

2015

United States v. George Tenet: A Federal Indictment for Torture

William J. Aceves
California Western School of Law, wja@cwsl.edu

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/fs>



Part of the [Human Rights Law Commons](#)

Recommended Citation

New York University Journal of International Law and Politics (JILP), Vol. 48, No. 1, 2015

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

HEINONLINE

Citation: 48 N.Y.U. J. Int'l L. & Pol. 1 2015



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu Feb 18 12:59:44 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0028-7873](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0028-7873)

UNITED STATES V. GEORGE TENET:
A FEDERAL INDICTMENT FOR TORTURE

WILLIAM J. ACEVES*

I.	INTRODUCTION	2
II.	THE PROHIBITION AGAINST TORTURE	12
	A. <i>International Codification</i>	12
	B. <i>Domestic Implementation</i>	19
III.	THE CASE OF ROY BELFAST, JR.	34
IV.	THE CASE OF GEORGE TENET	47
	A. <i>The Defendant</i>	48
	B. <i>The Victims</i>	80
	1. <i>SSCI Report</i>	81
	a. Abu Zubaydah	81
	b. Abd al-Rahim al-Nashiri	82
	c. Ramzi Bin Al-Shibh	84
	d. Khalid Shaykh Muhammad	85
	2. <i>ICRC Report</i>	87
	a. Abu Zubaydah	88
	b. Khaled Shaykh Muhammad	91
V.	UNITED STATES OF AMERICA V. GEORGE TENET ...	96
	A. <i>The Prosecution Memorandum</i>	96
	B. <i>The Indictment</i>	105
	C. <i>Possible Defenses</i>	118
VI.	CONCLUSION	125

* William J. Aceves is the Dean Steven R. Smith Professor of Law at California Western School of Law. Professor Aceves would like to thank Anonymous, Mario Conte, Melissa Hooper, Gabor Rona, and Steven Watt for their valuable comments. Taiba Munir and Megan Villamin provided excellent research assistance. The library staff at California Western School of Law assisted in locating numerous documents. All errors are the responsibility of the author.

[W]e conclude that the interrogation procedures that you propose would not violate Section [18 U.S.C. § 2340A]. We wish to emphasize that this is our best reading of the law; however, you should be aware that there are no cases construing the statute; just as there have been no prosecutions brought under it.¹

—August 1, 2002 Office of Legal Counsel,
Memorandum on the Interrogation of al Qaeda Operative

I. INTRODUCTION

The United States tortured detainees during the so-called War on Terror.² While this has been asserted on many occasions, it is difficult to overlook the number of admissions that have now been made by U.S. government officials.

On August 1, 2014, President Obama was discussing the anticipated release of the Senate Select Committee on Intelligence's ("SSCI") long-awaited report on the Central Intelli-

1. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Interrogation of al Qaeda Operative (Aug. 1, 2002), available at <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>.

2. See, e.g., JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND (2007) (describing interrogation in overseas detention centers); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER (2007) (examining executive war powers with respect to extreme interrogation at Guantanamo Bay); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008) (describing the path the Bush administration took to using controversial interrogation techniques); PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008) (detailing Donald Rumsfeld's signing of the Haynes Memo and its effects); THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009) (presenting a collection of legal memoranda regarding U.S. interrogation); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (presenting a collection of legal memoranda regarding U.S. interrogation); Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. REV. BOOKS, Apr. 9, 2009, available at <http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/> (discussing the International Committee of the Red Cross report on CIA detainee treatment); Major William T. Hennessey, *Willful and Outrageous Acts of Personal Abuse—Now OK for the CIA?*, 57 NAVAL L. REV. 203 (2009) (arguing that Executive Order 13440 permits the CIA to violate the Geneva Convention).

gence Agency's ("CIA") Detention and Interrogation Program.³ In his candid remarks, President Obama acknowledged that detainees were tortured by the United States during the War on Terror.⁴

[E]ven before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. *We did a whole lot of things that were right, but we tortured some folks.* We did some things that were contrary to our values. . . . [W]e did some things that were wrong. And that's what that report reflects. And that's the reason why, after I took office, one of the first things I did was to ban some of the extraordinary interrogation techniques that are the subject of that report.

And my hope is, is that this report reminds us once again that the character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard. *And when we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line.* And that needs to be — that needs to be understood and accepted. And we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future.⁵

On November 12, 2014, a U.S. government delegation appeared before the U.N. Committee against Torture in Geneva

3. The program is also referred to as the "Rendition, Detention, and Interrogation Program." S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2014), *available at* <http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program> [hereinafter SSCI REPORT].

4. The term "War on Terror" is used to describe the worldwide conflict between the United States and Al-Qaeda and other terrorist organizations. *See generally* Eric Schmitt & Thom Shanker, *U.S. Officials Retool Slogan for Terror War*, N.Y. TIMES (July 26, 2005), <http://www.nytimes.com/2005/07/26/politics/us-officials-retool-slogan-for-terror-war.html> (describing the Bush administration's use of the phrase "the global war on terror" to characterize the military campaign against Al-Qaeda and other terrorist groups).

5. Press Conference with Barack Obama, President (August 1, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president> (emphasis added).

as part of the U.S. submission of its Periodic Report to the Committee. In their prepared remarks to the Committee, several members of the U.S. delegation offered candid admissions acknowledging that the United States had committed torture. In his remarks, Tom Malinowski, the Assistant Secretary of State for Democracy, Human Rights, and Labor, affirmed that torture is categorically prohibited at all times and with no exceptions. He then acknowledged the United States had committed torture when it interrogated detainees during the War on Terror.

It's important to stress that we expect others to hold us to the same high standards to which we hold them. And we do not claim to be perfect. *A little more than ten years ago, our government was employing interrogation methods that, as President Obama has said, any fair minded person would believe were torture.*⁶

The Acting Legal Adviser to the U.S. Department of State, Mary McLeod, echoed these views in her own remarks to the Committee.

The United States is proud of its record as a leader in respecting, promoting, and defending human rights and the rule of law, both at home and around the world. But in the wake of the 9/11 attacks, we regretably did not always live up to our own values, including those reflected in the Convention. *As President Obama has acknowledged, we crossed the line and we take responsibility for that.*⁷

On December 9, 2014, the Senate Select Committee on Intelligence released a portion of its report on the CIA's Detention and Interrogation Program ("SSCI Report").⁸ Only

6. Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor, Tom Malinowski, Opening Statement to the U.N. Committee against Torture (Nov. 12, 2014) (emphasis added), *available at* http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_STA_USA_18815_E.pdf.

7. Acting Legal Adviser, U.S. Department of State, Mary McLeod, Opening Statement to the U.N. Committee against Torture (Nov. 12, 2014) (emphasis added), *available at* http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_STA_USA_18815_E.pdf.

8. SSCI REPORT, *supra* note 3, at app. 1. The SSCI's terms of reference included: "A review of how the CIA created, operated, and maintained its detention and interrogation program, including a review of the locations of

499 of the full report's 6,700 pages were released.⁹ While the released materials were heavily redacted, they still offered a detailed account of the Detention and Interrogation Program. In the Foreword to the Executive Summary, the Committee's Chairperson, Senator Dianne Feinstein, acknowledged that detainees were tortured.

*[I]t is my personal conclusion that, under any common meaning of the term, CIA detainees were tortured. I also believe that the conditions of confinement and the use of authorized and unauthorized interrogation and conditioning techniques were cruel, inhuman, and degrading. I believe the evidence of this is overwhelming and incontrovertible.*¹⁰

Even the redacted Findings and Conclusions and accompanying Executive Summary offered extensive evidence that torture occurred. According to the Executive Summary, the interrogations of CIA detainees were "brutal."

the facilities and any arrangements and agreements made by the CIA or other Intelligence Community officials with foreign entities in connection with the program." *Id.* In addition, the SSCI was asked to evaluate "the information acquired from the detainees including the periods during which enhanced interrogation techniques (EITs) were administered." *Id.*

9. *President Obama vows actions in CIA report won't take place on his watch*, CHICAGO TRIBUNE (Dec. 9, 2014), <http://www.chicagotribune.com/news/nationworld/chi-cia-torture-report-20141209-story.html>. See generally Rick Gladstone & Robert Mackey, *Overseas, Disclosures Leads to Calls for Retaliation*, N.Y. TIMES, Dec. 10, 2014, at A1 (describing the SSCI Report release); Siobhan Gorman et al., *Senate Report Calls CIA Interrogation Tactics Ineffective*, WALL ST. J., Dec. 9, 2014 (describing the released pages of the SSCI Report); Greg Miller et al., *Senate Report on CIA Program Details Brutality, Dishonesty*, WASH. POST, Dec. 9, 2014 (describing the takeaways from the released pages of the SSCI Report). There were extensive discussions regarding the content of the report and its eventual release. See *Frontline: Secrets, Politics and Torture* (PBS May 19, 2015), available at <http://www.pbs.org/wgbh/pages/frontline/secrets-politics-and-torture/>.

10. Sen. Dianne Feinstein, *Foreword* to SSCI REPORT, *supra* note 3, at 4 (emphasis added). Other members of the SSCI made similar statements in their separate views. See Sen. Susan Collins, *Additional Views*, in SSCI REPORT, *supra* note 3, at 2 (2014), available at <http://www.intelligence.senate.gov/sites/default/files/press/collins.pdf>. ("[T]he report's findings lead me to conclude that some detainees were subject to techniques that constituted torture."); Sen. Angus King, *Additional Views*, in SSCI REPORT, *supra* note 3, at 1 (2014), available at <http://www.intelligence.senate.gov/sites/default/files/press/king.pdf> ("[I]t is clear to me that some detainees were subjected to techniques that constituted torture.").

Beginning with the CIA's first detainee, Abu Zubaydah, and continuing with numerous others, the CIA applied its enhanced interrogation techniques with significant repetition for days or weeks at a time. Interrogation techniques, such as slaps and "wallings" (slamming detainees against a wall) were used in combination, frequently concurrent with sleep deprivation and nudity. . . .

The waterboarding technique was physically harmful, inducing convulsions and vomiting. Abu Zubaydah, for example, became "completely unresponsive, with bubbles rising through his open, full mouth." Internal CIA records describe the waterboarding of Khalid Shaykh Mohammad as evolving into a "series of near drownings."

Sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads. At least five detainees experienced disturbing hallucinations during prolonged sleep deprivation and, in at least two of those cases, the CIA nonetheless continued the sleep deprivation.¹¹

Six members of the SSCI released a dissenting statement that was highly critical of the SSCI Report.¹² They criticized the report's partisan nature and questioned its process, analysis, and conclusions.¹³ However, they did not address or dispute that detainees were tortured.

Under international law and, significantly, U.S. law, the consequences of torture are clear. Individuals who commit, attempt to commit, or conspire to commit torture are subject to

11. SSCI REPORT, *supra* note 3, at 3 (Executive Summary) (citations omitted).

12. *Minority views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn*, SSCI REPORT, *supra* note 3, at I (2014), available at <http://www.intelligence.senate.gov/sites/default/files/press/minority-views.pdf> [hereinafter SSCI MINORITY VIEWS].

13. SSCI MINORITY VIEWS, *supra* note 12, at IV (stating that no witnesses were interviewed in preparing the report and that the report took over five years to complete).

prosecution. And yet, no senior U.S. government official has ever been prosecuted for torture.¹⁴

In January 2008, Attorney General Michael Mukasey appointed Assistant U.S. Attorney John Durham to conduct a criminal investigation into the destruction of CIA interrogation records.¹⁵ The investigation was expanded on August 24, 2009 by newly appointed Attorney General Eric Holder to determine “whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.”¹⁶ In announcing the expanded inquiry, Holder added a significant qualification to the investigation:

[T]he Department of Justice will not prosecute anyone who acted in good faith and within the scope of

14. There have been several criminal prosecutions of military personnel and private contractors arising out of the mistreatment of detainees. *E.g.*, *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009) (affirming the conviction of David Passaro, who was convicted of felony assault for the beating of Abdul Wali). *See also* Clyde Haberman, *A Singular Conviction Amid the Debate on Torture and Terrorism*, N.Y. TIMES (Apr. 19, 2015), <http://www.nytimes.com/2015/04/20/us/a-singular-conviction-amid-the-debate-on-torture-and-terrorism.html> (describing Passaro’s conviction). In addition, there were several prosecutions of military personnel for abuses perpetrated at Abu Ghraib. CNN Library, *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 27, 2015), <http://cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts>.

15. Ninety-two videotapes documenting CIA interrogation sessions with detainees were destroyed. Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES, Mar. 3, 2009, at A16, *available at* <http://www.nytimes.com/2009/03/03/washington/03web-intel.html>. Several of the destroyed videotapes recorded waterboarding sessions. *Id.* For a detailed history regarding the videotape controversy, see JOHN RIZZO, *COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA* 1–30 (2014); JOSE A. RODRIGUEZ, JR., *HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES* 181–218 (2012). There is some uncertainty regarding the number of videotapes that were destroyed. John Rizzo, former CIA Acting General Counsel, indicated there were ninety-six videotapes whereas other sources identified ninety-two tapes.

16. Eric Holder, Attorney General, *Regarding a Preliminary Review into the Interrogation of Certain Detainees* (Aug. 24, 2009), *available at* <http://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees>. Holder based his decision to broaden the inquiry upon his review of the Office of Professional Responsibility’s report on the Office of Legal Counsel’s memoranda regarding enhanced interrogation techniques as well as the 2004 report by the CIA’s Inspector General regarding counterterrorism detention and interrogation activities. *Id.*

the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals.¹⁷

On June 30, 2011, Holder announced that further investigation regarding the use of unauthorized interrogation techniques by CIA interrogators was not warranted.¹⁸ Nevertheless, he authorized a full criminal investigation regarding the deaths of two individuals who died while in U.S. custody.¹⁹ On August 30, 2012, Holder announced the closure of this remaining investigation, stating there was insufficient admissible evidence to sustain a conviction beyond a reasonable doubt.²⁰

17. *Id.* Despite Holder's statement, his decision was subject to extensive criticism. *E.g.*, Rachel L. Swarns, *Cheney Offers Sharp Defense of C.I.A. Tactics*, N.Y. TIMES, Aug. 30, 2009, at A1, available at <http://www.nytimes.com/2009/08/31/us/politics/31cheney.html> (former Vice President Dick Cheney criticizing Obama administration's decision to investigate interrogation techniques). Holder's statement echoed the position of President Obama. When the Department of Justice released several memos from the Office of Legal Counsel that addressed the use of enhanced interrogation methods, President Obama emphasized that prosecutions of those who acted in good faith upon legal advice from the DOJ would not occur. "In releasing these memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution." Barack Obama, President of the United States, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), available at <https://www.whitehouse.gov/the-press-office/statement-president-barack-obama-release-olc-memos>.

18. Eric Holder, Att'y Gen., Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees (June 30, 2011), available at <http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>.

19. *Id.* While their names were not officially disclosed, it is believed the two detainees were Gul Rahman and Manadel al-Jamadi. *See* Scott Shane, *No Charges Filed in Two Deaths Involving C.I.A.*, N.Y. TIMES, Aug. 31, 2012, at A1 (discussing the Justice Department's decision to not press criminal charges in two cases of prisoner deaths during CIA interrogations, but that "officials had previously confirmed the identities of the prisoners" as Rahman and al-Jamadi). For more information on Gul Rahman's death, see Jane Mayer, *Who Killed Gul Rahman?*, THE NEW YORKER, Mar. 31, 2010 (reporting on Rahman's death, which remained a secret from 2002 until disclosed by the Associated Press on March 28, 2010).

20. Eric Holder, Att'y Gen., Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), available at <http://www.justice.gov/opa/pr/statement-attor>

He added, however, that this decision did not address whether the use of unauthorized interrogation techniques was appropriate.²¹ “Our inquiry was limited to a determination of whether prosecutable offenses were committed and was not intended to, and does not resolve, broader questions regarding the propriety of the examined conduct.”²² And so, despite numerous admissions by U.S. government officials that detainees were tortured, no prosecutions have occurred.²³ The lack of accountability is even more striking in light of the number of reports issued by U.S. government agencies documenting abuse and the malfeasance committed by U.S. government officials.²⁴

ney-general-eric-holder-closure-investigation-interrogation-certain-detainees. Attorney General Holder indicated that Durham had reviewed various sources, including “the Office of Professional Responsibility’s report regarding the Office of Legal Counsel memoranda related to enhanced interrogation techniques, the 2004 CIA Inspector General’s report on enhanced interrogations, additional matters investigated by the CIA Office of Inspector General, the February 2007 International Committee of the Red Cross Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody, and public source information.” *Id.* Holder added that Durham had considered all “potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes.” *Id.*

21. *Id.* During his Senate confirmation hearings, Holder indicated that waterboarding was a form of torture. David Stout, *Holder Tells Senators Waterboarding is Torture*, N.Y. TIMES, Jan. 15, 2009, available at <http://www.nytimes.com/2009/01/16/us/politics/16holdercnd.html>.

22. Holder, *supra* note 20.

23. The only prosecution arising out of the CIA’s Detention and Interrogation Program was of a CIA officer for leaking information about the program to the media. See Michael S. Schmidt, *Ex-C.I.A. Officer Sentenced to 30 Months in Leak*, N.Y. TIMES, Jan. 26, 2013, at A11 (describing the sentencing of former CIA officer John C. Kiriakou for disclosing the identity of a CIA officer involved in the interrogation program).

24. Even civil lawsuits raising claims of torture have been unsuccessful. See, e.g., William J. Aceves, *Constitutional Barriers and the Perils of Impunity*, in LESSONS AND LEGACIES OF THE WAR ON TERROR 49 (Gershon Shafir et al. eds., 2013) (analyzing how the state secrets privilege and *Bivens* doctrine have imposed barriers to civil redress for victims of the extraordinary rendition program). In the absence of accountability, some commentators have suggested that perpetrators should be pardoned. See Anthony D. Romero, Op-Ed., *Pardon Bush and Those Who Tortured*, N.Y. TIMES, Dec. 9, 2014, at A31, available at <http://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html> (arguing that, given the attendant difficulties and hesitance of the Obama Administration to prosecute individuals for tor-

This Article addresses the absence of accountability for torture in the War on Terror.²⁵ Part II examines the U.S. obligation under international law to investigate and prosecute acts of torture regardless of where such acts occurred.²⁶ It also reviews the domestic legislation that implements this international obligation. Adopted by Congress to implement the Convention against Torture, the Torture Statute (18 U.S.C. § 2340A) establishes criminal liability for torture committed outside the United States. Part III then reviews the first and only case ever brought under the Torture Statute.²⁷ Roy Bel-fast, Jr., a U.S. citizen, was prosecuted and subsequently con-

ture, tacit pardons might be a signal for the future that such actions could be prosecuted).

25. Numerous commentators have said that Bush administration officials should be investigated and prosecuted for torture. *E.g.*, MICHAEL RATNER & THE CENTER FOR CONSTITUTIONAL RIGHTS, *THE TRIAL OF DONALD RUMSFELD* (2008) (imagining a trial against Secretary of Defense Rumsfeld); WORLD ORGANIZATION FOR HUMAN RIGHTS USA ET AL., *INDEFENSIBLE: A REFERENCE FOR PROSECUTING TORTURE AND OTHER FELONIES COMMITTED BY U.S. OFFICIALS FOLLOWING SEPTEMBER 11TH 1* (2012) (“The report urges a thorough investigation of the high-ranking government officials who ordered and authorized the Bush Administration’s torture policies and also urges that domestic courts play a vital role in holding these officials accountable.”); Claire Finkelstein & Michael Lewis, Debate, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENUMBRA 195 (2010), available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1047&context=penn_law_review_online (Professor Finkelstein taking the position that Bush administration lawyers could have and should have been prosecuted as accomplices to torture); Scott Horton, *Justice After Bush: Prosecuting an Outlaw Administration*, HARPER’S MAGAZINE, Dec. 2008, at 49 (asserting that the Bush Administration not only committed crimes, but “waged war against the law itself”), available at <http://harpers.org/archive/2008/12/justice-after-bush/>; John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487 (2006) (recommending methodologies for removing hurdles to prosecution).

26. This Article focuses on allegations of torture arising out of the CIA’s Detention and Interrogation Program. It does not address allegations of mistreatment committed by other government agencies or the military.

27. The Justice Department’s reluctance to pursue cases of torture has long been recognized. *E.g.*, WILLIAM J. ACEVES, *UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS* (2002); Elise Keppler, et al., *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr.*, HUM. RTS. BRIEF 18 (2008).

victed in 2008 for committing torture in Liberia.²⁸ The Belfast case addressed several issues relating to the Torture Statute, including the definition of torture, the extraterritorial application of U.S. law, and the viability of potential defenses.

Using the Belfast prosecution as a model, Part IV examines the criminal liability of George Tenet, who served as the Director of Central Intelligence during the time when several detainees listed in the SSCI Report were tortured.²⁹ Tenet was responsible for the development and implementation of the CIA's Detention and Interrogation Program. He personally authorized the use of enhanced interrogation techniques on "high value" detainees who were held at CIA "black sites" around the world. Finally, Part V provides a criminal indictment of Tenet based on the treatment of four detainees: Abu Zubaydah, Khalid Shaykh Muhammad, Abd al-Rahim al-Nashiri, and Ramzi Bin Al-Shibh.³⁰ These detainees were held by the CIA at various facilities around the world during Tenet's tenure as the Director of Central Intelligence. Under the guise of enhanced interrogation techniques, the CIA subjected each detainee to horrific treatment. They were, in fact, tortured.³¹

28. Thomas J. G. Scott, *Prosecuting Charles Taylor's Son for Torture: A Step Toward Domestication of International Law*, 8 *LOY. U. CHI. INT'L L. REV.* 33, 33–35 (2010). For more information on this case, see Laura R. Brownlee, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles "Chuckie" Taylor Jr.*, 9 *WASH. U. GLOBAL STUD. L. REV.* 331 (2010).

29. In addition to the Torture Statute, numerous other federal statutes may be implicated, including: 18 U.S.C. § 113 (assault); 18 U.S.C. § 114 (maiming); 18 U.S.C. § 1201 (kidnapping); and 18 U.S.C. § 2441 (war crimes).

30. Detainee names are spelled as they appear in the original documents. Accordingly, their names may be spelled differently throughout this article.

31. This article does not address the prohibition against cruel, inhuman, or degrading treatment. While cruel, inhuman, or degrading treatment is also prohibited by the Convention against Torture, it is not subject to the same prosecution obligations as torture. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture]. In addition, there is no federal statute implementing the prohibition against cruel, inhuman, or degrading treatment.

II. THE PROHIBITION AGAINST TORTURE

Few international norms are more universal than the prohibition against torture. Torture is generally understood as acts or threatened acts of public officials that intentionally inflict severe physical or mental pain or suffering on an individual in order to fulfill a certain purpose.³² The prohibition against torture is codified in several multilateral and regional instruments. It is also expressed in numerous other forms of state practice, including the decisions of international and regional tribunals, the statements of international and regional organizations, and in national legislation throughout the world. A critical element in the prohibition against torture is the obligation to punish perpetrators.

A. *International Codification*

In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights ("Universal Declaration"), which is one of the most well-recognized and respected statements of international human rights norms.³³ While the Universal Declaration is not a treaty, it is recognized to embody the rules of international human rights law that all governments are bound to respect. Article 5 of the Universal Declaration states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."³⁴ Since the adoption of the Universal Declaration, numerous agreements have affirmed this prohibition. For example, the International Covenant on Civil and Political Rights, adopted in 1966, codifies many of the rights set forth in the Universal Declaration.³⁵ Article 7 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."³⁶ The General Assembly reaffirmed the prohibition against torture in its 1975 Declaration on the Protec-

32. See generally SIR NIGEL S. RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 85–88 (3d ed. 2009) (describing the definition of torture under international law).

33. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

34. *Id.* at art. 5.

35. International Covenant on Civil and Political Rights, U.N. Doc. Dec. 16, 1966, 999 U.N.T.S. 171 (prohibiting deprivations of life and reaffirming the prohibition against torture).

36. *Id.* at art. 7.

tion of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁷

In 1984, the prohibition against torture was formally codified in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”).³⁸ The Convention against Torture provides the most detailed codification of the prohibition against torture.³⁹ Article 1 of the Convention provides in pertinent part:

“[T]orture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁴⁰

Pursuant to the Convention against Torture, states must take effective legislative, administrative, and judicial measures to prevent acts of torture in any territory under their jurisdiction.⁴¹ Significantly, Article 2(2) provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a

37. G.A. Res. 3452 (XXX), U.N. Doc. A/RES/30/3452 (Dec. 9, 1975).

38. Convention against Torture, *supra* note 31.

39. See generally AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT (1999) (evaluating the ability of the convention to protect and enforce the right to be free from torture); J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1988) (describing the convention’s drafting process); MANFRED NOWAK & ELIZABETH McARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY (2008) (examining a variety of issues related to the convention).

40. Convention against Torture, *supra* note 31, at art. 1.

41. Convention against Torture, *supra* note 31, at art. 2(1). States are also obligated to prevent in any territory under their jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture when such acts are committed with the consent or acquiescence of a public official or other person acting in an official capacity. *Id.* at art. 16(1).

threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."⁴² Article 2(3) adds that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."⁴³

The Convention against Torture provides that each State Party shall ensure that all acts of torture, attempts to commit torture, and acts which constitute complicity or participation in torture, are offenses under the state's criminal law.⁴⁴ These offenses must be punishable by appropriate penalties that take into account their grave nature. In addition, the Convention requires a State Party to establish jurisdiction over these offenses in the following cases: "(a) when the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate;"⁴⁵ or when the alleged offender is present in any territory under its jurisdiction and it does not extradite him.⁴⁶

The Convention against Torture is quite detailed in its description of the State Party obligation to investigate persons suspected of torture.⁴⁷ If a person alleged to have committed acts of torture is found in the territory of a State Party, that state is obligated to investigate and, where appropriate, to take him into custody or take other legal measures to ensure his presence. Investigations must be prompt and impartial.⁴⁸ Custody may only continue as long as necessary to enable criminal or extradition proceedings to be initiated.⁴⁹ The State Party must make a preliminary inquiry into the facts of the alleged torture and notify the state where the offenses were committed or where the alleged offender or victim is a national. It must also indicate whether it intends to exercise jurisdiction over

42. Convention against Torture, *supra* note 31, at art. 2(1).

43. Convention against Torture, *supra* note 31, at art. 2(3).

44. Convention against Torture, *supra* note 31, at art. 4(1).

45. Convention against Torture, *supra* note 31, at art. 5.

46. Convention against Torture, *supra* note 31, at art. 5.

47. Convention against Torture, *supra* note 31, at art. 6.

48. Convention against Torture, *supra* note 31, at art. 12.

49. Convention against Torture, *supra* note 31, at art. 6(1). Throughout custody, a detained individual must be allowed to communicate with a representative of the state where he is a national. *Id.* at art. 6(3).

the person. If requested, a State Party may extradite an alleged offender.⁵⁰

If a State Party does not extradite the alleged offender, the Convention against Torture requires that the State Party submit the case to its competent authorities for prosecution.⁵¹ In these proceedings, the standards of evidence required for prosecution and conviction cannot be less stringent than the standards required in other criminal cases.⁵² All persons must be guaranteed fair treatment at each stage of the proceedings. The Convention also requires states to provide each other the greatest measure of assistance in connection with criminal proceedings brought in respect to any acts of torture.⁵³

The Convention against Torture requires State Parties to provide education and adequate training to all persons who may be involved in the “custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”⁵⁴ In addition, interrogation rules, instructions, methods, and practices along with arrangements for the custody and treatment of persons must be periodically reviewed.⁵⁵

To ensure that the international community adheres to the prohibition against torture, the Convention against Torture established the Committee against Torture.⁵⁶ The Committee is authorized to review and comment upon national reports submitted by member states describing their compliance

50. Convention against Torture, *supra* note 31, at art. 7(1). Under the principle of *non-refoulement*, however, a State Party may not extradite a person to another state when there are substantial grounds for believing that he would be in danger of being subjected to torture. Convention against Torture, *supra* note 31, at art. 3. For the purpose of determining whether there are such grounds, a State Party must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in the requesting state. Convention against Torture, *supra* note 31, at art. 3.

51. Convention against Torture, *supra* note 31, at art. 7(1).

52. Convention against Torture, *supra* note 31, at art. 7(2).

53. Convention against Torture, *supra* note 31, at art. 9(1).

54. Convention against Torture, *supra* note 31, at art. 10(1).

55. Convention against Torture, *supra* note 31, at art. 11.

56. See Convention against Torture, *supra* note 31, at arts. 17–24 (establishing a committee, which will accept State reports and produce its own). See generally CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE (2001) (examining the role of the committee in the development of the convention).

with the Convention against Torture.⁵⁷ The Committee is also authorized to receive state and individual communications alleging noncompliance by member states.⁵⁸ In such cases, however, the member state must have previously accepted the competence of the Committee to review these types of communications. While the United States is obligated to submit reports to the Committee and has accepted its competence to receive and consider state communications, it has not accepted the competence of the Committee to review individual communications. As a result, the Committee cannot consider any claims brought by individuals against the United States alleging violations of the Convention.

As part of its mandate, the Committee against Torture has issued General Comments that offer interpretations and clarifications regarding treaty provisions. In General Comment No. 2, for example, the Committee emphasized the *jus cogens* nature of the prohibition against torture and its non-derogable nature.⁵⁹

Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances, a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. Similarly, it rejects any religious or traditional justification that would violate this absolute prohibition. The Committee considers that amnesties or other impediments which preclude or indicate unwillingness

57. Convention against Torture, *supra* note 31, at art. 19.

58. Convention against Torture, *supra* note 31, at arts. 21–22.

59. Comm. against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (2008), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11.

to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.⁶⁰

The Committee has also emphasized the importance of prosecuting acts of torture. Accordingly, it has stated that immunities and other impediments to prosecution are inconsistent with the Convention against Torture.⁶¹

In addition to the Convention against Torture, the prohibition against torture has also been codified in several international humanitarian law agreements.⁶² Common Article 3 of the 1949 Geneva Conventions, for example, provides minimum standards of conduct that must be applied in cases of armed conflict that are not of an international character.⁶³ This provision precludes “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁶⁴ Other provisions of the 1949 Geneva Conventions provide similar protections against torture in cases of international armed conflicts. The

60. *Id.* at para. 5.

61. Comm. against Torture, General Comment No.3, U.N. Doc. CAT/C/GC/3 (2012), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11.

62. In addition to multilateral agreements, the prohibition against torture is recognized in several regional agreements. *E.g.*, African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 21 I.L.M. 58. (“All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”); American Convention on Human Rights art. 5(2), Nov. 22, 1969, 114 U.N.T.S. 123 (“No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

63. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

64. Third Geneva Convention, *supra* note 63, at art. 3; Fourth Geneva Convention, *supra* note 63, at art. 3.

prohibition against torture also appears in Additional Protocols I and II to the 1949 Geneva Conventions.⁶⁵

In sum, the international community recognizes that acts of torture cannot be tolerated under any circumstances. This universal condemnation has led the international community to place torture in that narrow realm of *jus cogens* norms—nonderogable obligations that bind all states.⁶⁶ Indeed, the crime of torture has attained such opprobrium that the Convention against Torture authorizes the assertion of universal jurisdiction for such acts—states are authorized to prosecute an alleged torturer located in their territory regardless of where the act took place.⁶⁷ These elements have been force-

65. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609.

66. See THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS AND OBLIGATIONS ERGA OMNES* (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) (addressing the existence and meaning of *jus cogens* norms); LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS I*, 509 (1988) (stating that prohibition of torture, among other brutal forms of treatment, is a *jus cogens* norm); CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976) (describing the status of *jus cogens* norms under international law); LISA YARWOOD, *STATE ACCOUNTABILITY UNDER INTERNATIONAL LAW: HOLDING STATES ACCOUNTABLE FOR A BREACH OF JUS COGENS NORMS* (2011) (discussing potential *jus cogens* norms including prohibition of torture).

67. Convention against Torture, *supra* note 31, at art. 5(2). The Committee against Torture has indicated that “even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture.” Rep. of the Comm. against Torture, para. 7.2 (Annex V), U.N. Doc. A/45/44, GAOR, 45th Sess., Supp. No. 44 (June 21, 1990), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N90/154/75/IMG/N9015475.pdf>. See generally LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (2003) (examining the basis and conditions for universal jurisdiction); William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129, 154 (2000) (arguing for universal jurisdiction for certain legal violations and noting that the Convention against Torture “explicitly authorizes universal jurisdiction”); Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2140 (1995)

fully acknowledged by various courts, from the International Criminal Tribunal for the former Yugoslavia to the British House of Lords.⁶⁸

B. *Domestic Implementation*

The United States signed the Convention against Torture on April 18, 1988. President Ronald Reagan submitted the treaty to the Senate for consideration on May 20, 1988. In his transmittal letter, President Reagan indicated that U.S. ratification “will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.”⁶⁹

In support of the submission, the Reagan administration prepared a Summary and Analysis of each treaty provision drafted by the State Department. While the administration supported the treaty, it had concerns with several provisions. In its analysis of Article 1 of the Convention against Torture, the Reagan administration expressed some concerns about the definition of torture and the “improper application of the Convention to legitimate U.S. law enforcement actions. . . .”⁷⁰ Accordingly, the administration proposed several understandings that would protect U.S. law enforcement interests.

“The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”

(examining the doctrine of universal jurisdiction); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEXAS L. REV. 785, 789 (1988) (recognizing universal jurisdiction for certain human rights violations including torture); Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universal Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281 (1987) (discussing war crimes and crimes against humanity being widely recognized as international offenses subject to universal jurisdiction).

68. See *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000], 1 A.C. 147 (H.L.) (recognizing that the Convention against Torture authorizes universal jurisdiction for torture); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, para.167 (Dec. 10, 1998) (recognizing that certain international crimes can give rise to universal jurisdiction).

69. S. TREATY DOC. NO. 100-20, at iii (1988).

70. *Id.* at 4.

“The United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender’s custody or physical control.”

“The United States understands that ‘sanctions’ includes not only judicially-imposed sanctions but also other enforcement actions authorized by United States law or by judicial interpretation of such law.”

“The United States understands that the term ‘acquiescence’ requires that the public official, prior to the activity constituting torture, have knowledge of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”

“The United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.”⁷¹

In its analysis of Article 2, the Reagan administration highlighted the absolute prohibition against torture.

Article 2 provides that no exceptional circumstances, such as war or public emergency, may be invoked as a justification for torture. The use of torture in wartime is already prohibited within the scope of the Geneva Conventions, to which the United States and virtually all other countries are Parties, and which in any event generally reflect customary international law. The exclusion of public emergency as an excuse for torture is necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.⁷²

Despite its analysis of Article 2, the administration indicated that certain situations might not constitute torture. In particular, “legitimate acts of self-defense or defense of others do not constitute torture . . . since they are not performed with the specific intent to cause excruciating and agonizing pain or suffering.”⁷³ As a result, the Reagan administration proposed

71. *Id.* at 4-5.

72. *Id.* at 5.

73. *Id.* at 6.

the following understanding: "The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."⁷⁴

The Reagan administration also discussed the implications of a claim of superior orders in cases of torture. During the diplomatic negotiations for the Convention against Torture, the administration proposed that a claim of superior orders could be used in mitigation of punishment. "While this proposal was ultimately not adopted, it appears not to have been rejected. Rather the matter has been left to the judgment of each State Party, and the United States could thus take superior orders into account in imposing criminal punishment for torture."⁷⁵ The administration also noted that a superior orders defense was recognized by the Uniform Code of Military Justice, although the defense was limited if "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."⁷⁶ Since a "person of ordinary sense and understanding" would know that acts of torture are criminal, "no change in U.S. military law would be required by Article 2 of the Convention."⁷⁷

In its analysis of the prosecution requirements set forth in Articles 4 through 7, the Reagan administration determined that acts of torture committed within the United States were already covered by existing state and federal law.

Acts of torture committed in the United States . . . as well as acts in the United States constituting an attempt or conspiracy to torture, would appear to violate criminal statutes under existing state or federal law. When such acts are subject to state jurisdiction, the offense would presumably be a common crime such as assault or murder. In particular cases, the nature of the activity or persons involved could give rise to a federal offense as well such as interstate kidnapping or hostage taking.

74. *Id.*

75. *Id.* at 5.

76. *Id.* at 6.

77. *Id.*

Where the acts are subject to federal jurisdiction, similar common crimes are defined under federal criminal law, for example, assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, and rape. Conspiracy to commit the above crimes and being an accessory after the fact are also offenses.⁷⁸

The administration also referenced other federal statutes and constitutional provisions that would offer protections against torture committed in the United States. Thus, additional legislation was not needed to prosecute such acts when committed in the United States. However, U.S. jurisdiction did not extend to acts of torture committed abroad. This was a significant concern because the principle of universal jurisdiction was a central feature of the Convention against Torture.

A major concern in drafting Article 5 [of the Convention against Torture], and indeed, in drafting the Convention as a whole, was whether the Convention should provide for possible prosecution by any State in which the alleged offender is found – so-called “universal jurisdiction.” The United States strongly supported the provision for universal jurisdiction on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences. Provision for “universal jurisdiction” was also deemed important in view of the fact that the government of the country where official torture actually occurs may seldom be relied upon to take action.⁷⁹

78. *Id.* at 8 (citations omitted).

79. *Id.* at 9. The Reagan administration indicated that the principle of universal jurisdiction was not unique; it was patterned after similar provisions in several other international agreements. See International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 (authorizing universal jurisdiction for hostage-taking); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 (authorizing universal jurisdiction for attacks on internationally protected persons); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec.

Accordingly, implementing legislation would be needed to establish U.S. jurisdiction in such cases. Thus, the administration proposed a declaration that provided “[t]he United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted.”⁸⁰

With respect to prosecution, the Reagan administration indicated that the Convention does not require prosecution in every case. “The decision whether to prosecute entails a judgment whether a sufficient legal and factual basis exists for such an action.”⁸¹ Moreover, the United States would prefer to extradite individuals to the state where the offense was committed. As a result, the administration submitted a proposed declaration to the Senate with respect to Article 7, indicating its preference for extradition in lieu of prosecution in such cases.

Following the 1988 presidential election, the administration of President George H.W. Bush reaffirmed the need for U.S. ratification of the Convention against Torture. In his May 8, 1989 letter to the Senate Committee on Foreign Relations, President Bush indicated there was an “urgent need for Senate approval” of the Convention. Subsequently, Senator Claiborne Pell, the Chairman of the Senate Committee on Foreign Relations, sent a letter to the Bush administration expressing concern about the proposed reservations, understandings, and declarations attached to the Convention. In response, the Bush administration submitted a revised package of proposed reservations, understandings, and declarations to the Senate on December 10, 1989.

Reflecting our consultations with various interested groups in the private sector, the package now contains a revised understanding to the definition of torture, which would not raise the high threshold of pain already required under international law, clarifies the definition of mental pain and suffering, and maintains our position that specific intent is required for torture. The revised package also eliminates the understanding regarding to “common-law” defenses,

16, 1970, 860 U.N.T.S. 105 (authorizing universal jurisdiction for seizures of aircraft).

80. S. TREATY DOC. NO. 100-20, *supra* note 69, at 10.

81. S. TREATY DOC. NO. 100-20, *supra* note 69, at 11.

makes it clear that the United States does not regard authorized sanctions that unquestionably violate international law as "lawful sanctions" exempt from the prohibition on torture, and removes our reservation to the obligation not to extradite individuals if we believe they would be tortured upon return.⁸²

On January 30, 1990, the Senate Committee on Foreign Relations held hearings on the Convention against Torture.⁸³ In his prepared remarks to the Committee, Abraham D. Sofaer, the Legal Adviser for the Department of State, explained the need for U.S. ratification. "The Bush administration places a high priority on the early ratification of this important human rights treaty. The need for this Convention, Mr. Chairman, stems from the tragic fact that torture continues to be practiced on a daily basis in many nations throughout the world, systematically and with the support or acquiescence of government officials."⁸⁴ Sofaer noted that existing U.S. laws adequately addressed situations of torture that occur in the United States.

Mr. Chairman, some may feel the United States has no need for the legal protections of the Convention against Torture. Existing U.S. law makes any acts falling within the Convention's definition of torture a criminal offense, as well as a violation of various civil statutes. Potential civil remedies include incarceration, compensation, and the full range of equitable relief. Any Public Official in the United States, at any level of government, who inflicts torture (or instigates, consents to, acquiesces in, or tolerates torture) would be subject to an effective system of control and punishment in the U.S. legal system.

This administration nonetheless believes, Mr. Chairman, that, as a member of the international community, we must stand with other nations in pledging to

82. Letter from Janet G. Mullins, Assistant Sec'y, Legislative Affairs, Dep't of State, to Claiborne Pell, Chairman, Comm. on Foreign Relations, U.S. Senate (Dec. 10, 1989) (on file with the U.S. Senate).

83. *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Hearing before the S. Comm. on Foreign Relations*, 101st Cong. 2 (1990).

84. *Id.* at 7 (statement of Abraham Sofaer).

bring to justice those who engaged in torture, whether in U.S. territory or in the territory of other countries.⁸⁵

In his prepared remarks, Mark Richard, Deputy Assistant Attorney General in the Criminal Division of the Justice Department, explained the need for including several conditions to U.S. ratification.⁸⁶ The principle concern involved the definition of torture, particularly with respect to its treatment of mental anguish. Specifically, the Bush administration believed the definition of mental pain or suffering was imprecise because such suffering is subjective and often transitory. The proposed understanding offered by the Bush administration would resolve such imprecision. Such clarity was deemed necessary because of the potential liability U.S. law enforcement officials would face when traveling abroad.

The Convention places U.S. law enforcement officials, when traveling overseas, at risk of arrest and prosecution in foreign jurisdictions, or even extradition to a third country, for purported violations committed within the United States. Even when such a prosecution is well-intended, albeit perhaps misguided, the fact remains that the would[-]be defendant law enforcement official will be subjected to trial under a definition which, viewed in light of U.S. Constitutional principles, is so imprecise as to raise the specter of fundamental unfairness. We believe that, in becoming a party to the Convention, the United States has an obligation to raise and if possible rectify this problem.⁸⁷

During the Senate hearings, several Committee members expressed concern about the Bush administration's decision to remove the proposed understanding regarding common law defenses to torture. In response, the Department of State sent a letter to several Committee members explaining the reasons for this decision.

Because the Convention applies only to custodial situations, i.e., when the person is actually under the

85. *Id.* at 8.

86. *Id.* at 15–18 (statement of Mark Richard).

87. *Id.* at 16.

control of a public official, the legitimate right of self-defense is not affected by the Convention. Moreover, to sustain a successful prosecution it will be necessary to establish beyond a reasonable doubt that the alleged perpetrator formed the specific intent to commit torture. Paragraph 2 of Article 2 of the Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." We accept this provision, without reservation. As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.

The Reagan administration, without in any way narrowing the prohibition on torture, had thought it desirable to clarify that the Convention does not preclude the availability of relevant common law defenses, including self-defense and defense of others. That is, the Convention does not prevent a person from acting in self-defense, as long as he does not torture. While there was no opposition to this concept, substantial concern was expressed that if this understanding were included in the instrument of ratification, it would be misinterpreted or misused by other states to justify torture in certain circumstances. We concluded that this concern was justified and therefore reviewed whether the understanding was necessary. We decide it was not, since nothing in the Convention purports to limit defenses of actions which are not committed with the specific intent to torture.⁸⁸

On July 19, 1990, the Committee voted favorably for the Convention. It subsequently presented its report to the full Senate recommending advice and consent to ratification, sub-

88. Letter from Janet G. Mullins, Assistant Sec'y, Legislative Affairs, Dep't of State to Sen. Larry Pressler (Apr. 4, 1990) (on file with the U.S. Senate).

ject to several reservations, understandings, and declarations.⁸⁹

On October 27, 1990, the Senate gave its advice and consent to the Convention against Torture.⁹⁰ Two reservations, five understandings, two declarations, and one proviso were included by the Senate as a condition for its advice and consent. Significantly, the Senate included the following understanding with respect to the definition of torture:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) 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.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the

89. COMM. OF FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. DOC. NO. 101-30 (1990).

90. 136 CONG. REC. 36192 (1990).

object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term “acquiescence” requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.⁹¹

The Bush administration did not immediately submit the instrument of ratification to the United Nations. According to the Bush administration, the United States would not become a party to the Convention against Torture until the necessary implementing legislation was adopted. Indeed, President Bush noted the importance of adopting legislation that would establish criminal jurisdiction for acts of torture committed abroad when he signed the Torture Victim Protection Act, legislation that established civil liability for acts of torture committed abroad.

I regret the legislation proposed by the Administration to implement the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has not yet been enacted. This proposed implementing legislation would provide a tougher and more effective response to the problem, putting in place for torturers the same international “extradite or prosecute” regime we have for terrorists. The Senate gave its advice and consent to the Torture Convention on October 27, 1990, but the United States cannot proceed to become a party until the necessary implementing legislation is in place. I again call upon the Congress to take prompt action to approve the Torture Convention implementing legislation.⁹²

91. *Id.* at 36193.

92. Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (Mar. 12, 1992).

A bill to implement U.S. obligations under the Convention against Torture was first introduced on September 24, 1992.⁹³ H.R. 6017 passed in the House of Representatives but was not acted upon by the Senate.⁹⁴ In February 1993, the bill was reintroduced in the House as H.R. 933.⁹⁵ In addition, a separate bill was also introduced that would withdraw sovereign immunity from foreign states in cases involving torture and extrajudicial killing.⁹⁶ Neither bill was adopted. On June 15, 1993, the Foreign Relations Authorization Act of 1994 was introduced in the Senate.⁹⁷ Section 304 addressed the implementation of the Convention against Torture.⁹⁸ According to a subsequent Senate report, this legislation would create a federal criminal offense for acts of torture committed outside the United States, thereby fulfilling the U.S. obligation under the Convention against Torture.⁹⁹ There was no substantive discussion in either the House or Senate regarding the Torture Statute. On April 29, 1994, Congress passed the legislation and sent the bill to the White House for presidential signature.¹⁰⁰

On April 30, 1994, President Bill Clinton signed the Foreign Relations Authorization Act of 1994, which codified the Torture Statute under 18 U.S.C. §2340A.¹⁰¹ By the terms of

93. H.R. 6017, 102d Cong. (1992) ("To Implement for the United States the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.").

94. Senator Joe Biden incorporated the language of H.R. 6017 into a larger crime bill (S.3349, 102d Cong. (1992)) being considered in the Senate.

95. H.R. 933, 103d Cong. (1993) ("To Implement for the United States the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.").

96. H.R. 934, 103rd Cong. (1993) ("A Bill to amend title 28, United States Code, relating to jurisdictional immunities of foreign states, to grant jurisdiction to the courts of the United States in certain cases involving torture or extrajudicial killing occurring in that state.").

97. S. 1099, 103d Cong. (1993) ("To authorize appropriations for the Department of State to carry out its authorities and responsibilities in the conduct of foreign affairs during the fiscal years 1994 and 1995, and for other purposes.").

98. *Id.*

99. S. REP. NO.103-107, at 58 (1993).

100. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236 (1994) (codified in sections of 22 U.S.C. and 18 U.S.C. among other titles).

101. *Id.*

the Foreign Relations Authorization Act, 18 U.S.C. §2340A would not become effective until the United States ratified the Convention against Torture.¹⁰² President Clinton deposited the instrument of ratification with the United Nations on October 21, 1994. Pursuant to Article 27(2) of the Convention, the treaty would enter into force on the thirtieth day after the deposition of the instrument of ratification. Accordingly, the Convention against Torture entered into force for the United States on November 20, 1994. The Torture Statute went into effect on the same day.¹⁰³

As currently set forth, 18 U.S.C. § 2340A(a) provides:

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.¹⁰⁴

102. Section 506(c) of the Foreign Relations Authorization Act provided that the legislation would "take effect on the later of - (1) the date of enactment of this Act; or (2) the date on which the United States has become a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." *Id.* at § 560(c).

103. In addition to 18 U.S.C. § 2340A, the United States has implemented the provisions of the Convention against Torture in other ways. In 1991, for example, Congress adopted the Torture Victim Protection Act of 1991 (TVPA) to establish civil liability for acts of torture and summary execution. 28 U.S.C. § 1350 note. The TVPA has been used on several occasions to establish civil liability for acts of torture committed abroad. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (recognizing civil liability for torture under the Torture Victim Protection Act). In 1998, Congress adopted the Torture Victim Relief Act of 1998 to provide funding for torture victim treatment centers in the United States and abroad. 22 U.S.C. 2152 note. Congress subsequently increased U.S. contributions to these domestic and international programs. 22 U.S.C. 2151 note.

104. As originally drafted, 18 U.S.C. § 2340A imposed a term of years or life imprisonment if the act of torture resulted in death.

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 imprisoned for any term of years or for life.

Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, *supra* note 100. It was subsequently amended to impose the death penalty for acts of torture that result in death. Pub. L. No. 103-322, § 60020 (1994).

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.”¹⁰⁵ Severe mental pain or suffering is further defined in the statute as the prolonged mental harm caused by or resulting from the following acts:

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.¹⁰⁶

There is jurisdiction over acts of torture when: (1) the alleged offender is a national of the United States or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.¹⁰⁷ In other words, a torturer can be held criminally liable for acts of torture even when such acts occur abroad and regardless of whether the victim or the perpetrator is a U.S. citizen. In 2001, the Torture Statute was amended to specifically include a conspiracy charge.¹⁰⁸ The Torture Statute is not meant to preclude other methods for establishing criminal liability for acts of torture.¹⁰⁹

105. 18 U.S.C. § 2340(1).

106. 18 U.S.C. § 2340(2).

107. 18 U.S.C. § 2340A(b).

108. Pub. L. No. 107-56 (2001). The conspiracy provision states, “A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.” 18 U.S.C. § 2340A(c).

109. 18 U.S.C. § 2340B (“Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor

In several submissions to the U.N. Committee against Torture, the United States has reiterated that 18 U.S.C. § 2340A was adopted to implement U.S. obligations pursuant to the Convention against Torture. In its 2000 submission to the Committee, the United States explained the scope of the Torture Statute.

Section 2340A of Title 18 provides for punishment of acts of torture committed outside the United States by a United States national or by a person subsequently present in the United States. The definition of torture set forth in section 2340 conforms to the definition in the Convention, as interpreted by the understandings expressed by the United States at the time of ratification. In sum, in such circumstances, prosecution can be initiated under United States law in a manner consistent with the obligations set forth in article 7. Indeed, the U.S. Department of Justice has undertaken measures to ensure that any person on United States territory believed to be responsible for acts of torture is identified and handled consistent with the requirements of this provision.¹¹⁰

The United States added that “any person on U.S. territory believed to be responsible for acts of torture” would be “identified and handled consistent with the requirements” of the Convention.¹¹¹ In its Concluding Observations, however, the Committee expressed concern regarding “[t]he failure of the State party to enact a federal crime of torture in terms consistent with article 1 of the Convention”¹¹² In its 2005 submission to the Committee, the United States acknowledged that several investigations were underway but there had been no prosecutions under the Torture Statute.

As of January 1, 2005, the United States has considered applying the statute in several cases, but it has

shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.”).

110. Committee against Torture, United States of America, Initial Report of States Parties 13, U.N. Doc. CAT/C/28/Add.5 (2000).

111. *Id.* at para. 194.

112. U.N. General Assembly, Report of the Committee against Torture, 23d Sess., Nov. 8–Nov. 19 1999, 24th Sess. May 1 – May 19, 2000, para. 179(a), U.N. Doc. A/55/44; GAOR, 55th Sess., Supp. No. 44 (2000).

not initiated any prosecutions under this provision to date. In some cases, investigations are pending. As is necessarily true of any successful criminal prosecution, the available evidence must establish the various elements of the offense. Accordingly, in order for the extraterritorial criminal torture statute to apply, the conduct must fall within the definition of torture, it must have been committed subsequent to the effective date of the statute (November 20, 1994), and it must have been committed “outside the United States.”¹¹³

The Committee again expressed concerns regarding the definition of torture set forth in federal law.¹¹⁴ The Committee also asked the United States to address a large number of issues regarding U.S. compliance with the treaty, including the treatment of detainees in Afghanistan, Guantanamo, and Iraq.¹¹⁵ In response, the United States offered additional information regarding individuals under the control of the U.S. military.¹¹⁶

In preparation for the 2014 U.S. submission, the Committee requested similar information from the United States.¹¹⁷ In its submission, the United States also described the first application of the Torture Statute.

113. Comm. against Torture, Second Periodic Report of States Parties Due in 1999: United States of America, para. 51, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005).

114. Comm. against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture: United States of America, 36th Sess. May 1 – May 19, 2006, para. 13, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

115. Comm. against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America, 35th Sess., Nov. 7 – Nov. 25, 2005, U.N. Doc. CAT/C/USA/Q/2 (Feb. 8, 2006).

116. Second Periodic Report of States Parties Due in 1999: United States of America, *supra* note 113, at 47; List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America, *available at* http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36_En.pdf (last visited Sept. 24, 2015).

117. Comm. against Torture, List of Issues to Prior to the Submission of the Fifth Periodic Report of United States of America, 43d Sess., Nov. 2 – Nov. 20, 2009, U.N. Doc. CAT/C/USA/Q/5 (Jan. 20, 2010).

The United States has investigated and prosecuted allegations of extraterritorial torture over which it has jurisdiction. On October 30, 2008, Roy M. Belfast, Jr., son of Charles G. Taylor, former president of Liberia, was convicted of crimes related to torture in Liberia between April 1999 and July 2003 under the U.S. extraterritorial torture statute, 18 U.S.C. 2340A. On January 9, 2009, he was sentenced to 97 years in prison. The prosecution of these torture claims was the first under the Torture Convention Implementation Act, 18 U.S.C. 2340A et seq.¹¹⁸

In its Concluding Observations, the Committee against Torture again expressed concerns about the definition of torture in U.S. law.¹¹⁹ The Committee also expressed “grave concern over the extraordinary rendition, secret detention and interrogation programme operated by the United States Central Intelligence Agency (CIA) between 2001 and 2008, which comprised numerous human rights violations, including torture, ill-treatment and enforced disappearance of persons suspected of involvement in terrorism-related crimes.”¹²⁰

III. THE CASE OF ROY BELFAST, JR.

Roy Belfast Jr. was born in the United States in 1977.¹²¹ His father, Charles Taylor, would become the leader of the National Patriotic Front of Liberia and, eventually, the President of Liberia in 1997. Upon assuming the presidency, Taylor

118. Comm. against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention Pursuant to the Optional Reporting Procedure: Third to Fifth Periodic Reports of States Parties Due in 2011: United States of America, para. 126, U.N. Doc. CAT/C/USA/3-5 (Dec. 4, 2013). The case of Roy Belfast was first reported to the U.N. Human Rights Committee in 2011. See Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Fourth Periodic Report: United States of America, para. 181(f), U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

119. Comm. against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of United States of America, para. 9, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) (discussing the U.S. position regarding the application of the Convention against Torture).

120. *Id.* at para. 11.

121. Belfast is also known as Chuckie Taylor, Charles Taylor, Jr., Charles Taylor II, and Charles McArther Emmanuel. See *United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. 2010).

asked his son to direct the Anti-Terrorism Unit (ATU) in Liberia. Belfast served in this capacity between 1999 and 2003. He was responsible for providing security for the president and worked with various Liberian security and military forces. As Liberia became engulfed in civil war, Belfast became increasingly brutal in his treatment of civilians. He was personally responsible for numerous human rights abuses, including torture and summary execution. Taylor eventually resigned from the presidency in 2003 and immediately left the country.¹²² Belfast also left Liberia and moved to Trinidad for several years. When Belfast returned to the United States in March 2006, he was arrested upon entry at the Miami International Airport. He was initially charged with passport fraud because he had lied about his father's identity on his U.S. passport application. He pled guilty to this charge, and was scheduled for sentencing on December 7, 2006.

On December 6, 2006, Belfast was charged by a federal grand jury in the federal district court for the Southern District of Florida with one count of torture, one count of conspiracy to torture, and one count of using a firearm during the commission of a violent crime. According to Assistant Attorney General Alice S. Fisher of the Criminal Division, "[t]his [case] marks the first time the Justice Department has charged a defendant with the crime of torture Crimes such as these will not go unanswered."¹²³ The indictment was the result of a joint task force involving the U.S. Attorney's Office, Immigration and Customs Enforcement, and the Counterterrorism Division of the Federal Bureau of Investigation. A superseding

122. Taylor first traveled to Nigeria, where he remained in exile for several years. See Ben Brumfield, *Charles Taylor sentenced to 50 years for war crimes*, CNN (May 31, 2012), <http://edition.cnn.com/2012/05/30/world/africa/netherlands-taylor-sentencing/index.html>. While in exile, Taylor was indicted by the Special Court for Sierra Leone for war crimes and crimes against humanity. *Id.* In June 2006, Taylor was transferred to The Hague for prosecution in the Special Court. *Id.* On April 26, 2012, Taylor was convicted of war crimes and crimes against humanity. See generally *Recent Case, Prosecutor v. Taylor*, 127 HARV. L. REV. 1847 (2014) (discussing international prosecution of Charles Taylor).

123. Press Release, Dep't of Justice, Roy Belfast Jr. AKA Chuckie Taylor Indicted on Torture Charges (Dec. 6, 2006), http://www.justice.gov/archive/opa/pr/2006/December/06_crm_813.html.

indictment issued on September 6, 2007 charged Belfast with five counts of torture.¹²⁴

On November 7, 2007, the federal grand jury issued a Second Superseding Indictment against Belfast.¹²⁵ The indictment alleged eight counts, charging Belfast with torture, conspiracy to commit torture, and use of a firearm in furtherance of these crimes. The indictment identified seven torture victims and provided a detailed description of each victim and the manner in which they were tortured.

Count One set forth the conspiracy charge, alleging that Belfast conspired under the color of law and with “the specific intent to inflict severe physical pain and suffering upon other persons” in violation of 18 U.S.C. § 2340A(a) and (c).¹²⁶

Object of the Conspiracy

It was the object of the conspiracy to maintain, preserve, protect and strengthen the power and authority of Charles McArthur Taylor’s presidency, and to intimidate, neutralize, punish, weaken and eliminate actual and perceived opponents of and threats to his administration, by means of torture, in violation of Title 18, United States Code, Sections 2340A and 2340(1).

Manner and Means of the Conspiracy

The manner and means by which members of the conspiracy sought to accomplish its goals included: that the defendant and others known and unknown to the grand jury used the ATU and other police and security forces to seize, imprison at various locations, and interrogate persons about actual, perceived and potential opposition to the Taylor presidency, and to mistreat persons including by acts specifically intended to inflict severe physical pain and suffering.¹²⁷

124. Press Release, Chuckie Taylor Charged with Additional Acts of Torture in Superseding Indictment (Sept. 6, 2007), http://www.justice.gov/archive/opa/pr/2007/September/07_crm_688.html.

125. Second Superseding Indictment, *United States v. Belfast*, 611 F.3d 783 (Nov. 7, 2007) (No. 06-20758).

126. *Id.* at 4.

127. *Id.*

Count One then offered a detailed description of the acts taken in furtherance of the conspiracy.¹²⁸ It identified seven victims, each of whom was tortured by Belfast or with his authorization. The victims were subjected to numerous acts of brutality. They were stripped of their clothes, bound in stress positions, and blindfolded for long periods of time. They were beaten and threatened with execution. The victims were held in unsanitary conditions in small cells that were often filled with unsanitary water. Several of the victims were burned with molten plastic or scalding water and stabbed with a bayonet. Other victims were sodomized and electrocuted. These acts occurred in Liberia and the victims were citizens of Liberia and Sierra Leone. One victim was killed while being tortured.

Count Two charged Belfast with conspiracy to use and carry a firearm in the commission of a felony in violation of 18 U.S.C. § 924(o).¹²⁹ Counts Three through Seven charged Belfast with committing torture against five individuals in violation of 18 U.S.C. § 2340A.¹³⁰ Finally, Count Eight charged Belfast with using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (1) (A).¹³¹

Belfast raised several procedural challenges to his prosecution.¹³² He also moved to dismiss the indictment on constitutional grounds.¹³³ The motion to dismiss offered a broad critique of the government's prosecution.

[T]he core problem with this case is that in its prosecution of Mr. Emmanuel [Belfast], the government seeks to oversee, through the open-ended terms of federal criminal law – the internal and wholly domestic actions of a foreign government. Not only does this constitute an improper attempt to meddle in the affairs of a foreign sovereign, presenting conflicting

128. *Id.* at 3–12.

129. *Id.* at 12.

130. *Id.* at 12–16.

131. *Id.* at 17.

132. *United States v. Belfast*, No. 06-20758, 2007 WL 1879909 (S.D. Fla. June 29, 2007).

133. Defendant's Motion to Dismiss the Indictment, and Memorandum of Law in Support Thereof, Based on the Unconstitutionality of 18 U.S.C. 2340A, Both on Its Face and as Applied to the Allegations of the Indictment, *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 980550 (S.D. Fla. Mar. 2, 2007).

and unintelligible standards for application, but also impermissibly expands the scope and authority of the federal government beyond constitutional parameters. In the indictment, the government charges that Mr. Emmanuel, while working as a leader in a special anti-terrorism unit, engaged in interrogation techniques that rose to the level of torture. As the government concedes, the prosecution of Mr. Emmanuel is a unique, first-of-its-kind prosecution despite the fact that the underlying law has existed for over a decade. However, as demonstrated below, it is an ill-fated prosecution that should not, and cannot, proceed without violating the Constitution of the United States.¹³⁴

Substantively, Belfast made six arguments. First, Belfast argued that Congress lacked the constitutional authority to implement the Torture Statute. He alleged that such authority could not be discerned from the Necessary and Proper Clause, the Treaty Clause, or the Offenses Clause.¹³⁵ Second, Belfast asserted that Congress lacked the authority to apply criminal law extraterritorially when the locus of the offense is completely foreign. In this case, Belfast argued there was no connection to the United States and no basis for overcoming the presumption against extraterritoriality. Third, he challenged the prosecution as a violation of the doctrine of sovereign immunity. As a government official acting in an official capacity, Belfast alleged he was immune from prosecution. Fourth, Belfast alleged that the Torture Statute was unconstitutionally vague because it did not give fair warning of the prohibited conduct and, therefore, violated the Due Process Clause of the Fifth Amendment. Fifth, Belfast argued that prosecuting him for acts that allegedly occurred outside the United States was unfair and, therefore, also violated the Fifth Amendment. Citing U.S. treatment of detainees in the war on terror, he also argued there was no consensus on the appropriate standards

134. *Id.* at 1.

135. Belfast also argued that the conduct set forth in the indictment was not universally condemned. "[T]he United States itself has concluded that depending on the severity of the domestic and even foreign threats faced by the government, the infliction of mental and related pain, such as by simulated drowning (waterboarding), is a permissible tactic." *Id.* at 3-4.

for interrogation in the context of national security.¹³⁶ Finally, Belfast asserted that the indictment would violate his Sixth Amendment right to a speedy trial, the right to compulsory process, and the right to effective assistance of counsel. On July 5, 2007, the district court denied all of Belfast's claims.¹³⁷

Belfast's trial began on September 29, 2008 before a jury in the federal district court for the Southern District of Florida. The trial lasted four weeks and included testimony from several victims, medical experts, and a State Department official. On October 30, 2008, the jury returned guilty verdicts on all eight counts. Attorney General Michael B. Mukasey announced that "[t]oday's conviction provides a measure of justice to those who were victimized by the reprehensible acts of Charles Taylor Jr. [Belfast] and his associates. It sends a powerful message to human rights violators around the world that, when we can, we will hold them fully accountable for their crimes."¹³⁸ On January 9, 2009, Belfast was sentenced to 97 years in prison.¹³⁹

136. *Id.* at 10 (citations omitted) ("According to news reports in the Washington Post and New York Times, the American government has detained persons and subjected them to torture: prolonged detention away from families and legal counsel, deprivation of sleep, sensory deprivation, kidnapping and delivery to countries not concerned with human rights, killing of civilians, intimidation by vicious dogs, waterboarding and disruption of families. Is there such a thing any more as a consensus view on the subject of torture in connection with interrogation touching on vital matters of national security?").

137. *United States v. Emmanuel*, No. 06-20758, 2007 WL 2002452 (S.D. Fla. July 5, 2007).

138. Press Release, Dep't of Justice, Roy Belfast Jr. A/K/A Chuckie Taylor Convicted on Torture Charges (Oct. 30, 2008), *available at* <http://www.justice.gov/archive/opa/pr/2008/October/08-crm-971.html>.

139. Press Release, Dep't of Justice, Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges (Jan. 9, 2009), *available at* <http://www.justice.gov/archive/opa/pr/2009/January/09-crm-021.html>. On January 9, 2009, Belfast was also sued in a civil lawsuit by five plaintiffs from Liberia. *See Kpadeh v. Emmanuel*, 261 F.R.D. 687 (S.D. Fla. 2009). One of the plaintiffs, Rufus Kpadeh, was also one of the victims in Belfast's criminal case. *Id.* The lawsuit was filed under the Alien Tort Statute and alleged claims of torture, cruel, inhuman, or degrading treatment, arbitrary arrest as well as several state law claims. *Id.* Belfast failed to respond to the lawsuit, and the court granted the plaintiffs a default judgment. *Id.* On February 5, 2010, the five plaintiffs were awarded \$22,352,000 in compensatory and punitive damages. *Id.*

Belfast appealed his conviction to the Eleventh Circuit Court of Appeals. According to Belfast, the primary focus of his appeal concerned the unique nature of the Torture Statute.

This appeal represents the first time any Court of Appeals will review the constitutionality of 18 U.S.C. § 2340A (the "Torture Act," or the "Act"). Emmanuel [Belfast] respectfully maintains that, by creating an offense that extends beyond that defined by the underlying treaty (the Convention against Torture or "CAT") and recognized as torture by the international community, Congress has created a statute that is *ultra vires*.¹⁴⁰

Belfast raised five issues on appeal. First, he alleged the statute defined torture "far more broadly" than the definition set forth in the Convention against Torture. As a result, Congress had exceeded its authority under the Constitution. Second, Belfast argued that the statute's effort to criminalize conspiracy also exceeded Congress's authority since conspiracy was not recognized either in the Convention against Torture or international law. Third, he alleged that 18 U.S.C. § 924(c) could not be applied to conduct that occurred abroad. Fourth, Belfast argued that numerous errors in the lower court proceedings deprived him of a fair trial. Finally, he alleged that his sentence had been imposed incorrectly because he had not been convicted of murder or kidnapping and, therefore, the cross-references to such acts in calculating his sentence were wrong.

On July 15, 2010, the Eleventh Circuit affirmed Belfast's conviction. In its opinion, the court noted that "[t]he facts of this case are riddled with extraordinary cruelty and evil."¹⁴¹ The court addressed each of the five issues Belfast raised on appeal. Part I of the opinion reviewed the facts of the case, and Part II examined the legal obligations established by the Convention against Torture and the Torture Statute.

In Part III of the opinion, the Eleventh Circuit considered several constitutional challenges Belfast brought regarding the

140. Brief of the Appellant, *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010), at 28.

141. *Belfast*, 611 F.3d at 793.

Torture Statute.¹⁴² The court began its analysis by considering the manner in which U.S. treaty obligations were implemented. The court determined that the Necessary and Proper Clause of the U.S. Constitution authorized the adoption of federal legislation that was meant to implement treaty obligations accepted pursuant to the Treaty Clause. For this reason, the Torture Statute was “a valid exercise of congressional power under the Necessary and Proper Clause, because the Torture Act tracks the provisions of the CAT [Convention against Torture] in all material respects.”¹⁴³ Indeed, the implementing legislation only needs a “rational relationship”¹⁴⁴ to the subject matter of the treaty.¹⁴⁵ “[D]ifferences in language and scope between the treaty and its implementing legislation did not mean that one lacked a rational relationship to the other.”¹⁴⁶ Thus, slight variations between the treaty and implementing legislation that are not material do not undermine the legitimacy of the legislation. Based on this analysis, the court rejected Belfast’s constitutional arguments regarding variances between the Convention against Torture and the language of the Torture Statute.

The court then reviewed the scope of the Torture Statute.¹⁴⁷ Both the language of the Convention against Torture and the U.S. record regarding ratification made clear that the treaty obligations were meant to apply during armed conflict. Thus, the court rejected Belfast’s claim that the Torture Statute was unconstitutional because it applied during armed conflicts. The court also rejected Belfast’s claim that he could not be prosecuted for acts of torture that occurred before Liberia ratified the Convention against Torture.¹⁴⁸ Such an interpretation was contrary to the text of the Convention.¹⁴⁹

142. *Id.* at 803.

143. *Id.* at 806.

144. *Id.* at 804.

145. *Id.*

146. *Id.* at 806.

147. *Id.* at 809.

148. *Id.*

149. The court also rejected Belfast’s argument that the torture statute was invalid because it sought to establish jurisdiction based solely on the alleged torturer’s presence in the United States. *Id.* at 810. Since the torture statute also established jurisdiction based on the alleged torturer’s U.S. nationality, Belfast’s argument was irrelevant.

Finally, the court considered and rejected Belfast's claim that the Torture Statute could not be applied to the extraterritorial conduct of a U.S. citizen.¹⁵⁰ The court recognized that Congress had the authority to regulate extraterritorial acts. Such intent was evident in the Torture Statute and could be inferred from the Convention against Torture.

First, the nature of the harm to which the CAT and the Torture Act are directed—"torture and other cruel, inhuman or degrading treatment or punishment throughout the world," *see* CAT, pmb1.—is quintessentially international in scope. Second, and relatedly, the international focus of the statute is "self-evident": Congress's concern was not to prevent official torture within the borders of the United States, but in nations where the rule of law has broken down and the ruling government has become the enemy, rather than the protector, of its citizens. Finally, limiting the prohibitions of the Torture Act to conduct occurring in the United States would dramatically, if not entirely, reduce their efficacy.¹⁵¹

In Part IV of the opinion, the Eleventh Circuit addressed Belfast's argument that Congress exceeded its constitutional authority by criminalizing conspiracy to commit torture, which was not recognized in either the Convention against Torture or international law.¹⁵² According to the court, the Convention against Torture did, in fact, authorize criminal liability for any acts in support of torture, including conspiracy.¹⁵³ The court also rejected Belfast's reliance on the Supreme Court's decision in *Hamdan v. Rumsfeld*.¹⁵⁴ Although the *Hamdan* decision found that a conspiracy charge is not recognized under customary international law, this was irrelevant because the Convention against Torture authorized criminal liability for conspiracy.¹⁵⁵

The court addressed two other arguments in Part IV. It rejected Belfast's assertion that acts committed in support of a

150. *Id.*

151. *Id.* at 811.

152. *Id.*

153. *Id.* at 811–12.

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

155. *Belfast*, 611 F.3d at 812.

conspiracy to commit torture were permissible when they were “governmental self-preservation tactics.”¹⁵⁶ In other words, claims of public emergency could not be used to justify torture.

[T]he entire premise of Emmanuel’s [Belfast’s] argument—that a conspiracy to commit torture is permissible whenever its object is to preserve governmental power—is unacceptable under the CAT. Official torture is most likely to occur precisely when an illegitimate regime perceives a threat to its dominance from dissenters. In recognition of this reality, the CAT itself unambiguously provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, art. 2(2). The CAT thus anticipated prosecutions such as this one, where torture is committed by a regime in order to maintain its brutal control over an unhappy populace. The conspiracy prosecution here was fully consistent with the mandate that such acts may be prosecuted.¹⁵⁷

The court also rejected Belfast’s assertion that the Torture Statute could not be applied to prosecute extraterritorial acts of conspiracy. Since the court had already determined that the Torture Statute applied to extraterritorial acts of torture, “it follows that there is extraterritorial jurisdiction to prohibit conspiracy.”¹⁵⁸

In Part V of the opinion, the Eleventh Circuit examined Belfast’s challenges to his conviction for using and carrying a firearm during, and in relation to, a crime of violence.¹⁵⁹ Belfast asserted that the statute could not be applied to such extraterritorial conduct. While the applicable statute (18 U.S.C. § 924(c)) was silent on its extraterritorial application, the court found that the statute was drafted in broad terms to apply “to any crime of violence that ‘may be prosecuted in a court of the United States.’”¹⁶⁰ Since the Torture Statute au-

156. *Id.*

157. *Id.*

158. *Id.* at 813.

159. *Id.*

160. *Id.* at 814 (quoting 18 U.S.C. § 924(c)(1)(A)).

thorized prosecution for torture, a clear act of violence, the court determined that 18 U.S.C. § 924(c) extended to extra-territorial acts of torture. The court also rejected Belfast's claims that the application of 18 U.S.C. § 924(c) was a violation of the Commerce Clause, holding that Congress had the authority under the Commerce Clause to adopt the statute.

In Part VI of the opinion, the Eleventh Circuit addressed several evidentiary challenges and other procedural issues raised by Belfast.¹⁶¹ It rejected the claim that hearsay statements by two victims should not have been admitted, finding that such statements fell within well-recognized exceptions to hearsay evidence. The court applied the same reasoning with respect to statements made by various individuals, including a former ATU solidier as well as a U.S. State Department official. The court also found no abuse of discretion when the district court allowed portions of the victims' medical records or excerpts from Belfast's personal notebook, which contained rap lyrics referencing the ATU and acts of violence, to be introduced at trial.¹⁶²

In addition, the court found that the jury instructions defining the elements of torture were appropriate. The jury instructions set forth the following definition and accompanying elements for establishing torture:

Torture means an act committed by a person, acting under the color of law, specifically intended to inflict severe physical pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the law prohibiting torture.

161. *Id.* at 816.

162. The rap lyrics appeared in a notebook that was in Belfast's possession upon his arrival at Miami International Airport. They included the following: "Take this for free, six feet is where you gonna be. ATU niggas on the scene. Body bag is all you see . . . More sweat in my training means less blood in my life. So with the shots from guns keep it dead and precise. Bull-doze ambushes in the midst of a fight. Try to cut my supply, you'll be losing your life. . . . army thugs united." *Id.* at 820.

The defendant can be found guilty of that offense only if all of the following acts are proved beyond a reasonable doubt: First: That the defendant committed an act with the specific intent to inflict severe physical pain or suffering; Second: That the defendant was acting under the color of law; Third: That the act of torture was against another person who was within the Defendant's custody or physical control; and Fourth: That the act of torture occurred outside the United States.¹⁶³

While the four-part test for establishing torture did not include the requirement that such conduct could not be incidental to a lawful sanction, the court did not find this omission problematic. The definition of torture, which appeared in the jury instructions, included the statement that judicially imposed sanctions or other lawful actions did not constitute torture.

Finally, the court rejected Belfast's argument that the district court committed reversible error by refusing to compel the U.S. government to produce classified memoranda from the Department of Justice regarding the definition of torture and the limits of lawful interrogation techniques. In reaching this decision, the court noted that Belfast had failed to establish the relevance of these documents in explaining his own actions. Moreover, the court noted that these documents were irrelevant for purposes of establishing the meaning of torture. "The Torture Act contains a specific and unambiguous definition of torture that is derived from the definition provided in the CAT. The language of that statute—not an executive branch memorandum—is what controls the definition of the crime."¹⁶⁴

In Part VII of the opinion, the Eleventh Circuit addressed Belfast's various challenges to his sentence.¹⁶⁵ It found that the district court properly calculated Belfast's sentence under the 2002 Federal Sentencing Guidelines Manual. It rejected Belfast's argument that the district court's use of the kidnapping guideline for determining an appropriate sentence was

163. *Id.* at 822.

164. *Id.* at 823.

165. *Id.*

inappropriate. It also rejected Belfast's claim that his victims had not been kidnapped.

On this record, taken in a light most favorable to the jury verdict, the evidence showed that even if Emmanuel's [Belfast's] victims were initially detained under lawful circumstances, the extended length and nature of their detention, coupled with the utter lack of access to courts, attorneys, or any information about their arrest, rendered the duration of their imprisonment wholly unlawful. And, in fact, there is absolutely no evidence in this record even suggesting that the seizure of Emmanuel's victims was lawful, or that any of his victims had violated, or were even suspected of violating, Liberian law. Instead, Jusu, Turay, and the other refugees were seized at a check-point because they were from Sierra Leone; Kpadeh was seized because he was a member of the non-violent Unity Party and refused to join the ATU; Dulleh, a university student, was arrested in his home, in the middle of the night; and Kamara was never told the reason for his arrest.

Not one of these victims was ever charged with a crime or brought before a court, and not one was given access to a lawyer, even though the Liberian courts were open and operating. The victims were transported to secret and remote locations, including the prison pits at Gbatala Base, the underground prison pits at Klay Junction, a military officer's garage, and an abandoned outhouse. Those are not the places of lawful detention. Indeed, the arrest and detention of the victims in inhumane conditions against their will was certainly an integral part of their torture. And, as the CAT itself provides in Article 2(2), claims of exigency or official justification can never be a defense to torture. The district court did not err in applying the kidnapping guideline in calculating Emmanuel's advisory guidelines range.¹⁶⁶

In addition, the court dismissed Belfast's claim that using the murder cross-reference in calculating his sentence was a

166. *Id.* at 825–26 (citations omitted).

violation of his rights under the Fifth and Sixth Amendments. The court held that the Sentencing Guidelines were advisory, and the district court had wide discretion in considering relevant conduct for purposes of calculating an appropriate sentence. While Belfast had not been convicted of murder or kidnapping, such information was still relevant under the Sentencing Guidelines.

In sum, the Eleventh Circuit rejected all of Belfast's arguments and affirmed the conviction. Belfast's petition for writ of certiorari was denied by the U.S. Supreme Court on Feb. 22, 2011.

After Belfast exhausted his direct appeals, he challenged his conviction in collateral proceedings and sought a certificate of appealability pursuant to 28 U.S.C. § 2255. He raised several ineffective assistance of counsel claims. His claims were found to be without merit and were denied by a magistrate judge.¹⁶⁷ This decision was subsequently affirmed by the district court.¹⁶⁸

The case of Roy Belfast, Jr. is significant for several reasons.¹⁶⁹ It represents the first prosecution and conviction under the Torture Statute. After 20 years, it still represents the only use of the statute. It addresses several issues regarding the legality of the Torture Statute. Finally, it provides a template for future prosecutions.

IV. THE CASE OF GEORGE TENET

The War on Terror has been a long and violent conflict. By most accounts, it began on September 11, 2001 even though some hostilities had occurred before that date.¹⁷⁰ The U.S. response to the attacks of September 11th was extensive. Counter-terrorism operations began immediately and were

167. Report of Magistrate Judge, *Belfast v. United States*, 2013 WL 594023 *20 (S.D. Fla. Oct. 17, 2012) (No. 12-20754).

168. *Belfast v. United States*, No. 12-20754, 2013 WL 594023 (S.D. Fla. Feb. 14, 2013).

169. See Elise Keppler, *supra* note 27 (discussing the criminal prosecution of Charles Taylor, Jr. in the United States).

170. Michael B. Mukasey, *The War on Terror: Where We Are and How We Got There*, 56 N.Y.L. SCH. L. REV. 9 (2011/2012) (arguing that Islamic terrorism in America started in the late 1980s).

conducted worldwide. On October 7, 2001, the United States began military operations in Afghanistan.

An integral component to the War on Terror was the detention and interrogation of suspected terrorists. Several individuals played a prominent role in developing, authorizing, and implementing the policies that governed these programs. At the highest level were President George W. Bush, Vice President Richard Cheney, Secretary of Defense Donald Rumsfeld, National Security Advisor Condoleezza Rice, Attorney General John Ashcroft, and CIA Director George Tenet.¹⁷¹ At the next level were senior government officials, including John Yoo and Jay S. Bybee (Department of Justice), William J. Haynes (Department of Defense), Alberto R. Gonzales (White House), and John Rizzo and Jose Rodriguez (Central Intelligence Agency). Countless other government officials and private contractors were involved, including those individuals who physically participated in the interrogation of detainees.

The Central Intelligence Agency played the primary role in developing and implementing the Detention and Interrogation Program. Its leader was George Tenet.

A. *The Defendant*

George Tenet was appointed by President Bill Clinton as the Director of Central Intelligence (“DCI”), and he began his tenure on July 11, 1997. As DCI, Tenet served as the head of the U.S. intelligence community, acted as the principal advisor to the President on intelligence matters, and served as the head of the Central Intelligence Agency.¹⁷² In this role, he was responsible for overseeing intelligence gathering as well as counterterrorism. He was also responsible for various CIA di-

171. Secretary of State Colin Powell was also a member of the Principals Committee, but he did not play an active role in the reviewing or authorizing the CIA’s Detention and Interrogation Program.

172. The responsibilities of the DCI were subsequently revised in 2004 by the Intelligence Reform and Terrorism Prevention Act. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004). While the DCI maintained responsibility for the Central Intelligence Agency, the position of Director of National Intelligence was created to oversee the entire U.S. intelligence community. *Id.* § 1011.

rectorates, including the Directorate of Operations. Tenet served as DCI until July 11, 2004.¹⁷³

The role of the Central Intelligence Agency in the detention of suspected terrorists was established soon after September 11, 2001.¹⁷⁴ Within days of the attacks, the National Security Council met to discuss operations for capturing terrorist suspects around the world.¹⁷⁵ On September 17, 2001, President Bush signed a classified Memorandum of Notification (“MON”) that authorized the Director of Central Intelligence to “undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.”¹⁷⁶ The MON “provided unprecedented authorities, granting the CIA significant discretion in determining whom to detain, the factual basis for the detention, and the length of the detention.”¹⁷⁷ On October 8, 2001, Tenet delegated the capture and detention authority set forth in the MON to James Pavitt, the CIA’s deputy director for operations and Cofer Black, the CIA’s chief of the Counterterrorism Center (“CTC”).¹⁷⁸ Despite this delegation, Tenet remained

173. GEORGE TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 487* (2007). In December 2004, Tenet was awarded the Presidential Medal of Freedom by President Bush. Ann Gerhart, *Bush Gives Medal of Freedom to “Pivotal” Iraq Figures*, WASH. POST, Dec. 15, 2004, at C01.

174. At the time, CIA policies prohibited “torture, cruel, inhuman, degrading treatment or punishment, or prolonged detention without charges or trial.” SSCI REPORT, *supra* note 3, at 18 (Executive Summary) (quoting Directorate of Operations Handbook, 50-2, Section XX(1)(a)). According to the CIA Directorate of Operations Handbook, “[i]t is CIA policy to neither participate directly in nor encourage interrogation which involves the use of force, mental or physical torture, extremely demeaning indignities or exposure to inhumane treatment of any kind as an aid to interrogation.” *Id.* (quoting Directorate of Operations Handbook, 50-2, Section XX(1)(a)).

175. See RON SUSKIND, *THE PRICE OF LOYALTY* 186 (2004) (There was a CIA plan for a covert war against terrorists all over the world the weekend after September 11, 2001.); BOB WOODWARD, *BUSH AT WAR 74–92* (2002) (describing Tenet’s briefing for President Bush on September 15, 2001).

176. SSCI REPORT, *supra* note 3, at 11 (Executive Summary) (citing the memorandum, which is a classified, unreleased document).

177. *Id.* (citing the classified memorandum). See also MAYER, *supra* note 2, at 38–39 (describing the path the Bush administration took to using controversial interrogation techniques).

178. SSCI REPORT, *supra* note 3, at 13 (Executive Summary).

actively involved in all aspects of the detention and interrogation of individuals in CIA custody.

The need to develop comprehensive procedures for interrogations became evident when Abu Zubaydah was captured in Pakistan on March 28, 2002. Zubaydah was believed to be a high-ranking Al-Qaeda official with extensive knowledge of Al-Qaeda operations. After Zubaydah was stabilized from injuries suffered during his capture, he was transferred to a CIA detention facility in Thailand where he received further medical treatment. He was initially interrogated by FBI officers, but interrogation authority was soon transferred exclusively to the CIA.¹⁷⁹ According to Tenet, “it was at this point that we got into holding and interrogating high-value detainees – ‘HVDs,’ as we called them – in a serious way.”¹⁸⁰

There were several steps in establishing the CIA’s Detention and Interrogation Program. The process for identifying interrogation techniques actually began in October 2001 when the CIA hired an outside psychologist, James Mitchell, to write a paper on Al-Qaeda’s interrogation resistance techniques. Mitchell collaborated with a Department of Defense psychologist, Bruce Jessen, on the project.¹⁸¹ Jessen was the senior psychologist at the Department of Defense’s Joint Personnel Recovery Agency, which was responsible for managing the military’s Survival Evasion Resistance and Escape (“SERE”)

179. See Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 22, 2009, at A27, available at <http://www.nytimes.com/2009/04/23/opinion/23soufan.html> (“Because the bureau would not employ these problematic techniques [of interrogation], our agents who knew the most about the terrorists could have no part in the investigation.”). See generally OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (2009).

180. TENET, *supra* note 173, at 241.

181. In 2005, Mitchell and Jessen formed a company that provided interrogators and debriefers to the CIA as well as general consulting services. By 2010, the CIA had paid over \$75 million to the company for its services. The consulting arrangement included an indemnification agreement that would cover expenses associated with criminal prosecution. In addition, Mitchell and Jessen received individual payments totaling \$2.6 million. SSCI REPORT, *supra* note 3, at 168–69 (Executive Summary). Spencer Ackerman, *Senate report on CIA torture claims spy agency lied about ‘ineffective’ program*, THE GUARDIAN (Dec. 9, 2014), <http://theguardian.com/us-news/2014/dec/09/cia-torture-report-released>.

training program.¹⁸² In Spring 2002, Mitchell and Jessen submitted their paper, *Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective*, to the CIA.¹⁸³ Soon thereafter, Mitchell and Jessen proposed that a series of specialized interrogation techniques be used against Al-Qaeda detainees in interrogations. These techniques were the subject of extensive discussions within the CIA. Eventually, ten “enhanced” interrogation techniques were proposed and submitted to CIA legal counsel for review:

- The **attention grasp** consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
- During the **walling** technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
- The **facial hold** is used to hold the detainee’s head immobile. The interrogator places an open palm on either side of the detainee’s face and the interrogator’s fingertips are kept well away from the detainee’s eyes.
- With the **facial or insult slap**, the fingers are slightly spread apart. The interrogator’s hand makes contact with the area between the tip of the detainee’s chin and the bottom of the corresponding earlobe.
- In **cramped confinement**, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller

182. The SERE program is used by the U.S. Army, Navy, and Air Force to train military personnel on survival tactics in hostile territory. See U.S. DEP’T OF DEFENSE, NO. 1300.21, DEPARTMENT OF DEFENSE INSTRUCTIONS (2001), available at <http://www.dtic.mil/whs/directives/corres/pdf/130021p.pdf>.

183. In addition to their work in developing interrogation techniques, Mitchell and Jessen personally participated as interrogators of CIA detainees. SSCI REPORT, *supra* note 3, at 66–67 (Executive Summary).

space lasts no more than two hours and in the larger space it can last up to 18 hours.

- **Insects** placed in a confinement box involve placing a harmless insect in the box with the detainee.
- During **wall standing**, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
- The application of **stress positions** may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle.
- **Sleep deprivation** will not exceed 11 days at a time.
- The application of the **waterboard** technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Air-flow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.¹⁸⁴

Two additional techniques, mock burials and the use of diapers on detainees, were considered but not included in the initial proposal. However, the use of diapers on detainees was eventually authorized as part of the CIA's Detention and Interrogation Program. Other techniques that were also authorized include solitary confinement, water dousing, dietary manipulation, sensory deprivation, rectal feeding and hydration, environmental manipulation, and forced nudity. The purpose of

184. CENTRAL INTELLIGENCE AGENCY, INSPECTOR GENERAL, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001 - OCTOBER 2003) 15 (2004) (emphasis added).

these interrogation techniques was to make detainees weak, fearful, and eventually compliant.¹⁸⁵

These interrogation techniques were discussed on several occasions by the Principles Committee in the Bush administration: National Security Adviser Condoleezza Rice, Vice President Richard Cheney, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and CIA Director George Tenet.¹⁸⁶ The interrogation techniques were discussed, reviewed, and refined by attorneys in various government offices, including the CIA's Office of General Counsel, National Security Council Legal Adviser, General Counsel to the Department of Defense, Counsel to the President, Counsel to the Vice President, Attorney General, and the Department of Justice's Office of Legal Counsel

185. According to a CIA background paper on interrogation techniques, Al-Qaeda detainees were well trained and able to resist standard interrogation techniques. CENT. INTELLIGENCE AGENCY, BACKGROUND PAPER ON CIA'S COMBINED USE OF INTERROGATION TECHNIQUES 1, 17 (2004) [hereinafter CIA BACKGROUND PAPER]. Accordingly, the interrogation process needed to overwhelm the detainee's resistance. "Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence HVD [high value detainee] behavior, to overcome a detainee's resistance posture." *Id.* at 1. Thus, the goal of interrogation "is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner." *Id.* Interrogation techniques were divided into three categories. *Id.* Conditioning techniques set the baseline level of treatment "to demonstrate to the HVD that he has no control over basic human needs." *Id.* at 4. These techniques include forced nudity, sleep deprivation, and dietary manipulation. *Id.* at 5. Corrective techniques are used "to correct, startle, or to achieve another enabling objective with the detainee." *Id.* These techniques include the insult slap, abdominal slap, facial hold, and attention grasp. *Id.* Finally, coercive techniques place the detainee in more physical and psychological stress. These techniques include walling, water dousing, stress positions, wall standing, and cramped confinement. *Id.* at 7-8. In addition to these interrogation techniques, detainees are exposed to white noise/loud sounds and constant light during the interrogation process. *Id.* at 4.

186. See MAYER, *supra* note 2, at 143 ("Bush also knew about, and approved of, White House meetings in which his top cabinet members were briefed by the CIA on its plans to use specific 'enhanced' interrogation techniques on various high-value detainees. The meetings were chaired by Rice, who was then the National Security Adviser . . . The participants were the members of the Principals Committee . . . : Vice President Cheney, Secretary of State Powell, Secretary of Defense Rumsfeld, CIA Director Tenet, and Attorney General Ashcroft.").

(“OLC”).¹⁸⁷ The OLC eventually played a critical role in the review process.¹⁸⁸ Other government offices, including the Federal Bureau of Investigation and the Criminal Division of the Department of Justice, were also informed of the proposed interrogation techniques although they played a less significant role in the review process.¹⁸⁹

As Zubaydah recuperated at the black site in Thailand from the wounds he suffered when he was captured, the CIA sought formal authorization for the use of the proposed interrogation techniques. However, the CIA continued to interrogate Zubaydah until mid-June 2002, when he was placed in isolation for 47 days.

During Zubaydah’s isolation, the CIA sought an advance declination of prosecution from the Department of Justice to protect CIA personnel from possible criminal prosecution for using enhanced interrogation techniques. On July 8, 2002, a lawyer for the CIA’s Counterterrorism Center drafted a letter to Attorney General Ashcroft seeking “a formal declination of prosecution, in advance, for any employees of the United States, as well as any other personnel acting on behalf of the United States, who may employ methods in the interrogation of Abu Zubaydah that otherwise might subject those individuals to prosecution.”¹⁹⁰ The letter acknowledged that use of aggressive methods would be prohibited by the Torture Statute “apart from potential reliance upon the doctrines of necessity

187. Letter from Eric H. Holder, Jr., Attorney General to the Honorable John D. Rockefeller IV, (Apr. 17, 2009) (containing the declassified “OLC Opinions on the CIA Detention and Interrogation Program Submitted by Senator John D. Rockefeller IV”).

188. See generally Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) (examining the role of the Office of Legal Counsel in the operations of the executive branch); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000) (examining the role of the Office of Legal Counsel).

189. Members of Congress were also informed about the Detention and Interrogation Program. See generally Cent. Intelligence Agency Ctr. for the Study of Intelligence, *Overview of CIA-Congress Interactions Concerning the Agency’s Rendition-Detention-Interrogation Program* (approved for release Dec. 8, 2014) (highlighting the efforts of the CIA to inform Congress on the rendition and interrogation program).

190. SSCI REPORT, *supra* note 3, at 33 (quoting classified email dated July 8, 2002).

or of self-defense.”¹⁹¹ Although the letter was widely circulated within the CIA, it is unclear whether the letter was ever sent to the Attorney General.¹⁹² At a July 13, 2002 meeting attended by several CIA and DOJ officials, the CIA’s Office of General Counsel proposed that the Department of Justice “issue an advance declination of prosecution for any CIA employee involved in the EIT program whose participation was in good faith and within the terms and conditions of the [forthcoming OLC] memorandum.”¹⁹³ The proposal was immediately rejected by Michael Chertoff, the chief of the Department of Justice’s Criminal Division.

Throughout June and July 2002, the CIA was in regular communication with the OLC as it refined its legal analysis on the legality of enhanced interrogation techniques. On July 13, 2002, John Yoo, Deputy Assistant Attorney General sent John Rizzo, Acting General Counsel, a two-page letter describing the elements necessary for establishing the crime of torture under 18 U.S.C. § 2340.¹⁹⁴ The letter was written in response to questions posed by Rizzo to Yoo at a meeting earlier that day. In his letter, Yoo indicated that a more detailed memorandum regarding 18 U.S.C. § 2340 was forthcoming. Yoo subsequently received a psychological assessment on Zubaydah from the CIA to assist him in drafting the legal opinion.¹⁹⁵ On July 24 and 26, 2002, the OLC informed the CIA by telephone that several of the proposed interrogation techniques were lawful and could be used on Zubaydah. The OLC indicated that written opinions would be issued shortly.

The now-infamous “torture memos” were issued on August 1, 2002. The first memorandum was submitted by Jay S. Bybee, the Assistant Attorney General and head of the OLC, for Alberto R. Gonzales, Counsel to the President, and ad-

191. SSCI REPORT, *supra* note 3, at 33.

192. SSCI REPORT, *supra* note 3, at 33.

193. RIZZO, *supra* note 15, at 192.

194. Letter from John Yoo, Deputy Assistant Attorney General, to John Rizzo, Acting General Counsel, Cent. Intelligence Agency (July 13, 2002).

195. LARRY SIEMS, THE TORTURE REPORT: WHAT THE DOCUMENTS SAY ABOUT AMERICA’S POST-9/11 TORTURE PROGRAM 52 (2011); Memorandum to John Yoo on Psychological Assessment of Zain al’Abidin al-Abideen Muhammad Hassan, a.k.a. Abu Zubaydah (July 24, 2002), *available at* <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc4.pdf>.

dressed the “Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A.”¹⁹⁶

[T]his question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.¹⁹⁷

The OLC first examined the elements for establishing torture under the Torture Statute. It determined that acts of torture must be inflicted with specific intent. “Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant’s precise objective.”¹⁹⁸ Mere knowledge that severe pain or suffering may result from a defendant’s actions is insufficient for establishing criminal liability. In addition, a defendant may negate specific intent if he acted with a good faith belief that his actions would not cause severe pain or suffering.

196. Memorandum from Dep’t of Justice, Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter 2002 OLC Memorandum to Gonzales]. John Yoo, Deputy Assistant Attorney General, was the primary author of the memorandum. SIEMS, *supra* note 195, at 53. Yoo also sent Gonzales a separate letter on August 1, 2002 discussing “whether interrogation methods used on captured al Qaeda operatives, which do not violate the prohibition on torture found in 18 U.S.C. §2340-2340A, would either: a) violate our obligations under the Torture Convention, or b) create the basis for a prosecution under the Rome Statute establishing the International Criminal Court (ICC).” Letter from Department of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (citations omitted). Yoo concluded that the interrogation methods would not violate the Convention against Torture and would not fall within the jurisdiction of the International Criminal Court. *Id.*

197. 2002 OLC Memorandum to Gonzales, *supra* note 196, at 1.

198. *Id.* at 3.

With respect to severe physical pain or suffering, the OLC asserted that a victim of torture must experience intense pain or suffering that rises to a high level, “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”¹⁹⁹ With respect to severe mental pain or suffering, the OLC argued that such acts must cause long-term mental harm. This temporal element must be extensive although it need not be permanent. Examples of long-term mental harm include post-traumatic stress disorder and chronic depression. By requiring specific intent for acts of torture, the OLC argued that the “defendant must specifically intend to cause prolonged mental harm” in order to commit torture.²⁰⁰

Accordingly, the OLC opinion concluded that torture is an extreme act and that the Torture Statute is only meant to apply to the most egregious acts that cause severe physical or mental pain or suffering.²⁰¹ The OLC also reviewed the text and history of the Convention against Torture, case law surrounding the Torture Victim Protection Act, and several international decisions, all of which reaffirmed that the Torture Statute only applies to the most egregious acts.²⁰²

The OLC then examined possible challenges to the Torture Statute. The OLC asserted that the statute might be unconstitutional if it infringed on the President’s authority to conduct war against Al-Qaeda and its allies. The Constitution vested the President with exclusive authority as the Commander-in-Chief. Thus, “[a]ny effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.”²⁰³ The OLC also asserted that standard criminal law defenses such as necessity and self-defense might be available to challenge a prosecution under the Torture Statute and eliminate criminal liability.²⁰⁴

199. *Id.* at 6.

200. *Id.* at 8.

201. *Id.* at 12.

202. *Id.* at 22, 31.

203. *Id.* at 31.

204. *Id.* at 39.

The second OLC memorandum was also submitted by Jay S. Bybee. It was sent to John Rizzo, the Acting CIA General Counsel, and addressed the "Interrogation of al Qaeda Operative."²⁰⁵ This document was drafted in response to the CIA's request for approval of the interrogation techniques that would be used on Zubaydah.

You have asked for this Office's views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code. You have asked for this advice in the course of conducting interrogations of Abu Zubaydah. As we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001. This letter memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002, that the proposed conduct would not violate this prohibition.²⁰⁶

The OLC set forth numerous conditions to its legal analysis.²⁰⁷ It presumed that Zubaydah had critical information regarding plans to attack the United States or U.S. interests overseas. It also presumed that Zubaydah was trained on resisting interrogation techniques and that he had already refused to disclose information. In addition, the OLC presumed that the proposed interrogation techniques would likely be used for several days and for no more than thirty days. A medical expert would be present throughout the interrogations, and the interrogations would stop if deemed medically necessary.²⁰⁸ The OLC then listed the ten interrogation techniques and offered a detailed description of each: (1) attention grasp; (2) walling; (3) facial hold; (4) facial slap (insult slap); (5) cramped confinement; (6) wall standing; (7) stress positions;

205. Memorandum from Department of Justice, Office of Legal Counsel, to John Rizzo, Acting General Counsel of the Cent. Intelligence Agency on the Interrogation of Al Qaeda Operative, (Aug. 1, 2002) [hereinafter 2002 OLC Memorandum to Rizzo]. Yoo was also the primary author of this memorandum. SIEMS, *supra* note 195, at 53.

206. 2002 OLC Memorandum to Rizzo, *supra* note 205, at 1.

207. *Id.* at 1-4.

208. *Id.* at 4.

(8) sleep deprivation; (9) insects placed in a confinement box; and (10) the waterboard.²⁰⁹ The OLC noted that most of these techniques had been used in the SERE training program upon thousands of U.S. military personnel with minimal harmful consequences. It then noted that the CIA had completed a psychological profile on Zubaydah which determined that the interrogation techniques would not have a negative impact on his mental condition.²¹⁰ Finally, the OLC indicated that its legal advice was based upon the facts that had been provided by the CIA and that the “advice would not necessarily apply” if these facts were to change.²¹¹

In its legal analysis, the OLC indicated that criminal liability under the Torture Statute required the establishment of five elements: “(1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant’s custody or control; (4) the defendant specifically intended to inflict severe pain or suffering; and (5) that the acted [sic] inflicted severe pain or suffering.”²¹² The first three elements were presumed: Zubaydah was in U.S. custody, he was detained outside the United States, and the CIA interrogators were acting under color of law. Accordingly, the memorandum focused on the remaining two elements.

The OLC examined whether the application of the ten interrogation techniques, either in isolation or when applied as part of a course of conduct, rose to the level of severe physical or mental pain or suffering.²¹³ With respect to physical pain or suffering, the OLC indicated that such pain must be “difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury.”²¹⁴ Examples of physical pain that could give rise to such claims of torture include “severe beatings with weapons such as clubs, and the burning of prisoners.”²¹⁵ The OLC concluded that none of the interrogation techniques, either in isolation or in

209. *Id.* at 2-4.

210. *Id.* at 6-9.

211. *Id.* at 1.

212. *Id.* at 9.

213. *Id.* at 9, 11.

214. *Id.* at 10.

215. *Id.*

conjunction, would inflict severe physical pain or suffering as required by the Torture Statute.

With respect to severe mental pain or suffering, the OLC noted that the Torture Statute required the establishment of a predicate act as a condition for finding severe mental pain or suffering. "Those predicate acts are: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application of mind-altering substances or procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that any of the preceding acts will be done to another person."²¹⁶ The OLC determined that none of the enhanced interrogation methods to be used on Zubaydah involved threats to a third party, the use of drugs, or the infliction of severe physical pain.²¹⁷ "Thus, the question is whether any of these acts, separately or as a course of conduct, constitutes a threat of severe physical pain or suffering, a procedure designed to disrupt profoundly the senses, or a threat of imminent death."²¹⁸ Reviewing each of the proposed interrogation methods, the OLC concluded that the attention grasp, facial hold, facial slap, walling, stress positions, wall standing, cramped confinement, and use of insects in the confinement box would not be considered a predicate act for purposes of the Torture Statute. Under the controlled circumstances set forth by the CIA, such acts would not disrupt the senses or cause a reasonable person to fear imminent death. Waterboarding would, however, constitute a threat of imminent death to a reasonable person.²¹⁹ "Although the waterboard constitutes a threat of imminent death, prolonged mental harm must nonetheless result to violate the statutory prohibition on infliction of severe mental pain or suffering."²²⁰ According to the information provided by the CIA, the effects of waterboarding dissipate almost immediately and prolonged mental harm is not anticipated. In the absence of pro-

216. *Id.* at 12.

217. *Id.*

218. *Id.*

219. *Id.* at 15.

220. *Id.*

longed mental harm, such “procedures would not constitute torture within the meaning of the statute.”²²¹

Finally, the OLC addressed the specific intent requirement in the Torture Statute. “To violate the statute, an individual must have the specific intent to inflict severe pain or suffering.”²²² In other words, the defendant’s goal must have been to inflict such pain or suffering on the victim. In the absence of such intent, the OLC determined there would be no violation of the Torture Statute. Thus, a good faith belief by the defendant that he was not causing such suffering would negate the finding of specific intent. In addition, the CIA’s research on the proposed interrogation methods and its consultations with medical and psychological professionals “demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah.”²²³

In conclusion, the OLC indicated that the proposed interrogation techniques would not violate the Torture Statute. However, the OLC added a qualification to its opinion. “We wish to emphasize that this is our best reading of the law; however, you should be aware that there are no cases construing the statute; just as there have been no prosecutions brought under it.”²²⁴

Following the OLC’s written approval, the CIA immediately began using the enhanced interrogation techniques on Abu Zubaydah. Mitchell and Jessen, the psychologists who developed the techniques, played a primary role in Zubaydah’s interrogation. Detailed descriptions of the interrogation sessions were forwarded to CIA Headquarters. The following account was presented in the SSCI Report and describes the initial application of enhanced interrogation techniques on Zubaydah.

From August 4, 2002, through August 23, 2002, the CIA subjected Abu Zubaydah to its enhanced interro-

221. *Id.*

222. *Id.* at 16.

223. *Id.* at 18.

224. *Id.* at 18. The two OLC legal opinions were subsequently withdrawn by the Office of Legal Counsel in 2004. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 142-76 (1st ed. 2007).

gation techniques on a near 24-hour-per-day basis. After Abu Zubaydah had been in complete isolation for 47 days, the most aggressive interrogation phase began at approximately 11:50 AM on August 4, 2002. Security personnel entered the cell, shackled and hooded Abu Zubaydah, and removed his towel (Abu Zubaydah was then naked). Without asking any questions, the interrogators placed a rolled towel around his neck as a collar, and backed him up into the cell wall (an interrogator later acknowledged the collar was used to slam Abu Zubaydah against a concrete wall). The interrogators then removed the hood, performed an attention grab, and had Abu Zubaydah watch while a large confinement box was brought into the cell and laid on the floor. A cable states Abu Zubaydah “was unhooded and the large confinement box was carried into the interrogation room and paced [sic] on the floor so as to appear as a coffin.” The interrogators then demanded detailed and verifiable information on terrorist operations planned against the United States, including the names, phone numbers, email addresses, weapon caches, and safe houses of anyone involved. CIA records describe Abu Zubaydah as appearing apprehensive. Each time Abu Zubaydah denied having additional information, the interrogators would perform a facial slap or face grab. At approximately 6:20 PM, Abu Zubaydah was waterboarded for the first time. Over a two-and-a-half-hour period, Abu Zubaydah coughed, vomited, and had “involuntary spasms of the torso and extremities” during waterboarding.²²⁵

The CIA recorded several of these interrogation sessions. The videos showed Zubaydah being subjected to various interrogation techniques, including waterboarding. In the videos, Zubaydah was shown screaming and begging the interrogators to stop the treatment. These recordings were later destroyed at the request of Jose Rodriguez, the Director of the CIA’s Counterterrorism Center. The destruction of the videotapes

225. SSCI REPORT, *supra* note 3, at 40–41 (Executive Summary) (citations omitted).

would give rise to a criminal inquiry by the Department of Justice although no charges were ever filed.²²⁶

Zubaydah was subjected to enhanced interrogation methods for 20 consecutive days. During this time, he “spent a total of 266 hours (11 days, 2 hours) in the large (coffin size) confinement box and 29 hours in a small confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet.”²²⁷ Zubaydah was told that “the only way he would leave the facility was in the coffin-shaped confinement box.”²²⁸ During his interrogation sessions, Zubaydah often became “hysterical” and he frequently “cried,” “begged,” “pleaded,” and “whimpered.”²²⁹ After one waterboarding session, Zubaydah became unresponsive, “with bubbles rising through his open, full mouth” and required medical intervention to regain consciousness.²³⁰

The CIA viewed the enhanced interrogation techniques as successful. In fact, Mitchell and Jessen recommended to CIA Headquarters that “the aggressive phase at [DETENTION SITE GREEN] should be used as a template for future interrogation of high value captives.”²³¹

Zubaydah remained in CIA custody for four years.²³² He was detained at CIA facilities in Afghanistan, Thailand, and Poland. On September 5, 2006, Zubaydah was transferred to Guantanamo and placed in the custody of the Department of Defense. In a March 2007 appearance before a Combatant Sta-

226. See RODRIGUEZ, *supra* note 15, at 181–218 (describing the destruction of the interrogation tapes).

227. SSCI Report, *supra* note 3, at 42.

228. *Id.*

229. *Id.* at 42–43. The interrogation sessions also had a profound impact on CIA personnel. *Id.* at 44–45.

230. *Id.* at 43–44.

231. *Id.* at 46.

232. Zubaydah’s presence in the CIA’s Detention and Interrogation Program was publicly revealed on December 26, 2002. See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html> (discussing the capture of Abu Zubaydah and CIA interrogation methods).

tus Review Tribunal at Guantanamo, Zubaydah described his treatment by the CIA as torture.²³³

Zubaydah's efforts to challenge his detention in federal court have been unsuccessful. While Zubaydah filed a petition for writ of habeas corpus in August 2008, the federal court has failed to rule on countless motions in the case.²³⁴ As of August 2015, the case remains pending in the federal district court for the District of Columbia.²³⁵ This outcome is consistent with statements made by CIA officials during Zubaydah's detention. On July 15, 2002, for example, CIA officers at one of Zubaydah's detention sites sent a cable to CIA Headquarters indicating that "[i]n light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life."²³⁶ In response, CIA Headquarters sent the following affirmation:

There is a fairly unanimous sentiment within HQS that [Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life. This may preclude [Abu Zubaydah] from being turned over to another country, but a final decision regarding his future incarceration condition has yet to be made.²³⁷

233. Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016, 22 (March 27, 2007), https://www.aclu.org/sites/default/files/pdfs/safefree/csrt_abuzubaydah.pdf. Large portions of Zubaydah's testimony, including descriptions of specific interrogation techniques, were redacted.

234. Petition for Writ of Habeas Corpus, *Husayn v. Gates*, 08-1360 (RWR) (D.D.C. Aug. 5, 2008).

235. See Raymond Bonner, *The Strange Case of the Forgotten Gitmo Detainee*, POLITICO MAGAZINE, May 12, 2015, <http://www.politico.com/magazine/story/2015/05/abu-zubaydah-tortured-waterboarded-cia-dc-circuit-court-guantanamo-117833.html#.VYmdKrfbJmM> ("Zubaydah's case has been pending for some 2,400 days, and it will be years before it goes to trial, if it ever does.").

236. SSCI REPORT, *supra* note 3, at 35 (Executive Summary) (citations omitted) (quoting a confidential cable).

237. *Id.*

Two other high profile Al-Qaeda members were captured in Fall 2002. Ramzi Bin Al-Shibh, an alleged facilitator for the September 11 attacks, was captured in Pakistan on September 11, 2002 and soon transferred to CIA custody. He was detained at CIA detention facilities in Afghanistan, Poland, Morocco, Romania and transferred to Guantanamo on September 5, 2006. Abd al-Rahim al-Nashiri, an alleged architect of the 2000 attack on the U.S.S. Cole, was captured in Dubai in October 2002. Al-Nashiri was transferred to CIA detention centers in Afghanistan, Thailand, Poland, Morocco, and Romania before being sent to Guantanamo on September 4, 2006.²³⁸ During their detention, both al-Nashiri and Al-Shibh were subjected to enhanced interrogation techniques, but only after the CIA received written confirmation from the OLC. According to CIA General Counsel:

[s]ince the OLC memo we had gotten a couple of months before was specifically addressed to the EITs [enhanced interrogation techniques] being applied only to Zubaydah, I quickly got confirmation from the DOJ that the conclusions reached by the OLC on its August 1 memo pertaining to Zubaydah would also cover similarly high-value – and resistant – Al Qaeda prisoners. And so the EITs began with al-Nashiri and bin al-Shibh.²³⁹

Tenet received regular updates from CIA detention centers on the status of individual detainees. In addition, he remained actively involved in reviewing and approving CIA detention and interrogation procedures. “[E]very single plan was drawn up by interrogators, and then submitted for approval to the highest possible level, meaning the director of the CIA. Any change in the plan – even if an extra day of a certain treatment was added – was signed off on by the Director.”²⁴⁰

238. Memorandum from Headquarters, Joint Task Force Guantanamo, Department of Defense to Commander, United States Southern Command 6, Dec. 8, 2006.

239. RIZZO, *supra* note 15, at 194.

240. MAYER, *supra* note 2, at 167. See also RIZZO, *supra* note 15, at 177; WOODWARD, *supra* note 175, at 146 (describing meetings regarding detention and interrogation program); Dana Priest, *CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A01 (describing the suspension of interrogation techniques pending a review by the Justice Department and other administration lawyers); Michael

On January 28, 2003, Tenet approved formal guidelines for the confinement and interrogation of detainees in CIA custody.²⁴¹ The Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001 identified two sets of permissible interrogation techniques – Standard Techniques and Enhanced Techniques – and imposed rules on the application of these techniques.²⁴² “Unless otherwise approved by Headquarters, CIA officers and other personnel acting on behalf of CIA may use only Permissible Interrogation Techniques.”²⁴³

Standard Techniques were defined as “techniques that do not incorporate physical or substantial psychological pressure,” and which “include, but are not limited to, all lawful forms of questioning employed by US law enforcement and military interrogation personnel.”²⁴⁴ Specific examples of Standard Techniques included: “the use of isolation, sleep deprivation not to exceed 72 hours, reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainee), deprivation of reading material, use of loud music or white noise (at a decibel level calculated to avoid damage to the detainee’s hearing), and the use of diapers for limited periods (generally not to exceed 72 hours)”²⁴⁵ Standard Techniques required prior approval “[w]henever feasible.”²⁴⁶ Medical and psychological personnel must be available for consultation and travel to the interroga-

Scheur, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005 (addressing meetings between National Security Council advisors and CIA officials).

241. CENT. INTELLIGENCE AGENCY, GUIDELINES ON INTERROGATIONS CONDUCTED PURSUANT TO THE [REDACTED] (2003) [hereinafter CIA GUIDELINES ON INTERROGATIONS]. By January 2003, approximately 40 detainees were already in CIA custody. SSCI REPORT, *supra* note 3, at 10 (Executive Summary) (citations omitted).

242. Tenet also approved a document setting forth minimum standards for detention. CENT. INTELLIGENCE AGENCY, GUIDELINES ON CONFINEMENT CONDITIONS FOR CIA DETAINEES (2003).

243. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 1. All personnel involved in interrogations had to be screened for medical, psychological, and security issues. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2. They were required to read the Guidelines and agree to comply with them. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2.

244. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 1.

245. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 1.

246. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 3.

tion site during interrogations employing Standard Techniques.

Enhanced Techniques were defined as “techniques that do incorporate physical or psychological pressure beyond Standard Techniques.”²⁴⁷ Twelve techniques were identified: attention grasp, walling, facial hold, facial slap, abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation, use of diapers for prolonged periods, use of insects, and waterboarding.²⁴⁸ Other techniques could be used if specifically approved. In addition, these techniques could only be used by approved interrogators “with appropriate medical and psychological participation in the process.”²⁴⁹ Moreover, “[t]he use of each Enhanced Technique is subject to specific temporal, physical, and related conditions, including a competent evaluation of the medical and psychological state of the detainee.”²⁵⁰

Enhanced Techniques required prior written approval, which could only be provided when the Director of the Counterterrorist Center determined that: “(a) the specific detainee is believed to possess information about risks to the citizens of the United States or other nations, (b) the use of the Enhanced Technique(s) is appropriate in order to obtain that information, (c) appropriate medical and psychological personnel have concluded that the use of the Enhanced Technique(s) is not expected to produce ‘severe physical or mental pain or suffering,’ and (d) the personnel authorized to employ the Enhanced Technique(s) have completed the attached Acknowledgment.”²⁵¹ Medical and psychological personnel must be “on site” during interrogations employing Enhanced Techniques. All interrogation sessions using Enhanced Techniques had to be documented, and the documents would later be sent to CIA Headquarters.²⁵²

247. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2.

248. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2. Additional “enhanced techniques” could be added subject to written approval.

249. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2.

250. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2.

251. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 3.

252. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 3. For both Standard Techniques and Enhanced Techniques, medical and psychological personnel were authorized to suspend the interrogations “if they determine that significant and prolonged physical or mental injury, pain, or suffering is

On March 1, 2003, Khalid Shaykh Muhammad was captured in Pakistan and transferred to CIA custody. Muhammad was considered one of the highest-ranking members of Al-Qaeda and the principal architect of the 9/11 attacks. He was first sent to the Salt Pit, a CIA detention facility located outside Bagram Air Base in Afghanistan. CIA Headquarters immediately authorized the use of enhanced interrogation techniques on Muhammad, which were used a few minutes after his questioning began.

KSM [Khalid Shaykh Muhammad] was subjected to facial and abdominal slaps, the facial grab, stress positions, standing sleep deprivation (with his hands at or above head level), nudity, and water dousing. Chief of Interrogations [redacted] also ordered the rectal rehydration of KSM without a determination of medical need, a procedure that the chief of interrogations would later characterize as illustrative of the interrogator's "total control over the detainee."²⁵³

Within a few days, Muhammad was transferred to a CIA detention facility in Poland (Detention Site Blue).

KSM arrived at DETENTION SITE BLUE at approximately 6:00 PM local time on March [redacted], 2003, and was immediately stripped and placed in the standing sleep deprivation position. At 6:38 PM, after the medical and psychological personnel who had traveled with KSM from DETENTION SITE COBALT cleared KSM for the CIA's enhanced interrogation techniques, the detention site requested CIA Headquarters' approval to begin the interrogation process. The detention site received the approvals at 7:18 PM, at which point the interrogators began using the CIA's enhanced interrogation techniques on KSM.²⁵⁴

Muhammad was stripped naked and subjected to standing sleep deprivation, attention grab, facial grab, insult slap, ab-

likely to result if the interrogation is not suspended." CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 3.

253. SSCI REPORT, *supra* note 3, at 82 (Executive Summary) (citations omitted).

254. SSCI REPORT, *supra* note 3, at 84 (Executive Summary) (citations omitted).

dominal slap, kneeling stress position, and walling.²⁵⁵ His family was also threatened during these interrogations.²⁵⁶

On March 10, 2003, KSM was subjected to the first of his 15 separate waterboarding sessions. The first waterboarding session, which lasted 30 minutes (10 more than anticipated in the Office of Legal Counsel's August 1, 2002, opinion), was followed by the use of a horizontal stress position that had not previously been approved by CIA Headquarters.²⁵⁷

Muhammad would eventually be waterboarded 183 times.²⁵⁸ He was subsequently transferred to other CIA detention facilities, including one in Romania, before being sent to Guantanamo on September 5, 2006.²⁵⁹

In January 2003, the CIA's Office of Inspector General (OIG) began a review of the CIA's detention and interrogation program.²⁶⁰ The review was initiated in response to a notification from the CIA Deputy Director for Operations "that Agency personnel had used unauthorized interrogation techniques with a detainee, 'Abd Al-Rahim Al-Nashiri, at another foreign site, and requested that OIG investigate.'"²⁶¹ In addition, the Inspector General had also received "information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights."²⁶² Based on this information, the Inspector General examined CIA detention and interrogation policies between September 2001 and October 2003.

On May 7, 2004, the Inspector General issued its Special Review of the CIA's "Counterterrorism Detention and Interro-

255. SSCI REPORT, *supra* note 3, at 84–85 (Executive Summary).

256. SSCI REPORT, *supra* note 3, at 85 (Executive Summary).

257. SSCI REPORT, *supra* note 3, at 85 (Executive Summary).

258. According to Jose Rodriguez, the Director of the Counterterrorism Center, the reference to 183 instances of waterboarding refers to each instance where water was applied to Muhammad's nose and mouth. RODRIGUEZ, *supra* note 15, at 52.

259. SSCI REPORT, *supra* note 3, at 96 (Executive Summary).

260. CENT. INTELLIGENCE AGENCY, OFFICE OF INSPECTOR GEN., 2003-7123-IG, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES 2 (2004) [hereinafter OIG SPECIAL REVIEW].

261. *Id.* at 1.

262. *Id.* at 2.

gation Activities.”²⁶³ While the OIG Special Review was highly redacted, the declassified portions described extensive abuses on several detainees including Abd Al-Rahim Al-Nashiri and Khalid Shaykh Muhammad. For example, the OIG documented that a debriefer had “racked” an unloaded semi-automatic handgun near Al-Nashiri’s head while he was shackled in his cell. The same debriefer also activated a power drill near Al-Nashiri’s head while Al-Nashiri was standing naked and hooded in his cell. In addition, the debriefer threatened Al-Nashiri by saying that “we could get your mother in here,” and “we can bring your family in here.”²⁶⁴ Similar threats were made to Muhammad, who was told, “we’re going to kill your children.”²⁶⁵ Other examples of “unauthorized” techniques included the use of pressure points, threats, blowing smoke into a detainee’s face, and the use of a hard brush on detainees.

The Inspector General offered several conclusions regarding the Detention and Interrogation Program.²⁶⁶ First, the OIG determined that the CIA had received several legal opinions affirming the legality of the enhanced interrogation techniques. These legal opinions had been drafted by the OLC with input from the CIA’s Office of General Counsel and other government agencies. Second, the OIG found that the CIA had offered different levels of guidance and support to CIA personnel who were detaining and interrogating high value detainees, particularly in the early months of the program. In this respect, the OIG noted that the CIA had failed to issue comprehensive written guidelines regarding detention and interrogation until January 2003.²⁶⁷ Until then, Agency personnel received only ad hoc guidance through cables and briefings. Similarly, the Office of Medical Services (OMS) did not issue guidelines regarding medical and psychological support to detainee interrogations until April 2003 and, even

263. *Id.* at 1.

264. *Id.* at 42. Debriefers were only allowed to question detainees. They were not allowed to use or administer enhanced interrogation techniques. *Id.* at n.6. In contrast, interrogators were authorized to question and administer enhanced interrogation techniques on detainees. *Id.*

265. *Id.* at 43.

266. A set of ten recommendations were redacted from the document. *Id.* at 106–09.

267. *Id.* at 103.

then, the guidelines were issued in “draft” form.²⁶⁸ Third, the OIG found that some Agency personnel did not follow written procedures. As a result, some “[u]nauthorized, improvised, inhumane, and undocumented detention and interrogation techniques were used”²⁶⁹ For example, “[o]ne key Al-Qa’ida terrorist was subjected to the waterboard at least 183 times [redacted] and was denied sleep for a period of 180 hours.”²⁷⁰ Such actions were inconsistent with the legal advice received from the Department of Justice.²⁷¹ Fourth, the OIG noted that some detainees were subjected to enhanced interrogation techniques without justification based on analytical assessments that were unsupported by credible intelligence or objective evaluation of available information.²⁷²

The OIG concluded its report by expressing concern about the implications of the Detention and Interrogation Program. “The Agency faces potentially serious long-term political and legal challenges as a result of the CTC Detention and Interrogation Program, particularly its use of EITs and the inability of the U.S. Government to decide what it will ultimately do with terrorists detained by the Agency.”²⁷³

Following the release of the OIG report, approximately 20 cases were forwarded to the Department of Justice for criminal investigation.²⁷⁴ Only one of these cases resulted in a prosecution and conviction although this case did not involve the

268. CENT. INTELLIGENCE AGENCY, DRAFT OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE INTERROGATIONS (2003).

269. OIG SPECIAL REVIEW, *supra* note 260, at 102.

270. *Id.* at 104.

271. *Id.* at 103–04.

272. *Id.* at 104.

273. *Id.* at 105.

274. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 108 (2012); David Johnston & Mark Mazzetti, *Hurdles Stand in Way of Prosecuting Abuses*, N.Y. TIMES, Aug. 25, 2009, available at <http://www.nytimes.com/2009/08/26/us/politics/26legal.html>. In addition, the CIA conducted several administrative review hearings to consider possible disciplinary action against CIA officers. See, e.g., Joby Warrick & R. Jeffrey Smith, *CIA Officer Disciplined for Alleged Gun Use in Interrogation: Bush Officials Filed No Charges over Tactics in Terror Case*, WASH. POST, Aug. 23, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/22/AR2009082202287.html> (discussing a case involving a CIA officer who was disciplined for alleged gun use during interrogations).

treatment of a detainee in CIA custody.²⁷⁵ The CIA also conducted a number of internal disciplinary actions.²⁷⁶

Throughout the existence of the Detention and Interrogation Program, the CIA sought reaffirmation from political leaders and legal counsel. Beginning with the detention and interrogation of Abu Zubaydah, the CIA requested written confirmation from the OLC that enhanced interrogation techniques could be used on specific detainees.²⁷⁷ In addition, Tenet sought reaffirmation of the Bush administration's continued support for the Detention and Interrogation Program.²⁷⁸ On July 3, 2003, for example, Tenet sent a memorandum to National Security Advisor Condoleezza Rice seeking reaffirmation of the program in light of media reports that suggested certain "stress and duress" interrogation "techniques are not used by U.S. personnel and are no longer ap-

275. Clyde Haberman, *A Singular Conviction Amid the Debate on Torture and Terrorism*, N.Y. TIMES (Apr. 19, 2015), http://www.nytimes.com/2015/04/20/us/a-singular-conviction-amid-the-debate-on-torture-and-terrorism.html?_r=0. That case is *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009). See also GOLDSMITH, *supra* note 274, at 108 (discussing criminal and administrative proceedings); *supra* text accompanying note 14.

276. The CIA conducted several administrative review hearings to consider possible disciplinary action against CIA officers. See, e.g., Joby Warrick & R. Jeffrey Smith, *CIA Officer Disciplined for Alleged Gun Use in Interrogation: Bush Officials Filed No Charges over Tactics in Terror Case*, WASH. POST (Aug. 23, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/22/AR2009082202287.html>.

277. See, e.g., Letter from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel to Scott W. Muller, General Counsel, Central Intelligence Agency (July 7, 2004) (discussing the general safeguards that must be adhered to in order to use interrogation techniques on a certain high value detainee); Letter from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (Sept. 6, 2004) (confirming that the use of the interrogation techniques would not violate any U.S. statute, the Constitution, or any treaty obligation of the United States); Memorandum from Scott W. Muller on "Humane" Treatment of CIA Detainees (Feb. 12, 2003) (discussing the use of enhanced interrogation techniques that were approved by the Attorney General through the OLC).

278. See SSCI REPORT, *supra* note 3, at 184, 186 (highlighting the briefing of the status of the CIA's Detention and Interrogation Program with the president). See also Letter from Scott W. Muller, Central Intelligence Agency, Office of General Counsel to Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel (March 2, 2004) (OLC reaffirming its analyses in several previously issued memos relating to interrogation).

proved as a policy matter.”²⁷⁹ According to Tenet, the CIA was concerned by White House statements that detainees were being treated “humanely.”²⁸⁰ On July 29, 2003, Tenet and CIA General Counsel Scott W. Muller met with Rice, Attorney General Ashcroft, Acting Attorney General Patrick Philbin, White House Counsel Alberto Gonzales, Counsel to the National Security Council John Bellinger, and Vice President Cheney to discuss the Detention and Interrogation Program.²⁸¹ Tenet indicated he was seeking reaffirmation of the Bush administration’s support of these policies. During the meeting, Muller distributed a set of briefing slides to each attendee that offered details of the Program, including descriptions of the interrogation methods and an analysis of their use on specific detainees. At the conclusion of the meeting, the Vice President stated that the CIA was executing administration policy, a conclusion supported by Rice and Ashcroft.²⁸²

On June 4, 2004, Tenet again requested reaffirmation from Rice.²⁸³ Tenet expressed concern that increasing media scrutiny on U.S. interrogation practices caused by the Abu Ghraib scandal and new questions raised by the Department of Justice required the Bush administration “to now review its previous legal and policy positions with respect to detainees to assure that we all speak in a united and unambiguous voice about the continued wisdom and efficacy of those positions in light of the current controversy.”²⁸⁴ On that same day, Tenet issued a memorandum to the Deputy Director for Operations suspending the use of any interrogation techniques until further notice in light of questions raised by the Department of

279. Memorandum from George Tenet, Director of Central Intelligence to National Security Advisor on Reaffirmation of the Central Intelligence Agency’s Interrogation Program 1 (July 3, 2003).

280. *Id.* at 2.

281. *See* Memorandum from Scott W. Muller on Review of Interrogation Program on 29 July 2003 1 (Aug. 5, 2003) (“The meeting was attended by the DCI, CIA General Counsel Scott W. Muller, the Attorney General, Acting Assistant Attorney General, Office of Legal Counsel, Patrick Philbin, Dr. Rice, White House Counsel Alberto Gonzales, Counsel to the National Security Council (NSC) John Bellinger and the Vice President.”).

282. *Id.* at 5.

283. *See* Memorandum from George Tenet, Director of Central Intelligence to National Security Advisor Condoleezza Rice on [redacted] (June 4, 2004).

284. *Id.* at 3.

Justice.²⁸⁵ The use of enhanced interrogation techniques was subsequently reauthorized, albeit with different parameters.²⁸⁶

On July 11, 2004, Tenet resigned as the Director of Central Intelligence.²⁸⁷ After he stepped down, Tenet repeatedly affirmed the value of the CIA's Detention and Interrogation Program and its success in providing actionable intelligence. He emphasized that the program had been subject to repeated affirmation by political leaders and legal counsel. He also denied that detainees were tortured.²⁸⁸

On September 6, 2006, President Bush disclosed the existence of the CIA's Detention and Interrogation Program during a televised address to the nation.²⁸⁹ He explained that the program had been necessary in order to acquire valuable intelligence from high-level detainees. The need for such a program had become evident when the United States captured Abu Zubaydah.

We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures.

285. Memorandum from George Tenet, Director of Central Intelligence to Deputy Director for Operations on Suspension of Use of Interrogation Techniques (June 4, 2004). Tenet had previously discussed suspending interrogations with Counterterrorism Center on May 24, 2004. See Memorandum for the Record from [redacted] Legal Group, on Meeting with the DCI Regarding DOJ's Statement that DOJ Has Rendered No Legal Opinion on whether CIA's Use of Interrogation Techniques Would Meet Constitutional Standards (May 24, 2004) (discussing that OLC had not rendered a written opinion on whether the CIA's use of interrogation techniques would meet the Constitution's "shocks the conscience" standard).

286. SSCI REPORT, *supra* note 3, at 143-49. See also Memorandum from John P. Mudd, Deputy Director DCI Counterterrorist Center on Meeting with National Security Adviser Rice ([redacted], 2004) (discussing how the techniques employed by the CIA were legal).

287. William Branigin, *CIA Director Tenet Resigns: Bush Says Tenet Will Leave in Mid-July for Personal Reasons*, WASH. POST (July 3, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A12296-2004Jun3.html>. Tenet submitted his resignation to President Bush on June 2, 2004. *Id.*

288. See discussion *infra*.

289. See Press Release, Office of the Press Sec'y, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (transcript of address).

These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used – I think you understand why – if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe and lawful, and necessary.²⁹⁰

President Bush emphasized that the program had been subjected to extensive legal reviews and complied with U.S. law. He then added, “I want to be absolutely clear with our people, and the world: The United States does not torture. It’s against our laws, and it’s against our values. I have not authorized it – and I will not authorize it.”²⁹¹ President Bush indicated he was acknowledging the program’s existence for two reasons. First, the detainees would be put on trial for their actions, which required that we “bring them into the open.”²⁹² Second, the Supreme Court’s decision in *Hamdan v. Rumsfeld* had put the CIA program into question by holding that Common Article Three of the Geneva Conventions applied to the war with Al-Qaeda.²⁹³

In his 2007 memoirs, Tenet offered a brief description of the CIA’s Detention and Interrogation Program.²⁹⁴ Once Abu Zubaydah was captured on March 28, 2002, Tenet indicated the National Security Council began discussing how to acquire information possessed by Zubaydah and other “high-value detainees” who might be captured. This soon led to the development of the Rendition and Interrogation Program.

Zubaydah and a small number of other extremely highly placed terrorists potentially had information that might save thousands of lives. We wondered what we could legitimately do to get that informa-

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. Tenet devoted only a handful of pages in the 549-page book to the program. TENET, *supra* note 173, at 240–57.

tion. Despite what Hollywood might have you believe, in situations like this you don't call in the tough guys; you call in the lawyers. It took until August to get clear guidance on what Agency officers could legally do. Without such legal determinations from the Department of Justice, our officers would have been at risk for future second guessing. We knew that, like almost everything else in Washington, the program would eventually be leaked and our Agency and its people would be inaccurately portrayed in the worst possible light. Out of those conversations came a decision that CIA would hold and interrogate a small number of HVDs.

CIA officers came up with a series of interrogation techniques that would be carefully monitored at all times to ensure the safety of the prisoner. The administration and the Department of Justice were fully briefed and approved the use of these tactics. After we received written Department of Justice guidance on the interrogation issue, we briefed the chairmen and ranking members of our oversight committees. While they were not asked to formally approve the program, as it was conducted under the president's unilateral authorities, I can recall no objections being raised.²⁹⁵

Tenet explained that “[t]he most aggressive interrogation techniques conducted by CIA personnel were applied to only a handful of the worst terrorists on the planet, including people who had planned the 9/11 attacks and who, among other things, were responsible for journalist Daniel Pearl’s death.”²⁹⁶ Furthermore, these interrogations were “conducted in a precisely monitored, measured way intended to try to prevent what we believed to be an imminent follow-on attack.”²⁹⁷ Tenet indicated that the information acquired through these interrogations was used to prevent future terrorist plots around the world.

295. *Id.* at 241–42.

296. *Id.* at 242.

297. *Id.*

In an April 2007 interview that coincided with the release of his memoirs, Tenet engaged in a heated exchange with reporter Scott Pelley regarding the treatment of detainees:

George Tenet: We don't torture people. Let me say that again to you, we don't torture people. OK? So. . .

Scott Pelley: Come on, George.

George Tenet: We don't torture people.

Scott Pelley: Khalid Sheikh Mohammed?

George Tenet: We don't torture people.

Scott Pelley: Waterboarding?

George Tenet: We do not. I don't talk about techniques . . .

Scott Pelley: It is torture.

George Tenet: And we don't torture people.²⁹⁸

In the interview, Tenet indicated the enhanced interrogation sessions were necessary to acquire information from detainees. He indicated that he never watched any of the interrogation sessions. He stated, however, that he understood "what [he] was signing off on."²⁹⁹

The CIA Detention and Interrogation Program continued, albeit in a limited form, until 2009. On January 22, 2009, President Barack Obama signed Executive Order 13491 that revised the interrogation standards for detainees.³⁰⁰ The Executive Order provided that any individuals detained in an armed conflict must be treated humanely and consistent with various rules, including the Convention against Torture, Common Article Three of the 1949 Geneva Conventions, and the Torture Statute.³⁰¹ Such individuals shall not be subject to any interrogation techniques not authorized by U.S. Army Field Manual 2-22.3.³⁰² The Executive Order also mandated the closure of any CIA detention centers "as expeditiously as possible."³⁰³ Significantly, "[a]ll executive directives, orders, and regulations inconsistent with this order, including but not lim-

298. *60 Minutes: George Tenet: At the Center of the Storm* (CBS News television broadcast Apr. 27, 2007), available at <http://www.cbsnews.com/news/george-tenet-at-the-center-of-the-storm/>.

299. *Id.*

300. Exec. Order No. 13,491, 3 C.F.R. pts. 100-02 (2009).

301. *Id.* § 3(a).

302. *Id.* § 3(b).

303. *Id.* § 4(a).

ited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order.”³⁰⁴

Following the release of the SSCI Report in December 2014, Tenet issued a statement criticizing the report as deeply flawed. According to Tenet, the Detention and Interrogation Program “was directed by the President, with the oversight of the National Security Council, and the legal authorization of the Attorney General and Department of Justice. These approvals were given not just once but on multiple occasions.”³⁰⁵ In addition, Tenet co-authored an essay in *The Wall Street Journal* along with other former CIA Directors and Deputy Directors.³⁰⁶ The essay criticized the SSCI Report, accusing the Committee of failing to conduct a fair and thorough inquiry of the CIA’s program.³⁰⁷ While the essay did not directly address whether the CIA committed torture, it discussed the program’s context. The essay highlighted the benefits of the Detention and Interrogation Program, emphasizing that the program resulted in actionable intelligence that thwarted several terrorist attacks.

The detention and interrogation program was formulated in the aftermath of the murders of close to 3,000 people on 9/11. This was a time when:

- We had evidence that al Qaeda was planning a second wave of attacks on the U.S.
- We had certain knowledge that bin Laden had met with Pakistani nuclear scientists and wanted nuclear weapons.
- We had reports that nuclear weapons were being smuggled into New York City.

304. *Id.* § 1.

305. George Tenet, Statement by George J. Tenet on the Release of the SSCI Report on CIA Rendition, Detention and Interrogation (Dec. 9, 2014), available at <http://ciasavedlives.com/statements.html>.

306. George J. Tenet et al., *Ex-CIA Directors: Interrogations Saved Lives*, WALL ST. J., Dec. 10, 2014, available at <http://www.wsj.com/articles/cia-interrogations-saved-lives-1418142644>. Former CIA Directors Porter J. Goss and Michael V. Hayden along with former CIA Deputy Directors John E. McLaughlin, Albert M. Calland and Stephen R. Kappes co-authored the essay.

307. *Id.*

- We had hard evidence that al Qaeda was trying to manufacture anthrax.

It felt like the classic “ticking time bomb” scenario—every single day.

In this atmosphere, time was of the essence and the CIA felt a deep responsibility to ensure that an attack like 9/11 would never happen again. We designed the detention and interrogation programs at a time when “relationship building” was not working with brutal killers who did not hesitate to behead innocents. These detainees had received highly effective counter-interrogation training while in al Qaeda training camps. And yet it was clear they possessed information that could disrupt plots and save American lives.³⁰⁸

In September 2015, a group of eight former CIA officials, including George Tenet, released a rebuttal to the SSCI Report.³⁰⁹ Tenet was highly critical of the Report because it failed to consider the historical context in the United States following the 9/11 attacks. “Nightly meetings in the CIA Director’s conference room presented threat reporting of a quantity and quality that led us to believe that the world was in great danger.”³¹⁰ Tenet also criticized the Report’s methodology, which he noted had failed to interview any CIA officials who were directly involved in the Rendition and Interrogation Program. Significantly, Tenet argued that the CIA worked “to ensure that the program was being implemented in a manner consistent with the U.S. laws, the Constitution, and international treaty obligations.”³¹¹ And yet, Tenet acknowledged mistakes. “There were indeed things that went wrong in the early days of this program, failures of leadership and management that left a stain on our record. To be sure, during these early tumultuous days our own oversight did not meet our profes-

308. *Id.*

309. REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE’S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM (Bill Harlow ed. 2015).

310. George J. Tenet, *Introduction: CIA Interrogation of al Qaeda Terrorists – The Rest of the Story*, in REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE’S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM 1, 2 (Bill Harlow ed. 2015).

311. *Id.* at 3.

sional standards.”³¹² While Tenet indicates these errors were immediately corrected and that the CIA was fully transparent regarding the program, the record reveals otherwise.

B. *The Victims*

It is unclear how many individuals the CIA detained as part of the Detention and Interrogation Program. The SSCI Report indicated that the CIA detained at least 119 individuals in the program, although an accurate count was simply not possible because some CIA records remained classified and other records were unclear.³¹³ These individuals, referred to as “High Value Detainees,” were held in a variety of locations throughout the world, designated by the SSCI Report as Detention Sites Cobalt (Afghanistan), Grey (Afghanistan), Brown (Afghanistan), Orange (Afghanistan), Blue (Poland), Green (Thailand), Black (Romania), and Violet (Lithuania). The majority of detainees were held at Detention Site Cobalt (also known as the Salt Pit), which was located outside of Bagram Air Base in Afghanistan. According to the SSCI Report, 39 of the 119 detainees were subjected to enhanced interrogation techniques.³¹⁴ Of the 39 detainees, 17 of them were subjected to enhanced interrogations between January 2003 and August 2003.

Detailed reports regarding detainee treatment have been prepared by various groups, including the SSCI and the International Committee of the Red Cross.³¹⁵

312. *Id.* at 4.

313. SSCI REPORT, *supra* note 3, at 14 (Executive Summary). According to a July 20, 2007 memorandum from the Office of Legal Counsel, the CIA had custody of 98 detainees between March 2002 and July 2007. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency on Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value Al Qaeda Detainees 5 (July 20, 2007). The memorandum indicated that the CIA had used “enhanced techniques” on approximately 30 detainees. *Id.*

314. SSCI REPORT, *supra* note 3, at 96.

315. To date, only a handful of first person accounts by detainees have been released. The accounts of Majid Khan, one high value detainee, were released after review by the U.S. government. David Rohde, *Detainee Alleges CIA Sexual Abuse, Torture Beyond Senate Findings*, REUTERS, June 2, 2015, available at <http://www.reuters.com/article/2015/06/02/us-usa-torture-khan-id>

1. *SSCI Report*

The SSCI Report provided extensive details regarding the treatment of four detainees: Abu Zubaydah, Abd al-Rahim al-Nashiri, Ramzi Bin Al-Shibh, and Khalid Shaykh Muhammad. The details regarding detainee treatment were based on CIA cables, email communications, internal reports, and other sources.³¹⁶ The SSCI did not interview any of the detainees.

a. *Abu Zubaydah*

The use of the CIA's enhanced interrogation techniques – including “walling, attention grasps, slapping, facial hold, stress positions, cramped confinement, white noise and sleep deprivation” – continued in “varying combinations, 24 hours a day” for 17 straight days, through August 20, 2002. When Abu Zubaydah was left alone during this period, he was placed in a stress position, left on the waterboard with a cloth over his face, or locked in one of two confinement boxes. According to the cables, Abu Zubaydah was also subjected to the waterboard “2-4 times a day . . . with multiple iterations of the watering cycle during each application.”

The “aggressive phase of interrogation” continued until August 23, 2002. Over the course of the entire 20 day “aggressive phase of interrogation,” Abu Zubaydah spent a total of 266 hours (11 days, 2 hours) in the large (coffin size) confinement box and 29 hours in a small confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet. The CIA interrogators told Abu Zubaydah that the only way he would leave the facility was in the coffin-shaped confinement box.

According to the daily cables from DETENTION SITE GREEN, Abu Zubaydah frequently “cried,” “begged,” “pleaded,” and “whimpered,” but contin-

USKBN0011TW20150602. For a first person account of life at Guantanamo and the consequences of torture, see MOHAMEDOU OULD SLAHI, *GUANTANAMO DIARY* (Larry Siems ed., 2015).

316. Words that were redacted from the original documents are designated [Redacted].

ued to deny that he had any additional information on current threats to, or operatives in, the United States.³¹⁷

At times Abu Zubaydah was described as “hysterical” and “distressed to the level that he was unable to effectively communicate.” Waterboarding sessions “resulted in immediate fluid intake and involuntary leg, chest and arm spasms” and “hysterical pleas.” In at least one waterboarding session, Abu Zubaydah “became completely unresponsive with bubbles rising through his open, full mouth.” According to CIA records, Abu Zubaydah remained unresponsive until medical intervention, when he regained consciousness and expelled “copious amounts of liquid.”³¹⁸

b. *Abd al-Rahim al-Nashiri*

At DETENTION SITE GREEN, al-Nashiri was interrogated using the CIA’s “enhanced interrogation techniques, including being subjected to the waterboard at least three times. In December 2002, when DETENTION SITE GREEN was closed, al-Nashiri and Abu Zubaydah were rendered to DETENTION SITE BLUE.³¹⁹

...

[CIA OFFICER 2] arrived at DETENTION SITE BLUE on December [redacted] 2002, and the CIA resumed the use of its enhanced interrogation techniques on al-Nashiri shortly thereafter, despite the fact that [redacted] [CIA OFFICER 2] had not been trained, certified, or approved to use the CIA’s enhanced interrogation techniques. [Redacted] [CIA OFFICER 2] wrote in a cable to CIA Headquarters that “[al]-Nashiri responds well to harsh treatment” and suggested that the interrogators continue to ad-

317. SSCI REPORT, *supra* note 3, at 42 (Executive Summary) (citations omitted).

318. SSCI REPORT, *supra* note 3, at 43–44 (Executive Summary) (citations omitted).

319. SSCI REPORT, *supra* note 3, at 67 (Executive Summary) (citations omitted).

minister “various degrees of mild punishment,” but still allow for “a small degree of ‘hope,’ by introducing some ‘minute rewards.’”

It was later learned that during these interrogation sessions, [redacted] [CIA OFFICER 2], with the permission and participation of the DETENTION SITE BLUE chief of Base, who also had not been trained and qualified as an interrogator, used a series of unauthorized interrogation techniques against al-Nashiri. For example, [redacted] [CIA OFFICER 2] placed al-Nashiri in a “standing stress position” with “his hands affixed over his head” for approximately two and a half days. Later, during the course of al-Nashiri’s debriefings, while he was blindfolded, [redacted] [CIA OFFICER 2] placed a pistol near al-Nashiri’s head and operated a cordless drill near al-Nashiri’s body. Al-Nashiri did not provide any additional threat information during, or after, these interrogations.³²⁰

After receiving the proposed interrogation plan for al-Nashiri on January 21, 2003, [redacted], the CIA’s chief of interrogations—whose presence had previously prompted al-Nashiri to tremble in fear—emailed CIA colleagues to notify them that he had “informed the front office of CTC” that he would “no longer be associated in any way with the interrogation program due to serious reservation[s] [he had] about the current state of affairs” and would instead be “retiring shortly.” In the same email, [redacted] wrote, “[t]his is a train wreck [sic] waiting to happen and I intend to get the hell off the train before it happens.” [Redacted] drafted a cable for CIA Headquarters to send to DETENTION SITE BLUE raising

320. SSCI REPORT, *supra* note 3, at 69 (Executive Summary) (citations omitted). The SSCI Report indicates that both the DETENTION SITE BLUE CIA chief of base and CIA Officer 2 were reprimanded and suspended for using unauthorized interrogation techniques on al-Nashiri. *Id.* at 70 n.356 (Executive Summary).

a number of concerns that he, the chief of interrogations, believed should be "entered for the record."³²¹

Rather than releasing the cable that was drafted by [redacted], CIA Headquarters approved a plan to reinstitute the use of the CIA's enhanced interrogation techniques against al-Nashiri, beginning with shaving him, removing his clothing, and placing him in a standing sleep deprivation position with his arms affixed over his head. CIA cables describing subsequent interrogations indicate that al-Nashiri was nude and, at times, "put in the standing position, handcuffed and shackled." According to cables, CIA interrogators decided to provide al-Nashiri clothes to "hopefully stabilize his physiological symptoms and prevent them from deteriorating," noting in a cable the next day that al-Nashiri was suffering from a head cold which caused his body to shake for approximately ten minutes during an interrogation. Beginning in June 2003, the CIA transferred al-Nashiri to five different CIA detention facilities before he was transferred to U.S. military custody on September 5, 2006.³²²

c. *Ramzi Bin Al-Shibh*

On February [redacted], 2003, in anticipation of bin al-Shib's arrival, interrogators at the detention site, led by the CIA's chief interrogator, [redacted], prepared an interrogation plan for bin al-Shibh. The plan became a template, and subsequent requests to CIA Headquarters to use the CIA's enhanced interrogation techniques against other detainees relied upon near identical language."

The interrogation plan proposed that immediately following the psychological and medical assessments conducted upon his arrival, bin al-Shibh would be subjected to "sensory dislocation." The proposed sen-

321. SSCI REPORT, *supra* note 3, at 71 (Executive Summary) (citations omitted).

322. SSCI REPORT, *supra* note 3, at 72 (Executive Summary) (citations omitted).

sory dislocation included shaving bin al-Shibh's head and face, exposing him to loud noise in a white room with white lights, keeping him "unclothed and subjected to uncomfortably cool temperatures," and shackling him "hand and foot with arms outstretched over his head (with his feet firmly on the floor and not allowed to support his weight with his arms)." Contrary to CIA representations made later to the Committee that detainees were always offered the opportunity to cooperate before being subjected to the CIA's enhanced interrogation techniques, the plan stated that bin al-Shibh would be shackled nude with his arms overhead in a cold room prior to any discussion with interrogators or any assessment of his level of cooperation." According to a cable, only after the interrogators determined that his "initial resistance level [had] been diminished by the conditions" would the questioning and interrogation phase begin.

The interrogation phase described in the plan included near constant interrogations, as well as continued sensory deprivation, a liquid diet, and sleep deprivation. In addition, the interrogation plan stated that the CIA's enhanced interrogation techniques would be used, including the "attention grasp, walling, the facial hold, the facial slap. . . the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation beyond 72 hours, and the waterboard, as appropriate to [bin al-Shibh's] level of resistance."³²³

d. *Khalid Shaykh Muhammad*

Between March [redacted], 2003 and March 9, 2003, contractors SWIGERT and DUNBAR, and a CIA interrogator, [redacted], used the CIA's enhanced interrogation techniques against KSM, including nudity, standing sleep deprivation, the attention grab and insult slap, the facial grab, the abdominal slap,

323. SSCI REPORT, *supra* note 3, at 76–77 (Executive Summary) (citations omitted).

the kneeling stress position, and walling. There were no debriefers present. According to the CIA interrogator, during KSM's first day at DETENTON SITE BLUE, SWIGERT and DUNBAR first began threatening KSM's children.³²⁴

...

On March 10, 2003, KSM was subjected to the first of his 15 separate waterboarding sessions. The first waterboarding session, which lasted 30 minutes (10 minutes more than anticipated in the Office of Legal Counsel's August 1, 2002, opinion), was followed by the use of a horizontal stress position that had not previously been approved by CIA Headquarters. The chief of Base, worried about the legal implications, prohibited the on-site medical officer from reporting on the interrogation directly to OMS outside of official CIA cable traffic.³²⁵

Beginning the evening of March 18, 2003, KSM began a period of sleep deprivation, most of it in the standing position, which would last for seven and a half days, or approximately 180 hours.³²⁶

On March 20, 2003, KSM continued to be subjected to the CIA's enhanced interrogation techniques throughout the day, including a period of "intense questioning and walling." KSM was described as "[t]ired and sore," with abrasions on his ankles, shins, and wrists, as well as on the back of his head. He also suffered from pedal edema resulting from extended standing. After having concluded that there was "no further movement" in the interrogation, the detention site personnel hung a picture of KSM's sons in his cell as a way to "[heighten] his im-

324. SSCI REPORT, *supra* note 3, at 84–85 (Executive Summary) (citations omitted).

325. SSCI REPORT, *supra* note 3, at 85–86 (Executive Summary) (citations omitted).

326. SSCI REPORT, *supra* note 3, at 90 (Executive Summary) (citations omitted).

agination concerning where they are, who has them, [and] what is in store for them.”³²⁷

2. ICRC Report

From October 6 through 11, 2006, the International Committee of the Red Cross (“ICRC”) was allowed to visit the U.S. detention facilities at Guantanamo. During the visit, the ICRC met with government personnel and toured the facilities. In addition, they met privately with several detainees. Following the visit, the ICRC prepared a confidential report (“ICRC Report”) on the detention of 14 “high value detainees.”³²⁸ The ICRC Report was based on private interviews conducted with the detainees. The report was submitted to the United States on February 14, 2007 and sent directly to John Rizzo, the Acting General Counsel for the CIA.

Each detainee interviewed by the ICRC had been in CIA custody prior to their transfer to Guantanamo.³²⁹ They were interviewed separately and outside the presence of U.S. government officials. The ICRC noted the similar stories offered by each detainee with respect to their capture, detention, and treatment. Indeed, “the consistency of the detailed allegations provided separately by each of the fourteen adds particular weight to the information provided below.”³³⁰

The fourteen . . . described being subjected, in particular during the early stages of their detention, lasting from some days up to several months, to a harsh regime employing a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information. This regime began soon after arrest, and included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire pe-

327. SSCI REPORT, *supra* note 3, at 90–91 (Executive Summary) (citations omitted).

328. INT’L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY, WAS 07/76 (Feb. 14, 2007) [hereinafter ICRC REPORT]. The ICRC Report was confidential and not supposed to be released without the approval of the ICRC. *Id.* at I.

329. *Id.* at 4.

330. *Id.* at 5.

riod of their undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements.³³¹

Each of the detainees was subjected to solitary confinement and incommunicado detention.³³² The ICRC identified several additional forms of ill treatment, including suffocation by water, prolonged stress standing positions, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, threats of ill-treatment, forced shaving, and deprivation/restriction of solid food.³³³ The detainees were also deprived of access to open air, exercise, and appropriate hygiene facilities, and their access to the Koran was restricted.³³⁴

The ICRC Report provided details regarding the treatment of several detainees, including Abu Zubaydah and Khaled Shaykh Muhammad.³³⁵ These statements represent verbatim transcripts of the ICRC interviews.³³⁶

a. *Abu Zubaydah*

Then the real torturing started. Two black wooden boxes were brought into the room outside my cell. One was tall, slightly higher than me and narrow. Measuring perhaps in area 1m x 0.75m and 2m in height. The other was shorter, perhaps only 1m in height. I was taken out of my cell and one of the interrogators wrapped a towel around my neck, they then used it to swing me around and smash me repeatedly against the hard walls of the room. I was also repeatedly slapped in the face. As I was still shackled,

331. *Id.* at 4.

332. *Id.* at 7.

333. *Id.* at 8–9.

334. *Id.* at 9.

335. *Id.* The ICRC's interview with Walid Bin Attash is not included in this article.

336. Verbatim interviews of these three detainees were provided in Annex I to the ICRC Report. *Id.* at 28–37 (Annex I).

the pushing and pulling around meant that the shackles pulled painfully on my ankles.

I was then put into the tall back box for what I think was about one and a half to two hours. The box was totally black on the inside as well as the outside. It had a bucket inside to use as a toilet and had water to drink provided in a bottle. They put a cloth or cover over the outside of the box to cut out the light and restrict my air supply. It was difficult to breathe. When I was let out of the box I saw that one of the walls of the room had been covered with plywood sheeting. From now on it was against this wall that I was then smashed with the towel around my neck. I think that the plywood was put there to provide some absorption of the impact of my body. The interrogators realized that smashing me against the hard wall would probably quickly result in physical injury.

During these torture sessions many guards were present, plus two interrogators who did the actual beating, still asking questions, while the main interrogator left to return after the beating was over. After the beating I was then placed in the small box. They placed a cloth or cover over the box to cut out all light and restrict my air supply. As it was not high enough even to sit upright, I had to crouch down. It was very difficult because of my wounds. The stress on my legs held in this position meant my wounds both in the leg and stomach became very painful. I think this occurred about 3 months after my last operation. It was always cold in the room, but when the cover was placed over the box it made it hot and sweaty inside. The wound on my leg began to open and started to bleed. I don't know how long I remained in the small box, I think I may have slept or maybe fainted.

I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few

minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out again with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.

I was then placed again in the tall box. While I was inside the box loud music was played again and somebody kept banging repeatedly on the box from the outside. I tried to sit down on the floor, but because of the small space the bucket with urine tipped over and spilt over me. I remained in the box for several hours, maybe overnight. I was then taken out and again a towel was wrapped around my neck and I was smashed into the wall with the plywood covering and repeatedly slapped in the face by the same two interrogators as before.

I was then made to sit on the floor with a black hood over my head until the next session of torture began. The room was always kept very cold.

This went on for approximately one week. During this time the whole procedure was repeated five times. On each occasion, apart from one, I was suffocated once or twice and was put in the vertical position on the bed in between. On one occasion the suffocation was repeated three times. I vomited each time I was put in the vertical position between the suffocation.

During that week I was not given any solid food. I was only given Ensure to drink. My head and beard were shaved everyday.

I collapsed and lost consciousness on several occasions. Eventually the torture was stopped by the intervention of the doctor.

I was told during this period that I was one of the first to receive these interrogation techniques, so no rules applied. It felt like they were experimenting and trying out techniques to be used later on other people.³³⁷

b. *Khaled Shaykh Muhammad*

It was here that the most intense interrogation occurred, led by three experienced CIA interrogators, all over 65 years old and all strong and well trained. There were the “emirs.” Although of course they never revealed their own names, I gave them names by which I could refer to them, all beginning with “Abu”. I think that “Abu Captain” was of South American origin, whereas “Abu Hanan” was perhaps of Moroccan origin and “Abu White” was of Eastern European descent.

As the interrogation again resumed I was told by one of the “emirs” that they had received the green-light from Washington to give him “a hard time”. They never used the word “torture” and never referred to “physical pressure”, only to “a hard time”, I was never threatened with death, in fact I was told that they would not allow me to die, but that I would be brought to the “verge of death and back again”.

Apart from when I was taken for interrogation to another room, I was kept for one month in the cell in a standing position with my hands cuffed and shackled above my head and my feet cuffed and shackled to a point in the floor. Of course during this month I fell asleep on some occasions while still being held in this position. This resulted in all my weight being applied to the handcuffs around my wrists resulting in open and bleeding wounds. The cuffs around my ankles also created open, bleeding wounds. [Scars consistent with this allegation were visible on both wrists as well as on both ankles.] Both my feet became very swollen after one month of almost continual standing.

337. *Id.* at 29–31.

Initially I was interrogated for approximately eight hours each day. This gradually became less until after one month it was about four hours each day. For the interrogation I was taken to a separate room. The number of people present varied greatly from one day to another. Other interrogators, including women, were also sometimes present along with the "emirs". A doctor was also usually present. If I was perceived not to be cooperating I would be put against a wall and punched and slapped in the body, head and face. A thick flexible plastic collar would also be placed around my neck so that it could then be held at the two ends by a guard who would use it to slam me repeatedly against the wall. The beatings were combined with the use of cold water, which was poured over me using a hose-pipe. The beatings and use of cold water occurred on a daily basis during the first month.

In addition I was also subjected to "water-boarding" on five occasions, all of which occurred during that first month. I would be strapped to a special bed, which could be rotated into a vertical position. A cloth would be placed over my face. Cold water from a bottle that had been kept in a fridge was then poured onto the cloth by one of the guards so that I could not breathe. This obviously could only be done for one or two minutes at a time. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about one hour. Injuries to my ankles and wrists also occurred during the water-boarding as I struggled in the panic of not being able to breathe. Female interrogators were also present during this form of ill-treatment and a doctor was always present, standing out of sight behind the head of bed, but I saw him when he came to fix a clip to my finger which was connected to a machine. I think it was to measure my pulse and oxygen content in my blood. So they could take me to breaking point.

After each session of torture I was put into a cell where I was allowed to lie on the floor and could

sleep for a few minutes. However, due to shackles on my ankles and wrists I was never able to sleep very well.

The harshest period of the interrogation was just prior to the end of the first month. The beatings became worse and I had cold water directed at me from a hose-pipe by guards while I was still in my cell. The worst day was when I was beaten for about half an hour by one of the interrogators. My head was banged against the wall so hard that it started to bleed. Cold water was poured over my head. This was then repeated with other interrogators. Finally I was taken for a session of water boarding. The torture on that day was finally stopped by the intervention of the doctor. I was allowed to sleep for about one hour and then put back in my cell standing with my hands shackled above my head.³³⁸

In its report, the ICRC stated that the forms of mistreatment suffered by the detainees, both in isolation and in combination, amounted to torture as well as cruel, inhuman or degrading treatment.³³⁹ The ICRC also found that the CIA detention program “amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law.”³⁴⁰ More broadly, the ICRC expressed great concern with the coordinated and systematic nature of the detention program. “When understood in their totality, the undisclosed detention regime to which these persons were subjected becomes all the more disturbing.”³⁴¹

Other descriptions of CIA detainee treatment corroborate the details offered in the SSCI and ICRC reports.³⁴² On No-

338. *Id.* at 35–36.

339. *Id.* at 5, 24.

340. *Id.* at 24.

341. *Id.* at 5.

342. Several reports on detainee treatment were issued by nongovernmental organizations and members of civil society. *E.g.*, AMNESTY INT’L, WE TORTURED SOME FOLKS (2014); REED BRODY, HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES (Andrea Prasow et al. eds., 2011); THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT (Randy Auerbach ed., 2013); FARNOOSH HASHEMIAN ET AL., PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TOR-

vember 20, 2008, for example, the Senate Armed Services Committee issued a report on detainee treatment.³⁴³ While the report focused on the treatment of detainees in military custody, it also addressed the CIA's Detention and Interrogation Program. The report noted that authorization for aggressive interrogation techniques came from the highest levels of government, which sent a clear message to military personnel at detention centers in Iraq, Afghanistan and Guantanamo.

The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.³⁴⁴

The report explained how CIA interrogation practices began to influence the Department of Defense and, as a result, many CIA interrogation practices migrated to military detention facilities. For example, "[i]nterrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO [Guantanamo]."³⁴⁵ The report emphasized that abusive treatment of detainees was contrary to American values and longstanding military policies. Other reports prepared by the U.S. military also raised concerns about the CIA's Detention and Interrogation Program and its impact on the military.³⁴⁶

Because some detainees were held in Europe, several European governments and intergovernmental agencies have undertaken investigations regarding the CIA detention pro-

TURE BY U.S. PERSONNEL AND ITS IMPACT (Tara Gingerich ed., 2008); AMRIT SINGH, OPEN SOC'Y FOUNDS., GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION (David Berry ed., 2013).

343. S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008).

344. *Id.* at xii.

345. *Id.* at xxix.

346. *E.g.*, GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MI BRIGADE (2004); ANTONIO M. TAGUBA, AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004).

gram.³⁴⁷ In addition, several detainees have filed actions against European countries based on their detention in those countries. Abu Zubaydah filed actions against Poland and Lithuania, and Abd al-Rahim al-Nashiri filed actions against Poland and Romania.³⁴⁸ Their applications provide details regarding their treatment and corroborate the information provided in the SSCI Report and the ICRC Report. On July 24, 2014, the European Court of Human Rights issued decisions in both cases involving Poland.³⁴⁹ The Court found that the CIA subjected both Zubaydah and al-Nashiri to torture during their detentions in Poland. Accordingly, the Court held that Poland had violated their rights under the European Convention on Human Rights. In particular, Poland had violated their right to be free from torture and ill treatment by allowing the CIA to detain and torture them in Polish territory and by failing to carry out effective investigations into their claims of abuse. The Court also held that Poland had violated their rights to liberty and security, their right to private and family life, and their right to an effective remedy. Poland was ordered to pay 130,000 euros to Zubaydah and 100,000 euros to al-Nashiri.³⁵⁰ On February 18, 2015, Poland agreed to pay reparations to both Zubaydah and al-Nashiri.³⁵¹

347. E.g., Eur. Parl. Ass., *Secret Dets. & Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report* (June 7, 2007), available at http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.

348. Application, Husayn (Abu Zubaydah) v. Poland, No. 7511/13 (Mar. 26, 2013); Application, al Nashiri v. Romania, App. No. 33234/12 (June 1, 2012); Application, Abu Zubaydah v. Lithuania, No. 46454/11 (July 14, 2011); Application, al Nashiri v. Poland, App. No. 28761/11 (May 6, 2011).

349. Husayn (Abu Zubaydah) v. Poland, No. 7511/13 (July 24, 2014); al Nashiri v. Poland, no. 28761/11 (July 24, 2014).

350. Husayn v. Poland, *supra* note 349, ¶¶ 567, 569; al Nashiri v. Poland, *supra* note 349, ¶ 100.

351. Alan Yuhas, *Poland Agrees to Pay Reparations to Guantanamo Detainees*, THE GUARDIAN, Feb. 18, 2015, available at <http://www.theguardian.com/world/2015/feb/18/poland-agrees-reparations-guantanamo-detainees>. See also Carol J. Williams, *Poland Feels Sting of Betrayal over CIA "Black Site"*, L.A. TIMES, May 10, 2015, available at <http://www.latimes.com/world/europe/la-fg-poland-cia-blacksite-20150510-story.html> (discussing political ramifications in Poland arising out of the detention and interrogation program).

V. UNITED STATES OF AMERICA v. GEORGE TENET

According to the United States Attorneys' Manual, cases involving torture "raise issues of national and international concern."³⁵² As a result, such cases are subject to additional oversight requirements within the Criminal Division of the Department of Justice. "Successful prosecution of these matters requires both careful coordination within the Department of Justice and careful coordination between the Department and senior officials in the foreign affairs and military communities."³⁵³ A U.S. Attorney must notify the Human Rights and Special Prosecutions Section of the Criminal Division when opening any torture matter as well as with any significant developments in the investigation or prosecution of such matter.³⁵⁴ Prior express approval by the Assistant Attorney General of the Criminal Division is required before filing an application for a search warrant, a material witness warrant, a criminal complaint or information, or for seeking the return of an indictment.³⁵⁵

A. *The Prosecution Memorandum*

To establish criminal liability under the Torture Statute, the Department of Justice must establish five elements beyond a reasonable doubt. First, the alleged offender must be a "national of the United States" or "present in the United States, irrespective of the nationality of the victim or alleged offender."³⁵⁶ Second, the alleged acts must be "committed by a person acting under the color of law."³⁵⁷ Third, these acts must be committed upon another person within the offender's custody or physical control.³⁵⁸ Fourth, the alleged acts must be "specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person."³⁵⁹ Fifth, the al-

352. DEP. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.139(A) (1997) (These requirements also apply to cases involving war crimes, genocide, and the recruitment of child soldiers.).

353. *Id.*

354. *Id.* §§ 9-2.139(C)–9-2.139(D).

355. *Id.* § 9-2.139(E).

356. 18 U.S.C. § 2340A(b).

357. § 2340(1).

358. *Id.*

359. *Id.*

leged acts must have been committed outside the United States.³⁶⁰

The Torture Statute authorizes criminal liability for torture. Based on the facts surrounding Tenet's role in the development and implementation of the Detention and Interrogation Program, Tenet could be prosecuted for committing torture and attempting to commit torture.

First, George Tenet is a U.S. citizen and, therefore, meets the first requirement for prosecution under the Torture Statute. The nationality of the victims is irrelevant.

Second, the alleged acts were committed under color of law. In *United States v. Belfast*, the district court explained that acting under color of law occurs when an "official was purporting or pretending to act in the performance of official duties."³⁶¹ The Eleventh Circuit affirmed this interpretation on appeal, citing the legislative history of the Torture Act.³⁶² The color of law requirement is met even if the defendant acts beyond the bounds of lawful authority as long as the power to take such acts only exists because that person is a government official.³⁶³

Tenet was acting as a government official when he personally authorized the use of interrogation techniques on high value detainees, including enhanced interrogation techniques. Tenet's authority for such actions came solely from his status as the Director of Central Intelligence, which was statutorily established by the National Security Act of 1947.³⁶⁴ While Tenet was acting under color of law, he cannot assert his actions were justified because he was implementing government policies, a determination made by the Eleventh Circuit in *Belfast*.³⁶⁵

Third, the alleged acts were committed upon the victims who were within Tenet's custody and control. As the Director

360. § 2340A(a).

361. Court's Instructions to the Jury at 5, *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2008) (No. 06-20758) [hereinafter *Belfast* Jury Instructions].

362. *Belfast*, 611 F.3d at 808.

363. *West v. Atkins*, 487 U.S. 42, 49 (1988). See also 18 U.S.C. § 242 (permitting criminal liability for deprivation of rights under color of law); 42 U.S.C. § 1983 (allowing civil liability for deprivation of rights under color of law).

364. 50 U.S.C. § 3036.

365. *Belfast*, 611 F.3d at 808.

of Central Intelligence, Tenet had responsibility over the Directorate of Operations and the Counterterrorism Center, which implemented the Detention and Interrogation Program. The victims were detained at CIA detention centers operated by the Directorate. The Supreme Court has indicated that “[a]n individual is held ‘in custody’ by the United States when the United States official charged with his detention has ‘the power to produce’ him.”³⁶⁶ In its communications with the OLC, the CIA did not question that detainees held in the Detention and Interrogation Program were within its custody and control or that such acts were committed under color of law.³⁶⁷

Fourth, the alleged acts were specifically intended to inflict severe physical and mental pain and suffering upon the detainees. In *United States v. Belfast*, the district court defined torture in the jury instructions as “extreme, deliberate, and unusually cruel practices rather than lesser forms of cruel, inhuman or degrading treatment or punishment.”³⁶⁸ Severe physical pain was defined as “bodily pain that is extreme in intensity and difficult to endure,” and severe physical suffering was defined to mean “physical distress that is extreme considering its intensity and duration or persistence and that is difficult to endure.”³⁶⁹ The Eleventh Circuit rejected efforts to use other sources beyond the Convention against Torture and the Torture Statute to define torture.³⁷⁰ While the *Belfast* courts only addressed physical pain and suffering, their analysis is instructive for understanding the meaning of mental pain and suffering.

The *Belfast* courts also clarified the requirement of intent under the Torture Statute.³⁷¹ In the jury instructions, the dis-

366. *Munaf v. Geren*, 128 S.Ct. 2207, 2217 (2008) (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). See also 28 U.S.C. § 2243 (specifying that habeas corpus is directed to the person having custody of the detained person).

367. 2002 OLC Memorandum to Rizzo, *supra* note 205, at 9.

368. *Belfast* Jury Instructions, *supra* note 361, at 5.

369. *Id.*

370. In fact, the Eleventh Circuit rejected the use of executive branch documents to define torture. *Belfast*, 611 F.3d at 823.

371. With respect to attempts to commit torture, the Eleventh Circuit stated that “an attempt to commit torture is exactly the same as an act done with the specific intent to commit torture.” *Id.* at 808.

strict court indicated that torture requires specific intent.³⁷² It then defined specific intent to mean: “to act with the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe physical pain or suffering.”³⁷³ Similarly, the Eleventh Circuit indicated that the Torture Statute was consistent with the Convention against Torture in requiring torture to be intentionally inflicted on another person.³⁷⁴ The Eleventh Circuit added, however, that the defendant’s motive is not material. Citing the legislative history of the Convention against Torture as well as several federal cases that examined the meaning of torture, the Eleventh Circuit emphasized that a defendant must act with purpose to inflict pain. The reasons for a defendant’s actions are not relevant for purposes of criminal prosecution under the Torture Statute.³⁷⁵

The CIA’s Detention and Interrogation Program was designed so that individuals who had allegedly been trained to resist traditional interrogation techniques would become compliant and cooperate with CIA interrogators. According to the CIA, the high value detainees had been trained by Al-Qaeda to resist interrogation. As a result, they would not willingly reveal valuable intelligence. To counter such training, the CIA identified techniques used in the SERE Program that would create significant physical and psychological pressure on detainees, thereby inducing their compliance. The CIA’s goal was to use “physical and psychological pressures in a comprehensive, systematic, and cumulative manner” that would “create a state of learned helplessness and dependence” and “overcome a detainee’s resistance posture.”³⁷⁶

The interrogation techniques were intentionally designed to cause severe physical pain and suffering. Indeed, the Guidelines on Interrogations approved by Tenet specifically indi-

372. Belfast Jury Instructions, *supra* note 361, at 5.

373. *Id.*

374. *Belfast*, 611 F.3d at 807.

375. *Id.* “The ‘for such purposes’ language [in the Convention against Torture] is meant merely ‘to illustrate the common motivations that cause individuals to engage in torture . . . [and to] ensure . . . that, whatever its specific goal, torture can occur . . . only when the production of pain is purposive, not merely haphazard.’” (citing *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)).

376. CIA BACKGROUND PAPER, *supra* note 185, at 1.

cated that these interrogation techniques “incorporate physical or psychological pressure.”³⁷⁷ For example, stress positions, wall standing, and cramped confinement were specifically intended to cause intense pain and suffering that was difficult to endure. Waterboarding caused such intense physical distress that it could only be performed for short periods of time.³⁷⁸ Sleep deprivation caused significant physical distress, particularly when it was authorized for in excess of 72 hours and when it was combined with other techniques. The CIA authorized the use of coercive techniques—walling, water dousing, stress positions, wall standing, and cramped confinement—because these techniques would place detainees in severe physical and psychological stress.³⁷⁹

The enhanced interrogation techniques were also designed to cause severe mental pain and suffering. Waterboarding and mock burials were specifically designed to instill a fear of death in the detainees, which is a form of mental suffering listed in the Torture Statute.³⁸⁰ Sleep deprivation and

377. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2. The guidelines added that medical personnel should suspend interrogations if they determined that “significant and prolonged physical or mental injury, pain, or suffering is likely to result if the interrogation is not suspended.” *Id.*

378. John Rizzo, *I Could Have Stopped Waterboarding Before It Happened: An Exclusive Account From The CIA’s Former Top Lawyer*, POLITICO MAGAZINE (Jan. 5, 2014), http://www.politico.com/magazine/story/2014/01/waterboarding-cia-lawyer-john-rizzo-torture-101758_full.html#Vi_IrvmrTIU. Waterboarding was found to constitute torture by the International Military Tribunal for the Far East. INT’L MILITARY TRIBUNAL FOR THE FAR E., JUDGMENT OF 4 NOVEMBER 1948 1059 (1948), *available at* <http://www.ibiblio.org/hyperwar/PTO/IMTFE/>. See generally Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007) (discussing interrogation techniques using water and finding that such techniques have been condemned by U.S. courts). The CIA has acknowledged waterboarding three detainees, Abu Zubaydah, Khalid Shaykh Muhammad, and Abd al-Rahim al-Nashiri, and that the last waterboarding session occurred in March 2003. Memorandum to Dianne Feinstein and Saxby Chambliss on CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program (June 27, 2003), https://www.cia.gov/library/reports/CIA_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf.

379. CIA GUIDELINES ON INTERROGATIONS, *supra* note 241, at 2.

380. 18 U.S.C. § 2340A. In his interview with the ICRC, Zubaydah described the fear of death he experienced during waterboarding. “I struggled against the straps, trying to breathe, but it was hopeless. I thought I was

cramped confinement were intended to disrupt the senses, which is another form of mental suffering listed in the Torture Statute. In addition to these interrogation techniques, environmental manipulation, sensory deprivation, solitary confinement, dietary manipulation, and forced nudity were also used to disrupt the senses. The pain and suffering experienced by detainees continued even after the interrogation techniques ceased to be applied. This was essential so that the detainees would continue cooperating through weeks and months of interrogations. In fact, many of the detainees suffered insomnia, depression, and anxiety for years after they were subjected to the interrogation techniques. As a result, detainees were often medicated to counter the effects of their symptoms. The psychological trauma experienced by detainees was still evident when the ICRC interviewed them at Guantanamo in October 2006. It was also manifest in several detainee hearings before the Combatant Status Review Tribunals at Guantanamo.³⁸¹

The interrogation techniques were not applied in isolation. They were, in fact, applied concurrently and repeatedly for days and weeks. Such extensive treatment heightened the physical and mental pain and suffering experienced by the detainees. The cumulative and concurrent nature of the treatment was of significant concern to the ICRC because it heightened the severity of pain and suffering experienced by the detainees.

In sum, Tenet authorized the use of interrogation techniques on detainees that were specifically intended to inflict severe physical and mental pain and suffering. None of the detainees had been charged or convicted of any crimes and so their pain and suffering could not have been incidental to lawful sanctions. Even if the detainees were initially captured under lawful circumstances, "the extended length and nature of their detention, coupled with the utter lack of access to courts, attorneys, or any information about their arrest, rendered the duration of their imprisonment wholly unlawful."³⁸²

going to die. I lost control of my urine. Since then I still lose control of my urine when under stress." ICRC REPORT, *supra* note 328, at 30.

381. See, e.g., *Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10015*, ACLU (Mar. 14, 2007), www.aclu.org/pdfs/safefree/csrt_al_nashiri.pdf (Combat Status Review Hearing transcript of Al Nashiri detailing the psychological trauma experienced by detainees).

382. *United States v. Belfast*, 611 F.3d 783, 825 (11th Cir. 2010).

Finally, the alleged acts were committed outside the United States. The term "United States" is defined in the Torture Statute to mean "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States."³⁸³ The victims were tortured at CIA detention centers located outside the United States, including Afghanistan, Lithuania, Poland, Romania and Thailand. All four of the victims were ultimately transferred to Guantanamo. It is well established that Congress can impose legal obligations on U.S. citizens for actions taken outside the United States. In *Belfast*, the Eleventh Circuit affirmed that Congress had the authority to criminalize the extraterritorial conduct of U.S. citizens.³⁸⁴ Moreover, the language of the Torture Statute "evinces an unmistakable congressional intent to apply the statute extraterritorially."³⁸⁵

For these reasons, Tenet could be directly liable for committing torture and attempting to commit torture. He could also be liable for aiding and abetting torture under the general aiding and abetting statute in the U.S. Code, which provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."³⁸⁶ It also provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."³⁸⁷ Aiding and abetting broadens Tenet's liability because he would be held responsible for assisting others who committed torture.³⁸⁸

383. 18 U.S.C. § 2340(3).

384. *Belfast*, 611 F.3d at 809–10.

385. *Id.* at 811.

386. 18 U.S.C. § 2(a).

387. 18 U.S.C. § 2(b).

388. This is analogous but distinct from the doctrine of command responsibility, which is a theory of liability recognized in both domestic and international law. See HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE?: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (2005), available at <http://www.hrw.org/reports/2005/us0405/us0405.pdf> (documenting how high-ranking U.S. civilian and military leaders made decisions and issued policies that facilitated serious and widespread violations of the law); James P. Pfiffner, *U.S. Torture Policy and Command Responsibility*, in EXAMINING TORTURE: EMPIRICAL STUDIES OF STATE REPRESSION 103 (Tracy Lightcap & James P. Pfiffner eds., 2014) (arguing that harsh interrogation policies were clearly

In addition to these charges, Tenet could be liable for conspiracy to commit torture. Criminal liability for conspiracy is set forth in the Torture Statute.³⁸⁹ A conspiracy charge for torture contains three elements.³⁹⁰ First, two or more persons must agree to try to accomplish a common plan. Second, the defendant must knowingly and voluntarily join or participate in the plan. Third, the object of the unlawful plan must be to commit torture. Conspiracy is also recognized under the general conspiracy statute in the U.S. Code although this statute requires an overt act in furtherance of the conspiracy.³⁹¹

The nature of a conspiracy charge can be quite broad. Essentially, a conspiracy is an agreement in which each member of the conspiracy becomes an agent or partner of every other member of the conspiracy.³⁹² According to the district court in *Belfast*, it is “not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who *were* members had entered into any formal type of agreement; or that the members had planned together *all* of the details of the scheme or the ‘acts in furtherance of the conspiracy’ that the indictment charges would be carried out in an effort to commit the intended crime.”³⁹³ Thus, the conspirator does not need to know the name and identity of every member of the conspiracy. Instead, the conspirator only needs to have a general understanding of the unlawful purpose of the plan and must knowingly and voluntarily join in that plan. In these circumstances, the conspirator can be convicted for conspiracy even though he only played a small role.³⁹⁴

Tenet developed the CIA’s Detention and Interrogation Program along with other high ranking government officials

established at the uppermost levels of the executive branch). *See generally* THE LAW OF COMMAND RESPONSIBILITY (M.P.W. Brouwers ed., 2012) (examining the doctrine of command responsibility); GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY (2009) (examining the doctrine of command responsibility).

389. 18 U.S.C. § 2340(A)(c).

390. Belfast Jury Instructions, *supra* note 361, at 4–5. *See generally* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (discussing the conspiracy doctrine in federal criminal law).

391. 18 U.S.C. § 371.

392. Belfast Jury Instructions, *supra* note 361, at 3.

393. *Id.* at 4 (emphasis in original).

394. *Id.*

and numerous CIA personnel and private contractors. They sought to develop a plan that would apply severe physical and mental pain and suffering on detainees to make them compliant and cooperative during interrogations. Thousands of emails and cables were exchanged among the conspirators regarding detainee treatment.³⁹⁵ Numerous meetings were held among the conspirators. Hundreds of interrogations took place. The interrogation plans for each detainee were regularly reviewed and updated by the conspirators to reflect the effectiveness of the interrogation techniques. Transcripts and summaries of detainee interrogations were provided to Tenet and the other conspirators. Tenet knowingly and voluntarily participated in this plan and remained an active member of the conspiracy until his retirement from the CIA on July 11, 2004.

As a member of a conspiracy, Tenet could also be criminally liable for other criminal acts perpetrated by members of the conspiracy, including torture.³⁹⁶ Known as *Pinkerton* liability, this is a significant consequence of a conspiracy charge. Establishing *Pinkerton* liability requires three steps. First, a conspirator must commit the underlying offense during the existence of the conspiracy and in furtherance of its objectives.³⁹⁷ Second, Tenet must have been a knowing and voluntary member of the conspiracy at the time the offense was committed.³⁹⁸ Third, the commission of such an offense by a conspirator must have been a reasonably foreseeable consequence of the conspiracy.³⁹⁹

Each CIA interrogator and debriefer acted under Tenet's oversight and authority. They implemented interrogation plans that he authorized. They received his approval to per-

395. See, e.g., *Vaughn Index Regarding Abu Zubaydah Interrogation*, ACLU (2009), www.aclu.org/torturefoia/legaldocuments/torturefoia_vaughn1_20090501.pdf (collecting various Vaughn Indices submitted by the Department of Defense to shield documents for American Civil Liberties Union v. Dep't of Defense, 2010 WL 9499016 (S.D.N.Y. 2010)). See also SSCI REPORT *passim*, *supra* note 3.

396. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (stating that acts in furtherance of a conspiracy are attributable to all members of the conspiracy).

397. See Belfast Jury Instructions, *supra* note 361, at 6.

398. *Id.*

399. *Id.*

form the interrogation techniques. When they committed torture, they did so as part of the conspiracy to inflict severe physical and mental pain and suffering on the detainees for the purpose of making them compliant and obtaining information from them. Even acts not specifically authorized by Tenet can give rise to criminal liability because such acts were reasonably foreseeable consequences of the conspiracy. Thus, Tenet could be liable when interrogators exceeded their purported authority such as by using unauthorized interrogation techniques or by exceeding the permitted time and frequency of authorized interrogation techniques. Such acts were a clearly foreseeable consequence of the conspiracy. Tenet was a knowing and voluntary member of the conspiracy until his retirement from the CIA.

In sum, Tenet could be liable for each substantive count of torture under three separate theories of liability: direct liability, aiding and abetting liability, and *Pinkerton* liability.⁴⁰⁰ Tenet could also be subject to liability for conspiracy.

B. *The Indictment*

The Federal Rules of Criminal Procedure provide that an indictment must contain a “plain, concise, and definite written statement of the essential facts constituting the offense charged.”⁴⁰¹ The indictment need not offer a detailed summary of all the facts and evidence. Rather, it “need only contain those facts and elements of the alleged offense necessary to inform the accused of the charge so that he or she may prepare a defense and invoke the Double Jeopardy clause when appropriate.”⁴⁰²

This indictment charges George Tenet with five counts: conspiracy and four separate counts of torture. The four unnamed victims are Abu Zubaydah, Khalid Shaykh Muhammad, Abd al-Rahim al-Nashiri, and Ramzi Bin Al-Shibh. Because the torture occurred outside the United States, venue is appropri-

400. U.S. ATTORNEYS’ MANUAL, *supra* note 352, § 2482 (Criminal Resources Manual).

401. FED. R. CRIM. P. 7(c)(1). See *United States v. Belfast*, No. 06-20758, 2007 WL 844508, (S.D. Fla. Feb. 12, 2007).

402. U.S. ATTORNEYS’ MANUAL, *supra* note 352, § 222 (Criminal Resources Manual).

ate in the federal district where the defendant is arrested.⁴⁰³ The federal district court for the Eastern District of Virginia is also an appropriate venue because it is the district in which CIA headquarters is located.

403. 18 U.S.C. § 3238; *United States v. Yousef*, 327 F.3d 56, 114–15 (2d Cir. 2003).

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA**

UNITED STATES OF AMERICA)	CASE NO: _____
)	
)	INDICTMENT
v.)	18 U.S.C. § 2340A(a)
)	18 U.S.C. § 2340A(c)
)	18 U.S.C. § 2
GEORGE J. TENET)	
_____)	

The Grand Jury charges that:

INTRODUCTORY ALLEGATIONS

1. The defendant, GEORGE J. TENET, is a national of the United States who was born in Flushing, New York on January 5, 1953.
2. The defendant, GEORGE J. TENET, is present in the United States and works in New York City and Washington, D.C., through and including the filing date of this Indictment. At all times relevant to this Indictment:

GENERAL ALLEGATIONS

1. The Central Intelligence Agency is an official federal agency of the United States Government.
2. The offices of the Central Intelligence Agency are located in Langley, Virginia, which is located in the Eastern District of Virginia.
3. On July 11, 1997, the defendant, TENET, was appointed Director of Central Intelligence.
4. As the Director of Central Intelligence, the defendant, TENET, served as the head of the U.S. intelligence community, acted as the principal advisor to the President on intelligence matters, and served as the head of the Central Intelligence Agency. In this role, he was responsible for overseeing intelligence gathering as well as counterterrorism. He was also responsible for overseeing the Directorate of Operations, including the Counterterrorism Center.
5. On or around September 17, 2001, President George W. Bush authorized the Director of Central Intelligence to un-

dertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests, or who are planning terrorist activities.

6. In response to this authorization, the defendant, TENET, developed and implemented the CIA's Detention and Interrogation Program.

7. The defendant, TENET, made decisions regarding the Detention and Interrogation Program from CIA headquarters in Langley, Virginia.

8. Between September 11, 2001 and July 11, 2004, the Central Intelligence Agency maintained detention centers at several locations around the world, including Afghanistan, Lithuania, Poland, Romania, and Thailand.

9. Between September 11, 2001 and July 11, 2004, the Central Intelligence Agency gained custody and maintained physical control of persons known to the Grand Jury (collectively referred to herein as "the victims").

10. Between September 11, 2001 and July 11, 2004, the defendant, TENET, approved the use of interrogation techniques that caused severe physical and mental pain and suffering on the victims. These interrogation techniques included: attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, use of diapers for prolonged periods, use of insects, mock burials, water dousing, and waterboarding. Victims were also subjected to forced nudity, dietary manipulation, sensory deprivation, environmental manipulation, and solitary confinement.

11. Between September 11, 2001 and July 11, 2004, the defendant, TENET, was notified that each victim was subjected to both authorized and unauthorized interrogation techniques.

12. On January 28, 2003, the defendant, TENET, approved the Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001. These Guidelines distinguished between standard and enhanced interrogation techniques and authorized their use on detainees. Standard interrogation techniques included the following: use of isolation, sleep deprivation not to exceed 72 hours, reduced caloric intake, deprivation of reading materials, use of loud music or white noise, and use of

diapers for limited periods. Enhanced interrogation techniques included the following: attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, use of diapers for prolonged periods, use of insects, mock burials, and waterboarding.

13. At all times, detainees were held outside the territory of the United States.

14. Throughout his tenure as Director of Central Intelligence, TENET had the authority to suspend or terminate the use of standard and enhanced interrogation techniques on detainees.

15. On June 2, 2004, TENET submitted his resignation as Director of Central Intelligence. TENET's final day with the Central Intelligence Agency was on July 11, 2004.

COUNT ONE: CONSPIRACY TO COMMIT TORTURE

1. Paragraphs 1-2 of the Introductory Allegations contained in this Indictment and Paragraphs 1-15 of the General Allegations contained in this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. From September 11, 2001 to July 11, 2004, the defendant, TENET, did knowingly combine, conspire, confederate, and agree with others known and unknown to the Grand Jury to commit torture, in that the defendant, TENET, and others conspired to commit acts, under the color of law, with the specific intent to inflict severe physical and mental pain and suffering upon other persons, including persons known to the Grand Jury (collectively referred to herein as "the victims"), within the conspirators' custody and physical control.

3. The manner and means by which members of the conspiracy sought to accomplish its goals included: that the defendant, TENET, and others known and unknown to the Grand Jury used the Central Intelligence Agency, other government agencies, and private contractors to seize, detain, and interrogate persons who might possess information about actual, perceived, or potential threats to the United States, and to mistreat these persons by acts specifically intended to inflict severe physical and mental pain and suffering.

4. In furtherance of the conspiracy and to accomplish its purpose and objects, at least one of the conspirators commit-

ted and caused to be committed, outside the United States, at least one of the following acts, among others:

VICTIM #1

1. On or about March 28, 2002, Victim #1 was captured in Pakistan and transferred to CIA custody at a facility outside the United States. During his capture, Victim #1 sustained serious gunshot wounds that required immediate medical attention.

2. Victim #1 was detained under the direct authorization of the defendant, TENET.

3. In April and May 2002, Victim #1 was interrogated on several occasions by CIA interrogators outside the United States. During these interrogations, Victim #1 was typically handcuffed and wore leg shackles. When he was not interrogated, Victim #1 was kept in solitary confinement in his cell. He was typically kept naked and sleep deprived. Loud music or machine noise was often used to enhance his sense of hopelessness.

4. In or about June and July 2002, Victim #1 was detained in complete isolation in a CIA facility outside the United States for approximately 47 days.

5. On or about August 4, 2002, Victim #1 was shackled, hooded, and stripped by CIA interrogators. The interrogators then placed a rolled towel around his neck and slammed Victim #1 against a concrete wall. The interrogators then removed the hood and performed an attention grab. A confinement box was brought into the cell and placed on the floor so as to appear like a coffin. Victim #1's hood was then removed and he was questioned by the interrogators. Each time Victim #1 denied having information, the interrogators would perform a facial slap or face grab. During this interrogation session, Victim #1 was waterboarded.

6. Between August 4 and 23, 2002, Victim #1 was subjected to several interrogation techniques, including walling, attention grasps, slapping, facial hold, stress positions, cramped confinement, white noise, sleep deprivation, and waterboarding.

7. During his detention, Victim #1's hair and beard were shaved every day.

8. During his detention, Victim #1 was waterboarded 2-4 times a day, with multiple iterations of the watering cycle dur-

ing each application. These waterboarding sessions resulted in immediate fluid intake, involuntary leg, chest, and arm spasms. In at least one waterboarding session, Victim #1 became unresponsive. Bubbles began rising from Victim #1's open mouth, and he remained unresponsive until medical intervention.

9. During his detention, Victim #1 was forced to spend a total of 266 hours (11 days, 2 hours) in a confinement box that was the size of a coffin. The interrogators informed Victim #1 that the only way he would leave the facility would be in the confinement box. Victim #1 was also forced to spend a total of 29 hours in an even smaller confinement box. The dimensions of the smaller confinement box were 21 inches in width, 29 inches in depth, and 29 inches in height.

10. During his detention, Victim #1 was doused with cold water while he was naked and shackled.

11. During his detention, Victim #1 frequently cried and whimpered. He also begged and pleaded with his interrogators. At times, Victim #1 became hysterical and distressed.

12. In total, Victim #1 was waterboarded approximately 83 times.

13. The defendant, TENET, approved each interrogation session of Victim #1 and received summaries of each session after they had been completed.

14. Victim #1 was eventually transferred to the Guantanamo Bay Detention Facility on or about September 5, 2006.

VICTIM #2

1. On or about March 1, 2003, Victim #2 was captured in Pakistan and transferred to CIA custody at a facility outside the United States.

2. Victim #2 was detained under the direct authorization of the defendant, TENET.

3. On or about March 2, 2003, Victim #2 was subjected to facial and abdominal slaps, the facial grab, stress positions, standing sleep deprivation, nudity, and water dousing by CIA interrogators. Victim #2 was also subjected to rectal rehydration.

4. On or about March 5 and 6, 2003, Victim #2 was subjected to nudity, sleep deprivation, and rectal rehydration.

5. On or about March 7 and 8, 2003, Victim #2 was stripped and placed in a standing sleep deprivation position. CIA interrogators made statements to Victim #2 threatening his children.

6. On or about March 9, Victim #2 was subjected to nudity, standing sleep deprivation, attention grab, insult slap, facial grab, abdominal slap, kneeling stress position, and walling.

7. On or about March 10, 2003, Victim #2 was subjected to waterboarding. His first waterboarding session lasted 30 minutes. He was subjected to 15 separate waterboarding sessions. After the waterboarding sessions, Victim #2 was subjected to a horizontal stress position.

8. On or about March 12, 2003, Victim #2 was subjected to several waterboarding sessions. Victim #2 ingested large quantities of water during the waterboarding sessions. He vomited during and after the waterboarding sessions. He was subjected to the attention grasp, insult slap, abdominal slap, and walling. Victim #2 was subjected to waterboarding for the next ten days.

9. On or about March 13, 2003, Victim #2 was subjected to three waterboarding sessions. He vomited during and after each of these procedures.

10. On or about March 18, 2003, Victim #2 was subjected to an extended period of sleep deprivation for seven and a half days, most of it in a standing position.

11. On or about March 20, 2003, Victim #2 was subjected to several interrogation techniques throughout the day. Victim #2 suffered abrasions on his ankles, shins, wrists, as well as the back of his head. Victim #2 also suffered from pedal edema. At the end of the last interrogation session, the interrogators left a picture of one of Victim #2's sons in his cell to remind Victim #2 that his family was in custody and that they were at risk.

12. On or about March 22, 2003, Victim #2 was subjected to several interrogation techniques throughout the day. He was thrown against the wall and waterboarded.

13. On or about March 24, 2003, Victim #2 was subjected to several interrogation techniques throughout the day, including waterboarding.

14. In total, Victim #2 was waterboarded approximately 180 times.

15. The defendant, TENET, approved each interrogation session of Victim #2 and received summaries of each session after they had been completed.

16. Victim #2 was eventually transferred to the Guantanamo Bay Detention Facility on or about September 5, 2006.

VICTIM #3

1. In or about October 2002, Victim #3 was captured in the United Arab Emirates. He was eventually transferred to CIA custody in a facility outside the United States in November 2002.

2. Victim #3 was detained under the direct authorization of the defendant, TENET.

3. In or about November 2002, Victim #3 was interrogated and subjected to waterboarding at least three times by CIA interrogators.

4. In or about December 2002 and January 2003, Victim #3 was interrogated and subjected to waterboarding on several occasions. During his detention, he was also subjected to sensory deprivation, loud noises, isolation, and dietary manipulation.

5. In or about December 2002, Victim #3 was placed in a standing stress position with his hands affixed over his head for approximately two and a half days. While Victim #3 was bound and blindfolded, a CIA interrogator placed a pistol near his head and racked it. While Victim #3 was bound and blindfolded, a CIA interrogator activated a power drill near his head.

6. During interrogation sessions, Victim #3 was slapped on the back of the head several times. CIA interrogators informed Victim #3 that his mother would be brought before him and sexually abused. CIA interrogators blew cigar smoke in his face. They also gave Victim #3 a bath using a stiff brush.

7. In or about January 2003, Victim #3 was shaved, his clothes were removed, and he was placed in a standing sleep deprivation position with his arms affixed over his head. During interrogation sessions, Victim #3 was nude, handcuffed, and shackled in a standing position.

8. The defendant, TENET, approved each interrogation session of Victim #3 and received summaries of each session after they had been completed.

9. Victim #3 was eventually transferred to the Guantamo Bay Detention Facility on or about September 4, 2006.

VICTIM #4

1. On or about September 11, 2002, Victim #4 was captured in Pakistan. He was eventually transferred to CIA custody in a facility outside the United States in February 2003.

2. Victim #4 was detained under the direct authorization of the defendant, TENET.

3. Victim #4 was subjected to sensory dislocation, which included shaving his head and face, exposing him to loud noise, keeping him naked, and subjected to cold temperatures. Victim #4 was shackled with his arms outstretched over his head.

4. Victim #4 was subjected to sleep deprivation during his detention. He was also subject to other interrogation techniques, including the attention grasp, walling, the facial hold, the facial slap, the abdominal slap, cramped confinement, wall standing, and stress positions.

5. The defendant, TENET, approved each interrogation session of Victim #4 and received summaries of each session after they had been completed.

6. Victim #4 was eventually transferred to the Guantamo Bay Detention Facility on or about September 5, 2006.

All such acts were in violation of Title 18, United States Code, Section 2340A(a) and Section 2340A(c).

COUNT TWO: TORTURE (VICTIM #1)

1. Paragraphs 1-2 of the Introductory Allegations contained in this Indictment and Paragraphs 1-15 of the General Allegations contained in this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. From on or about March 28, 2002 to on or about September 4, 2006, while outside the United States, the defendant, TENET, and others known and unknown to the Grand Jury did, while specifically intending to inflict several physical and mental pain and suffering, commit and attempt to com-

mit torture, while acting under color of law, by committing and causing and aiding and abetting others to commit acts against another person known to the Grand Jury (referred to herein as Victim #1), that is: by subjecting Victim #1 to various interrogation techniques, including attention slap, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, water dousing, and waterboarding as well as forced nudity, dietary manipulation, sensory deprivation, environmental manipulation, and solitary confinement, all while Victim #1 was within the custody and physical control of the defendant, TENET, and others known and unknown to the Grand Jury, in violation of Title 18, United States Code, Section 2340A and Title 18, United States Code, Section 2.

COUNT THREE: TORTURE (VICTIM #2)

1. Paragraphs 1-2 of the Introductory Allegations contained in this Indictment and Paragraphs 1-15 of the General Allegations contained in this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. From on or about March 1, 2003 to on or about September 4, 2006, while outside the United States, the defendant, TENET, and others known and unknown to the Grand Jury did, while specifically intending to inflict several physical and mental pain and suffering, commit and attempt to commit torture, while acting under color of law, by committing and causing and aiding and abetting others to commit acts against another person known to the Grand Jury (referred to herein as Victim #2), that is: by subjecting Victim #2 to various interrogation techniques, including attention slap, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, water dousing, and waterboarding as well as forced nudity, dietary manipulation, sensory deprivation, environmental manipulation, and solitary confinement, all while Victim #2 was within the custody and physical control of the defendant, TENET, and others known and unknown to the Grand Jury, in violation of Title 18, United States Code, Section 2340A and Title 18, United States Code, Section 2.

COUNT FOUR: TORTURE (VICTIM #3)

1. Paragraphs 1-2 of the Introductory Allegations contained in this Indictment and Paragraphs 1-15 of the General Allegations contained in this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. From in or about October 2002 to on or about September 4, 2006, while outside the United States, the defendant, TENET, and others known and unknown to the Grand Jury did, while specifically intending to inflict several physical and mental pain and suffering, commit and attempt to commit torture, while acting under color of law, by committing and causing and aiding and abetting others to commit acts against another person known to the Grand Jury (referred to herein as Victim #3), that is: by subjecting Victim #3 to various interrogation techniques, including attention slap, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, water dousing, and waterboarding as well as forced nudity, dietary manipulation, sensory deprivation, environmental manipulation, and solitary confinement, all while Victim #3 was within the custody and physical control of the defendant, TENET, and others known and unknown to the Grand Jury, in violation of Title 18, United States Code, Section 2340A and Title 18, United States Code, Section 2.

COUNT FIVE: TORTURE (VICTIM #4)

1. Paragraphs 1-2 of the Introductory Allegations contained in this Indictment and Paragraphs 1-15 of the General Allegations contained in this Indictment are realleged and incorporated by reference as if fully set forth herein.

2. From on or about September 11, 2002 to on or about September 4, 2006, while outside the United States, the defendant, TENET, and others known and unknown to the Grand Jury did, while specifically intending to inflict several physical and mental pain and suffering, commit and attempt to commit torture, while acting under color of law, by committing and causing and aiding and abetting others to commit acts against another person known to the Grand Jury (referred to herein as Victim #4), that is: by subjecting Victim #4 to various interrogation techniques, including attention slap, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, and water dousing as well as

forced nudity, dietary manipulation, sensory deprivation, environmental manipulation, and solitary confinement, all while Victim #4 was within the custody and physical control of the defendant, TENET, and others known and unknown to the Grand Jury, in violation of Title 18, United States Code, Section 2340A and Title 18, United States Code, Section 2.

Dated:

A True Bill

United States Attorney

Foreperson

C. Possible Defenses

Several defenses that Tenet could raise to challenge his indictment were considered and rejected by the district court and the Eleventh Circuit in *Belfast*. The constitutionality of the Torture Statute was upheld. The extraterritorial application of the statute was also affirmed. The legitimacy of a conspiracy charge for torture was recognized. The meaning of torture and the role of specific intent in torture cases were established. Likewise, both the district court and Eleventh Circuit in *Belfast* rejected the legitimacy of a “sovereignty” defense, and the Eleventh Circuit also rejected a “necessity” defense.⁴⁰⁴

Tenet cannot argue that his actions were justified to protect the United States. Neither the Convention against Torture nor the Torture Statute offer such exceptions from liability. In this regard, the Convention against Torture is quite clear: “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴⁰⁵ Moreover, the legislative history of U.S. ratification of the Convention against Torture reveals a clear understanding that the prohibition was absolute and that even public emergencies could not justify torture. The legislative history also reveals that a proposed understanding regarding the viability of several defenses to torture, including superior orders, self-defense and defense of others, was rejected.

Tenet cannot argue that his actions were justified because they were taken to prevent a terrorist attack. While Tenet may have acted with good intentions in seeking to prevent another attack, such motivation is not a valid defense in criminal proceedings. As noted in *Belfast*, “[g]ood motive alone is never a defense where the act done or omitted is a crime. The motive of the defendant is, therefore, immaterial except insofar as evidence of motive may aid in the determination of state of mind or the intent of the defendant.”⁴⁰⁶ Other courts have rejected

404. *Belfast*, 611 F.3d at 809, 812–13; *Emmanuel*, 2007 WL at *14.

405. Convention against Torture, *supra* note 31, art. 2(2). See generally DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) (critiquing the lawyers who wrote the torture memos); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2006) (discussing how the torture memos were inconsistent with international law).

406. *Belfast* Jury Instructions, *supra* note 361, at 8.

similar claims that sought to justify the use of excessive force against a shackled detainee because the detainee might have information about potential terrorist threats.⁴⁰⁷

Tenet cannot argue that his actions were protected because he had sought and received the advice of counsel.⁴⁰⁸ As a general matter, defendants cannot invoke advice of legal counsel as a blanket defense, immunizing them from criminal liability. “If unreasonable advice of counsel could automatically excuse criminal behavior, criminals would have a straight and sure path to immunity.”⁴⁰⁹ Numerous courts have rejected an “advice of counsel” defense when the advice was sought as a way to justify the illegal activity or when the attorney was a partner in the illegal activity.⁴¹⁰ A limited exception is recognized, however, for reasonable reliance on good faith advice. This element does not exist in Tenet’s case.⁴¹¹

In considering the legitimacy of the proffered legal advice, it is relevant to consider that the torture memos were withdrawn soon after their principal authors, Jay Bybee and John Yoo, left the OLC.⁴¹² The legal reasoning contained in the memos was criticized by their successor in OLC as one-

407. *E.g.*, *United States v. Passaro*, 577 F.3d 207, 221 (4th Cir. 2009) (use of force against shackled defendant constitutes criminal act). *See also* *Graham v. Connor*, 490 U.S. 386 (1989) (examining liability of law enforcement officials who use excessive force).

408. *See* Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086 (2008) (addressing the immunizing effect of OLC opinions); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (discussing implications of OLC opinions); Ross L. Weiner, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524 (2009) (discusses the background of the OLC and its role in shaping the Bush administration’s position on torture).

409. *United States v. Urfer*, 287 F.3d 663, 665 (7th Cir. 2002).

410. *See, e.g.*, *United States v. Carr*, 740 F.2d 339 (5th Cir. 1984) (rejecting the defense of “advice of counsel”).

411. *See* Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 694 (2004) (“[T]hese memoranda cannot in themselves insulate or immunize persons engaging or complicit in torture or war crimes from international or domestic criminal responsibility for their conduct. It is well settled that advice of counsel—the “My lawyer said it was OK” defense—cannot serve as an excuse for violating the law, especially in cases where legal advice is deliberately sought and given for the very purpose of providing such an excuse.”).

412. Carrie Johnson, *Senators Seek Ethics Findings*, WASH. POST (Feb. 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/16/AR2009021601198.html>. The overturning of an OLC opinion is a rare

sided and legally flawed.⁴¹³ It is equally relevant that the Department of Justice's Office of Professional Responsibility (OPR) censured Bybee and Yoo for their work on the memos.⁴¹⁴ According to the OPR, Yoo failed to provide a "thorough, objective, and candid interpretation of the law."⁴¹⁵ Similarly, Bybee "should have known that the memoranda were not thorough, objective, or candid in terms of the legal advice they were providing to the clients and that thus he acted in reckless disregard of his professional obligations."⁴¹⁶ The OPR found that the memos were incomplete, one-sided, and misstated law and precedent. For these reasons, the OPR found that Yoo and Bybee had committed professional misconduct in their drafting of the torture memos.⁴¹⁷ However, a recommendation to refer OPR's findings of misconduct to the appropriate bar counsel in the states where Yoo and Bybee were licensed was subsequently rejected.⁴¹⁸

occurrence. To have this occur within the same administration is unprecedented. GOLDSMITH, *supra* note 274, at 145-46.

413. *Id.* at 146-51. It should be noted, however, that OLC subsequently issued new legal analysis that found most of the enhanced interrogation techniques to be lawful. Memorandum from Principal Deputy Assistant Attorney General, Steven G. Bradbury to Senior Deputy General Counsel, CIA John Rizzo regarding Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005), <http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf>.

414. DEP'T OF JUSTICE, OFFICE OF PROF. RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009) [hereinafter OPR REPORT]. Both Bybee and Yoo submitted detailed responses challenging OPR's analysis and conclusions.

415. *Id.* at 251.

416. *Id.* at 256.

417. *Id.* at 260.

418. Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES (Feb. 19, 2010), http://www.nytimes.com/2010/02/20/us/politics/20justice.html?_r=0. Pursuant to Justice Department procedures, the OPR Report recommended that its findings be transmitted to the appropriate bar counsel in the states where Yoo and Bybee were licensed. Memorandum from David Margolis, Associate Deputy Attorney General, to the Attorney General on OPR Report Findings (Jan. 5, 2010), https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105_DAG_Margolis_Memo.pdf. This decision was subsequently rejected by David Margolis, the Associate Deputy Attorney General. Memorandum from David Margolis, Associate

The close relationship between the CIA and OLC, and the outcome-driven nature of the legal advice, further undermine the legitimacy of an “advice of counsel” defense.⁴¹⁹ The OLC was in frequent contact with the CIA throughout the drafting process for the torture memos.⁴²⁰ And, in fact, OPR “found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result. . . .”⁴²¹

For these reasons, the controversial provisions in the Detainee Treatment Act of 2005 (“DTA”) should not offer Tenet a defense from prosecution.⁴²² The DTA offers a defense in civil or criminal proceedings to claims arising out of the operational practices of U.S. officials involved in the detention and interrogation of detainees if such officials “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”⁴²³ The DTA added that “[g]ood faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.”⁴²⁴ This defense applies to “an officer, employee, member

Deputy Attorney General, to the Attorney General on OPR Report Findings (Jan. 5, 2010), *available at* https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105_DAG_Margolis_Memo.pdf. Margolis criticized the OPR findings and concluded that Yoo and Bybee exhibited poor judgment but had not committed misconduct. *Id.* at 68.

419. *See generally* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Unlawful Conduct?*, 35 U. MIAMI L. REV. 669 (1981) (discussing the Model Code of Professional Responsibility, which provides that a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997) (discussing the defense of reasonable reliance on official interpretations of law).

420. RIZZO, *supra* note 15, at 188–93.

421. OPR REPORT, *supra* note 414, at 227. *But see* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 170 (2006).

422. Detainee Treatment Act, 42 U.S.C. § 2000dd-1. The Military Commissions Act of 2006 subsequently amended the Detainee Treatment Act to make it retroactive so it would extend its coverage to acts committed from September 11, 2001 through December 30, 2005. Military Commissions Act of 2006, <http://www.gpo.gov/fdsys/pkg/BILLS-109s3930enr/pdf/BILLS-109s3930enr.pdf>.

423. § 2000dd-1(a).

424. *Id.*

of the Armed Forces, or other agent of the United States Government who is a United States person.”⁴²⁵ Essentially, the DTA codified the public authority and entrapment by estoppel defenses recognized by federal courts.⁴²⁶ The public authority defense provides an affirmative defense to a defendant who acts in reliance of a grant of authority from a government official to commit an illegal act. In contrast, entrapment by estoppel provides a defense to a defendant who reasonably relies on an official misrepresentation that certain conduct is legal. Given that the DTA only applies to those individuals “engaging in specific operational practices, that involve detention and interrogation,” it is unclear that these provisions would even apply to Tenet.⁴²⁷ Moreover, Tenet’s reliance on the DTA to provide a defense would be further undermined in light of the CIA’s own internal policies that prohibited “the use of force, mental or physical torture, extremely demeaning indignities or exposure to inhumane treatment of any kind as an aid to interrogation.”⁴²⁸ And, the CIA has faulted its “handling of accountability for problems in the conduct and management” of the Detention and Interrogation Program.⁴²⁹

Reliance on these defenses is further undermined by international law. Since the Nuremberg Tribunal, international law has routinely rejected claims that legal opinions, statutory provisions, or superior orders can obviate liability for viola-

425. *Id.*

426. See John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487 (2006) (discussing the detainee abuse problem). See also Mark W.S. Hobel, Note, “So Vast an Area of Legal Irresponsibility”? *The Superior Orders Defense and Good Faith Reliance on Advice of Counsel*, 111 COLUM. L. REV. 574, 578 (2011) (noting how the Detainee Treatment Act “may not only immunize government officials and agents involved in interrogations, but also disrupt emerging international legal norms surrounding the superior orders defense.”); Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433 (2007) (discussing custodial interrogations in counterterrorism detention operations).

427. § 2000dd-1(a).

428. SSCI REPORT, *supra* note 3, at 18 (Executive Summary) (quoting Directorate of Operations Handbook, 50-2, Section XX(1)(a) (Oct. 9, 2001)).

429. DIR. OF THE CENT. INTELLIGENCE AGENCY, COMMENTS ON THE SENATE SELECT COMMITTEE ON INTELLIGENCE’S STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S FORMER DETENTION AND INTERROGATION PROGRAM 8 (2013) [hereinafter CIA COMMENTS ON SSCI REPORT].

tions of fundamental norms.⁴³⁰ International tribunals have also rejected such claims.⁴³¹ And, in fact, U.S. courts have recoiled at the “Nuremberg” defense and have interpreted the law narrowly so that a defendant cannot “transform an illegal act into a legal one” by simply referencing statutory provisions or superior orders.⁴³² Moreover, government actions that effectively function as amnesty decrees or which otherwise grant immunity for violations of fundamental norms have also been rejected by the international community.⁴³³ At a more fundamental level, a person of “ordinary sense and understanding” would have known that the abusive treatment imposed on the detainees was unlawful, something the Reagan administration acknowledged would occur in cases of torture when it first submitted the Convention against Torture to the Senate for consideration in 1988.

430. *See, e.g.*, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279. *See also* Rome Statute of the International Criminal Court, (Rome, July 17, 1998) UN Doc. A/CONF.183/9; Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993).

431. *See, e.g.*, United States v. von Weizsaecker (Ministries Case), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 959 (1949) (“If the program was in violation of international law the duty was absolute to so inform the inquiring branch of the government.”); United States v. von Leeb (High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 508 (1948) (“A directive to violate international criminal common law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.”). *See also* United States v. Alstoeffer (Justice Case), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1170 (1951) (affirming that crimes against humanity violate international law).

432. United States v. North, 910 F.2d 843, 879, 881 (D.C. Cir. 1990).

433. *See generally* FAUSTIN Z. NTOUBANDI, AMNESTIES FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW (2007) (examining amnesties for crimes against humanity in the context of transitional justice in post-conflict or post-dictatorial societies); Simon M. Meisenberg, *Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone*, 86 INT’L REV. RED CROSS 837 (2004) (focusing on the Lomé Decision of the Special Court for Sierra Leone as a step toward the abolition of blanket amnesties for mass atrocities); Yasmin Naqvi, *Amnesties for War Crimes: Defining the Limits of International Recognition*, 85 INT’L REV. RED CROSS 583 (2003) (discussing the criteria for recognition of amnesty for war crimes).

Even if Tenet could rely on the advice of counsel or other authorization as a legal defense, this would only offer protection for those acts that fell directly within the scope of such legal advice or authorization. Thus, Tenet would still be liable for acts he sanctioned before such advice or authorization was proffered as well as for acts he sanctioned that exceeded the scope of advice or authorization. For example, Abu Zubaydah was stripped naked and subjected to sleep deprivation well before the OLC submitted the torture memos to the CIA in August 2002.⁴³⁴ In fact, Zubaydah's treatment was so extreme that an FBI official informed FBI Headquarters that he was prepared to arrest CIA personnel involved in these interrogation sessions.⁴³⁵

In addition, the OLC expressed concerns to the CIA's General Counsel in May 2004 that actual practice within the Detention and Interrogation Program "may not have been congruent" with the assumptions and limitations previously discussed.⁴³⁶ "In particular, it appears that the application of the waterboard technique may have deviated in some respects from the descriptions in our opinion."⁴³⁷ The CIA has itself acknowledged that detainees were subjected to interrogation techniques that "deviated from representations originally made by CIA to OLC in 2002."⁴³⁸

Tenet would also be liable for unauthorized acts taken by co-conspirators if such acts were a foreseeable consequence of the conspiracy. For example, the CIA Inspector General's Special Review identified several unauthorized acts taken against detainees including the use of pressure points, water dousing,

434. SSCI REPORT, *supra* note 3, at 28–29 (Executive Summary).

435. See generally ALI H. SOUFAN, *THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA* (2011) (discussing the criteria for recognition of amnesty for war crimes); *Frontline: The Interrogator* (PBS television broadcast Sept. 13, 2011), available at <http://www.pbs.org/wgbh/pages/frontline/the-interrogator/> (interview with FBI agent Ali Soufan). See also Michael Isikoff, *Ali Soufan Breaks His Silence*, NEWSWEEK, Apr. 24, 2009, available at <http://www.newsweek.com/ali-soufan-breaks-his-silence-77243> (discussing how the enhanced interrogation techniques were ineffective).

436. Letter from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel to Scott Muller, General Counsel, Central Intelligence Agency (May 27, 2004), available at <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-muller2004.pdf>.

437. *Id.*

438. CIA COMMENTS ON SSCI REPORT, *supra* note 429, at 55.

threats to family members, and use of guns and power drills to threaten detainees. Even John Yoo, who helped author the torture memos, acknowledged that criminal liability could extend to acts that were not specifically authorized by the OLC memos.⁴³⁹

While federal law recognizes a statute of limitations for certain criminal offenses, it would not be applicable in cases of torture. Federal law generally requires that an indictment be brought within eight years after the offense was committed.⁴⁴⁰ There is an exception, however, in cases where the “offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.”⁴⁴¹ By definition, torture requires the infliction of serious physical or mental pain or suffering.⁴⁴² Waterboarding, stress positions, walling, striking detainees, and cramped confinement created a foreseeable risk of serious bodily injury to detainees. Other enhanced interrogation techniques also created a foreseeable risk of injuries.

In sum, there is ample evidence to support an indictment against George Tenet and sufficient grounds for rejecting possible defenses to his prosecution.

VI. CONCLUSION

From its inception, the War on Terror led to an escalating set of harms, all of which were implemented in the purported defense of the United States and liberal democracy. “Black sites” were established to hold “high value” detainees who were subjected to “extraordinary rendition” as they were transferred

439. Conor Friedersdorf, *John Yoo: If the Torture Report is True, CIA Officers Are at Legal Risk*, THE ATLANTIC, Dec. 16, 2014, available at <http://www.theatlantic.com/politics/archive/2014/12/john-yoo-if-senate-report-is-true-cia-interrogators-are-at-legal-risk/383790/> (“[I]f these things happened as they are described in the report, . . . those were not authorized by the Justice Department. They were not supposed to be done and those people who did those are at risk legally because they were acting outside their orders.”). *But c.f.* William R. Levi, *Interrogation’s Law*, 118 YALE L.J. 1434, 1440 (2009) (“[A]pplicable proscriptive language in the various legal instruments governing interrogation was opaque and open to interpretational latitude.”).

440. *E.g.*, 18 U.S.C. § 3286(a) (“[N]o person shall be prosecuted . . . unless the indictment is found or the information is instituted within 8 years after the offense was committed.”).

441. *Id.* at § 3286(b).

442. *Nezirovic v. Holt*, 779 F3d 233, 238 n.5 (4th Cir. 2015) (quoting 18 U.S.C. § 3286(a)).

from one detention facility to another in secrecy. At these sites, the detainees were subjected to “enhanced interrogation techniques” to make them compliant and to acquire information that might prevent another terrorist attack. Euphemisms became commonplace and were used to hide the truth.

The debate over the efficacy of torture—whether it led to actionable intelligence—has dominated the discourse surrounding the release of the SSCI Report and the broader War on Terror.⁴⁴³ It is, however, an irrelevant debate. The Convention against Torture provides that no circumstances justify torture, and there are no exceptions to this fundamental norm. Likewise, the Torture Statute offers no exceptions to torture under federal law. There is, in fact, a legal obligation to investigate and, where appropriate, to prosecute individuals who have committed, attempted to commit, or conspired to commit acts of torture.

This Article has focused on the criminal liability of George Tenet. As the Director of Central Intelligence, he was primarily responsible for the development and implementation of the Detention and Interrogation Program. But, other government officials who participated in and approved the Detention and Interrogation Program should also be held accountable. Political leaders who authorized the program are responsible.⁴⁴⁴ Government lawyers who drafted legal opin-

443. See David Bromwich, *Working the Dark Side*, 37 LONDON REV. BOOKS 15–16 (2015) (“A whole subset of the argument on torture has asked whether it works With the same propriety, one might ask whether slavery works.”); David Cole, *Did the Torture Report Give the C.I.A. a Bum Rap?*, N.Y. TIMES, Feb. 22, 2015, at SR6 (suggesting that discourse surrounding the Torture Report has improperly focused on the questionable efficacy of torture as an intelligence tool, rather than on torture’s immoral nature and illegal status). See generally ROBERT L. GRENIER, 88 DAYS TO KANDAHAR: A CIA DIARY (2015) (describing the value of detainee interrogations and evidence allegedly acquired through torture); RODRIGUEZ, *supra* note 15, at 71 (arguing for the efficacy of interrogation methods in acquiring actionable intelligence); MARC A. THIESSEN, COURTING DISASTER: HOW THE CIA KEPT AMERICA SAFE AND HOW BARACK OBAMA IS INVITING THE NEXT ATTACK (2010) (discussing reasons for the Bush administration’s interrogation policies).

444. See, e.g., GEORGE W. BUSH, DECISION POINTS 169 (2010) (“I approved the use of the interrogation techniques.”); Rachel L. Swarns, *Cheney Offers Sharp Defense of C.I.A. Interrogation Tactics*, N.Y. TIMES, Aug. 30, 2009, available at <http://www.nytimes.com/2009/08/31/us/politics/31cheney.html> (quoting Dick Cheney, who says that “we had approved [of waterboarding]”);

ions justifying the interrogation techniques are liable.⁴⁴⁵ Medical professionals who developed the interrogation techniques are also responsible.⁴⁴⁶ The interrogators and debriefers who directly participated in torturing detainees are liable. Admit-

MAYER, *supra* note 2, at 143 (describing the path the Bush administration took in using controversial interrogation techniques).

445. See, e.g., HAROLD H BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009) (discussing legal advice given to President Bush during the war on terror); THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE (Marjorie Cohn ed., 2011) (analyzing the U.S. policy of torture); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193 (2010) (addressing whether the lawyers who had authored or signed the torture memos should face professional sanction or prosecution); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389 (2010) (critiquing the lawyers who wrote the torture memos). *But see* JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006) (arguing that memos were properly researched and made good faith arguments in support of interrogation program); Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449 (2009) (arguing criminal punishment of the Bush administration lawyers for their legal advice on interrogation policy is both wrong-headed and dangerous); Michael B. Mukasey, *National Security and the Rule of Law*, 32 HARV. J.L. & PUB. POL'Y 831 (2009) (discussing how criminal investigations and legal disagreements could endanger future national security); David Rivkin Jr. & Lee A. Casey, *The Memos Prove We Didn't Torture*, WALL STREET J., updated Apr. 20, 2009, available at <http://www.wsj.com/articles/SB124018665408933455> (discussing how the interrogations were continuously monitored and did not cause severe pain).

446. See, e.g., STEVEN H. MILES, *OATH BETRAYED: TORTURE, MEDICAL COMPLICITY, AND THE WAR ON TERROR* (2006) (discussing how doctors and medics had cleared detainees for interrogations and monitored abuse); STEPHEN SOLDZ ET AL., *ALL THE PRESIDENT'S PSYCHOLOGISTS: THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S SECRET COMPLICITY WITH THE WHITE HOUSE AND US INTELLIGENCE COMMUNITY IN SUPPORT OF THE CIA'S "ENHANCED" INTERROGATION PROGRAM* (2015), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/2069718/report.pdf> (examines role that Bush administration played in shaping the American Psychological Association's ethics policy on psychologist participation in national security interrogations); Jeffrey S. Kaye, *Isolation, Sensory Deprivation, and Sensory Overload: History, Research, and Interrogation Policy, from the 1950s to the Present Day*, 66 GUILD PRAC. 2 (2009) (discussing the role of psychologists in interrogations); James Risen, *Report Finds Collaboration over Torture*, N.Y. TIMES, May 1, 2015, at A1 (discussing the collaboration between the American Psychological Association and the Bush administration). On Oct. 13, 2015, a federal lawsuit was filed pursuant to the Alien Tort Statute against James Mitchell and Bruce Jessen, the two psychologists who helped develop the enhanced interrogation techniques. Complaint, *Salim v. Mitchell*, No. 2:15-CV-286-JLQ (E.D. Wa. Oct. 14, 2015). The complaint raised two causes of action: torture, cruel,

tedly, the sheer number of government officials implicated in the torture of detainees may pose an additional challenge to accountability efforts.⁴⁴⁷ However, such difficulties cannot be used to justify inaction.

A cloud of impunity has settled over a dark period in our nation's history. As more information is released about the CIA's Detention and Interrogation Program, it will become increasingly difficult to ignore the brutality of enhanced interrogation techniques and the responsibility of those individuals who authorized, developed, and implemented the program.⁴⁴⁸ Even the CIA has acknowledged that it failed to hold its own senior leadership accountable.⁴⁴⁹ Only 499 of the SSCI Report's 6,700 pages have been released.⁴⁵⁰ It is troubling to consider what other evidence of torture may exist in those thousands of yet-to-be released pages.

inhuman, or degrading treatment and non-consensual human experimentation.

447. In order to gain "legal cover," CIA officials sought support for the Detention and Interrogation Program from throughout the Bush administration. *See, e.g.*, RIZZO, *supra* note 15, at 188–201 (describing efforts to get "legal cover" for CIA programs); TENET, *supra* note 173, at 241–42 (describing CIA efforts to receive "legal determinations" on what Agency officers could legally do).

448. There are growing calls for the Department of Justice to reopen its criminal investigation of the Rendition and Interrogation Program. *See, e.g.*, Letter from Haureen Shah, Director, Security with Human Rights, Amnesty International USA, to Inspector General, U.S. Department of Justice (Sept. 21, 2015); Letter from William C. Hubbard, President of the American Bar Association, to Attorney General Loretta Lynch (June 23, 2015).

449. CIA COMMENTS ON SSCI REPORT, *supra* note 429, at 8–10.

450. Efforts to compel the release of the full SSCI report have been unsuccessful. *E.g.*, American Civil Liberties Union v. Central Intelligence Agency, No. 13-1870 (JEB), 2015 WL 2406825 (D.D.C. May 20, 2015).