III, *Investigation Into Dep't of Def. Interrogation Operations* (unclassified executive summary), Mar. 2005, available at <http://www.defense.gov/news/Mar2005/d20050310exe.pdf>

⁵⁹ Tim Golden, *Army Faltered in Investigating Detainee Abuse*, New York Times, May 22, 2005, available at <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html?ex=1274414400&en=35951e72c65a2185&ei=5088&partner=rssnyt&emc=rss>

⁶⁰ Lisa Myers, Aram Roston, & the NBC Investigative Unit, *CIA Accused of Detaining Innocent Man*, NBC Nightly News, Apr. 21, 2005, available at <http://msnbc.msn.com/id/7591918/>

⁶¹ See, e.g. Matthias Gebauer and John Goetz, *Cables Show Germany Caved to Pressure from Washington*, Der Spiegel, Dec. 9, 2010, available at <http://www.spiegel.de/international/germany/0,1518,733860,00.html> (also noting how cables released by Wikileaks have revealed how much pressure US officials put on Germany to keep them from prosecuting the agents involved in El-Masri's abduction)

⁶² Lisa Myers, Aram Roston, & the NBC Investigative Unit, *CIA Accused of Detaining Innocent Man*, NBC Nightly News, Apr. 21, 2005, available at <http://msnbc.msn.com/id/7591918/>

⁶³ Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report Council of Europe Parliamentary Committee on Legal Affairs and Human Rights, Jun. 7, 2007, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/24_01_06_detention.pdf

⁶⁴ Scott Horton, *New CIA Docs Detail Brutal “Extraordinary Rendition” Process*, Huffington Post, August 29, 2009, available at http://www.huffingtonpost.com/2009/08/28/new-cia-docs-detail-bruta_n_271299.html

As with many of those detained in the war on terror, the extraordinary rendition process has swept up many innocent persons. In addition to El-Masri, Maher Arar was a Canadian citizen apprehended at New York's JFK Airport in fall 2002, interrogated in the U.S. and held incommunicado for twelve days, sent to Syria to be tortured, then released a year later when it became obvious he had done nothing wrong.

Canada's government has compensated Arar around \$10.5 million for wrongfully informing the US government that he was a terror suspect and publicly acknowledged the mistake,⁶⁵ and a case is proceeding against Macedonia at the European Court of Human Rights for collaborating with the U.S. in El-Masri's rendition and torture.⁶⁶ Both men have also brought lawsuits against the United States for its violations of human rights and domestic law, but both suits were thrown out of court before ever getting to the merits. While the U.S. role in their rendition and torture is beyond dispute, both the Bush and Obama administrations have successfully blocked these allegations by invoking the "state secrets doctrine," a powerful privilege intended for protecting important information like nuclear secrets, not a tool of state power used to avoid embarrassment.⁶⁷ Courts have also blocked suits on state secrets grounds against a Boeing subsidiary, Jeppesen Dataplan, that arranged the flights for five other men subjected to rendition, one of whom had his bones broken in Morocco, his skin cut with a scalpel and a stinging liquid poured into his wounds.⁶⁸

While CIA director Leon Panetta announced in April 2010 that the U.S. would be closing its system of secret prisons for terrorism detainees, *The New York Times* reported in January 2011 that Gulet Mohamed, a 19-year old Somali-American teenager from Virginia, was placed on a U.S. government no-fly list and detained, interrogated, and tortured in Kuwait while traveling with a valid U.S. passport. The boy stated he was beaten with sticks, threatened with electric shocks, forced to stand for hours at a time and warned that his mother would be imprisoned if he didn't say more about his trips to Yemen and Somalia in 2009. At one point during the interrogation three FBI agents arrived and asked similar questions, agreeing to "facilitate" his release if he provided information, but stating they could offer no help if he did not.⁶⁹

⁶⁵ *Ottawa Reaches \$10M Settlement with Arar*, CBC News, Jan. 25, 2007, available at <http://www.cbc.ca/canada/story/2007/01/25/arar-harper.html>

⁶⁶ *See El-Masri v. Macedonia*, Open Society Foundation Litigation, June 15, 2010, available at <http://www.soros.org/initiatives/justice/litigation/macedonia>

⁶⁷ Suzanne Ito, *Canadian Torture and Rendition Victim Denied Supreme Court Review*, ACLU Blog, June 14, 2010, available at <http://www.aclu.org/blog/national-security/canadian-torture-and-rendition-victim-denied-supreme-court-review>

⁶⁸ *See Torture is a Crime, Not a Secret* (editorial), NY Times, Sept. 8, 2010, available at <http://www.nytimes.com/2010/09/09/opinion/09thurs2.html?scp=1&sq=torture%20is%20a%20crime,%20not%20a%20secret&st=cse>

⁶⁹ Mark Mazzetti, *Detained American Says He Was Beaten in Kuwait*, NY Times, Jan. 5, 2011, available at http://www.nytimes.com/2011/01/06/world/middleeast/06detain.html?_r=2&hp

Ascertaining how many of the nearly 100,000 persons processed through the American detention system have been subjected to physical torture, wherever the line is drawn, will be nearly impossible. Severe psychological distress, though, is also recognized as torture by the Geneva Conventions and the UN Convention, and psychological torture has been recognized as being “systematic and central” to interrogations in Iraq, Afghanistan, and Guantanamo by Physicians for Human Rights. What’s more, the American Psychological Association (APA) has filed complaints in American courts against psychologists who participated in the interrogations.⁷⁰

Medical personnel, in addition to the actual interrogators, played a key role in making torture possible, as noted in a January 2011 article in the journal *Science*.⁷¹ The so-called “torture memos” not only expanded the threshold for what constitutes torture, but included the proviso that, even if an interrogator inflicted “severe physical pain and severe and prolonged mental pain,” it had to be the interrogator’s “precise objective” for the conduct to give rise to legal liability for torture.⁷² Having medical personnel present at interrogations, the memo asserted, would provide a legal defense for the interrogators as indicating a lack of intent to cause harm. By having torture be based upon the specific intent of the interrogator, medical personnel had no meaningful guidelines by which to recognize torture. Further, medical documents released as a result of FOIA litigation suggest that medical personnel not only failed to properly assess physical or mental harm to ensure interrogations were carried out safely, but most often worked to identify psychological *vulnerabilities* to better conquer the subject. The presence of medical officers not only provided legal cover for torture, but personnel actually worked with the interrogators to make torture more effective. Other reports appeared to justify EITs without anything more than cursory observations (a practice not consistent with standards for assessing torture); these findings were then used to justify additional torture. In the 2005 “Bradbury memo,” then Principal Deputy Assistant Attorney General Steven G. Bradbury to then Acting CIA General Counsel John A. Rizzo that: “We understand that these limitations have been established with extensive input from OMS, based on experience to date with this technique and OMS’s professional judgment that use of the waterboard on a healthy individual subject to these limitations would be ‘medically acceptable.’”

Death in Detention

In part as a result of torture, hundreds of persons have died while being detained and/or interrogated by the United States. 108 died in detention in the first four years of the war,⁷³ and at least 80 more have died

⁷⁰ Terrorism Detainees: Al Qaeda Cook Sentenced; Other Developments." *Facts On File World News Digest*: n. pag. *World News Digest*. Facts On File News Services, 12 Aug. 2010. Web. 31 Jan. 2011. <<http://www.2facts.com/article/2010525730>>.

⁷¹ Iacopino, Vincent, Scott Allen, and Allen Keller. "Bad Science Used to Support Torture and Human Experimentation." *Science*, 331.6013 (2011): 34.

⁷² One of the torture memos, the “Bybee memo” stated that in order “for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act.” Under that interpretation, to violate the law, a person must expressly intend to commit torture and the memo stated that “knowledge alone that a particular result is certain to occur does not constitute specific intent” J. Bybee, *Assistant Attorney General, Office of Legal Counsel, DOJ, memorandum for A. Gonzales. Counsel to the President, 1 August 2002*; www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

⁷³ U.S. has Detained 83,000 in Anti-Terror Effort, MSNBC, Nov. 16, 2005, *supra* note ()

in subsequent years. The ACLU has received autopsy reports and military investigations for about 190 of those deaths through FOIA requests, and have deemed at least 25 to 30 to be “unjustifiable homicides” (i.e. murders). There is the example of four Iraqi detainees executed by a group of U.S. soldiers and then pushed into a Baghdad canal in 2007. Or the case where an injured detainee was lying wounded when, according to one of the investigating documents, the sergeant entered the room “and assaulted him ... then shot him twice thus killing him.” The sergeant instructed the other soldiers to lie about the incident, and a corporal later shot the deceased detainee in the head after finding his corpse.⁷⁴

Current Moment

On May 2, 2011, Al Qaeda leader Osama Bin Laden was killed by U.S. Special Operations forces in a safehouse in Abbotabad, Pakistan, taken to Afghanistan for identification, then “buried at sea.”

Some have questioned the legal and ethical aspects of killing an unarmed Bin Laden in Pakistani territory without the country’s consent, but the killing has been well-received by the U.S. population and UN Secretary Ban Ki-moon, making continued mainstream public debate on its legality unlikely.⁷⁵

It is a different story in Pakistan. The population had already resented the U.S. for its drone strikes and for CIA contractor Raymond Davis’s acquittal after shooting two Pakistanis, and begrudged Pakistani leaders’ complicity in these matters.⁷⁶ The bin Laden operation has further shaken the country. If U.S. forces snuck undetected into the territory, Pakistanis question the military’s competence; if Pakistani leaders were complicit, the government’s claims to the contrary are lies.⁷⁷ In any case, the Pakistani population’s faith in their leaders and view of America has declined in an already fragile and deeply divided country.

U.S.-Pakistani relations have also strained, with American officials suspicious that Pakistan’s security forces were complicit in harboring bin Laden, and Pakistani leaders complaining their sovereignty has been violated.⁷⁸ In the weeks following bin Laden’s death, the U.S. threatened to cut aid if Pakistan fails to cooperate in the “War on Terror,” and Pakistan responded with a list of tough demands for its continuing participation, including an end to drone strikes in Tribal Areas,

⁷⁴ Jennifer Rizzo, *Documents Raise Questions on Treatment of Detainees*, CNN.com, Jan. 22, 2010, available at <http://www.cnn.com/2011/US/01/22/detainee.documents/index.html?hpt=T2>

⁷⁵ Owen Bowcott, *Osama bin Laden: US responds to questions about killing's legality*, THE GUARDIAN, May 2, 2011, available at <http://www.guardian.co.uk/world/2011/may/03/osama-bin-laden-killing-legality>

⁷⁶ Isaam Ahmed, *CIA Contractor Raymond Davis Freed From Pakistan Jail on ‘Blood Money’*, C.S. MONITOR, March 16, 2011, available at <http://www.csmonitor.com/World/Asia-South-Central/2011/0316/CIA-contractor-Raymond-Davis-freed-from-Pakistan-jail-on-blood-money>

⁷⁷ Atif Salahuddin, *Pakistan: Democracy and the Will of the People*, PAKTRIBUNE, May 16, 2011, available at <http://www.paktribune.com/news/index.shtml?239353>

⁷⁸ Patrick Quinn, *Pakistan-U.S. Relations at Crossroads, Kerry Warns*, ASSOC. PRESS / SAN FRAN. CHRON., May 16, 2011, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2011/05/16/MN8S1JGH39.DTL>

greater intelligence sharing, and withdrawal of CIA spies and defense contractors.⁷⁹ While Pakistan did release the tail section of the U.S. helicopter left behind in the bin Laden raid (without requiring that the U.S. meet those demands), also released were the names of two CIA chiefs in Islamabad.

Bin Laden's death has also reignited the torture debate, with former Bush Administration officials alleging "Enhanced Interrogation Techniques" used on enemy prisoners revealed the intelligence that led to the Al Qaeda leader's discovery. Bush-era attorney general Michael Mukasey wrote in *The Wall Street Journal* that Sept. 11 mastermind Khalid Sheikh Mohammed "broke like a dam under the pressure of harsh interrogation techniques that included waterboarding" and "loosed a torrent of information — including eventually the nickname of a trusted courier of bin Laden."⁸⁰

But Republican Senator John McCain claimed otherwise in a May 11 *Washington Post* op-ed, citing information he said came directly from CIA Director Leon Panetta.

"The trail to bin Laden did not begin with a disclosure from Khalid Sheik Mohammed, who was waterboarded 183 times. The first mention of Abu Ahmed al-Kuwaiti — the nickname of the al-Qaeda courier who ultimately led us to bin Laden — . . . came from a detainee held in another country, who we believe was not tortured. None of the three detainees who were waterboarded provided Abu Ahmed's real name, his whereabouts or an accurate description of his role in al-Qaeda."

McCain added that "the use of 'enhanced interrogation techniques' on Khalid Sheik Mohammed produced false and misleading information," and that "[a]ccording to the Senate intelligence committee, the best intelligence gained from a CIA detainee -- information describing Abu Ahmed al-Kuwaiti's real role in al-Qaeda and his true relationship to bin Laden -- was obtained through standard noncoercive means."⁸¹

To the extent that the "War on Terror" is aimed at eradicating Muslim extremism, the largely peaceful democratic uprisings that spread across the Arab world in 2011 are more promising than bin Laden's demise. His extremist ideology will survive his passing. More important is the fact that democratic participation may provide young Arabs and Muslims an alternative.

Bin Laden's death is a symbolic milestone. It accomplishes an early rationale for the "War on Terror," but more than ten years after the 9-11 attacks, his death is of limited relevance. The crusade against an ambiguous and amorphous enemy has generated its own momentum and new

⁷⁹ Asher John, *Pakistan Unwilling to Budge on Stance Despite Aid Cut Warning by US*, CHRISTIAN POST, May 16, 2011, available at <http://www.christianpost.com/news/pakistan-unwilling-to-budge-on-stance-despite-aid-cut-warning-by-us-50254/>

⁸⁰ Michael B Mukasey, *The Waterboarding Trail to Bin Laden*, WALL ST. JOURN. (op-ed), May 6, 2011, available at <http://online.wsj.com/article/SB10001424052748703859304576305023876506348.html>

⁸¹ John McCain, *Bin Laden's Death and the Debate Over Torture*, WASH. POST, May 11, 2011, available at http://www.washingtonpost.com/opinions/bin-ladens-death-and-the-debate-over-torture/2011/05/11/AFd1mdsG_story.html

justifications for prolonging military engagement. One of the longest wars in U.S. history rages on.