

***The Physical and Psychological Impact  
of Indefinite Detention on  
Guantánamo Prisoners***

# APPENDIX

## 1

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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MOHAMMED ABDULLAH MOHAMMED	:	
BA ODAH, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	Civil Action No. 06-1668 (TFH)
v.	:	
	:	
BARACK H. OBAMA, <i>et al.</i> ,	:	
	:	
Respondents.	:	
	x	

**STATUS REPORT**

In accordance with this Court's Minute Order of July 16, 2012, undersigned counsel to Petitioner Tariq Ali Abdullah Ahmed Ba Odah respectfully submits this supplement to the July 5, 2012 status report in order to further advise the Court of Petitioner's (Mr. Ba Odah) physical condition and the status of litigation in the above-captioned matter.

Mr. Ba Odah remains on the hunger-strike he began in February 2007. The Department of Defense continues to feed him twice a day via nasogastric intubation. To protest the severe isolative conditions of Camp V, where Mr. Ba Odah is housed, Mr. Ba Odah periodically even refuses to submit to nasogastric feedings. On those days, he goes without any sustenance at all. What toll the hunger-strike is taking on Mr. Ba Odah's body is unclear without access to his medical records. However, there can be no question that Mr. Ba Odah is very ill. He is underweight and weak. He admits to having great difficulty concentrating. Mr. Ba Odah complains of injuries to his nostrils and upper-

respiratory tract from the repeated insertion and removal of feeding tubes. He also complains of severe discomfort in his chest and abdomen. These pains are aggravated when he sits upright, which makes a two or three hour meeting with counsel physically exhausting for Mr. Ba Odah.

As a result, though Mr. Ba Odah desires legal representation, he is often compelled to cancel scheduled meetings. For example, in the months since the July 5<sup>th</sup> Status Report was filed, undersigned counsel made two visits to Guantánamo to meet with Mr. Ba Odah and other clients: the first was from September 9 - 12 and the second from December 18 - 23. During these trips, Mr. Ba Odah cancelled multiple scheduled meetings, including each of the longer afternoon sessions.<sup>1</sup>

Mr. Ba Odah's condition actually appears to have worsened between counsel's September and December visits. Mr. Ba Odah appeared even thinner in December than he had during previous meetings. He was exhausted and in obvious pain. Of the three consecutive meetings scheduled with Mr. Ba Odah, he was fit enough to attend just one meeting on the morning of December 18. This means that during the entirety of the December trip, counsel met with Mr. Ba Odah for a total of roughly two hours.

Nonetheless, counsel's recent interactions with Mr. Ba Odah suggest that he is seriously considering withdrawing his petition for a writ of habeas corpus. Mr. Ba Odah's physical condition, however, impedes counsel's ability to advise him as he weighs that decision. In particular, counsel has still been unable to speak to Mr. Ba Odah in detail about the purported legal basis for his continued detention or the substance of the government's allegations against him – both of which are necessary for Mr. Ba Odah

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<sup>1</sup> Counsel also attempted to communicate with Mr. Ba Odah via secure telephone call on September 24, but Mr. Ba Odah was again unable to attend.

to make an informed choice between withdrawing his petition and proceeding with this litigation. After more than a decade of indefinite detention, it is a particularly fraught legal decision Mr. Ba Odah faces – one complicated immensely by his now six year hunger-strike.

Counsel acknowledges that the above-captioned matter has been inactive for an extended period of time. However, under these extraordinary circumstances, counsel submits that maintaining the current stay is the appropriate way to accommodate Mr. Ba Odah's compromised health, while preserving his ability to consider his legal options. Counsel will continue to make every effort to confer with Mr. Ba Odah, including by returning to Guantánamo as soon as it is practicable, to determine how he wishes to proceed. Counsel proposes to file an additional status report within six months from the date of this filing, on or before July 8, 2013, and respectfully requests that the current stay remain in effect at least until that time.

Dated: New York, New York  
January 7, 2013

Respectfully submitted,

/s/ Omar A. Farah

Omar A. Farah (Pursuant to LCvR 83.2(g))  
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# APPENDIX

## 2

# Latif Autopsy Report Calls Gitmo Death a Suicide: Questions Remain

Monday, 26 November 2012 13:46

By [Jason Leopold](#), [Truthout](#) | [Exclusive Report](#)

*The manner of death has been ruled a suicide, the cause of death has not yet been disclosed. The list of unanswered questions grows.*

Truthout has obtained the results of the autopsy on Adnan Farhan Abdul Latif, but the long-awaited report on the mysterious September death of the Guantanamo Bay detainee raises more questions than answers.

Yemeni government officials, who have been briefed on the autopsy report, as well as a US military investigator close to the case, told Truthout this weekend that a military medical examiner has concluded the manner of death of the 36-year-old prisoner was suicide.

However, the cause of death has not yet been disclosed and the autopsy's reported conclusions conflict with previous statements by US and Yemeni government officials that there was no sign of "self-harm" on his body when he was found "motionless and unresponsive" in his cell in a disciplinary wing of Camp 5 on the afternoon of September 8. The manner in which Latif is reported to have taken his own life has not been disclosed either.



Adnan Farhan Abdul Latif. (Photo: [JTF-GTMO](#))

These sources, who declined to be named because they were not authorized to speak with the media, would not disclose additional details from the autopsy report until the Yemen government accepts Latif's remains and returns his body to his family.

"We will issue a statement as soon as [Yemen] accepts his remains," said Lt. Cmdr. Ron Flanders, a spokesman for United States Southern Command (SOUTHCOM), Joint Task Force-Guantanamo's (JTF-GTMO) higher command. Flanders would not comment on the autopsy report's conclusions. Truthout has filed a Freedom of Information Act request for a copy of the report.

Latif, who had been seriously injured in a car wreck in his native Yemen, was in search of free medical treatment in Afghanistan in October 2001 when the US invaded the country in the wake of the 9/11 terrorist attacks on the Pentagon and the World Trade Center.

Trapped by the bombing of Kabul, Latif was captured at the Pakistan border by Pakistani police and sold to the Northern Alliance for a bounty of \$5,000. He had been cleared for transfer back to his homeland four times over the past decade by both the Bush and Obama administrations.

A Yemeni government official told Truthout Saturday Latif's remains would be returned to his family in "the upcoming days." The Yemeni government had previously declined to accept his remains until they received a copy of the autopsy report and the findings from the Naval Criminal Investigative Service (NCIS), which has been investigating the circumstances and cause of Latif's death as required whenever a prisoner dies at Guantanamo.

Although the Yemeni Embassy in Washington, DC received a copy of the autopsy report on November 10, the NCIS probe, as Truthout [previously reported](#), could take as much as a year to complete.

Latif's body has been held for nearly three months at Ramstein Air Base in Germany. US officials have said Latif's remains have been handled according to Muslim precepts, which precluded taking steps to preserve his

body and organs, now badly decomposed. Therefore, his family will not be able to seek an independent autopsy.

"This will be very tough for [Latif's] family," the Yemeni government official said the condition of Latif's remains.

That the cause of Latif's death was determined to be suicide -the seventh such case at Guantanamo - appears to contradict what US officials originally believed.

Last month the Yemeni official told Truthout a US government official [seemed to rule out suicide](#) during their discussions with embassy officials in September, prior to the completion of the autopsy report.

Embassy officials specifically asked the US government representative if there was any sign Latif "choked himself" or hung himself and the answer was "no," the Yemeni official said.

Previous rulings of suicides at Guantanamo, several of which have been [called into question](#), were the result of hanging and strangulation by the elastic waistband of a pair of underwear. In all of those cases, a news release was immediately issued characterizing the deaths as suicides.

But Latif's death stands out because, after three months, the US government still has not issued a statement saying how he died. That is partially due to the fact that when his body was discovered there wasn't any sign of "physical harm" or "any harm" on Latif's body to suggest he committed suicide, the Yemeni government official said.

That's consistent with what Capt. Robert Durand, a JTF-GTMO spokesman, told the Associated Press two days after Latif's death in which [he is quoted](#) as saying, "There is no apparent cause [of death], natural or self-inflicted."

Durand told Truthout that although Latif "had a history of self-harm acts" he "generally refrained from activities which would potentially cause his death."

Latif, who had suffered severe head injuries in the car accident that caused neurological problems, was deemed a mentally unstable prisoner who often said he wanted to die.

Still, Durand said, Latif "was monitored by the behavioral health unit, and his recent actions, activities and statements to therapists indicated that he did not appear to want to end his life."

Absent an obvious indication of self-harm, or a known medical condition, it would be inappropriate to speculate on the cause of death," Durand said in October.

Durand would not say if Latif, who was monitored round-the-clock by prison guards and subjected to video surveillance, was placed on suicide watch.

Guards are supposed to check on prisoners in Camp 5 at least every three minutes and, if the prisoner is deemed a "detainee of interest," every 60 seconds. The guards are supposed to check to make sure the prisoners are breathing, according to one former Guantanamo guard.

### **Latif's Last Days Revealed**

According to Durand, Latif was sent to Camp 5 after being "medically cleared," because he assaulted a guard with a "cocktail," a mixture of bodily fluids and food. Neither Durand nor Guantanamo spokeswoman Capt. Jennifer Palmeri would say when the incident took place or when he was transferred to Camp 5 Alpha Block, where most prisoners are held in isolation.

But according to the accounts that a half-dozen prisoners gave David Remes, a Washington, DC-based human rights lawyer who began challenging Latif's detention in 2004, the circumstances that led to Latif's transfer to Camp 5 are much more complex. He was first sent from Camp 6 to a psychiatric ward, then the prison hospital and then to Camp 5.

Some of the prisoners, who are also represented by Remes, were housed in the same cell block in Camp 6 as Latif. Remes has asked that their names not be used for their protection.

It appears Latif was in Camp 5 only a day or two before he died. One of the prisoners who provided insight into Latif's detention in Camp 5 is Shaker Aamer, who was Latif's "neighbor" in the Alpha cellblock at Camp 5.



Aamer, who allowed his name to be used, is the last British prisoner whose ten-plus years of detention and torture at Guantanamo has attracted international attention and has put pressure on the British government by human rights organizations to secure his immediate release.

Aamer told Remes last month that in early August, Latif was in the recreation yard at Camp 6 when he threw a stone at a guard tower and broke the spotlight; he was then taken to the psychiatric ward connected to the prison facility's hospital.

Aamer contends Latif was told on September 6, two days before his death, he would be given an "ESP injection," that other prisoners claim "makes you a zombie" and "has a one-month afterlife," according to unclassified notes of the meeting between Remes and Aamer.

It is not known what an "ESP injection" is or how Aamer obtained the information. Remes said he could not provide additional details about his discussions with Aamer. However, Truthout has [previously reported](#), based on a Defense Department Inspector General's report obtained through the Freedom of Information Act, that Guantanamo prisoners who act out are "chemically restrained" with unknown medications.

A Defense Department spokesman said he could not respond to the allegations leveled by Aamer because he was not familiar with the chain of events.

Aamer, who speaks English, then told Remes that on September 5, three days before his death, Latif broke a fence and "escaped," presumably from the psych ward, and was then taken to the hospital at the urging of another prisoner who said it would "calm him."

Either on September 6 or 7, just a day or two before he died, is when Latif was moved to Camp 5. Aamer said Latif protested his transfer into the cell at Camp 5 because of the constant buzzing noise from a generator located behind a wall.

"He fought and fought against going there," Aamer said, according to the unclassified notes.

Another prisoner said a female psychologist accompanied Latif from the hospital to Camp 5, where one prisoner told Remes the minimum stay is three months, "regardless of the magnitude of the offense."

The female psychologist said she would communicate Latif's concerns about being housed in Camp 5 to "higher-ups." Latif said he was happy at the hospital and eventually wanted to return to Camp 6. But a guard apparently told Latif, according to another prisoner, he would never return to Camp 6.

Aamer's account is consistent with the accounts provided to Remes by other prisoners who gave statements to Remes.

The other prisoners went into greater detail about the guard tower incident. They said Latif threw the rock at the guard tower because he was not given his medication "on time or not at all," according to unclassified notes of meetings between Remes and a half-dozen other prisoners that took place in September and October.

Latif went out to the rec yard of Camp 6 and, through an interpreter, sought assistance from guards, asking them to contact "the clinic people" for his medication. It's unknown what medication Latif was taking. Those details are classified.

"The guards waved him off, so [Latif] picked up a rock and threw it at one of the towers in the rec area, breaking a spotlight," according to the prisoner's account.

The incident took place during Ramadan and resulted in dozens of soldiers being called into the rec area, some of who rolled up in Hummers, fired their weapons into the ground and threatened to kill Latif, according to several prisoners who were present.

"The guards came into Camp 5 with guns, and beat up the detainees," another prisoner recalled. "Other soldiers surrounded the camp. [The Officer in Charge] came and told detainees, 'You are extremists and I'm going to deal with you in a harsh way. You intend to kill our soldiers; we'll do the same thing to you.'"

Aamer also said Latif was on a hunger strike at the time of his transfer to Camp 5; another prisoner said before his transfer to Camp 5, Latif was housed in a wing of the hospital reserved for hunger strikers.

A US official knowledgeable about the NCIS investigation into Latif's death told Truthout Latif did not leave his cell to attend prayer on the day of his death and did not eat breakfast or lunch prior to being found unresponsive by prison guards on Saturday afternoon, September 8.

After prisoners were informed about his death on September 8, according to the account of another detainee, they "refused food" and "people in various blocks demonstrated."

### **Politics at Play?**

The autopsy report into Latif's death has been complete for more than a month and was shared with Yemeni government officials on November 10. But both the US and Yemen have refused to discuss it - until now.

Several US officials told Truthout that Yemen did not publicly disclose the contents of the autopsy report or accept Latif's remains because they were "using him as a political tool during high-level discussions" about the release of other Yemeni detainees.

Discussions between the US and Yemen surrounding Latif's death have always centered on the repatriation of the remaining Yemeni prisoners at Guantanamo, half of whom have been cleared for release, and those being held at Bagram Air Base in Afghanistan.

In [a statement](#) issued in Arabic by the Yemen Embassy in Washington, DC on November 11 - one day after embassy officials received an official copy of Latif's autopsy report - the Yemen government said Adal Al-Suneini, acting charge d'affaires in the Yemen Embassy in Washington, DC, met with William K. Lietzau, the assistant secretary of defense for detainee policy, to discuss these issues.

According to a copy of the statement, for which Truthout [obtained a translation](#):

[Yemen Embassy statement \(p. 1\)](#)

[...continued \(p. 2\)](#)

It should be noted that the embassy spokesman who wrote this release, Mohammed Albasha, disputed the translation provided to Truthout that alludes to "mysterious circumstances." He contends there are no "mysterious" circumstances.

The Latif family reports they received a telephone call from the Ministry of Foreign Affairs a few days after their eldest son's death. They were told to expect to receive his body within two weeks, but did not hear any more from the Yemen government until last week.

In an interview with Truthout over the weekend, Adnan Latif's brother, Muhammed, said the family received a telephone call on Thursday from Yemen's [feared intelligence agency](#), the Political Security Organization (PSO), which deals with issues involving Yemeni Guantanamo prisoners, and was asked if the family still wanted to receive his brother's remains.

"Yes," Muhammed told the PSO officer. "He said the initial [autopsy report] is only conditional and the final cause [to be issued by NCIS] will not be available for nine months."

Muhammed said when he tried to ask the PSO official questions about the cause of his brother's death he was told, "We're very busy. Call back later."

Muhammed also said he had sent numerous emails to the Ministry of Foreign Affairs over the past several months inquiring about his brother and not one was answered.

"The family is still very sad and in shock," he said. "We don't know what is happening with Adnan."

It was during this interview that Truthout told Muhammed that the autopsy report concludes that his brother committed suicide. He was silent, eventually saying he refused to accept the autopsy report's conclusions and reiterating what he has said in earlier interviews: that President Obama is personally responsible for the death of his brother.

The Yemeni government official disputed any suggestion that politics played a role in their government's failure to release details of the autopsy report publicly, or share it with Latif's family.

"This is just the worst time for the Yemeni government to be working on this," the government official said. "The government is preoccupied with other things and this is on the backburner. The bureaucracy is terrible in Sana'a. Things are not going as smooth as we would hope it to be."

The official declined to elaborate and it is unclear why Latif's family has not yet received a copy of the autopsy report.

Remes, Latif's lawyer, told embassy officials he was authorized to accept it on behalf of the family. But Asmaa Katah, the political official at the Yemeni Embassy in Washington, DC, said she was not authorized to give it to Remes. Katah, who did not respond to requests for comment, told Remes that Muhammed make the five-hour journey to Sana'a and pick up a copy.

But Katah would not guarantee that it would be turned over to him, Remes said.

"It's easy to imagine why the Defense Department would want to keep Adnan's autopsy report under lock and key," Remes said. "The mystery is why the Yemen government is following suit. Yemen has nothing to fear from the report. They apparently lack the resolve to stand up to the United States. Once again, it's Adnan's family that bears the brunt. This matter is getting weirder by the day."

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# APPENDIX

## 3

# Sold Into "a Piece of Hell:" A Death of Innocence at Gitmo

Thursday, 18 October 2012 07:03

By [Jason Leopold, Truthout](#) | *Investigative Report*

*Sold for a \$5,000 bounty, Adnan Latif was among the first prisoners detained at Guantanamo. A federal judge and two presidential administrations said he didn't belong there. A decade later he left in a box - and no one will say why.*

"Ya Baba! Ya Baba!" Ezzi Deen shouted in Arabic.

The 14-year-old boy was crying out for his father. He last uttered those words as a toddler. Ezzi Deen never received a response then, either.

He remained connected to his father through pictures and letters that trickled into his home from the International Committee of the Red Cross. But it did little to ease his pain. He woke up every morning and imagined, "Today is the day my father will come home."

He had it all planned out: His father would walk through the door and he would leap out of his bed and embrace him. Then he would go outside to play with the other boys in his village, the anguish of the past 11 years gone – just like that.

Ezzi Deen believed in his heart this is exactly how it would play out. He believed this even though his grandparents and aunts and uncles and cousins had given up hope that their son and brother would ever return to Yemen.



(Photo: [Wikipedia](#))

So, Ezzi Deen wept, dropped to his knees and screamed when his uncle, Muhammed, broke the news on the 11th anniversary of the 9/11 attacks that the tragedy had claimed his father as its latest victim.

No, Adnan Farhan Abdul Latif wasn't a passenger on the airplanes that plowed into the twin towers or the Pentagon. Nor was he among the thousands of people on the ground who perished that day.

He was just a man, one of hundreds - thousands perhaps - who was in the wrong place at the wrong time after the tragic events unfolded.

It was not a good time to be a Muslim.

"He was the favorite of all my sons," said Farhan Abdul Latif during a telephone interview with Truthout from his home in Yemen. Adnan was his fourth child, a treasured member of a large and loving family.

Before the Arabic interpreter translated Farhan's words into English, his voice had already conveyed the sentiment: Grief is an international language understood by all.

"He never created any problems," Farhan said of Adnan, his voice loud and filled with emotion. "Everybody loved him. He had very good manners. After the accident, his manner and conduct changed a little bit. But not much."

Adnan was a teenager in 1994, when the car he was traveling in flipped over and changed his life forever. He [emerged from the wreck](#) with a fractured skull, a punctured eardrum, a hemorrhage above one eye and

a legacy of blinding headaches and neurological problems.

Adnan traveled to Jordan for medical treatment, paid for by the Yemini government because his family could not afford it. His hearing and sight impaired, his body wracked with unrelenting pain, Adnan was declared disabled by his government and encouraged to seek further treatment through charitable organizations in other countries.

He spent the next seven years obsessively searching for affordable medical care, his father said. "I have his medical papers that proves this."

When he wasn't helping his father at the family's home goods store, Adnan would visit mosques, clinics and charities in search of medical treatment that was largely unavailable in Yemen. Finally someone at a hospital directed him to Pakistan - that was where he could find reliable, free health care, the man told him.

And so, in August 2001 - a month before terrorists turned commercial jetliners into guided missiles - Adnan gathered his medical records and left home for what would be the last time. He promised his wife and 3-year-old Ezzi Deen that he would soon return as a new man.

Instead, he became ensnared in a post-9/11 dragnet for Arabs that earned him the dubious distinction of becoming one of the first residents of the newly-designated detention center at Guantanamo Bay, where he would spend the rest of his life trying to prove he was not a terrorist.

### **Sold Into "a Piece of Hell"**

Adnan's medical odyssey had led him across the border into Afghanistan at a most unfortunate time. When the US invaded the country in October 2001, he was trapped during the bombing of Kabul.

Two months later, he was arrested by Pakistani police at the Pakistan-Afghanistan border and [sold to the Northern Alliance](#) for the princely sum of \$5,000.

That was one of the many problems that arose in the early days, when innocent "war on terror" prisoners, like Adnan, were turned over to US forces "for the wrong reasons, particularly for bounties and other incentives," said [Col. Lawrence Wilkerson](#), former chief of staff to Secretary of State Colin Powell.

Wilkerson made that assertion in a stunning nine-page sworn declaration about weaknesses in the detainee system. According to his 2009 declaration:

A related problem with the initial detention was that predominantly US forces were not the ones who were taking the prisoners in the first place. Instead, we relied upon Afghans ... and upon Pakistanis, to hand over prisoners whom they had apprehended, or who had been turned over to them for bounties ... Such practices meant that the likelihood was high that some of the ... detainees had been turned in to US forces in order to settle local scores, for tribal reasons, or just as a method of making money.

President George W. Bush, Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld were well aware that the "vast majority" of prisoners in US custody in early 2002 were innocent, Wilkerson stated, but they continued to be held because of the political repercussions that would have ensued if the US government set them free.

Adnan told his CIA and Pakistani interrogators he was in Afghanistan seeking medical treatment, that he was not as a fighter. He even had medical records with him when the US took custody of him in Kandahar, a fact noted on the Department of Defense intake form.

A US District Court [judge would later find](#) his story, supported by the documentation, to be credible. But at the time, neither the CIA nor the US military believed the young man from Yemen.

In the aftermath of 9/11, Muslim had become synonymous with terrorist. Even wearing a certain model of [Casio wristwatch](#) was enough to raise military suspicions that its owner was linked to al-Qaeda.

Adnan had no Casio watch, only medical records. Nonetheless, intelligence and military officials decided he had attended a jihadist training camp and fought alongside the Taliban and that, they concluded, was why he was in Afghanistan.

He was sent to Guantanamo, arriving on January 17, 2002, a month after his 26th birthday. A decade later,

Adnan would leave the island - in a box.

## Not a Model Prisoner

At Guantanamo, prisoners were expected to be compliant, even submissive. But Adnan, despite being in desperate need of medical treatment, refused to bow to the demands of his detainers, said David Remes, a Washington, DC-based human rights lawyer who began challenging Adnan's detention in 2004.

Adnan protested his confinement by staging hunger strikes, punctuated by suicide attempts. His behavior resulted in forced feedings and severe beatings by Guantanamo's brutal [Immediate Reaction Force](#) police team, followed by lengthy stretches in solitary confinement and periodic commitment to the prison camp's psychiatric ward, which only exacerbated his fragile mental state.

"I think he was psychotic or schizophrenic," said a former senior intelligence official who served at Guantanamo between 2002 and mid-2003. The official, who requested anonymity because he still serves in US military intelligence, said it was "fairly common" to deal with noncompliant detainees by injecting them with sedatives.

"In this detainee's situation, because he was also a mental case as well as being a troublemaker, he was always doped up with sedatives and anti-depressants and who knows what else," he said. "It was the only way we could deal with his mood swings."

In July, Truthout obtained through a Freedom of Information Act request an inspector general's report from the Department of Defense that revealed "war on terror" prisoners in custody of the US military at Guantanamo and elsewhere were [forcibly drugged](#) with powerful antipsychotics and other medications, and also subjected to "chemical restraints" when they got out of hand.

In some cases, prisoners diagnosed with severe mental health conditions were drugged and interrogated, which could impair their ability to provide accurate information, the inspector general concluded.

Remes said the government's idea of medical treatment was simply to keep Adnan "subdued." During interviews with Remes, Adnan often spoke of being forcibly administered unknown "medications," and being beaten when he resisted.

"On many occasions he told me he was drugged and sedated," Remes said. "When he met with me he told me he was given energy boosters or mood boosters."

Remes won access to Adnan's medical records from his early years at Guantanamo. The documents likely reveal the medications he had been administered. But the records are classified and Remes, who has a secret-level security clearance, is not permitted to discuss it.

Remes did say he saw evidence of the physical and psychological torture Adnan endured. So when he traveled to Guantanamo to meet with his client, he would take an inventory of Adnan's scars, rashes, swellings and broken bones.

In the interview room, Remes would ask Adnan, whose ankle was chained to the floor, to remove his light, cotton shirt. Adnan sat quietly as Remes assumed the role of physician and carefully ran his fingers over the skin of his neck, chest, back, waist, knees and feet. Even though Guantanamo had destroyed his spirit and body, there was still a childlike innocence to Adnan as he watched Remes catalog his injuries.

"I often found scrapes and scarring around his wrists, signs that he had been too tightly bound, or had been roughly pulled by the guards," Remes said. "Mine was undoubtedly the only comforting human touch he ever felt at Guantanamo."

Remes was devastated when he learned Adnan had died.

"Of all of the detainees I've represented over the years, I was fondest of Adnan," Remes said. "Our relationship was far more than that of lawyer and client ... I'll miss him."

Adnan often said he wanted to die.

Guantanamo "is a piece of hell that kills everything," Adnan wrote in a letter to his attorneys.

In 2007, Adnan contributed a poem, "Hunger Strike Poem," to the book "Poems from Guantanamo: The



Detainees Speak." In just 20-lines, Adnan captured his despair and gave a voice to the other prisoners who could not speak for themselves.

Where is the world to save us from torture?  
Where is the world to save us from the fire and sadness?  
Where is the world to save the hunger strikers?

Adnan's younger brother, Muhammed, told Truthout in a recent interview he is not surprised his brother expressed himself through poetry while imprisoned at Guantanamo.

"Adnan created a lot of poetry about nature and the things around him when he was a young man," Muhammed said through an interpreter. "He was very good. He also very much liked to read a lot."

A three-year age difference separated Adnan and Muhammed, who were very close.

"We went to the same school together and were friends during our childhood and took care of each other and loved each other very much," Muhammed said. "I also remember how much he liked to play sports with the other boys. No specific sport. Just whatever was available in the village that could be made into a sport."

Muhammed said, for a time, he believed he would see his brother again and that certainly seemed to be a possibility when the Bush administration, despite insisting that Adnan fought with the Taliban, [recommended](#) Adnan's transfer out of Guantanamo no less than three times between 2004 and 2008.

### **Fight for Freedom**

One Kafka-esque moment of Adnan's detention came during his 2005 [Combatant Status Review Tribunal](#) where the tribunal president asked Adnan to respond to the charges leveled against him. Adnan protested because the name on the complaint read aloud was not his.

"Well, that's the name we have," the tribunal president replied.

Adnan continued to languish at Guantanamo, largely due to disagreements between the US and Yemen over the conditions the US set to allow for his repatriation and rehabilitation, according to a State Department official privy to the diplomatic communications in Adnan's case.

The official declined to elaborate and requested anonymity because he was not authorized to speak with the media.

When Barack Obama was elected president it seemed that Adnan had a real shot at reuniting with Ezzi Dean, his wife and the rest of his family in Yemen. Aside from promising to permanently shutter the island prison, Obama set up a task force to review all of the cases at Guantanamo and decide who should stay, who should go and who could be prosecuted for war crimes.

In 2010, the task force issued a report that recommended the release of 126 prisoners. Adnan was one of them. But only his attorneys knew about it. The information was deemed "protected," meaning they could not discuss it publicly.

Remes and the other lawyers on Adnan's legal team continued to pursue one simple issue: getting his case before a judge so the circumstances surrounding his detention could see the light of day.

Not long after Obama's task force issued its recommendations, a federal judge in the nation's capital granted Adnan his habeas petition and ordered his release from Guantanamo.

Judge Henry Kennedy ruled that the government could not prove Adnan attended a training camp and was a Taliban foot soldier. The cornerstone of the government's case against Adnan was a single CIA intelligence report that purported to show he had incriminated himself after he was captured.

Judge Kennedy found that document "unconvincing" and said Adnan's continued detention was "not lawful."

Why the Obama administration decided to appeal the ruling when its own task force - and even the Bush administration - recommended Adnan's transfer to Yemen is unknown. The US Justice Department did not return repeated requests for comment.



In October 2011, the government won. A divided three-judge panel on the US Court of Appeals, Washington, DC, Circuit, vacated the lower court's ruling. The judges essentially said the government's evidence, no matter how thin or unreliable, "was entitled to a presumption of regularity."

In other words, the burden fell upon Adnan to prove he was not the terrorist recruit the government claimed he was.

"I am a prisoner of death," Adnan said during a meeting with his lawyer about two weeks after the appellate court's decision.

Adnan's attorneys pursued his case all the way to the Supreme Court. But in June, the high court's justices, who in 2008 issued a landmark ruling that said Guantanamo prisoners were entitled to challenge the legality of their detentions, declined to review it and helped seal his fate.

Adnan ended his last hunger strike shortly thereafter. Over the next few months he regained 95 percent of his body weight, the Defense Department has claimed, and was heavier than when he first arrived at the prison more than a decade ago.

Remes met with him for the last time in May.

"The last time I saw Adnan he was lucid and in very good spirits," he said.

### **A Mysterious Death**

Sometime on September 8, Adnan was found dead in his cell at Camp 5, a disciplinary wing of Guantanamo. Adnan was sent there for allegedly hurling a mixture of bodily fluids and feces at a guard. He is the ninth prisoner reported to have died at Guantanamo.

Adnan was found "motionless and unresponsive by the guard force," Joint Task Force-Guantanamo spokesman Capt. Robert Durand told Truthout. "Following standard operating procedures, the guards called for medical help and provided first aid. The corpsmen provided emergency medical treatment and quickly transported the detainee to [the] Naval Hospital Guantanamo. After extensive lifesaving measures had been performed, the detainee was pronounced dead by a physician."

Remes called Adnan's family on September 11 and broke the news.

"Adnan has died," Remes told Adnan's brother, Muhammed, through an interpreter.

There was silence at first. Deep down, Muhammed knew he would one day receive a phone call like this.

The International Committee of the Red Cross was supposed to contact Adnan's family but, for unknown reasons, they never did. Remes feared the family would learn about their son's passing through news reports so he decided to contact them on his own.

When Adnan's mother found out, "She lost consciousness," Adnan's father, Farhan told Truthout.

"Everyone is in great distress," he said. "Especially Adnan's mother and his child. There is a feeling of great sadness and tragedy."

Adnan's tragic story did not end with his death, however.

Muhammed said the family was told by Yemen's Ministry of Foreign Affairs that his brother's remains would be sent home within two weeks after his death. The Ministry of Foreign Affairs, according to Muhammed, obtained that information from the Yemen Embassy in Washington, DC.

But according to a Yemeni official, the Yemen government refused to accept Adnan's body until they receive a full accounting of the cause of his death.

The official, who declined to be named because he was not authorized to speak with the media, said Yemen's President Abd Rabbuh Mansur Hadi was briefed about Adnan's death and decided against accepting the remains.

"We have asked for a copy of the investigation report and the autopsy report and the requested documents have not been provided to us," the official told Truthout.

The Yemeni government official's comments about Adnan were obtained during an interview late last month when President Hadi visited the United States. His statements about Adnan were made in the context of discussions Hadi had with top US officials in the White House about the remaining Yemeni detainees in Guantanamo and Afghanistan.

"President Hadi was in Washington, DC, and met with President Obama's cabinet ministers," the official said. "The remaining Yemeni detainees was one of the talking points. President Hadi has made Guantanamo and Bagram [prison in Afghanistan] a high priority for Yemen. We are emphasizing talks and opening up a dialogue to ensure the timely release and transfer and rehabilitation of those remaining detainees to Yemeni custody and we are working closely with the US government. These discussions took place with high-level officials in the Obama administration."

The official added that US and Yemen officials are scheduled to speak about Adnan's case again at the end of the week.

Lt. Col. Todd Breasseale, a Defense Department spokesman, would only comment on issues surrounding Adnan's death and his remains. He told Truthout the US is "collaborating closely with the Republic of Yemen government on this case" and, "We respect their wishes that we maintain the remains until a time when they are prepared to receive them."

"Mr. Latif's remains are being handled with the utmost care and respect by medical professionals and are being maintained in an appropriate facility designed to best facilitate preservation," Breasseale said. "His remains are no longer at JTF-Guantanamo Bay."

Breasseale added that Adnan's remains are currently being held in a secure undisclosed facility, which Truthout has learned is Ramstein Air Base in Germany.

The bureaucratic infighting between the US and Yemen means Adnan's family cannot mourn his death.

"We will not mourn our son under Islamic law until we receive his body," Farhan said. "As you can imagine, this is a nightmare for us."

## **Compelling Questions**

So how did Adnan die?

Initial media reports suggested Adnan took his own life, a not implausible theory considering his history of suicide attempts.

In the eight previous deaths that occurred at Guantanamo, six of which were said to be suicides, Joint Task Force-Guantanamo has always cited a manner of death in their official statements even though an investigation and autopsy had not yet been conducted on those prisoners. But there was no such determination made when the government announced Adnan's death.

"In Mr. Latif's case, the detainee was found motionless and unresponsive," Joint Task Force Guantanamo spokesman Capt. Robert Durand told Truthout. "The detainee had a history of self-harm acts, but generally refrained from activities which would potentially cause his death. He was monitored by the behavioral health unit, and his recent actions, activities and statements to therapists indicated that he did not appear to want to end his life. Following his assault on the guard, he was medically cleared for transfer to Camp 5. Absent an obvious indication of self-harm, or a known medical condition, it would be inappropriate to speculate on the cause of death."

But in a statement to the Associated Press two days after Guantanamo officials [announced the death of a prisoner](#) without naming him, Durand said, "There is no apparent cause, natural or self-inflicted."

Durand explained to Truthout at the time he made that statement he was responding to a reporter's query: "Would you call it an apparent suicide or natural causes?"

Now, however, "It would be inappropriate to speculate on the cause of death at this time."

There was nothing to "immediately suggest 'apparent suicide,'" Durand said, and the death is being investigated by "multiple entities."

Those include the Naval Criminal Investigative Service (NCIS) and US Southern Command, Joint Task Force-Guantanamo's higher command.

The timeframe for when those probes will be complete, however, is unknown.

But here's what is known.

Adnan was housed in isolation in a section of Camp 5, where prisoners are checked on by the guard force every three minutes, 24 hours a day.

A former Guantanamo guard who still serves in the military and requested anonymity, told Truthout the guards need to "see skin" when they walk the block to check on the detainees.

"The guards are checking to make sure the detainees are alive. They need to see them breathing," he said. "They do their rounds and they have a block log where they write in what they observed. It's a sheet that you fill out on every shift recording the detainees' movement every 30 minutes or so. You write something like, 'walked cell block and all secure.' The log is then given to the block NCO (non-commissioned officer) who enters the information into the Detainee Information Management System (DIMS). That is then sent over the SIPRNET system. The only way, in my opinion, they wouldn't have been able to catch his death is if the guards weren't following the SOP (Standard Operating Procedure). That is - if they weren't walking the cell blocks."

In addition, the prisoners, especially those housed in Camp 5, are subjected to round-the-clock video surveillance. The cells are wired for sound and a dome-like camera is affixed to the ceiling of the cells.

Durand, the Joint Task Force-Guantanamo spokesman, noted there are also certain Guantanamo prisoners who are deemed to be "Detainees of Interest (DOI)" and those prisoners are subject to monitoring every 60 seconds, or "continuous checks."

The number of prisoners determined to be Detainees of Interest is classified, Durand said, but given Adnan's past behavior he certainly [appears to fit the description](#). "A detainee may be designated as a detainee of interest if they represent a threat to themselves, other detainees, the guard force or good order and discipline in the camps."

Adnan told Remes he was under constant surveillance and the guards scrutinized his every move. The only privacy Adnan had, he claimed, was when his back was facing the cell door window.

So if the Guantanamo guard force had been properly monitoring Adnan via video surveillance and walking the cell blocks to check on him - at minimum, every three minutes - is it possible that he fell "unresponsive and motionless" within that time frame but was still alive when he was transported to the Naval hospital?

Durand won't say. Presumably that will be determined by the multiple investigations.

## **The Autopsy**

Adnan's autopsy was conducted and observed by a medical examiner, an observer/recorder, a technician and a mortician from the Armed Forces Medical Examiner from Dover Air Force Base, Durand said. Following the autopsy, which usually takes about two hours, a mortician prepared Adnan's body for burial.

Then, Durand said, "A Muslim military chaplain, the Joint Task Force-Guantanamo Cultural Advisor and Islamic volunteers from the staff were on hand to ensure the appropriate handling of the body."

"The traditional Islamic burial rites were performed, including the rituals of washing and shrouding the body and offering prayers for the deceased," he added.

Meanwhile, back in Yemen, the rituals of grief for the family remain in limbo.

Officials say the results of the autopsy could take several weeks, pending lab results, toxicology and other analyses. In any case, the autopsy results, when completed, are classified, Breasseale said.

The Yemeni government official told Truthout that US officials appear to have ruled out suicide as the manner of his death.

"There were many different theories being discussed," he said. "They still can't figure out how he died."

That's not entirely unusual, said Dr. Cyril Wecht, a world-renowned forensic pathologist who has performed more than 15,000 autopsies and consulted on 35,000 postmortem examinations, many of which were high-profile cases.

"You can't make a ruling on manner of death until you make a ruling on cause of death," Wecht said in an interview with Truthout.

"The failure to release a cause of death is likely due to the fact that they have not found anything of a traumatic nature on the body and they haven't found anything on the microscopic slides yet either," he said. "There aren't many things to discover microscopically when you don't have any evidence in the gross autopsy: He probably does not have heart disease, a tumor and so on. So it is a sudden, unexplained death of a young man."

Remes said he does not recall Adnan ever mentioning any of the pre-existing medical conditions Wecht described.

As for the head injury Adnan suffered in the car accident, Wecht said, "You cannot look at someone when they are dead and look at their brain and say what the extent of their neurological damage was and to what degree motor coordination, cognitive functions, sensory perception would have been compromised."

So, even in death, Adnan is unable to undercut the US government's challenge to his claims about the injury he endured in 1994.

However, "to some extent you can, depending upon how severe and well-defined changes are in the brain and where they are located; you can do some retrospective correlations," Wecht said.

"Another thing to keep in mind that can be a real problem is that some people who have brain injuries go on to have convulsions from time to time. And if you have a convulsion, sometimes you can die. Sometimes epileptics do die. Doesn't happen very often, but it can happen and you don't find a single thing in the autopsy. That's something else to keep in mind as a possible explanation for his death."

Remes said he does not recall Adnan ever mentioning convulsions or seizures. Still, if Adnan had suffered a seizure or convulsion severe enough to kill him, wouldn't it have been noticed by the guards monitoring him around-the-clock before he became unresponsive?

That leads Wecht to speculate that Adnan's death may have been the result of drugs - specifically, drugs that cause brain depression like opioids, benzodiazepines, anti-depressants and anti-anxiety sedatives - the kinds of drugs that seem to have been a routine part of life at Guantanamo for the recalcitrant detainee.

"You said he was monitored. There is apparently nothing of a physical nature on his body. He doesn't have heart disease or a tumor. But there has to be a cause of death. Usually the thing that leads to a death like this are drugs," Wecht said. "That's been my experience."

If Adnan were given drugs a day or two - or hours - before his death, some traces would likely show up in the toxicology tests. But beyond that timeframe, any drugs that Adnan may have been administered would have already been excreted from his body, Wecht said.

Neither Durand nor Breasseale would say if Adnan had been administered drugs in the hours prior to his death. However, Truthout and investigative blogger Marcy Wheeler have jointly filed a Freedom of Information Act request seeking Adnan's medical records, which should answer that question.

Wecht suspects the government already has a pretty good idea what happened to Adnan "considering he was a prisoner at Guantanamo and monitored regularly."

There is also the possibility that the cause of his death will never be determined, as is the case in one-tenth of one percent of autopsies, he said.

Whatever the government's conclusions are, Adnan's family members have drawn their own.

"He died from torture," Muhammed said. "He talked in letters to his attorney about how the end is near because of torture and always said how cruel they are to him."

He should be with us right now, Farhan said. "He was a sick man trying to receive treatment."

A sick man trying to receive treatment. Adnan's father repeated this over and over, unable to fathom how this incomprehensible twist of fate had befallen his first-born, his favorite son.

The family holds America accountable for Adnan's death and they intend to seek justice.

"You have to tell the Obama officials that they are responsible for my brother's death and the law needs to be applied to them now," Muhammed said. "Why did the American government have rules that stops detainees from getting justice for the courts? That is what I want President Obama to tell us. Because of this my brother is dead."

Adnan would have turned 37 in December. Several years ago, as a much younger man, he wrote a Last Will and Testament in which he left all of his possessions to Ezzi Deen. But the US government refused to process it.

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## [JASON LEOPOLD](#)

Jason Leopold is lead investigative reporter of Truthout. He is the author of the Los Angeles Times bestseller, [News Junkie](#), a memoir. Visit [jasonleopold.com](#) for a preview. His most recent investigative report, "From Hopeful Immigrant to FBI Informant: The Inside Story of the Other Abu Zubaidah," is now available as an [ebook](#). Follow Jason on Twitter: [@JasonLeopold](#).

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# APPENDIX

4



September 14, 2012

# The Face of Indefinite Detention

By **BAHER AZMY**

BEFORE he [died](#) on Sept. 8, [Adnan Farhan Abdul Latif](#) had spent close to 4,000 days and nights in the American prison at Guantánamo Bay, Cuba. He was found unconscious, alone in his cell, thousands of miles from home and family in Yemen.

Eleven years ago, he found himself in Afghanistan at the wrong place and the wrong time. It was an unusual set of events that took him there. Years earlier Mr. Latif had been badly injured in a car accident in Yemen. His skull was fractured; his hearing never quite recovered. He traveled to Jordan, seeking medical treatment at a hospital in Amman; then, following the promise of free medical care from a man he met there, journeyed to Pakistan, and eventually to Afghanistan.

Like so many men still imprisoned at Guantánamo, Mr. Latif was fleeing American bombing — not fighting — when he was apprehended by the Pakistani police near the Afghan border and turned over to the United States military. It was at a time when the United States was paying substantial bounties for prisoners. Mr. Latif, a stranger in a strange land, fit the bill. He was never charged with a crime.

The United States government claims the legal authority to hold men like Mr. Latif until the “war on terror” ends, which is to say, forever. Setting aside this troubling legal proposition, his death and the despair he endured in the years preceding it remind us of the toll Guantánamo takes on human beings.

Adnan Latif is the human face of indefinite detention.

In the landmark 2008 case [Boumediene v. Bush](#), the Supreme Court ruled that Guantánamo detainees were entitled to “meaningful judicial review” of the legality of their detentions, via the writ of habeas corpus — a constitutional check obligating the government to demonstrate a sufficient factual and legal basis for imprisoning someone. The Boumediene decision, in principle, ought to have given hope to Mr. Latif and men like him.

And it was under such principle that two years later, a [United States District Court](#) judge hearing Mr. Latif’s habeas corpus petition ordered him released, ruling that the accusations

against him were “unconvincing” and that his detention was “not lawful.” By that time, Mr. Latif had been cleared for release from Guantánamo on three separate occasions, including in 2009 by the Obama administration’s multiagency Guantánamo Review Task Force.

Nevertheless, the Department of Justice appealed the district court’s decision to the United States [Court of Appeals](#) for the District of Columbia Circuit — which has ruled in the government’s favor in nearly every habeas corpus appeal it has heard. The appellate court reversed the trial judge’s release order, effectively ruling that evidence against detainees must be presumed accurate and authentic if the government claims it is.

A strong dissenting opinion criticized the appellate court majority for not just “moving the goal posts,” but also calling “the game in the government’s favor.”

But Mr. Latif didn’t see it as a game. He was dying inside. Like other men, he had been on a hunger strike to protest his detention. After losing the appeal of his case, he told his lawyer, “I am a prisoner of death.”

Three months ago, the Supreme Court declined to hear the appeals of Mr. Latif and six other detainees, who pleaded for the court to restore its promise of meaningful review of their cases.

But what is unsaid in all of the court rulings is that Mr. Latif was imprisoned not by evidence of wrongdoing, but by accident of birth. In Guantánamo’s contorted system of justice, the decision to detain him indefinitely turned on his citizenship, not on his conduct.

With Mr. Latif’s death, there are now 56 Yemenis who have been cleared for release by the Guantánamo Review Task Force since 2009 but who remain in prison. President Obama, citing general security concerns, has imposed a moratorium on any and all transfers to Yemen, regardless of age, innocence or infirmity.

It is fair, and regrettable, to assume that some of these detainees will die there as well.

Mr. Latif, after all, was the [ninth man](#) to die at Guantánamo. More men have died in the prison camp than have been convicted by a civilian court (one) or by the military commissions system in Guantánamo (six). In 2006, Salah al-Salami, a Yemeni, and Yasser al-Zahrani and Mani al-Utaybi, both Saudis, were the first men to die at Guantánamo. Their deaths were called suicides, even though soldiers stationed at the base at the time have raised serious questions about the plausibility of the Defense Department’s account. (Full disclosure: the Center for Constitutional Rights represents the families of two of the men who died.)

According to the government, three more detainees committed suicide and two others died of natural causes. There has been no independent investigation into any of the deaths, however;



there has been no accountability for a range of constitutional and human rights violations at Guantánamo.

The government has not yet identified the cause of Mr. Latif's death, but it is Guantánamo that killed him. Whether because of despair, suicide or natural causes, death has become an inevitable consequence of our politically driven failure to close the prison — a natural byproduct of the torment and uncertainty indefinite detention inflicts on human beings.

The case of Adnan Latif should compel us to confront honestly the human toll of the Guantánamo prison — now approaching its 12th year in operation. We can start this reckoning by releasing the 86 other men at Guantánamo who the United States government has concluded no longer deserve to be jailed there.

*Baher Azmy is the legal director of the [Center for Constitutional Rights](#).*

# APPENDIX

## 5



# UNITED STATES SOUTHERN COMMAND

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## NEWS RELEASE: Joint Task Force Guantanamo Releases Deceased Detainee's Identity

9/11/2012

By U.S. Southern Command Public Affairs

Sept. 11, 2012  
FOR IMMEDIATE RELEASE

MIAMI -- Joint Task Force Guantanamo released the identity of the detainee who died on Saturday, September 8, 2012. The detainee is identified as Adnan Farhan Abdul Latif, a 32-year-old Yemeni. Latif arrived at Guantanamo in January 2002 and was being detained consistent with the law of war. The detainee's name was withheld pending family notification.

Following the detainee's death, an autopsy was conducted by a medical examination team from the office of the Armed Forces Medical Examiner to determine the cause of death. Autopsy results and cause of death determinations take time, and therefore are not available for release.

As a matter of Department of Defense policy, the Naval Criminal Investigative Service has initiated an investigation of the incident to determine the cause and manner surrounding the death. Additionally, Commander, U.S. Southern Command, JTF-Guantanamo's higher command, has initiated a Commander's Inquiry into the incident.

The remains of the deceased detainee are being treated with respect for Islamic culture and traditions. Following the autopsy, a Muslim military chaplain, the Joint Task Force Guantanamo Cultural Advisor, and Islamic volunteers from the staff were on hand to ensure the appropriate handling of the body.

Joint Task Force Guantanamo continues to provide safe, humane, legal and transparent care and custody of detainees. This mission is being performed professionally by the men and women of Joint Task Force Guantanamo.

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# APPENDIX

6

**TO THE HONORABLE MEMBERS OF  
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES**

---

TALAL AL-ZAHRANI, as the personal representative of  
YASSER AL-ZAHRANI, and in his individual capacity,

NASHWAN AL-SALAMI, as the personal representative of  
SALAH AL-SALAMI, and in his individual capacity,

Petitioners,

v.

UNITED STATES,

State.

---

**PETITION ALLEGING VIOLATIONS OF  
THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN**

By the undersigned, appearing as counsel for Petitioners  
under Article 23 of the Commission's Rules of Procedure

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## **I. INTRODUCTION**

1. This Petition concerns two men who were detained by the United States at the U.S. Naval Base at Guantánamo Bay, Cuba (“Guantánamo”), for four years without charge or adequate review of their detention, subjected to torture and held in inhumane conditions, and ultimately died in 2006 under circumstances that raise serious questions about whether they were killed. While the government claims the men committed suicide in their cells, four soldiers who were stationed at Guantánamo at the time of the deaths have come forward with first-hand accounts that undercut the official narrative, provide evidence of a cover-up and suggest that the men may have been killed at the hands of the authorities.

2. The United States has opposed every effort by the families for information and a judicial inquiry into the deaths. A range of other actors – including this Commission, UN special rapporteurs, investigative journalists, academics, physicians, and human rights organizations – have also raised questions and concerns with the government to no avail. Six years after the deaths, there still has not been an adequate investigation or any accountability. Petitioners – the father and brother of the deceased – bring this Petition under the American Declaration of the Rights and Duties of Man (“American Declaration”) in search of acknowledgement and responsibility by the United States for the wrongful detention and torture of their relatives at Guantánamo, and in a continued quest for the truth about how they died.

## **II. PETITIONERS**

3. Talal Al-Zahrani is the father of Yasser Al-Zahrani. His son was a citizen of Saudi Arabia who was detained by the United States at Guantánamo from January 2002 until his death on or about June 9 or 10, 2006. Born in September 1984, he was 17 years old when he was transferred to Guantánamo. Talal Al-Zahrani, also a Saudi citizen, acts as the personal representative of his son’s estate and in his individual capacity.

4. Nashwan Al-Salami is the brother of Salah Ali Abdullah Ahmed Al-Salami. His brother was a citizen of Yemen who was detained by the United States at Guantánamo from approximately June 2002 until his death on or about June 9 or 10, 2006. Nashwan Al-Zahrani, also a Yemeni citizen, acts as the personal representative of his brother’s estate and in his individual capacity.

## **III. STATEMENT OF FACTS**

### **A. Deaths of Yasser Al-Zahrani and Salah Al-Salami**

5. Yasser Al-Zahrani and Salah Al-Salami died at Guantánamo on or about June 9 or 10, 2006. At the time of their deaths, each man had been detained for approximately four years without charge or judicial review of his detention, in conditions the International Committee of the Red Cross (“ICRC”) had described as torture. Yasser Al-Zahrani, who

was 17 years old when he was transferred to Guantánamo, was 21 when he died. Salah Al-Salami died at the age of 37.

6. The morning following the deaths, the U.S. Southern Command issued a public announcement stating that Yasser Al-Zahrani and Salah Al-Salami, along with a third detainee, Mani Al-Utaybi, had died of “apparent suicides” and that the Naval Criminal Investigative Service (“NCIS”), the main law enforcement arm of the U.S. Navy, had begun an investigation to determine the cause and manner of the deaths. Despite having just initiated an investigation, the authorities were quick to provide further details to the press: the men had hung themselves in their cells with their clothes and bed sheets, guards had found them shortly after midnight and attempts to resuscitate them had failed. The authorities also made a number of derisive comments to the press. The top commander at Guantánamo, Rear Adm. Harry Harris, called the deaths an “act of asymmetric warfare.”<sup>1</sup> A top Department of State official said they were “a good PR move.”<sup>2</sup> The Deputy Assistant Secretary of Defense compared all Guantánamo detainees to Nazis during World War II and called them terrorists.<sup>3</sup> The chief press officer for the Defense Department specifically described Salah Al-Salami as “a mid-to-high-level Al Qaeda operative” and Yasser Al-Zahrani as “a frontline Taliban fighter.”<sup>4</sup> Another Guantánamo commander, Col. Mike Bumgarner, said there was “not a trustworthy son of a ... in the entire bunch.”<sup>5</sup>

7. Yasser Al-Zahrani’s and Salah Al-Salami’s remains were not repatriated until five to six days after they died, and the families were prevented from receiving the bodies for nearly another week, even though their Islamic faith called for their bodies to be prepared for burial within 24 hours of death. When Yasser Al-Zahrani’s family finally did receive his remains, they saw injuries on his chest and signs of trauma on his face, and his larynx had been removed. Salah Al-Salami’s body was badly bruised, with marks resembling chemical burns, and his larynx and neck matter had also been removed. The families were never directly contacted by the United States about the deaths but learned the news second-hand—from television reports, in the case of Mr. Al-Zahrani’s family—and were in disbelief. After repeated unanswered requests to the authorities for an explanation about the condition of the bodies, they sought second autopsies from independent pathologists, who also requested information from the authorities to no avail. In Mr. Al-Salami’s case, a formal letter with detailed questions, including about the missing neck parts and the fact that his fingernails and toenails had been freshly cut, was sent to the U.S. military pathologist in charge of the original autopsy, who responded that he was not

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<sup>1</sup> BBC, *Guantánamo suicides ‘acts of war,’* June 11, 2006, available at <http://news.bbc.co.uk/2/hi/5068606.stm>.

<sup>2</sup> BBC, *Guantánamo suicides ‘a PR move,’* June 11, 2006, available at <http://news.bbc.co.uk/2/hi/americas/5069230.stm>.

<sup>3</sup> U.S. Dep’t Defense, News Transcript, *Radio Interview with Deputy Assistant Secretary Stimson*, June 21, 2006, available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=22>.

<sup>4</sup> The Guardian, *How US hid the suicide secrets of Guantánamo*, June 17, 2006, available at <http://www.guardian.co.uk/world/2006/jun/18/usa.Guantánamo>.

<sup>5</sup> The Guardian, *Briton could be ‘next dead body’ at Guantánamo*, June 14, 2006, available at <http://www.guardian.co.uk/world/2006/jun/14/Guantánamo.usa>.



authorized to assist.<sup>6</sup> The independent pathologist who performed Al-Salami's second autopsy found that there were troubling and unexplained facts in relation to the missing neck parts and the cleanly-cut nails, but was prevented from giving a clear opinion on the cause of death without more information.<sup>7</sup>

8. The deaths, as the first reported at Guantánamo, generated considerable public attention and concern, with widespread calls for information and transparency, including from this Commission.<sup>8</sup> Despite the concern and requests, the government failed to provide any meaningful information to the families or the public for a full two years following the deaths.<sup>9</sup>

## **1. Military Investigation**

9. In June 2008, after being compelled by a Freedom of Information Act lawsuit filed by attorneys for the deceased, the NCIS released files from its investigation, which concluded that Yasser Al-Zahrani, Salah Al-Salami and Mani Al-Utaybi had committed suicide by hanging.<sup>10</sup> The relevant findings include:

- That the men were each discovered in their cells on “Alpha Block” in “Camp 1,” which was one of four smaller camps contained within the main prison camp, “Camp Delta,” early in the morning on June 10;
- That guards discovered the first detainee, Yasser Al-Zahrani, between approximately 12:28 a.m. and 12:39 a.m.;
- That a team of guards carried each detainee on a backboard from his cell to the camp medical clinic, where attempts were made to resuscitate the men. Salah Al-Salami died at the clinic. Yasser Al-Zahrani was transported to the camp hospital for further efforts to resuscitate him and died there.

10. Despite the two-year duration of the NCIS' investigation and the voluminous – although heavily-redacted – files released, there are significant gaps and inconsistencies in its findings. In December 2009, Seton Hall University Law School issued a

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<sup>6</sup> Scott Horton, *Six Questions for Rachid Mesli: The missing throats*, *Harper's Magazine*, Feb. 3, 2010, available at <http://www.harpers.org/archive/2010/02/hbc-90006471>. Military officials later denied that they had ever received a formal request by the independent pathologists. See Scott Horton, *Rules for Drone Wars: Six Questions for Philip Alston*, *Harper's Magazine*, June 9, 2010, available at <http://www.harpers.org/archive/2010/06/hbc-90007190>.

<sup>7</sup> Scott Horton, *Six Questions for Rachid Mesli: The missing throats*, *Harper's Magazine*, Feb. 3, 2010.

<sup>8</sup> On June 12, 2006, as part of its Precautionary Measures in favor of Guantánamo detainees, the Commission requested that the United States provide information about the deaths within ten days.

<sup>9</sup> The United States' response to this Commission's inquiry, for example, which was submitted four months after the Commission's request, consisted of a meager packet of press releases, briefings and interviews that did little to illuminate the deaths.

<sup>10</sup> See Seton Hall University Law School, Center for Policy and Research, *Death in Camp Delta* (2009), available at [http://law.shu.edu/About/News\\_Events/Guantánamo\\_report\\_death\\_camp\\_delta.cfm](http://law.shu.edu/About/News_Events/Guantánamo_report_death_camp_delta.cfm).

comprehensive analysis of the documents that raised a number of unexplained questions,<sup>11</sup> including:

- The investigation found that the men had been dead for more than two hours before they were discovered; how could three bodies could have hung in wire-mesh cells undetected for two hours, when the cells were under constant supervision, both by video camera and guards continually walking the corridors and guarding only about two dozen detainees?
- Why is there no indication in the documents that guards or medics walking the block that night observed anything out of the ordinary, when the process the deceased would have had to undergo to hang themselves in the manner described by the military would have required each detainee to do the following: braid a noose by tearing up his sheets and/or clothing, make a mannequin of himself so it would appear to guards that he was asleep in his cell, hang sheets to block vision into the cell (a violation of the Standard Operating Procedures at Guantánamo (“SOPs”)), tie his feet together, tie his hands together, hang the noose from the metal mesh of his cell wall and/or ceiling, climb up onto the sink, put the noose around his neck and release his weight to result in death by strangulation, hang until dead, and hang for at least two hours completely unnoticed by guards?
- Why did the two-year investigation failed to review information as critical as, *inter alia*, the guard roster for Alpha Block that night?
- Why do the documents indicate that certain Alpha Block guards were advised that they were suspected of making false statements or failing to obey direct orders?
- Why is there not a single sworn statement from a guard, a medic or any other personnel about the events of that night, as required after such incidents by the SOPs? Why do the documents indicate that Col. Bumgarner, the Commander in charge of detention operations at Guantánamo, told guards not to provide such statements?

## **2. Subsequent Accounts from U.S. Soldiers at Guantánamo**

11. In early 2009, a former soldier by the name of Joe Hickman approached Seton Hall Law School, whose work he had followed. Hickman was a decorated Army officer who had served a distinguished tour of duty at Guantánamo from March 2006 to March 2007 and had been on duty as “Sergeant of the Guard” the night Yasser Al-Zahrani and Salah Al-Salami died. He had decided to come forward because what he had seen that night was “haunting me” and he felt that “silence was just wrong.”

12. On January 18, 2010, Hickman’s account and interviews with three other soldiers on duty at Guantánamo on the night of the deaths – Specialist Tony Davila, Army

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<sup>11</sup> See *id.*

Specialist Christopher Penvose, and Army Specialist David Carroll – were published in *Harper's Magazine*.<sup>12</sup> The soldiers describe a cover-up initiated by the authorities within hours of the deaths and say they were affirmatively told not to speak out. Despite having first-hand observations of camp activity that night, they were never approached or interviewed for the NCIS investigation. While the official account of the deaths concluded that the detainees had hung themselves in their cells, the soldiers' observations suggest that the men may have been transported from their cells to an unacknowledged "black site" nicknamed "Camp No" outside of the perimeter of the main prison camp, and died there or from events that transpired there. According to the soldiers' published accounts:

- Between approximately 6-8 p.m. on June 9, Hickman observed the van used to transport detainees drive up to the camp where the deceased were held three separate times in short succession. Each time, guards escorted a detainee from the camp to the van and drove away in the direction of Camp No. By the third time he saw the van approach the deceased's camp, Hickman decided to drive ahead of the vehicle in the direction of Camp No to confirm where it was going. From his vantage point shortly thereafter, he saw the van approach and turn toward Camp No, eliminating any question in his mind about its destination.
- Camp No is an unnamed and officially unacknowledged facility located outside the perimeter of the area enclosing the prison complex at Guantánamo. Guards nicknamed the facility "Camp No" because anyone who asked if it existed would be told, "No, it doesn't." Hickman was never briefed about the site, despite frequently being put in charge of security for the entire prison. He reported once hearing a "series of screams" coming from the facility.
- At approximately 11:30 p.m. from his position in a watchtower, Hickman watched the van he had seen transporting the detainees to Camp No return to the camp. This time, the van backed up to the entrance of the medical clinic, as if to unload something.
- At approximately 11:45 p.m., nearly an hour before the NCIS claims the first dead body (Yasser Al-Zahrani) was discovered in the cells, Army Specialist Christopher Penvose was approached by a senior navy officer who appeared to be extremely agitated and instructed Penvose to go the prison chow hall, identify a specific officer who would be dining there, and relay a specific code word. Penvose did as he was instructed. The officer leapt up from her seat and immediately ran out of the chow hall.
- At approximately 12:15 a.m. on June 10, Hickman and Penvose reported that the camp was suddenly flooded with lights and the scene of a frenzy of activity. Hickman headed to the medical clinic, which appeared to be the center of activity,

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<sup>12</sup> Scott Horton, *The Guantánamo "Suicides": A Camp Delta Sergeant blows the whistle*, *Harper's Magazine*, Jan. 18, 2010, available at <http://www.harpers.org/archive/2010/01/hbc-90006368/>.

and was told by a medical corpsman there that three dead prisoners had been delivered to the clinic, that they had died because they had rags stuffed down their throats, and that one of them was severely bruised.

- According to Specialist Tony Davila, guards he talked to also said the men had died as the result of having rags stuffed down their throats.
- While the NCIS investigation found that the deceased were found dead in their cells and transported from there to the medical clinic, Penvose, who was on guard duty in a watchtower at the time the deceased would have been transported to the clinic, had an unobstructed view of the walkway between the camp and the clinic, which was the path by which any detainee would be delivered to the clinic. Penvose reported that he saw no detainees being moved from the camp to the clinic.
- Army Specialist David Carroll, who was also on guard duty in another watchtower at the time the NCIS investigation found that the deceased would have been transported to the clinic, also had an unobstructed view of the alleyway that connected the men's specific cellblock to the clinic. He similarly reported that he had seen no detainees transferred from the cellblock to the clinic that night.
- By dawn, news had circulated through the prison that three detainees had committed suicide by swallowing rags.
- On the morning of June 10, Col. Bumgarner called a meeting of the guards during which he announced that three detainees had committed suicide during the night by swallowing rags, causing them to choke to death. Bumgarner said that the media would instead report that the detainees had committed suicide by hanging themselves in their cells. He said that it was important that the guards make no comments or suggestions that in any way undermined the official report, and reminded them that their phone and email communications were being monitored. This account of the meeting was corroborated by various guards in independent interviews conducted by *Harper's Magazine*.
- On the evening of June 10, Rear Adm. Harris, the top commander at Guantánamo and Bumgarner's superior at the time, read this statement to reporters: "An alert, professional guard noticed something out of the ordinary in the cell of one of the detainees. ... When it was apparent that the detainee had hung himself, the guard force and medical teams reacted quickly to attempt to save the detainee's life. The detainee was unresponsive and not breathing. [The] guard force began to check on the health and welfare of other detainees. Two detainees in their cells had also hung themselves."
- In a press interview at the time, Bumgarner, contrary to his own admonition to the guards, let slip that each deceased detainee "had a ball of cloth in their mouth either for choking or muffling their voices."

- As soon as Bumgarner's interview was published, Harris called him for a meeting and told him that the article "could get me relieved." The same day, an investigation was launched to determine whether classified information had been leaked from Guantánamo. Bumgarner was subsequently suspended.
- Hickman and Davila later learned that Bumgarner's home was raided by the FBI over a concern that he had taken classified materials and was planning to send them to the media or use them for writing a book.
- The only apparent discrepancy between Bumgarner's interview and the official Pentagon narrative was on one point: that the deaths had involved cloth being stuffed into the detainees' mouths.

13. For several months after Hickman first came forward, he and his attorneys attempted to pursue an investigation through the U.S. Department of Justice. Their first meeting was on February 2, 2009, where they related a detailed account of Hickman's observations and later handed over a list of corroborating witnesses with contact information. The Justice Department closed its investigation on November 2, 2009, concluding without explanation that "the gist of Sergeant Hickman's information could not be confirmed" and that his conclusions "appeared" to be unsupported.<sup>13</sup> It bears noting that nearly five months before the Justice Department concluded its investigation, the government had already represented in court in response to a civil lawsuit filed by Petitioners that U.S. officials had not acted unlawfully in relation to the deceased.

## **B. Arbitrary Detention**

14. At the time of their deaths, Yasser Al-Zahrani and Salah Al-Salami had been detained at Guantánamo for four years without charge or any semblance of meaningful review, and without knowing whether or when their detention would end.

15. For over two years, from January 2002 until July 2004, there was no review at all of their detention. They like all Guantánamo detainees were held solely on the unilateral determination of executive branch officials that they were "enemy combatants."

16. In July 2004, the government set up ad-hoc Combatant Status Review Tribunals ("CSRTs") for administrative review of detainees' status. The rules for the CSRTs presumed detainees to be "enemy combatants" and limited the scope of review to confirming or reversing prior determinations. The tribunals consisted of mid-level military officers who had no institutional safeguards for independence in reviewing their superiors' determinations, in a context where for years prior to the CSRTs, high-ranking officials had repeatedly declared all detainees at Guantánamo to be dangerous terrorists. Detainees had no right under the rules to see or rebut any classified information, despite the tribunals' substantial reliance on classified information in making their decisions; no effective right to call witnesses or present other evidence; and no right to counsel, but

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<sup>13</sup> *See id.*

only the option of a non-lawyer military officer who had no duty of confidentiality and an obligation to disclose any inculpatory information learned from the detainee. In addition, against a background where torture had been approved and used in interrogations for at least two years prior to the CSRTs, both at Guantánamo and other U.S.-controlled sites where detainees had been held prior to their transfer to Guantánamo, the rules for the CSRTs allowed evidence obtained through torture to be used as a basis for continued detention.

17. During the span of a few months in 2004, CSRTs were convened for all detainees at Guantánamo. Not surprisingly, the tribunals authorized the continued detention as “enemy combatants” of almost all detainees. In the rare instances where the tribunals reached a different outcome, re-hearings were ordered.

18. In September and November 2004, CSRTs were convened for Yasser Al-Zahrani and Salah Al-Salami, respectively. After an inherently biased and unfair proceeding, the tribunals confirmed that each man was an “enemy combatant.” In 2005 and 2006, Administrative Review Boards (“ARBs”) with similarly flawed procedures rubber-stamped their continuing detention.

19. In June 2004, the U.S. Supreme Court ruled in *Rasul v. Bush* that detainees had the right to access federal courts in the United States and to file petitions for the writ of *habeas corpus*, but it took months, even years, for many prisoners to retain and meet with attorneys and file petitions. The reasons why included the government’s refusal to disclose identifying information about detainees and the resulting difficulty of attorneys in obtaining authorizations for representation; the government’s own difficulty in confirming detainees’ identities once *habeas* petitions were filed; and the government’s opposition to the terms of a protective order governing attorneys’ access to detainees, which had to be resolved before attorneys could meet with their clients.<sup>14</sup>

20. For these reasons, Salah Al-Salami was never able to meet with attorneys his family had retained for him, and Yasser Al-Zahrani did not have an attorney at the time he died.<sup>15</sup> The CSRTs and ARBs were thus the only tribunals to review the men’s detention in their four years at Guantánamo.

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<sup>14</sup> As the Commission itself noted in its 2005 Precautionary Measures for Guantánamo detainees, “[n]otwithstanding the Supreme Court’s pronouncement [in *Rasul v. Bush*], the information before the Commission indicates that over one year since the decision, nearly half of the detainees at Guantánamo Bay have not been given effective access to counsel or otherwise provided with a fair opportunity to pursue a *habeas corpus* proceeding in accordance with the Supreme Court’s ruling, despite the fact the purpose of *habeas* is intended to be a timely remedy aimed at guaranteeing personal liberty and humane treatment.”

<sup>15</sup> *Habeas* petitions filed by other detainees were ultimately stayed on the basis of the 2006 Military Commissions Act, and it was not until the U.S. Supreme Court’s decision in *Boumediene v. Bush* in June 2008, which held that detainees had a constitutional right to *habeas corpus*, that the petitions began moving forward.

### C. Treatment and Conditions of Confinement<sup>16</sup>

21. In 2004, the ICRC charged in reports to U.S. authorities that the detention and interrogation system at Guantánamo, "...whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."<sup>17</sup>

22. The first detainees transferred to Guantánamo in January 2002, like Yasser Al-Zahrani, were held for the first few months of their detention in a temporary holding area called "Camp X-Ray" while more permanent facilities were being constructed. In Camp X-Ray, detainees were held in wire-mesh cages that measured six-by-six feet, had a cement slab for a floor and metal sheets overhead, and where detainees had no reprieve from the heat, humidity or the elements. The Muslim chaplain at Guantánamo in 2002 compared the camp to "an outdoor cattle stable."

23. In April 2002, detainees were moved to "Camp Delta," a large complex containing several separate detention facilities, including "Camp 1," where Yasser Al-Zahrani and Salah Al-Salami were detained at the time of their deaths. The cells in most of the facilities were identical, measuring six-by-eight feet with steel-mesh walls, and a steel sink next to a "squat" toilet in the floor, next to a bed. In Camp 1, florescent lights were on 24-hours a day. There was no air-conditioning, only exhaust fans.

24. The newest facility constructed before the deaths of Yasser Al-Zahrani and Salah Al-Salami was "Camp 5," which was modeled after super-max prisons in the United States and was more restrictive than any of the other facilities at Guantánamo at the time. Camp 5, which became operational in May 2004, is a 100-bed maximum-security facility where detainees were confined in concrete cells that have a narrow opaque window to the outside, another one-way "window" to the interior of the prison that allows guards to keep watch, and two slots at the middle and foot of a solid steel cell door through which meals were passed and detainees' arms and legs were shackled before they were led out of their cells. Cameras monitored each cell 24-hours a day. Florescent lights were on continuously day and night.

25. Pursuant to SOPs in effect at Guantánamo during Yasser Al-Zahrani and Salah Al-Salami's detention, detainees were issued certain basic items for personal use in their cells: a blanket, a thin rubber mat to cover the solid and sometimes metal beds, flip flops, an orange detainee uniform, shorts, a towel, and a Qur'an. All other items – including soap, toilet paper, a toothbrush, toothpaste, a t-shirt, a sheet – were considered "comfort" items. Detainees could earn such items by demonstrating "good behavior" like cooperating with interrogators, or lose them for "infractions" like talking to a detainee

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<sup>16</sup> Petitioners note that they are unable to allege facts here with greater specificity because of the inherent obstacles to their ability to know the treatment of the deceased: the men themselves are dead, they had virtually no contact with the outside world during their detention, and the government controls much of the relevant information.

<sup>17</sup> Neil A. Lewis, *Red Cross Finds Detainee Abuse at Guantánamo*, N.Y. Times, Nov. 30, 2004, available at <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?8bl=&pagewanted=print&po>.

across the block or keeping leftover food in their cells. Detainees were also moved between camps of greater or fewer restrictions depending on their “good behavior” or “infractions.”

26. Government records indicate numerous instances when block guards requested disciplinary action for various “infractions” by Salah Al-Salami, including talking to another detainee across his cell block, refusing to return a food plate, possessing “contraband” (a salt packet), and refusing to return an uneaten apple left over from a meal.

27. During the period of their detention, the deceased and other detainees spent most of each day, every day, confined alone in their cells in the conditions described, effectively cut off from the rest of the world. Particularly before mid-2004 when attorneys were first permitted to visit the base, detainees had virtually no human contact with anyone other than their jailors and their interrogators, and were largely prohibited from speaking with other detainees. They also had numbingly little activity. A few times a week, they were shuffled out of their cells in shackles to small outdoor pens for 30 minutes of exercise and a five-minute shower. They had no educational, vocational or rehabilitative activities. Even access to reading materials was limited to one book at a time.

28. Detainees were also effectively deprived of communicating with their families. Family visits and telephone calls were prohibited. Letters, while permitted through the ICRC, were screened and censored by the government and took several months or more to reach family members.

29. In addition to these conditions, detainees were subjected to specific methods and acts of physical and psychological torture and abuse, including in connection with interrogations. In a memorandum approved by then-Secretary of Defense Donald Rumsfeld on December 2, 2002, a series of specific interrogation techniques were authorized for use at Guantánamo, including putting detainees in “stress positions” for up to four hours; forcing detainees to strip naked, intimidating detainees with dogs, interrogating them for 20 hours at a time, forcing them to wear hoods, shaving their heads and beards, keeping them in total darkness and silence, and using what was euphemistically called “mild, non-injurious physical contact.”<sup>18</sup>

30. In April 2003, following receipt of a “Working Group Report,” Rumsfeld authorized a new set of interrogation techniques for use at Guantánamo. The authorizing memorandum specifically recognized that certain of the approved techniques may violate the Geneva Conventions, including the removal of religious items, threats, intimidation, manipulation of temperatures and other environmental factors, and isolation. While the memorandum did not include approval for unlawful actions that had been ongoing for months, including hooding, forced nudity, shaving, stress positions, use of dogs and

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<sup>18</sup> Action Memo for Secretary of Defense from William J. Haynes, General Counsel, Re: “Counter-Resistance Techniques,” signed Dec. 2, 2002.



“mild, non-injurious physical contact,” these practices continued to be employed against detainees at Guantánamo.

31. Some of the most brutal physical abuse reported by Guantánamo detainees was attributed to the Immediate Reaction Force (“IRF”). IRF squads, which were comprised of military police, functioned as a disciplinary force within the camps. Squad members wore riot gear, carried Plexiglas shields and frequently used tear gas or pepper spray. Video footage taken by the military at Guantánamo during the period of Yasser Al-Zahrani and Salah Al-Salami’s detention shows five-member IRF squads punching detainees, kneeling them in the head, tying one to a gurney for interrogation, and forcing a dozen to strip from the waist down.<sup>19</sup> All-female IRF squads were also used to taunt and traumatize the all-Muslim detainee population at Guantánamo.

32. In letters retrieved by the government after his death, Yasser Al-Zahrani described multiple forms of physical and psychological abuse he and other detainees suffered, including beatings by IRF squads; sleep deprivation for up to 30 days; exposure to extreme temperatures of hot and cold; invasive and degrading body searches; religious interference and humiliation by guards, who prohibited detainees from sounding the Muslim call to prayer and praying communally according to custom, desecrated the Qur’an, and forcibly shaved detainees’ heads and beards; the withholding of necessary medication; and what he generally described as the “continuous oppression” of being confined in a small steel cell each day and prohibited from human contact with other detainees.

33. In letters discovered after his death, Salah Al-Salami wrote of being held in solitary confinement “inside a very cold metal box,” and that his captors “used the [IRF]’ing units and burning gases on us, they desecrated our religion, our bodies ... all of this is known to the world.” Government records indicate that Salah Al-Salami was subjected to IRF squads multiple times. Medical records from August 2005, for example, state that he had been “IRF’d” four months prior and had “banged [his] knees into wall” during the beating. The records state that he told the doctor that his level of knee pain from the injury was “10 out of 10” and that it felt “like [his] bones are rubbing together.” The records also indicate that his severe knee pain persisted and that he repeatedly asked medical personnel for knee braces to no avail.

34. The ICRC consistently put the authorities on notice that Guantánamo detainees’ treatment and conditions amounted to cruel treatment and even torture, and warned of the damaging effects. In 2003, the ICRC said publicly that the system of holding detainees indefinitely without allowing them to know their fates was unacceptable and would lead to mental health problems.<sup>20</sup> In confidential reports in 2004, the ICRC charged that the

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<sup>19</sup> Paisley Dodds, *Videos of Riot Squads at Guantánamo Show Prisoners Being Punched and Stripped From the Waist Down*, Associated Press, Feb. 2, 2005, available at <http://www.commondreams.org/headlines05/0202-03.htm>.

<sup>20</sup> Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantánamo Bay*, N.Y. Times, Oct. 10, 2003, available at <http://www.nytimes.com/2003/10/10/us/red-cross-criticizes-indefinite-detention-in-Guantánamo-bay.html?pagewanted=all&src=pm>.

military was intentionally using psychological and physical coercion “tantamount to torture” on prisoners at Guantánamo.<sup>21</sup>

35. To protest their conditions and detention, hundreds of detainees, including the deceased, went on hunger strikes for weeks and months at a time. Available records indicate that Salah Al-Salami participated in hunger strikes several times during his imprisonment, in 2002, 2005 and 2006, for periods of up to six months. Yasser Al-Zahrani also went on hunger strike, including for a period of six months.

36. Force-feeding of detainees on hunger strike was and continues to be standard policy at Guantánamo. In December 2005, the authorities introduced the use of “restraint chairs” – marketed by their manufacturer as a “padded cell on wheels” – in force-feeding. Detainees are strapped into the chairs and restrained at the legs, arms, shoulders, and head. A tube described by detainees as the thickness of a finger is forcibly inserted up the nose and down into the stomach, and as much as 1.5 liters of formula is then pumped through the tube. Detainees are kept strapped in the chairs for an hour after “feeding” to prevent them from purging the formula. No sedatives or anesthesia are given during the procedure. The tubes are generally inserted and withdrawn twice a day, and the same tubes, covered in blood and stomach bile, have reportedly been used from one detainee to another without sanitization. Detainees have also reported verbal, religious and sexual abuse by military personnel standing watch during the feedings, with medical personnel either actively participating in the abuse or watching without intervening.

37. Military officials described Salah Al-Salami as “a long and dedicated striker, perhaps being tube fed longer than any other detainee in the camp.” His medical records indicate that the tube used for feeding caused bleeding, severe inflammation and infection in his nasal passage to the point where his feedings had to be put on hold for a period of time.

#### **D. Domestic Judicial Proceedings**

38. Yasser Al-Zahrani and Salah Al-Salami died at Guantánamo before they could file *habeas corpus* petitions to challenge their detention. After their deaths, the United States had the sole ability to initiate criminal proceedings, which it has not pursued. To date, the government has not criminally prosecuted any senior official for alleged torture and mistreatment of detainees in its custody at Guantánamo or elsewhere.

39. On January 7, 2009, Petitioners filed a civil action for damages in the United States District Court in Washington, DC, against 24 named U.S. officials for their alleged role in the arbitrary detention, torture and mistreatment, and wrongful deaths of the deceased. Petitioners brought claims under the U.S. Constitution, the Federal Tort Claims Act, and international law on behalf of the deceased, and for infliction of emotional distress on behalf of themselves. On February 16, 2010, the district court dismissed the complaint without reaching the merits and without oral argument, holding that the officials were protected by immunity and that the constitutional claims were

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<sup>21</sup> Neil A. Lewis, *Red Cross Finds Detainee Abuse at Guantánamo*, N.Y. Times, Nov. 30, 2004.

additionally barred by national security considerations.<sup>22</sup> The court's decision was based on precedent in the Court of Appeals in the D.C. Circuit in a similar Guantánamo civil damages case.<sup>23</sup>

40. On March 16, 2010, Petitioners filed a request with the district court to reconsider its dismissal on the basis of the new accounts from the soldiers and to allow them to amend their complaint. The district court denied their request on September 29, 2010.

41. On November 29, 2010, Petitioners noticed an appeal of the district court's dismissal of their original complaint and its denial of their request to amend their complaint to the D.C. Circuit Court of Appeals. Oral argument was held on October 6, 2011. The circuit court affirmed the district court's decisions on February 21, 2012, holding that Petitioners' claims were entirely barred by a provision of the Military Commissions Act of 2006 ("MCA").<sup>24</sup> According to Section 7 of the MCA:

- (a) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
- (b) [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Section 7(a) was at issue in *Boumediene v. Bush* and was invalidated by the court. The D.C. Circuit found that section 7(b) survived *Boumediene* and barred Petitioners' claims. Petitioners' right to appeal ended with the D.C. Circuit's dismissal.

#### **IV. VIOLATIONS OF THE AMERICAN DECLARATION<sup>25</sup>**

##### **A. Right to Life: Article I**

42. The Commission has described the right to life as "the supreme right of the human being, respect for which the enjoyment of all other rights depends."<sup>26</sup> It is one of

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<sup>22</sup> *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010).

<sup>23</sup> *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

<sup>24</sup> *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012).

<sup>25</sup> Petitioners note that the Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and Inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with regard to other rules of international law applicable to members states. See, e.g., *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 118 (2011).

the core rights protected by the American Declaration and has “undoubtedly attained the status of customary international law.”<sup>27</sup>

43. The right to life is non-derogable. Accordingly, the right’s core prohibition against the arbitrary deprivation of life applies in all circumstances, including situations of armed conflict and states of emergency.<sup>28</sup>

44. In situations outside the context of armed conflict, the jurisprudence of the Inter-American system holds that the use of lethal force may be justified only in narrow circumstances, for example, for the purpose of self-defense.<sup>29</sup> International standards provide that lethal force may only be used where “strictly unavoidable” in order to protect life.<sup>30</sup> The Commission and the Court have found the use of lethal force to be excessive or disproportionate and in violation of the right to life, *inter alia*, in the context of prison disturbances where the authorities used lethal force against prisoners who were unarmed or had surrendered.<sup>31</sup>

45. The rules governing situations of armed conflict under international humanitarian law also include constraints on the use of lethal force, including against prisoners of

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<sup>26</sup> *Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 112; *see also Report on Terrorism and Human Rights*, Inter-Am. Comm’n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 81 (2002).

<sup>27</sup> *Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 112; *see also, e.g.*, Universal Declaration of Human Rights, article 3; International Covenant on Civil and Political Rights, article 6; European Convention on Human Rights, article 2; African Charter on Human Rights and Peoples’ Rights, article 4, among others.

<sup>28</sup> *See, e.g., Third Report on the Human Rights Situation in Colombia*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.102, Doc. 9 rev. 1, chap IV, ¶ 24 (1999); *Chumbivilcas v. Peru*, Case 10.559, Inter-Am. Comm’n H.R., Report No. 1/96 (1996) (specifying that the prohibition against arbitrary deprivation of human life “is at the core of the right to life. The use of the term ‘arbitrarily’ might appear to indicate that the Convention allows exceptions to the right to life, on the mistaken assumption that life may be taken in certain circumstances provided this is not done arbitrarily. However, quite the opposite is the case ....”); *Bustios Saavedra v. Peru*, Case 10.548, Report No. 38/97, ¶ 59 (1997); *Arturo Ribón Avila v. Colombia*, Case 11.142, Inter-Am. Comm’n H.R., Report No. 26/97, ¶ 135 (1997); *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, ¶ 158 (1997); *Coard v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶ 39 (1999).

<sup>29</sup> *See, e.g., Carandiru v. Brazil*, Case 11.291, Inter-Am. Comm’n H.R., Report No. 34/00, ¶¶ 63, 88 (2000) (finding that several deaths caused by the use of force by the police during a riot in a Brazilian prison was not for purposes of self-defense or for disarming the rioters).

<sup>30</sup> For example, Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials specifies that “enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, ¶ 9 (1990).

<sup>31</sup> *See, e.g., Neira Alegría v. Peru*, Inter-Am. Ct. H.R., Ser. C, No. 21 (1995); *Carandiru*, Case 11.291, Inter-Am. Comm’n H.R., Report No. 34/00.

war<sup>32</sup> and persons not directly participating in hostilities in a non-international armed conflict.<sup>33</sup>

46. As with other obligations under the American Declaration, states are required not only to respect the right to life – that is, refrain from arbitrary deprivations – but also to take positive measures to protect and prevent violations.<sup>34</sup>

47. The positive obligation of states to protect and preserve the right to life includes the duty to investigate violations, punish the responsible parties and provide reparations.<sup>35</sup> As the Commission and the Court have recognized, failures to investigate are especially grave in cases involving the right to life, particularly when they take place as part of a pattern of systematic human rights violations, because they foster a favorable climate for the chronic repetition of such breaches.<sup>36</sup>

48. In *Sebastião Camargo Filho v. Brazil*, the Commission held that Brazil’s positive obligation to protect the right to life “necessarily required an effective official investigation when individuals have been killed as the result of the use of force by ... agents of the State.”<sup>37</sup> The Commission cited international and regional human rights decisions holding that “any violation of right to life requires the state involved to undertake a judicial investigation by a criminal court instructed to prosecute criminally, try and punish those held responsible for such violations.”<sup>38</sup> The Commission found Brazil liable because “such a process of investigation, prosecution, and compensation has not been undertaken in a serious and exhaustive fashion ... which gives rise to its international responsibility.”<sup>39</sup>

49. In *James Zapata Valencia v. Colombia*, the Commission found that “gaps or defects in the investigation that prevent effective action to determine the cause of death or to identify the responsible parties or the masterminds behind the crime imply noncompliance with the obligation to guarantee the right to life.”<sup>40</sup> The Commission noted that the Inter-American Court has repeatedly ruled that in cases of extrajudicial executions, forced disappearances, torture, and other serious human rights violations, “an

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<sup>32</sup> See, e.g., Third Geneva Convention, Article 13; see also Additional Protocol I, Article 75(2).

<sup>33</sup> See Common Article 3 of the Geneva Conventions.

<sup>34</sup> See *Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 117-118, 164; see also *Víctor Hugo Maciel v. Paraguay*, Case 11.607, Inter-Am. Comm’n H.R., Report No. 85/09, ¶ 124 (2009) (finding a violation of the State’s obligation to guarantee the right to life in its failure to conduct appropriate medical examinations of the victim); *Sebastião Camargo Filho v. Brazil*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 102 (2009) (finding a violation of the State’s obligation to guarantee the right to life in its failure to prevent the violation despite learning of an imminent risk facing the victims).

<sup>35</sup> See *Víctor Hugo Maciel*, Case 11.607, Inter-Am. Comm’n H.R., Report No. 85/09, ¶ 123; *Sebastião Camargo Filho*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 90.

<sup>36</sup> See *Sebastião Camargo Filho*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 90.

<sup>37</sup> *Id.* ¶ 101.

<sup>38</sup> *Id.*, citing *Bautista v. Colombia*, UN Human Rights Committee, ¶ 8.6 (1995).

<sup>39</sup> *Sebastião Camargo Filho*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 101.

<sup>40</sup> *James Zapata Valencia v. Colombia*, Case 10.916, Inter-Am. Comm’n H.R., Report No. 79/11, ¶ 145 (2011).

*ex officio* investigation that is prompt, serious, impartial, and effective is a fundamental element” of the obligation to protect the affected rights, such as personal liberty, humane treatment, and life.<sup>41</sup>

50. The obligation of states to investigate and punish violations of the right to life requires not only that the actual perpetrators be punished, but also the intellectual authors of the acts and any accomplices.<sup>42</sup> The state “incurs international responsibility when its judicial organs do not seriously investigate and punish, as applicable, the material and intellectual authors and accomplices or accessories for human rights violations.”<sup>43</sup>

51. The duty to investigate also encompasses the right of victims, their families and society in general to knowledge about the circumstances of deaths resulting from violations by a state.<sup>44</sup> As the Inter-American Court stated in *Víctor Hugo Maciel v. Paraguay*:

Only if it has clarified all the circumstances of a violation will the State have provided the victims and their next of kin with effective recourse, and complied with its general obligation to investigate and punish, thereby permitting the next of kin of the victim to learn the truth, not only as regards the whereabouts of his mortal remains, but also with regard to what happened to the victim.<sup>45</sup>

52. In *Carandiru v. Brazil*, state authorities used lethal force to suppress a prison riot, resulting in the deaths and injuries of inmates. The Commission held that “[t]he failure, through negligence or fraud, to notify the families, who had been waiting for days immediately outside the prison for reliable news, is in itself a violation and causes a specific harm for which the State must assume responsibility and make amends and every effort must be made to ensure that it is not repeated.”<sup>46</sup>

53. The jurisprudence of the Inter-American system does not require petitioners to establish the culpability or intentionality of perpetrators, or to identify individually the agents to whom the acts of a violation are attributed.<sup>47</sup>

54. In holding Yasser Al-Zahrani and Salah Al-Salami in its exclusive custody and care at Guantánamo, the United States had obligations to respect and protect their right to life under the American Declaration. Whether the deaths resulted from an excessive use of force at the hands of the authorities or were acts of

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<sup>41</sup> *Id.*; see also *Sebastião Camargo Filho*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 90.

<sup>41</sup> *Id.* ¶ 102.

<sup>42</sup> See *Víctor Hugo Maciel*, Case 11.607, Inter-Am. Comm’n H.R., Report No. 85/09, ¶ 150.

<sup>43</sup> *Id.*

<sup>44</sup> See *Sebastião Camargo Filho*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 90.

<sup>45</sup> *Víctor Hugo Maciel*, Case 11.607, Inter-Am. Comm’n H.R., Report No. 85/09, ¶ 147; see also *James Zapata Valencia*, Case 10.916, Inter-Am. Comm’n H.R., Report No. 79/11, ¶ 145.

<sup>46</sup> *Carandiru*, Case 11.291, Inter-Am. Comm’n H.R., Report No. 34/00, ¶ 89.

<sup>47</sup> *Sebastião Camargo Filho*, Case 12.310, Inter-Am. Comm’n H.R., Report No. 25/09, ¶ 76.

suicide within a system designed to break detainees physically and emotionally, the facts alleged demonstrate a violation of those obligations.

55. The facts also show that the United States failed to conduct an impartial and effective investigation or to punish those responsible, as required by the law of the Inter-American system. The authorities not only failed to conduct a thorough investigation, but may also have actively obstructed and destroyed evidence. Six years later, the United States' continuing failure to clarify the circumstances of the deaths and provide adequate information to the families of the deceased and the public constitutes a distinct harm for which the government is responsible.

## **B. Right to Liberty: Articles I, XVIII, XXV and XXVI**

56. Articles I and XXV of the American Declaration prohibit the arbitrary deprivation of liberty. Article XXV provides more specifically that "No person may be deprived of his liberty except ... according to the procedures established by pre-existing law," and guarantees the right of every person deprived of his liberty "to have the legality of his detention ascertained without delay by a court."

57. These protections apply in all situations, including those of armed conflict and other emergencies.<sup>48</sup> The Inter-American system's jurisprudence has specifically held that the writ of *habeas corpus* is a non-derogable right.<sup>49</sup>

58. Articles XVIII and XXVI of the American Declaration guarantee certain fundamental due process protections to persons deprived of their liberty,<sup>50</sup> including the right to a hearing by a competent, independent and impartial tribunal within a reasonable time,<sup>51</sup> access to the evidence against oneself and the right to obtain witnesses and

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<sup>48</sup> See *Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 61. In the latter context, however, international humanitarian law may serve as the *lex specialis* in interpreting international human rights instruments, such as the American Declaration. See *id.*

<sup>49</sup> See *id.* ¶¶ 126-27, 139. The Inter-American Court has ruled that the right to habeas corpus under Article 7(6) of the American Convention may not be subject to derogation in the Inter-American system. See *id.* at ¶ 126, n. 342. This position is also in line with the interpretations of UN bodies. See UN Human Rights Committee, General Comment No. 29 (2001), ¶ 11 (explaining that Article 9(4) of the International Covenant on Civil and Political Rights is non-derogable even in times of emergency).

<sup>50</sup> See *Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 218. The due process protections of Articles XVIII and XXVI have been considered most frequently by the Commission and the Court in the context of criminal proceedings, but the system's jurisprudence clearly establishes that such protections are also applicable in "non-criminal proceedings for the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature." *Id.* at ¶¶ 219, 240. The Inter-American Court has observed, for example, that "the due process of law guarantee must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons." *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., Ser. C, No. 146, ¶ 82 (2006).

<sup>51</sup> See *Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 218.

evidence in one's defense,<sup>52</sup> and the assistance of counsel.<sup>53</sup> These protections are also non-derogable.<sup>54</sup>

59. In its first Precautionary Measures in favor of Guantánamo detainees in 2002, the Commission, in responding to information that detainees were being held incommunicado, without access to counsel, called for the United States to take the "urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal."<sup>55</sup> As the Commission explained, determining detainees' status was indispensable to identifying the scope of their rights and assessing whether their rights were being respected, and was an obligation of the United States as the detaining state.<sup>56</sup> The Commission expressed concern that "it remains entirely unclear from their treatment by the United States what minimum rights under international human rights and humanitarian law the detainees are entitled to."<sup>57</sup>

60. The Commission reiterated this request in 2003, 2004 and 2005, before calling for the closure of Guantánamo in 2006.<sup>58</sup> In 2005, the Commission, responding to information about the CSRTs, repeated that "it remains entirely unclear from the outcome of [the CSRTs and ARBs] what the legal status of the detainees is or what rights they are entitled to under international or domestic law," and that the tribunals did not adequately respond to the Commission's concerns.<sup>59</sup>

61. In its 2005 Precautionary Measures, the Commission also emphasized "the longstanding and fundamental role that the writ of habeas corpus plays as a means of reviewing Executive detention" and underscored that *habeas* is intended to be a timely remedy.<sup>60</sup> In situations involving the detention of individuals suspected of terrorism, both the Commission and the Court have found that holding the person for more than 20 days without charge or judicial review violates the right to be free from arbitrary detention.<sup>61</sup>

62. As the facts alleged show, Yasser Al-Zahrani and Salah Al-Salami were detained at Guantánamo from 2002 until their deaths in 2006 without ever having the legality of

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<sup>52</sup> See *Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 238.

<sup>53</sup> See *Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 236.

<sup>54</sup> See *id.* at paras. 258-59; see also Human Rights Committee, General Comment No. 29 (2001), at para. 11.

<sup>55</sup> Precautionary Measures No. 259, Inter-Am. Comm'n H.R. (2002).

<sup>56</sup> See *id.* at 3.

<sup>57</sup> *Id.*

<sup>58</sup> See Precautionary Measures No. 259, Inter-A. Comm'n H.R. (2003, 2004, and 2005); Press Release No. 27/06.

<sup>59</sup> Precautionary Measures No. 259, Inter-A. Comm'n H.R. (2005).

<sup>60</sup> *Id.* at 8.

<sup>61</sup> See, e.g., *Cantoral Benavides v. Peru*, Inter-Am. Ct. H.R., Ser. C, No. 69, at ¶¶ 63, 66, 74 (2000). In ordinary circumstances, the Commission has suggested that a delay of more than two or three days in bringing a detainee before a judicial authority would generally not be considered reasonable. See *Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶¶ 122, n. 334; see also *Suarez-Rosero v. Ecuador*, Inter-Am. Ct. H.R., Ser. C, No. 35 (1997) (finding that a judicial proceeding occurring one month after a defendant's arrest constituted arbitrary detention).



their detention ascertained by a court. Indeed, U.S. officials chose Guantánamo as the site of their prison and intended to hold foreign citizens there indefinitely without judicial review precisely because they believed detainees would be beyond the reach of U.S. laws and international obligations. Yasser Al-Zahrani and Salah Al-Salami were denied judicial review by law until the U.S. Supreme Court's ruling in *Rasul v. Bush* in June 2004, and then effectively prevented from accessing attorneys and filing *habeas* petitions because of government obstruction. In their four years of detention, the only review the men received was by the sham CSRTs and ARBs. Regardless of whether their right to liberty would be properly analyzed under international human rights or the *lex specialis* of international humanitarian law, their detention at Guantánamo for four years without charge or any measure of adequate review constitutes a clear violation of their rights under the American Declaration.

### **C. Right to Humane Treatment: Articles I, XXV, in Conjunction with Articles XI and III**

63. Article I of the American Declaration guarantees the right to personal security, which the Commission has consistently interpreted to include the right to humane treatment, specifying that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture.”<sup>62</sup> Article XXV of the Declaration specifically protects the right of persons in state custody to humane treatment. Article 5 of the American Convention, the analog to these guarantees, provides in more explicit terms the right of “[e]very person ... to have his physical, mental, and moral integrity respected. ... No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”<sup>63</sup>

64. Articles XI and III of the American Declaration specifically guarantee the rights to health and religion, distinct violations of which have been found by the Commission and other human rights bodies in the context of abuse of prisoners in state custody.<sup>64</sup>

65. The law of the Inter-American system, like international law in general, considers the prohibition of torture in all its forms to be a *jus cogens* norm that cannot be subject to derogation for any reason,<sup>65</sup> and violations of which must be prosecuted and punished.<sup>66</sup>

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<sup>62</sup> *Report on Terrorism*, Inter-Am. Comm’n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶¶ 155, n. 389.

<sup>63</sup> The Commission has interpreted Article I of the American Declaration as containing a prohibition similar to that under the American Convention. See *Report on Terrorism*, Inter-Am. Comm’n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 155 n. 388.

<sup>64</sup> See *Cuba*, Case 6091, Inter-Am. Comm’n H.R., Res. No. 3/82, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982) (finding that prisoners’ denial of adequate medical care constituted a violation of their right to humane treatment under Article XXV and a separate violation of the right to health under Article XI); *Clement Boodoo v. Trinidad and Tobago*, UN Human Rights Committee, Communication No. 721/1996, UN Doc. CCPR/C/74/D/721/1996, ¶ 6.6 (2002) (finding that the State violated a detainee’s right to religious freedom where the detainee’s government captors had forcibly shaved him, removed his prayer books and prevented him from participating in religious services).

<sup>65</sup> See *Report on the Situation of Human Rights Asylum Seekers within the Canadian Refugee Determination System*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev., ¶ 154 (2000); *Lori*

The decisions of the Inter-American Court also make clear that the prohibition against cruel, inhuman and degrading punishment is universal and non-derogable.<sup>67</sup>

66. In interpreting the scope and content of the prohibition on torture, the Commission and the Court have generally looked to the Inter-American Convention to Prevent and Punish Torture (“Inter-American Torture Convention”).<sup>68</sup> Article 2(1) of the Inter-American Torture Convention defines torture as follows:

“For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. ...”

67. As this definition and the decisions of the Inter-American Court reflect, mental and psychological suffering, even in the absence of physical injuries, can constitute inhuman treatment.<sup>69</sup>

68. The Commission has held that the key factor distinguishing torture from other cruel, inhuman or degrading treatment or punishment “primarily results from the intensity of the suffering inflicted.”<sup>70</sup> For treatment to be considered inhuman or degrading, it must attain “a minimum level of severity,” which depends on the circumstances in each case, including the duration of the treatment, its physical and mental effects, and the age and health of the victim.<sup>71</sup> In *Gomez Paquiyauri brothers v. Peru*, the Inter-American Court’s finding that the physical and mental abuse at issue constituted torture took into particular account the fact that the victims were minors.<sup>72</sup>

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*Berenson-Mejía v. Peru*, Inter-Am. Ct. H.R., Ser. C, No. 119, ¶ 100 (2004) (finding that “[t]he prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes”) (citations omitted); *Caesar v. Trinidad and Tobago*, Inter-Am. Ct. H.R., Ser. C, No. 123, ¶ 70 (2005); *Maritza Urrutia v. Guatemala*, Inter-Am. Ct. H.R., Ser. C, No. 103, ¶ 92 (2003); *see also* Inter-American Torture Convention, art. 5.

<sup>66</sup> *See Goiburú v. Paraguay*, Inter-Am. Ct. H.R., Ser. C, No. 154, ¶ 128 (2006).

<sup>67</sup> *Ximenes-Lopes v. Brazil*, Inter-Am. Ct. H.R., Ser. C, No. 139, ¶ 126 (2005).

<sup>68</sup> *See Raquel Martín de Mejía v. Peru*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, ¶ 185 (1995) (declaring that, while the American Convention does not define “torture,” “in the Inter-American sphere, acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture”). The Inter-American Court has stated that the Inter-American Convention to Prevent and Punish Torture constitutes part of the Inter-American *corpus iuris*, and that the Court must therefore refer to it in interpreting the scope and content of Article 5(2) of the American Convention. *See Tibi v. Ecuador*, Inter-Am. Ct. H.R., Ser. C, No. 114, ¶ 145 (2004).

<sup>69</sup> *See Report on Terrorism*, Inter-Am. Comm’n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 159.

<sup>70</sup> *Id.* ¶ 158.

<sup>71</sup> *Id.* ¶ 157.

<sup>72</sup> *Gomez-Paquiyauri brothers v. Peru*, Inter-Am. Ct. H.R., ¶ 117 (2004).

69. The Commission and the Court have held that the concept of inhumane treatment includes degrading treatment.<sup>73</sup> The Court has described degrading treatment as “the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance,” and that the degrading aspect of the treatment “is exacerbated by the vulnerability of a person who is unlawfully detained.”<sup>74</sup>

70. The jurisprudence of the Inter-American system also recognizes that the next-of-kin of victims of grave human rights violations can experience secondary pain and suffering, which can rise to the level of cruel, inhuman or degrading treatment or punishment for which the state is responsible.<sup>75</sup> In *Gomez Paquiyauri brothers*, the Inter-American Court found that the immediate next-of-kin of the victims had suffered psychological harm as a direct consequence of their relatives’ arbitrary detention, mistreatment and torture, ultimate deaths, and slander by the State as “subversives,” and that their rights to protection against cruel, inhuman and degrading treatment had also been violated.<sup>76</sup>

71. The Inter-American system’s jurisprudence on the right to humane treatment establishes that persons deprived of their liberty have the right to conditions of detention that respect their personal dignity, and that the State is obligated to ensure conditions that safeguard prisoners’ fundamental rights.<sup>77</sup>

72. In *Velasquez Rodriguez v. Honduras*, the Court held that “[p]rolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being” – a position the Court and the Commission have consistently held in their jurisprudence on prisoners’ right to humane treatment.<sup>78</sup> In other decisions, the Court has warned that “[i]ncommunicado [detention] may only be used exceptionally, taking into account its severe effects, because isolation from the exterior world produces moral suffering and mental stress on any individual, which place[s] him in an exacerbated situation of vulnerability, creating a real risk of aggression and abuse of authority in prisons.”<sup>79</sup>

73. In *Lori Berenson Mejia v. Peru*, the Court found that the detention conditions at

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<sup>73</sup> See *Report on Terrorism*, Inter-Am. Comm’n H.R., Doc. OEA/Ser.L./V/II.116 Doc. 5 rev. 1 corr., ¶ 158.

<sup>74</sup> *Id.* ¶ 159.

<sup>75</sup> See *Gomez-Paquiyauri brothers v. Peru*, Inter-Am. Ct. H.R., ¶ 118.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *Bulacio v. Argentina*, Inter-Am. Ct. H.R., Ser. C, No. 100, ¶ 126 (2003); *Cantoral Benavides v. Peru*, Inter-Am. Ct. H.R., Ser. C, No. 69, ¶ 87 (2000); *Lori Berenson-Mejía*, Inter-Am. Ct. H.R., Ser. C, No. 119, ¶ 102. The Commission has also interpreted Article XXV’s guarantee of humane treatment for individuals in state custody along the lines of international standards for the confinement and treatment of prisoners, including the United Nations’ Standard Minimum Rules for the Treatment of Prisoners. See *Oscar Elias Biscet v. Cuba*, Case. 12.476, Inter-Am. Comm’n H.R., Report No. 67/06 (2006).

<sup>78</sup> *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R., Ser. C, No. 4, ¶ 156 (1988).

<sup>79</sup> *Case of Lori Berenson*, cit., at para. 104 (internal quotations omitted); cf. *Case of Maritza Urrutia v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 103, at para. 87 (Nov. 27, 2003); *Case of Bámaca-Velásquez*, cit., at para. 150; *Case of Cantoral Benavides*, cit., at para. 84.

issue – continuous solitary confinement for one year in a small cell without ventilation, natural lighting or heating, adequate food, sanitary facilities or necessary medical care, and with severe restrictions on receiving visitors – constituted cruel, inhuman and degrading treatment.<sup>80</sup>

74. The jurisprudence of the Inter-American system has also addressed specific acts and methods of harm and found them to constitute inhumane treatment, generally and specifically in the context of detention and interrogation.<sup>81</sup> These include beatings;<sup>82</sup> electric shocks;<sup>83</sup> hooding;<sup>84</sup> holding a person's head in water until the point of drowning;<sup>85</sup> rape;<sup>86</sup> standing or walking on top of individuals;<sup>87</sup> mock burials and mock executions;<sup>88</sup> threats of a behavior that would constitute inhumane treatment;<sup>89</sup> death threats;<sup>90</sup> and exposure to the torture of other victims.<sup>91</sup> More broadly, the Court has held that “any use of force that is not strictly necessary to ensure proper behavior [by] the detainee constitutes an assault on the dignity of the person in violation of Article 5 of the American Convention.”<sup>92</sup>

75. In its 2005 Precautionary Measures in favor of Guantánamo detainees, the Commission expressed concern that instances of abuse and other inhumane treatment may be continuing, including the denial of adequate medical treatment to detainees who had participated in hunger strikes and interrogation methods directed at the religion of the men. The Commission reiterated its request that the United States investigate and prosecute instances of torture and other mistreatment at Guantánamo, and expressed concern that all investigations that had been undertaken thus far had been conducted by the Department of Defense, the very institution alleged to be responsible for the abuse, calling into question the impartiality of the investigation.<sup>93</sup>

76. In its 2006 review of the United States' compliance with the Convention Against

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<sup>80</sup> *Lori Berenson-Mejía*, Inter-Am. Ct. H.R., Ser. C, No. 119, ¶¶ 106, 109.

<sup>81</sup> *See Report on Terrorism*, Inter-Am. Comm'n H.R., Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., ¶ 164 (referring specifically to the European Court of Human Rights' decision in *Ireland v. UK* and stating that the Commission and the Court have suggested that similar acts – including stress positions, hooding, subjection to extreme noise, and sleep and food deprivation – are prohibited in any interrogations by state agents).

<sup>82</sup> *See id.* ¶ 161 n. 405.

<sup>83</sup> *See id.* ¶ 161 n. 402.

<sup>84</sup> *See id.* ¶ 161 n. 400, 407.

<sup>85</sup> *See id.* ¶ 161 n. 403.

<sup>86</sup> *See id.* ¶ 161 n. 408.

<sup>87</sup> *See id.* ¶ 161 n. 404.

<sup>88</sup> *See id.* ¶ 161 n. 409.

<sup>89</sup> *See id.* ¶ 161 n. 410.

<sup>90</sup> *See id.* ¶ 161 n. 412.

<sup>91</sup> *See id.* ¶ 161 n. 411. The United Nations Special Rapporteur on Torture has listed several similar acts severe enough to constitute torture. These include beating, burns, electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual aggression, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance, total isolation and sensory deprivation, being held in constant uncertainty in terms of space and time, threats to torture or kill relatives, and simulated executions. *See id.* ¶ 162 n. 413.

<sup>92</sup> *See id.* ¶ 166.

<sup>93</sup> Precautionary Measures No. 259, Inter-A. Comm'n H.R. (2005).

Torture, the Committee Against Torture called on the United States to “cease to detain any person at Guantánamo Bay and close this detention facility ... in order to comply with its obligations under the Convention.”<sup>94</sup> Noting that “detaining persons indefinitely without charge constitutes per se a violation of the Convention,” the Committee expressed concern that Guantánamo detainees had been held “for protracted periods ... without sufficient legal safeguards and without judicial assessment of the justification for their detention.”<sup>95</sup> The Committee also expressed concern about certain interrogation methods used against detainees in executive custody, including sexual humiliation, “waterboarding,” “short shackling,” and “using dogs to induce fear,” and called for the United States to “rescind any interrogation technique ... that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.”<sup>96</sup>

77. The conditions and treatment of Yasser Al-Zahrani and Salah Al-Salami in the custody of the United States at Guantánamo as described above constitute a clear violation of their non-derogable right to humane treatment under the American Declaration. As the ICRC charged before the men’s deaths, the entire detention and interrogation system at Guantánamo could not be considered “other than an intentional system of cruel, unusual and degrading treatment and a form of torture.” The Inter-American system’s jurisprudence has also addressed specific aspects of the conditions and treatment to which the men were subjected, including prolonged isolation and incommunicado detention; many of the interrogation methods that were authorized at Guantánamo; and the beatings, sleep deprivation, exposure to temperature extremes, religious abuse, and denial of medical care described in letters by the men found after their deaths. The fact of men’s deaths in state custody, whether they took their own lives or were killed, is itself an indication of the cruelty and torture they suffered at Guantánamo. That Yasser Al-Zahrani was a minor when he was detained only added to the intensity and impact of his mistreatment.

78. Petitioners, as the immediate next-of-kin of the deceased, have also suffered a distinct violation by virtue of the unlawful detention, torture and ultimate deaths of their relatives in U.S. custody. They have also been harmed in the aftermath of the deaths, including in receiving the injured remains of the men, in hearing the derisive statements of the authorities as the families were grappling with their loss, and in being denied the basic dignity of properly burying their loved ones.

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<sup>94</sup> Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), ¶ 22, available at [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf). The CAT issued the findings in this subsection in response to the U.S. 2006 report.

<sup>95</sup> *Id.* ¶ 22.

<sup>96</sup> *Id.* ¶ 24.

## E. Rights of the Family: Articles V and VI

79. The Commission has described the protections of Articles V and VI as prohibiting arbitrary or illegal government interference with family life.<sup>97</sup> While circumstances such as imprisonment inevitably limit full enjoyment of the right to family life, the Commission has emphasized that this is a fundamental right that can never be completely suspended.<sup>98</sup>

80. In the detention context, the Commission has consistently held that the right to family life obligates states to facilitate contact between a prisoner and his next of kin, notwithstanding the restrictions on personal liberty inherent in imprisonment.<sup>99</sup> Indeed, because of those inherent limitations, the Commission has held that states must take positive steps to guarantee the right to maintain and develop family relationships.<sup>100</sup> The Commission has also repeatedly indicated that ensuring visiting rights is a fundamental obligation of states in protecting the right to family life of the prisoner and his next of kin.<sup>101</sup>

81. With respect to Article V's guarantee of protection against abusive attacks on personal honor and reputation, the Commission found in *Cirio v. Uruguay* that the State's imposition of a penalty that was later recognized as arbitrary violated the victim's honor and reputation as protected under Article V.<sup>102</sup> In *Miguel Castro-Castro Prison v. Peru*, the petitioners alleged that the State had labeled detainees in preventive detention as "terrorists," despite the fact that they had not been convicted, and that the detainees had in turn been treated in the press as terrorists. The Inter-American Court found that the situation implied an insult to the honor, dignity and reputation of the detainees and their

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<sup>97</sup> *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.106, Feb. 28, 2000, ¶ 162 (2000).

<sup>98</sup> *Oscar Elias Biscet v. Cuba*, Case. 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, ¶ 236; *X and Y v. Argentina*, Case 10.506, Inter-Am. Comm'n H.R., Report No. 38/96, ¶¶ 96-97 (1996) (interpreting the analog to the right to family life in Article 17 of the American Convention); *see also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, ¶ 166 (holding that interference may only be justified where necessary to meet a pressing need to protect public order and where the means are proportional to that end").

<sup>99</sup> *See X and Y*, Case 10.506, Inter-Am. Comm'n H.R., Report No. 38/96, ¶ 98.

<sup>100</sup> *See id.*; *Oscar Elias Biscet*, Case. 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, ¶ 237; *see also McVeigh, O'Neill and Evans v. United Kingdom*, App. Nos. 8022/77, 8025/77 and 8027/77, 5 Eur. Ct. H.R. 71, ¶¶ 52-53 (1983) (Commission Report), in which the European Commission on Human Rights held that a failure to allow persons detained under anti-terrorism legislation to communicate with their spouses constituted a denial of private and family life contrary to Article 8. Similarly, in *PK, MK and BK v. United Kingdom*, App. No. 19086/91 (1992), the European Commission noted, while finding no violation in the instant case, that significant limits on visits from family members may well raise Article 8 issues.

<sup>101</sup> *See X and Y*, Case 10.506, Inter-Am. Comm'n H.R., Report No. 38/96, ¶ 98; *Oscar Elias Biscet*, Case. 12.476, Inter-Am. Comm'n H.R., Report No. 67/06, ¶ 237; *see also Situation of Human Rights in Cuba Seventh Report*, Inter-Am. Comm'n H.R., Chap. III, ¶ 25 (1983); *Annual Report of the Inter-American Commission on Human Rights (Uruguay)*, Inter-Am. Comm'n H.R., Chap. IV, ¶ 10 (1983-1984).

<sup>102</sup> *Cirio v. Uruguay*, Case 11.500, Inter-Am. Comm'n H.R., Report No. 124/06, ¶¶ 91, 95 (2006); *see also Wayne Smith v. United States*, Case 12.562, Report No. 81/10, ¶ 48 (2010) (holding that state action that may not be directly aimed at harming family life but has secondary consequences for family life may present a colorable claim under the American Declaration).

next of kin, “since they were perceived by society as terrorists or the next of kin of terrorists, with all the negative consequences this implies,” and could constitute a violation of the Convention.<sup>103</sup>

82. The United States violated its obligation to protect the right to family life of Yasser Al-Zahrani, Salah Al-Salami and their next of kin, and to respect their personal honor and reputation in several respects. The United States’ detention of the deceased in essentially incommunicado conditions deprived the men and their families of their basic right to family relationships, of which they are now forever deprived. The government’s designation of the deceased as “enemy combatants” was an arbitrary penalty and a slanderous label that the authorities continued to apply even after the men died – indeed, as the government announced their deaths. The military’s conclusion that the deaths were suicide, despite its inherently biased internal investigation and the gaps, inconsistencies and questions that remain, has also been particularly devastating to the families because suicide is against the tenets of their Islamic faith.

#### **D. Rights of the Child: Article VII**

83. Article VII of the American Declaration requires specific measures of protection for the rights of children. The jurisprudence of the Inter-American system refers to the definition of “child” in the Convention on the Rights of the Child, which covers all persons under the age of 18, “unless, by virtue of an applicable law, he shall have attained his majority previously.”<sup>104</sup> Under United States law, persons under 18 are also considered minors.

84. The Commission and the Court have also applied or referenced the Children’s Rights Convention and other relevant international treaties in interpreting the human rights obligations of states regarding minors. The Children’s Rights Convention specifically protects, *inter alia*, the right of children to non-discrimination; life; freedom from torture or cruel, inhuman or degrading treatment or punishment; and freedom from unlawful or arbitrary deprivation of liberty. With respect to deprivations of liberty, the Convention elaborates additional guarantees, including that “the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;” and that detained minors should be treated with humanity and respect, should have the right to prompt access to legal assistance and a prompt decision on any action challenging the legality of their detention, should generally be detained apart from adults, and should have the right to maintain contact with their family through correspondence and visits.<sup>105</sup> Consistent with these provisions, the Commission has found that violations of fundamental rights such as personal liberty, personal integrity and life are aggravated when the victim is a minor, necessitating special protection.<sup>106</sup> In the context of detention, the Commission has held that imprisonment of children can only

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<sup>103</sup> *Miguel Castro Prison v. Peru*, Inter-Am. Ct. H.R., ¶¶ 352, 356-359 (2006) (interpreting Article 11 of the American Convention, which contains protections similar to Article V of the American Declaration).

<sup>104</sup> *Villagran-Morales v. Guatemala*, Inter-Am. Ct. H.R., ¶ 188 (1999).

<sup>105</sup> *See id.* ¶ 195 (discussing these rights).

<sup>106</sup> *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. Comm’n H.R., Report N° 41/99, ¶ 70 (1998).

be used as a last recourse and for the shortest time, and that children must never be kept *incommunicado* or incarcerated with adults.<sup>107</sup>

85. The Commission's concern for minors is reflected in its Precautionary Measures for Guantánamo detainees as well. In its 2005 Measures, the Commission reiterated its request that the United States provide information regarding allegations that juveniles who arrived at Guantánamo before the age of 18 continue to be held there.<sup>108</sup>

86. Yasser Al-Zahrani was 17 years old when he was taken into U.S. custody and transferred to Guantánamo. He was detained *incommunicado* and denied judicial review for over four years. During that time he was held without adequate exercise or educational or vocational activities, denied visits, phone calls and any meaningful contact with his family, and subjected to physical and psychological abuse, at the end of which he took his own life or was killed. In every respect, the United States violated its obligation to provide special protection for the human rights of Yasser Al-Zahrani.

#### **D. Right to Judicial Protection: Article XVIII, in Conjunction with Article II**

87. Article XVIII of the American Declaration protects the right of all persons to access judicial remedies when they have suffered human rights violations.<sup>109</sup> The guarantee of Article XVIII is similar in scope to the right to judicial protection under Article 25 of the American Convention, which the Commission has interpreted to encompass the right of every individual to access a tribunal when any of her rights have been violated; to obtain a judicial investigation by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and to receive reparations for the harm suffered.<sup>110</sup> The Inter-American Court has described the guarantees of Article 25 as “one of the basic pillars, not only of the American Convention but of the very rule of law in a democratic society....”<sup>111</sup>

88. As with all other human rights in the American Declaration and Convention, states must respect and protect the right to judicial protection without discrimination, which is also protected under Article II of the American Declaration. The Inter-American Court has recognized “an inherent interconnection” between states’ duties to respect and ensure human rights and to provide effective judicial protection for those rights – meaning that the failure to ensure the latter without discrimination has implications for the protection of human rights more broadly.<sup>112</sup>

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<sup>107</sup> *Report on Peru*, Inter-Am. Comm’n H.R., ¶¶ 23, 24 (2000); Annual Report, Inter-Am. Comm’n H.R., Ch. VI, Section IV, Subsection III-2 (1991), ¶ 308; Case 11.491, *Minors in Detention*, Case 11.491, Inter-Am. Comm’n H.R., Report No. 41/99.

<sup>108</sup> Precautionary Measures No. 259, Inter-Am. Comm’n H.R. (2005).

<sup>109</sup> *See Maria Da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, ¶ 37 (2001).

<sup>110</sup> *See, e.g., Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 172.

<sup>111</sup> *Manoel Leal de Oliveira v. Brazil*, Case 12.308, Inter-Am. Comm’n H.R., Report No. 37/10, ¶ 113 (2010), citing *Mapiripán Massacre Case*, Inter-Am. Ct. H.R., ¶ 111.

<sup>112</sup> *See Report on Terrorism*, Inter-Am. Comm’n H.R., Doc. OEA/Ser.L./V/II.116 Doc. 5 rev. 1 corr., ¶ 340.



89. The duty of states to respect and ensure fundamental human rights through judicial protection without discrimination is non-derogable.<sup>113</sup> The law of the Inter-American system makes clear that no circumstance, including the declaration of a state of emergency, can justify the suppression or ineffectiveness of judicial guarantees required for the protection of rights not subject to derogation or suspension.<sup>114</sup>

90. The jurisprudence of the Inter-American system establishes that the right to a remedy includes not only the right of all persons who allege violations of their fundamental rights to have access to a judicial tribunal, but also that such a tribunal be capable of granting adequate and effective redress for the harm suffered.<sup>115</sup> In *Carranza v. Argentina*, the Commission held that Argentina violated the petitioner's right to an effective remedy when its courts applied the political question doctrine and refused to decide a case on the merits.<sup>116</sup> As the Commission explained, the right to effective judicial protection entitles a claimant to a judicial determination of the substance of her claims:

[T]he logic of every judicial remedy – including that of Article 25 – indicates that the deciding body must specifically establish the truth or error of the claimant's allegation. The claimant resorts to the judicial body alleging the truth of a violation of his rights, and the body in question, after a proceeding involving evidence and a discussion of the allegation, must decide whether the claim is valid or unfounded.<sup>117</sup>

91. The right to an effective remedy encompasses the right of victims to have their violations investigated, prosecuted and punished, and to receive reparations for the harm suffered (*see supra* Part IV.A).<sup>118</sup> The Commission has held that investigations must be serious, prompt, thorough, and impartial.<sup>119</sup> In situations involving violent deaths, the Commission has referred to international standards for the investigation of extrajudicial

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<sup>113</sup> *See id.* ¶ 343.

<sup>114</sup> *See Gustavo Carranza v. Argentina*, Case 10.087, Inter-Am. Comm'n. H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 80 (1997); *see also Tinnelly and McElduff v. United Kingdom*, Eur. Ct. H.R., Case 62/1997/846/1052-1053, App. No. 20390/92, 27 EHRR 249 (1998) (recognizing the importance of the right to a judicial remedy as a safeguard for other rights, even when national security concerns are raised by the State).

<sup>115</sup> *See, e.g., Velásquez-Rodríguez*, Inter-Am. Ct. H.R., Ser. C, No. 4 ¶¶ 62-64. In *Wayne Smith v. United States*, the Commission reiterated that “when a state fails to provide an adequate and effective remedy to a violation of a fundamental right under the American Declaration, that deficiency creates an independent violation of the right to judicial protection under Article XVIII of the American Declaration.” *Wayne Smith*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 62 (citing *Ferrer-Mazorra v. United States*, Case No. 9903, Inter-Am. Comm'n H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20, rev. t 1188, ¶ 243 (2001)).

<sup>116</sup> *Carranza v. Argentina*, Case 10.087, Inter-Am. Comm'n. H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 80 (1997).

<sup>117</sup> *Id.* ¶ 73.

<sup>118</sup> *See Franz Britton v. Guyana*, Case 12.264, Inter-Am. H.R., Report No. 1/06, ¶ 30 (2006).

<sup>119</sup> *See Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 181; *Manoel Leal de Oliveira*, Case 12.308, Inter-Am. Comm'n H.R., Report No. 37/10, ¶ 134.

killings as guidelines that states should follow.<sup>120</sup> The Commission has also held that responsibility for ascertaining the truth does not rest with the victim or her next-of-kin, but with states on their own initiative.<sup>121</sup>

92. When allegations of an improper investigation are raised, states have the burden of showing that the investigation “was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth.”<sup>122</sup> When situations are not seriously investigated, “they are aided, in a sense, by the government, thereby making the State responsible on an international plane.”<sup>123</sup>

93. The Commission has held that the right to a judicial remedy also includes the right of victims and society as a whole to know the truth of the facts connected with serious violations of human rights, as well as the identity of those who committed them. In *Oscar Romero v. El Salvador*, the Commission found that the right “to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them [forms part] of the right to reparation for human rights violations.”<sup>124</sup>

94. In *Jessica Lenahan v. United States*, the Commission found that the United States had violated the right to judicial protection of the petitioner and her next-of-kin under Article XVIII, in part because it found, in addition to the government’s failure to conduct a prompt, thorough, exhaustive and impartial investigation into the deaths of the petitioner’s children, that the United States had failed to convey information to the family about the circumstances of the deaths.<sup>125</sup> In the domestic violence context of that case, the Commission found that compliance with this obligation was “critical to sending a social message in the United States” against violence and impunity.<sup>126</sup>

95. As the facts alleged demonstrate, the United States has denied Yasser Al-Zahrani and Salah Al-Salami judicial protection for every aspect of the human rights violations they suffered at Guantánamo. For their arbitrary detention, the government prevented the men from accessing the courts for the duration of their detention, even after the Supreme Court ruled in favor of detainees’ right to *habeas corpus* in June 2004. For the civil claims of torture and other harms their families brought on their behalf after their deaths, the Department of Justice actively opposed judicial review and the D.C. Circuit Court ultimately dismissed the case, holding that the Military Commissions Act bars the court from exercising jurisdiction. The deceased were thus denied their basic right to access a tribunal for grave violations of their human rights.

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<sup>120</sup> See *Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 182-83 (referring to the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions).

<sup>121</sup> See *id.* ¶ 181.

<sup>122</sup> *Id.*; *Manoel Leal de Oliveira*, Case 12.308, Inter-Am. Comm’n H.R., Report No. 37/10, ¶ 115.

<sup>123</sup> *Manoel Leal de Oliveira*, Case 12.308, Inter-Am. Comm’n H.R., Report No. 37/10, ¶ 114.

<sup>124</sup> *Id.* ¶ 138, citing *Monsenor Oscar Arnulfo Romero v. El Salvador*, Case 11.481, Inter-Am. Comm. H.R., Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671, ¶ 147 (1999); ¶ 193.

<sup>125</sup> *Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 196.

<sup>126</sup> *Id.* ¶ 195.

96. The men’s inability to access to the courts of the United States also violated their right to judicial recourse, and the protection of their rights more broadly, without discrimination on the basis of nationality and religion. The MCA, which the government argued and the D.C. Circuit Court agreed should bar judicial review of their civil claims, applies by its plain terms only to non-U.S. citizens. As noted above, Section 7 of the MCA deprives only “an alien” enemy combatant of the right of access to the courts. In practice, the MCA also only applies to Muslim detainees, since no non-Muslim has been detained as an “enemy combatant” at Guantánamo or anywhere since 2001.<sup>127</sup> There is also no legitimate purpose for the jurisdiction-stripping provisions of Section 7. The legislative history of the MCA makes clear that Congress created it based on a desire to punish individuals that Congress viewed—without a basis in law or fact—as terrorists.<sup>128</sup> No other rational motivation is evident other than the desire to further punish an unpopular group of individuals already arbitrarily tarred with the “enemy combatant” label.

97. In addition to denial of any judicial investigation, the investigations by the NCIS and the Department of Justice fell far short of required standards of thoroughness and impartiality. Indeed, military officials actively obstructed the internal investigation by the NCIS, which, *inter alia*, failed to interview key witnesses. The government also opposed, ignored or responded superficially to every request for information from the families, their advocates and international bodies, including the Commission and UN Special Rapporteurs. The United States thus remains in continuous breach of its duty to conduct an effective investigation into the deaths and to communicate that information to the families and the public, who, six years later, still have a right to the truth about what happened.

## **V. ADMISSIBILITY**

### **A. Jurisdiction**

98. Pursuant to Article 23 of the Commission’s Rules of Procedure, the Commission has personal jurisdiction to consider this Petition because the alleged victims were persons who were subject to the jurisdiction of the United States and whose rights were

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<sup>127</sup> The U.S. Congress was clearly aware of this fact. *See* 152 Cong. Rec. S.10,395 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn: “Let me just say a word about who that enemy is. ... it is an enemy that has hijacked one of the world’s great religions, Islam”); *Id.* at S.10,403 (statement of Sen. McConnell: “We are a Nation at war, and we are at war with Islamic extremists.”).

<sup>128</sup> *See, e.g.*, 152 Cong. Rec. H7538 (Sept. 27, 2006) (statement of Rep. McHugh) (“Why should an accused terrorist enjoy protections that exceed what the Constitution provides to every one of us as United States citizens?”); Hearing Before the Senate Judiciary Committee (Sept. 25, 2006) (statement of Sen. Cornyn) (“It is important to remember, and sometimes I think some forget, these are enemies of the United States, captured on the battlefield. These are not individuals who have been arrested for committing crimes and then who are entitled to all of the process an American citizen would in an Article III court.”); 152 Cong. Rec. S10,238-01 (Sept. 27, 2006) (Statement of Sen. Lott) (“Bring on the lawyers. What a wonderful thing we can do to come up with words like this. Our forefathers were thinking about citizens, Americans. They were not conceiving of these terrorists who are killing these innocent men, women, and children.”)

protected under the American Declaration when the alleged violations occurred.<sup>129</sup> The violations Petitioners allege in their individual capacities – their pain and suffering as a result of their relatives’ mistreatment and deaths; the denial of their right to family life; and the denial of their right to truth about the circumstances of their relatives deaths – have been recognized in the Inter-American system’s jurisprudence as distinct violations vis-à-vis the next-of-kin of direct victims.

99. The Commission has subject-matter jurisdiction because the Petition alleges violations of human rights protected by the American Declaration, which the Commission has long held constitutes a source of binding international obligations for the United States.<sup>130</sup> The Commission has subject-matter jurisdiction over the Petition whether or not international humanitarian law also applies.<sup>131</sup>

100. The Commission has temporal jurisdiction to examine this Petition because the obligation to respect and guarantee the rights protected in the American Declaration was already in effect for the United States during the period of the violations alleged, which began in 2002 and, with respect to the right to judicial protection and the rights of the Petitioners as next-of-kin, are ongoing.<sup>132</sup>

101. The Commission is also competent to consider the Petition because the alleged violations at Guantánamo occurred within the territorial jurisdiction of the United States. The Commission has long established that a state’s duty to protect the rights of persons on its territory may extend to conduct with an extraterritorial locus where the person concerned is located in the territory of another state, but subject to the “authority and control” of the acting state.<sup>133</sup>

102. Pursuant to the “authority and control” inquiry, the Commission has already established that detainees at Guantánamo are subject to the jurisdiction of the United States and benefit from the protection of the American Declaration. In deciding as admissible the petition of a Guantánamo detainee in *Djamel Ameziane v. United States*, the Commission stated unequivocally, “it is clear that the State exercises its jurisdiction over its Military facilities at Guantánamo Bay.”<sup>134</sup> In finding jurisdiction, the Commission referred to the decision of the U.S. Supreme Court itself in *Rasul v. Bush*,

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<sup>129</sup> See *Djamel Ameziane v. United States*, Petition P-900-08, Inter-Am. Comm’n H.R., Report No. 17/12 (Admissibility), ¶ 27 (2012).

<sup>130</sup> See, e.g., *Jessica Lenahan (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 115, (“according to the well-established and long-standing jurisprudence and practice of the inter-American human rights system, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including those States that are not parties to the American Convention on Human Rights”); *Wayne Smith*, Petition 8-03, Inter-Am. C.H.R. Report No. 56/06 (Admissibility), ¶ 32-33.

<sup>131</sup> See *Djamel Ameziane*, Petition P-900-08, Inter-Am. Comm. H.R., Report No. 17/12, ¶ 28 (noting that in situations of armed conflict, both international human rights law and international humanitarian law apply).

<sup>132</sup> The United States ratified the OAS Charter on June 19, 1951.

<sup>133</sup> See *Djamel Ameziane*, Petition P-900-08, Inter-Am. Comm. H.R., Report No. 17/12 ¶ 30, citing *Coard*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶ 37, (1999); *Alejandro*, Case 11.589, Report No. 86/99, ¶ 23 (1999).

<sup>134</sup> See *id.* ¶ 33.

and the Commission's own issuance of Precautionary Measures in favor of Guantánamo detainees since 2002.

103. To the extent Yasser Al-Zahrani and Salah Al-Salami were held and mistreated under U.S. control in other facilities prior to their transfer to Guantánamo, like hundreds of other Guantánamo detainees, that conduct would also be subject to the jurisdiction of the United States and the Commission.<sup>135</sup>

## **B. Exhaustion of Domestic Remedies**

104. Under Article 31 of the Commission's Rules of Procedure, individual petitions are admissible only where domestic remedies have been exhausted, or where such remedies are unavailable as a matter of law or fact. The Commission has specified that remedies are unavailable where the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated; where the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them; or where there has been an unwarranted delay in reaching a final judgment under the domestic remedies.<sup>136</sup>

105. In addition, domestic remedies requiring exhaustion must be adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.<sup>137</sup>

106. For claims alleging violations of fundamental rights such as the right to life and the prohibition against torture, the Commission has held that the adequate remedy is the criminal prosecution of those responsible. In *La Granja v. Colombia*, the petitioners' claims involved alleged violations of the rights to life and humane treatment, which under domestic law were offenses that could be prosecuted by the state on its own initiative; the Commission held that "therefore it is this process, pushed forward by the State, that should be considered for the purpose of determining the admissibility of the claim."<sup>138</sup> Notwithstanding the availability of disciplinary or damages remedies, the Commission found that

whenever a crime is committed that can be prosecuted on the State's own initiative, the State has the obligation to promote and give impetus to the criminal process to its final consequences and that ... this process is the suitable means for clarifying the facts, prosecuting the persons responsible, and establishing the corresponding criminal sanctions, in addition to making possible means of reparation other than monetary compensation."<sup>139</sup>

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<sup>135</sup> See *id.* ¶¶ 31-32.

<sup>136</sup> See, e.g., *Graham v. United States*, Case 11.193, Inter-Am. C.H.R., Report No. 51/00, OEA/Ser.L/V/II.111, doc. 20, rev., ¶ 54 (2000).

<sup>137</sup> See, e.g., *Velásquez Rodríguez*, Inter-Am. Ct. H.R., Ser. C, No. 4, ¶¶ 64-66.

<sup>138</sup> *La Granja, Ituango v. Colombia*, Case 12.050, Inter.-Am. Comm'n H.R., Report No. 57/00 (Admissibility), ¶ 41 (2000).

<sup>139</sup> *Id.* (internal citations omitted). "[T]he IACHR has established, in similar cases, that disciplinary proceedings do not meet the obligations established by the Convention in the area of judicial protection,

107. For claims alleging the arbitrary deprivation of liberty, the Commission has held that in general *habeas corpus* is the appropriate remedy.<sup>140</sup>

108. The Commission has also established that, as a general rule, “the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right,” and that “in principle, these are ordinary rather than extraordinary remedies.”<sup>141</sup> In *Juvenile Offenders v. United States*, the Commission affirmed that the exhaustion requirement does not mean that alleged victims must exhaust all available domestic remedies, “which implies that extraordinary remedies do not need to be exhausted because they have a discretionary character, and their procedural availability is restricted and does not fully satisfy the right of the accused to challenge the judgment.”<sup>142</sup> As the Commission and the Court have maintained on numerous occasions, the rule requiring exhaustion is designed to allow the state the opportunity to remedy violations by internal means before having to respond to charges before an international body.<sup>143</sup> Thus, “if the alleged victim raised the issue by any lawful and appropriate alternative under the domestic juridical system and the State had the opportunity to remedy the matter within its jurisdiction, then the purpose of the international rule has thus been served.”<sup>144</sup>

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since they are not an effective and sufficient means for prosecuting, punishing, and making reparation for the consequences of the extrajudicial execution of persons protected by the Convention. Therefore, in the context of this case, the disciplinary measures cannot be considered remedies that must be exhausted .... As regards exhaustion of the contentious-administrative jurisdiction, the Commission has already indicated that this type of proceeding is exclusively a mechanism for supervising the administrative activity of the State aimed at obtaining compensation for damages caused by the abuse of authority. In general, this process is not an adequate mechanism, on its own, to make reparation for human rights violations; consequently, it is not necessary for it to be exhausted when, as in this case, there is another means for securing both reparation for the harm done and the prosecution and punishment demanded” (internal citations omitted).

<sup>140</sup> See *Rochac Hernandez v. El Salvador*, Petition 731-03, Inter-Am. Comm’n H.R., Report No. 90/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 28 (2006).

<sup>141</sup> *Guillermo Patricio Lynn v. Argentina*, Petition 681-00, Inter-Am. Comm’n H.R., Report No. 69/08 (Admissibility), ¶ 41 (2008), citing *Christian Daniel Domínguez Domenchetti v. Argentina*, Case 11.819, Inter-Am. Comm’n H.R., Report 51/03, ¶ 45 (2003); *Santos Soto Ramírez v. Mexico*, Case 12.117, Inter-Am. Comm’n H.R., Report 68/01, ¶ 14 (2001); *Zulema Tarazona Arriate v. Peru*, Case 11.581, Inter-Am. Comm’n H.R., Report 83/01, ¶ 24 (2001); see also *Sebastian Claus Furlan v. Argentina*, Petition 531-01, Inter-Am. Comm’n H.R., Report No. 17/06 (Admissibility), ¶ 40, (2006); *Mendoza v. Argentina*, Inter-Am. Comm’n H.R., Report No. 26/08 (Admissibility) (2008). The European Court of Human Rights has also adopted this standard, repeatedly finding that discretionary or extraordinary remedies need not be exhausted. See e.g., *Cinar v. Turkey*, No. 28602/95, 13 Nov. 2003; *Prystavka v. Ukraine*, No. 21287/02, 17 Dec. 2002.

<sup>142</sup> *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, Petition 161-06, Inter-Am. Comm’n H.R., Report No. 18/12 (Admissibility), ¶¶ 46-48 (2012) (internal citations and quotations omitted).

<sup>143</sup> See *Guillermo Patricio Lynn*, Petition 681-00, Inter-Am. Comm’n H.R., Report No. 69/08 (Admissibility), ¶ 40.

<sup>144</sup> *Id.*; see also *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, Petition 161-06, Inter-Am. Comm’n H.R., Report No. 18/12 (Admissibility), ¶¶ 46-48.

109. Criminal remedies for the violations alleged here are effectively unavailable. As the Commission has recognized, in the United States, “the State holds a complete monopoly on bringing criminal prosecutions, and the system does not provide the presumed victim with a participatory role in the decision to prosecute or with any ordinary judicial appeal against a decision not to prosecute. Beyond notifying the proper authorities ... there are no other measures [] alleged victims [can] pursue to exhaust criminal domestic remedies.”<sup>145</sup> The United States has not pursued prosecution in this case.

110. Furthermore, domestic legislation provides U.S. government personnel with a defense to any criminal prosecution or civil action arising out of their engagement in the “detention and interrogation of aliens” whom the President or his designees believed were “engaged in or associated with international terrorist activity.”<sup>146</sup> The defense is available for actions dating back to September 11, 2001.

111. As previously discussed, the remedy of *habeas corpus* was also unavailable as a matter of law and fact to Yasser Al-Zahrani and Salah Al-Salami before they died. Section 7(b) of the MCA also continues to be an obstacle to civil claims arising out of the detention and treatment of Guantánamo detainees.

112. Despite the unavailability of adequate remedies, Petitioners pursued civil claims in federal court challenging the detention, treatment and deaths of their relatives. Their claims were dismissed by the district court on immunity and national security grounds, including when petitioners attempted to amend their complaint with the new information suggesting a cover-up and killing. Petitioners appealed to the circuit court, which affirmed dismissal by holding that the claims were all barred by the MCA.

113. Petitioners did not seek *en banc* review in the D.C. Circuit or Supreme Court review, which are discretionary and extraordinary remedies of restricted scope and access.<sup>147</sup> The exhaustion rule does not require Petitioners to seek such “extraordinary” remedies.

114. In addition, Petitioners’ pursuit of a remedy would have had to overcome the bar of the MCA by challenging its constitutionality. As the Inter-American Court has held, actions challenging the constitutionality of a law are also an “extraordinary recourse whose purpose is to question the constitutionality of a law, not to have a court ruling

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<sup>145</sup> *Case of Undocumented Migrant, legal resident and US Citizen victims of Anti-immigrant vigilantes v. United States*, Petition 478-05, Inter-Am. Comm’n H.R., Report No. 78/08 (Admissibility), ¶ 54 (2009).

<sup>146</sup> Detainee Treatment Act of 2005, section 1004(a); Military Commissions Act of 2006, section 8(b)(3). The defense applies to conduct arising out of detentions and interrogations that were “officially authorized and determined to be lawful at the time that they were conducted” if the individual “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”

<sup>147</sup> Pursuant to the rules for the D.C. Circuit Court, an *en banc* hearing “is not favored” and will only be granted in limited circumstances. Circuit Rules of the U.S. Court of Appeals for the D.C. Circuit, Rule 35(a). The *writ of certiorari* to the Supreme Court is also an extraordinary remedy. In practice, the U.S. courts of appeals are the final decision-making courts in over 98 percent of federal cases.

reviewed,” and thus “cannot be counted among the domestic remedies that a petitioner is necessarily required to pursue and exhaust.”<sup>148</sup> Petitioners have thus been denied access to adequate and effective domestic remedies for the harms they have suffered, or have exhausted domestic remedies.

### **C. Timeliness**

115. Article 32(2) of the Commission’s Rules of Procedure provides that where an exception to the exhaustion of domestic remedies rule applies, the petition shall be presented “within a reasonable time.” Petitions must otherwise be presented within six months of the date on which the victim was notified of the decision that exhausted domestic remedies.

116. This Petition is being presented within six years of the deaths of Yasser Al-Zahrani and Salah Al-Salami, violations resulting from which are still continuing, including with respect to the right to judicial protection. The Petition is also being submitted within six months of the date Petitioners were notified of the D.C. Circuit Court’s decision dismissing their civil case on February 21, 2012. The Petition is thus being submitted within a reasonable time consistent with the Commission’s precedents,<sup>149</sup> or is timely with respect to the exhaustion of domestic remedies.

### **D. Duplication of proceedings**

117. Article 33 of the Commission’s Rules of Procedure establishes that the Commission may not consider a petition if its subject matter is pending before another international governmental organization or essentially duplicates a petition already decided by the Commission or another international governmental organization. The subject matter of this Petitioner is neither pending before the Commission or any other international governmental organization, nor has it previously been decided by any such body.

## **VI. CONCLUSION AND REQUESTED RELIEF**

Petitioners respectfully request that the Inter-American Commission on Human Rights:

Declare this Petition admissible with respect to Articles I, II, III, V, VI, VII, XI, XVIII, XXV, and XXVI of the American Declaration;

Investigate the alleged violations, with hearings and witnesses as necessary;

Declare, as the facts establish, that the United States is responsible for violating the rights of the deceased and the Petitioners under the American Declaration as described herein;

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<sup>148</sup> *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R., Preliminary Objections, Ser. C, No. 107, ¶ 85 (2004).

<sup>149</sup> See *Djamel Ameziane*, Petition P-900-08, Inter-Am. Comm. H.R., Report No. 17/12 (Admissibility), ¶ 45.



Declare that the United States must adequately investigate and provide clarification to Petitioners and the public about the cause and circumstances of the deaths;

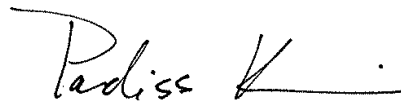
Declare that the United States must criminally prosecute those responsible for the violations of the deceased's fundamental rights and must provide adequate reparations;

Declare that Section 7(b) of the 2006 Military Commissions Act, to the extent it applies to Guantánamo detainees' civil claims, violates the right to judicial protection and non-discrimination;

Recommend such other remedies that the Commission considers adequate and effective in addressing the human rights violations described herein.

Dated: August 21, 2012

Respectfully submitted,



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## **Attachments**

Appendix to Opening Brief in D.C. Circuit Court of Appeals, filed June 14, 2011

# APPENDIX

*7*

# EXCLUSIVE: DoD Report Reveals Some Detainees Interrogated While Drugged, Others "Chemically Restrained"

Wednesday, 11 July 2012 00:00

By [Jeffrey Kaye](#) and [Jason Leopold](#), [Truthout](#) | [Report](#)

Detainees in custody of the US military were interrogated while drugged with powerful antipsychotic and other medications that "could impair an individual's ability to provide accurate information," according to a declassified Department of Defense (DoD) inspector general's report that probed the alleged use of "mind altering drugs" during interrogations.

In addition, detainees were subjected to "chemical restraints," hydrated with intravenous (IV) fluids while they were being interrogated and, in what appears to be a form of psychological manipulation, the inspector general's probe confirmed at least one detainee - convicted terrorist supporter Jose Padilla - was the subject of a "deliberate ruse" in which his interrogator led him to believe he was given an injection of "truth serum."

Truthout obtained a copy of the report - "[Investigation of Allegations of the Use of Mind-Altering Drugs to Facilitate Interrogations of Detainees](#)" - prepared by the DoD's deputy inspector general for intelligence in September 2009, under a Freedom of Information Act (FOIA) request we filed nearly two years ago.



(Image: [Jared Rodriguez / Truthout](#))

Over the past decade, dozens of current and former detainees held by the US government in Guantanamo, Iraq and Afghanistan have alleged in news reports and in court documents they took pills against their will or were forcibly injected with unknown substances that had mind-altering effects during or immediately prior to marathon interrogation sessions in an attempt to compel them to confess to terrorist-related crimes of which they were accused.

But the inspector general's investigation was unable to substantiate any of the allegations that, as a matter of government policy, detainees were given mind-altering drugs "to facilitate interrogation."

However, the watchdog's report provides startling new details about the treatment of detainees by US military personnel. For example, the report concludes, "certain detainees, diagnosed as having serious mental health conditions being treated with psychoactive medications on a continuing basis, were interrogated."

[Leonard Rubenstein](#), a medical ethicist at Johns Hopkins Center for Public Health and Human Rights and the former president of [Physicians for Human Rights](#), said, "this practice adds another layer of cruelty to the operations at Guantanamo."

"The inspector general's report confirms that detainees whose mental deterioration and suffering was so great as to lead to psychosis and attempts at self-harm were given anti-psychotic medication and subjected to further interrogation," said Rubenstein, who reviewed a copy of the report for Truthout. "The problem is not simply what the report implies, that good information is unlikely to be obtained when someone shows

psychotic symptoms, but the continued use of highly abusive interrogation methods against men who are suffering from grave mental deterioration that may have been caused by those very same methods."

Shayana Kadidal, the senior managing attorney of the Guantanamo Project at the [Center for Constitutional Rights](#), said what struck him after he read the report is "under the system set up by the [US Court of Appeals for the District of Columbia], [any statements detainees made during these interrogations would be presumed accurate](#) even if detainees took medication that could produce unreliable information."

"The burden ends up falling upon the detainee to prove what was said wasn't accurate if they were challenging their detention" in habeas corpus proceedings, Kadidal said.

Explaining the rationale behind forcibly drugging detainees, the former commander of the Joint Medical Group at Guantanamo said, "some detainees were involuntarily medicated to help control serious mental illnesses," according to the report, which added that an ethics committee approved of such plans.

"For example, one detainee had a piece of shrapnel in his brain which resulted in control problems and a limited ability to provide effective consent," the report said.

The detainee with the shrapnel injury may be [Abu Zubaydah](#). In 1992, Zubaydah had suffered a shrapnel wound to the head while fighting on the front lines of a civil war in Afghanistan. Brent Mickum, Zubaydah's habeas attorney, said the high-value detainee has been [routinely overdosed with Haldol](#), the only drug the inspector general identified that was used on certain detainees.

But the report suggests detainees were often not told what types of drugs they were given when they asked or for what purpose it was administered.

Brandon Neely, a former Guantanamo guard who was at the prison facility the day it opened in January 2002, told Truthout, "medics never informed the detainees what the medication was."

"The medics walked around with little white cups that had pills in it a couple of times a day," said Neely, who sometimes accompanied the medics when they distributed the medication. He added that if detainees refused to take it an "Immediate Reaction Force" team, who guards would call to deal with resistant or combative detainees, would administer the medication to prisoners by force.

Lt. Col. Todd Breasseale, a Defense Department spokesman, said, "while it is true that the [inspector general's] report discusses that certain medications may be administered to detainees without their consent, it is the call of the doctor treating the detainee as to whether to administer the drug."

Rubenstein, however, said the failure to inform prisoners what drugs they were given means "some basic principles of medical ethics were cast aside, especially those requiring a doctor to explain his or her recommendation and seek consent for it as an affirmation of the dignity and autonomy of the patient."

"Even where consent is not forthcoming and involuntary medication is allowed after voluntary medication is not accepted, it should never take place unless this process is followed," Rubenstein said.

The cumulative effects of indefinite detention, interrogations, use of drugs, and other conditions of confinement also appear to have taken a toll on the detainees' mental state and impacted the DoD watchdog's ability to conduct a thorough investigation.

Indeed, when the inspector general sought to interview the attorney representing one detainee who claimed he was given mind-altering drugs during interrogations, the attorney responded, "at this state of his incarceration, [redacted] memory is severely compromised and, unfortunately, we are skeptical that he can provide you with any further details ..."

The investigation also found instances where "chemical restraints" were used on detainees "that posed a threat to themselves or others," which Rubenstein said, "is contrary to US Bureau of Prison regulations, decisions of the US Supreme Court and to medical ethics principles that forbid subordinating the patient's medical interests to prison security."

Breasseale said, "as a matter of long-standing department policy," he could not comment on whether "chemical restraints" continue to be part of the Standard Operating Procedure (SOP), also known as Tactics,

Techniques, Procedures (TTPs), at Guantanamo and other prisons operated by the DoD because "doing so might not only compromise security but [the SOPs] are 'living' documents, subject to regular change and updating."

## Media Report Sparked Probe

The inspector general's yearlong probe was launched in June 2008, two months after the publication of a [Washington Post report](#) in which some detainees claimed they were forcibly drugged and coerced into making confessions.

One of the detainees at the center of The Washington Post report, Adel al-Nusairi, a former Saudi policeman who was imprisoned at Guantanamo from 2002 to 2005, is prominently featured in the inspector general's report and identified as "IG-02."

According to his attorney's notes cited in The Washington Post, al-Nusairi claimed he was injected with an unknown medication that made him extremely sleepy just before he was interrogated in 2002. When his captors awakened him, he fabricated a confession for US interrogators in hopes they would leave him alone so he could sleep.

"I was completely gone," al-Nusairi told his attorney, Anant Raut. "I said, 'Let me go. I want to go to sleep. If it takes saying I'm a member of al-Qaeda, I will.'"

The inspector general's review of al-Nusairi's medical records showed he was diagnosed as "schizophrenic and psychotic with borderline personality disorder" and injected with Haldol, a powerful antipsychotic medication, whose side effects include lethargy, tremors, anxiety, mood changes and "an inability to remain motionless," according to the watchdog's report.

Haldol can also cause the usually irreversible movement disorder known as tardive dyskinesia. But the inspector general did not say that in his report. The inspector general noted al-Nusairi had told his interrogators he was being forced to take monthly injections that he no longer wanted to receive. The report said "uncooperative" detainees were sometimes forcibly injected with psychoactive medications.

But the investigation concluded there was "no evidence that [al-Nusairi] was administered shots during interrogation."

Despite his diagnosis and the unreliability of the information he provided to his interrogators due to the effects of the antipsychotic medication, al-Nusairi was declared an enemy combatant after he confessed to being a member of al-Qaeda and imprisoned at Guantanamo for three more years before finally being repatriated to Saudi Arabia.

"I think any rational person would agree that confessions of terrorism while under the influence of mind-altering drugs are about credible as professions of love while under the influence of alcohol," Raut, al-Nusairi's attorney, told Truthout.

Two days after The Washington Post story was published, then-Sen. Joe Biden, who at the time was chairman of the Senate Foreign Relations Committee; Sen. Carl Levin, chairman of the Senate Armed Services Committee; and Sen. Chuck Hagel, a senior member of the Foreign Relations Committee and the Senate Select Committee on Intelligence, [sent a letter](#) to DoD Inspector General Claude Kicklighter urging him to investigate the detainees' allegations and to focus solely on whether the Department of Defense and its sub-agencies issued written and/or oral policy authorizing the use of "mind-altering drugs to facilitate interrogations."

The CIA's inspector general also conducted an investigation at the request of the Democratic lawmakers into the claims about the use of mind-altering drugs pertaining to detainees in custody of the agency. That report, which Truthout is also seeking under the FOIA, remains classified.

## Investigative Gaps

The inspector general reviewed Department of Defense interrogation policy from 2001 through 2008 and interviewed more than 70 military intelligence and medical officials who had oversight of detainee operations in Iraq, Afghanistan and Guantanamo. Top military intelligence officials interviewed by the inspector general said they were "unaware" of any special access "black" program, policies, direction or

order authorizing the use of drugs as an interrogation tactic or to "facilitate interrogations."

The watchdog also looked at classified and open-source documents, including detainees' medical records and 1,620 interrogation plans covering 411 detainees between August 2002 and January 2005.

"No interrogation plans were noted which mentioned drugging, medicating, or threatening to drug or medicate a detainee to facilitate interrogation," according to the report, which added that a separate review of detainees' medical records documenting their "physical and psychological care and treatment" did not turn up any evidence "of mind-altering drugs being administered for the purposes of interrogation."

"The 'headline' here is that there's no evidence of any organized, systematic [Department of Defense] effort to use drugs for interrogation purposes," said Gregg Bloche, the author of "[The Hippocratic Myth](#)" and a health policy expert and professor of law at Georgetown University who also reviewed the inspector general's report for Truthout. "Can isolated cases of drug use for interrogation purposes be absolutely ruled out? No - as the report acknowledges, there are gaps in evidence available to the [inspector general]. But if there were such cases, they were likely few and far between."

But it appears that the probe did not scrutinize other documents, such as a second set of detainee medical records maintained by the Behavioral Science Consultant Teams or BSCTs that may have contained information relevant to the inspector general's investigation into the use of mind-altering drugs during interrogations.

The BSCTs were made up of psychologists and other mental health technicians and, at one time, psychiatrists. The BSCTs work closely with interrogators in crafting interrogation plans based on the psychological assessments of a detainee's weaknesses. The BSCT psychiatrists and at least one psychologist who passed a special Defense Department psychopharmacology program were able to administer drugs, at least in principle.

Human rights activists have long believed the Defense Department controlled a second set of detainee medical records, but evidence never surfaced to support the suspicions. However, Truthout has uncovered previously unreported testimony from Army Surgeon General Kevin Kiley's [2005 report](#) on detainee medical operations in Guantanamo, Iraq and Afghanistan that confirms the suggestion. (pg. 18-13)

Kiley indicated that, while BSCTs were not medical personnel and "did not document the medical condition of detainees in the medical record," they "did keep a restricted database which provided medical information on detainees."

Rubenstein said, "if drugs were used those BSCT records should be consulted."

### **Jose Padilla and "A Deliberate Ruse"**

The report also delves into the area of so-called "truth" drugs, which are administered for their presumed mind-altering effects.

Since the start of the "war on terror," intelligence officials have publicly said drugs like sodium pentothal should be introduced in interrogations as a way of getting "uncooperative" detainees to talk.

"We ought to look at what options are out there," former FBI and CIA Director William Webster [told reporters](#) in 2002.

The inspector general's report pointed to instances in which top military officials had considered introducing "truth" drugs during interrogations. The watchdog cited an October 2, 2002 meeting of Guantanamo interrogation command and legal staff where the use of "truth serum" on detainees was discussed as having a "placebo effect."

George Bimmerle discussed the use of placebos as ersatz "truth drugs" in a classic 1961 CIA text titled "[Truth' Drugs in Interrogation](#)." Bimmerle wrote that placebos are "most likely to be effective in situations of stress." The drugs are described as acting upon "a subject's sense of guilt," absolving a prisoner under interrogation of responsibility for giving up information, because it is assumed the effect of the drug was to blame.

Interrogators utilized the "placebo effect" when they questioned convicted terrorist Jose Padilla, a US



citizen who was arrested in May 2002 on suspicion of plotting to build and detonate a dirty bomb and held as an enemy combatant at the US Naval Brig in South Carolina.

Padilla's federal public defender, Michael Caruso, in a 2006 federal court filing, claimed Padilla was "given drugs against his will, believed to be some form of lysergic acid diethylamide (LSD) or phencyclidine (PCP), to act as a sort of truth serum during his interrogations."

Sanford Seymour, the technical director of the US Naval brig in South Carolina where Padilla was held, however, vehemently denied the charge during a 2006 hearing to determine whether Padilla, a US citizen, was competent to stand trial. Seymour asserted Padilla was injected with an influenza vaccine.

But what Seymour failed to disclose, reported here for the first time, was that Padilla was given the flu shot during an interrogation session and told by his interrogators the injection was "truth serum."

The inspector general's probe determined "the incorporation of a routine flu shot into an interrogation session ... was a deliberate ruse by the interrogation team, intended to convince [redacted, Padilla] he had been administered a mind-altering drug," such as LSD.

Investigators from the inspector general's office reached that conclusion after a visit to the Naval Brig where they reviewed records and interviewed Brig officials about Padilla's claims.

Padilla's name is redacted from the report, but it's clear, based on the detailed descriptions of the allegations, the inspector general is referring to him. The report says the FBI and Joint Task Force 170, the "predecessor organization" of Joint Task Force Guantanamo, interrogated Padilla from June 2002 through October 2002. The Defense Intelligence Agency (DIA) took over his interrogations from October 2002 through March 2003 at which point the FBI and DIA jointly conducted the interrogations.

The inspector general's office also viewed some of Padilla's interrogation videotapes where Padilla "expressed concern about the possible use of drugs to induce him to cooperate with the interrogators."

"The most detailed discussion of truth serum occurred on November 14, 2002, after [redacted] declined to take a polygraph examination," according to the inspector general's report. "The interrogation video recording depicts that following the polygraph declination, [redacted] and the interrogator had a discussion of other techniques which could be used to verify [redacted] statements. Among the techniques described by the interrogator was the use of a 'truth serum.'"

At the end of the tape, according to the inspector general, the interrogator told Padilla, "There is no such thing as a 'truth serum.'" But the initial suggestion apparently affected the detainee when he was given a flu shot during his interrogation session about three weeks later. Padilla asked his interrogator why he was given a shot.

"It was necessary," the interrogator said, "and proceeded to ask [redacted] what kind of shot he received."

Padilla said he was told it was a flu shot, but as the interrogation wore on he said he did not feel well and asked, "what did you shoot me with? Did you shoot me with serum?"

Bloche, the health policy expert and Georgetown University law professor, said the ruse interrogators pulled on Padilla "sounds like a juvenile prank."

"But it's a serious breach of medical ethics," Bloche said. "It undermines trust in military physicians and it's an unfair insult to the integrity of the vast majority of military doctors, who quite rightly believe that this sort of thing is contrary to their professional obligation."

The inspector general rebuked a government agency - possibly the DIA or FBI - involved in Padilla's interrogation for failing "to follow legal review procedures" established by US Joint Forces Command.

Padilla was convicted of terrorism support charges in 2007. Recently, the Supreme Court [refused to hear an appeal](#) Padilla filed against former Secretary of Defense Donald Rumsfeld and other Bush administration officials. The high court let stand an appeals court ruling, which dismissed Padilla's complaint related to his treatment at the Naval Brig. Caruso, Padilla's federal public defender, did not return messages left at his



Miami office for comment about the inspector general's conclusions.

But just a few months after the deception on Padilla, according to the inspector general's probe, an unnamed DIA "representative" came up with a list of 40 techniques at the request of a Pentagon "working group" [overseen](#) by former Secretary of Defense Donald Rumsfeld that met between January and April 2003 to discuss interrogation methods to use on detainees captured in the global war on terror.

The "DIA representative" was identified in a declassified 2009 Senate Armed Services Committee report that probed the treatment of detainees in custody of the US military as [Dave Becker](#), the Interrogation Control Element (ICE) Chief at Guantanamo. Becker recommended to the "working group" the use of drugs, "such as sodium pentothal and Demerol," which was number 40 on the list of interrogation methods presented to the "working group." Becker said those drugs "could prove to be effective" and "relaxes detainee to a cooperative state."

When Senate Armed Services Committee investigators interviewed him about the list of interrogation techniques, Becker said he had recommended the "use of drugs" to Rumsfeld's panel because he'd heard "a rumor" that another agency "had used drugs in their interrogation program."

The inspector general's report went on to say the working group ultimately rejected the use of drugs. But the report failed to mention an important document: a March 2003 [legal opinion](#) sent to Pentagon general counsel William "Jim" Haynes by Justice Department Office of Legal Counsel attorney John Yoo, which said drugs could be used in interrogations as long as they did not "disrupt profoundly the senses or personality." Yoo's memo was cited in the senators' letter to the inspector general calling for the investigation. It's unclear why it was not mentioned in the watchdog's report.

The investigation also reviewed published reports prepared by the US government and human rights organizations revolving around the treatment of detainees in US custody. One report scrutinized was Kiley's 2005 US Army surgeon general report on detainee medical operations in Guantanamo, Iraq and Afghanistan, which said a doctor refused "to provide cough syrup as a 'truth drug'" to an Iraqi detainee. The inspector general interviewed this doctor, who indicated the request, which he turned down as unethical, came from his "brigade S-2 (Intelligence Officer)."

The surgeon general's report also said a licensed practical nurse saw "sedatives (ativan, diazepam, etc.) being used by medical personnel to calm a [Iraqi] detainee so that the detainee would talk more."

According to the DoD inspector general's investigation, after the watchdog attempted to obtain a sworn statement from the nurse, identified in its report as a "non-commissioned officer," about the use of sedatives on detainees, the nurse "elected to make a corrective statement" to what he had claimed three years earlier.

"Sedatives were only given to patient detainees to alleviate pain," the nurse's statement now says.

### **"They Said It Was Some Candy"**

The inspector general's office also received permission from the deputy secretary of defense to interview three detainees in January 2009 about their claims of being forcibly drugged during interrogations. An attorney for one of the detainees declined the interview request. The inspector general did not attempt to interview detainees who claimed they were administered mind-altering drugs during interrogations and have since been repatriated,

The names of the two detainees interviewed are redacted in the report.

The detainee told the inspector general after he was captured in Karachi, Pakistan, by Pakistanis in September 2002 where he held for three days he was transferred to the "Prison of Darkness," in Kabul, Afghanistan for 40 days. He was then sent to the US prison base at Bagram for about a week and then shipped off to Guantanamo.

"[Redacted] stated that during an interrogation at Bagram he was given pills; green and red ones," according to statements the detainee gave the inspector general in April 2009. "After I ate like three of them, my

tongue started getting heavier. After that, I woke up and they (interrogators) said thank you very much, we've got what we need. After I ate the stuff, it was like a state of delusion ... it took like three-four days to (feel normal again). I was not normal until I came to Cuba and then I started to feel my mind back. It was a state of delusion. Like everything was a dream. My sensation was not great."

The inspector general asked the detainee if he was told what the pills were.

"At the time they said it was some candy. And I was so hungry so I ate it," the detainee said.

The inspector general then asked the detainee if it was possible what he had experienced at the "Prison of Darkness" was due to exhaustion.

"I don't remember exactly," the detainee said. "If you saw my condition in the Prison of Darkness after 40 days of being tortured and having to stand all the time at Bagram. Those were things consuming my mind at the time ... when I start to remember that, I get somewhat upset, because it was a terrible event in my life. When you had been standing for three-four days in a row, I was so tired, I was exhausted. I can't describe those sensations."

Interrogators who questioned the detainee were interviewed by the inspector general's office. They did not remember the detainee "as each had interrogated over 100 persons during their respected assignments." They denied giving detainees drugs or medication for "interrogation purposes" and never witnessed other military personnel administer detainees drugs. The interrogators said, however, they "frequently gave the detainees food and candy to reward or encourage them to talk," such as "Fruit Loops," "Jolly Ranchers," "cookies," "suckers," and "Taffy's."

"Based on the statements provided by the interrogators and lacking any evidence of drugging, we concluded that we could not substantiate [redacted] allegation," the inspector general's probe concluded.

The inspector general also interviewed a detainee who was captured in Faisalabad, Pakistan, in March 2002 and claimed after he was transferred to Guantanamo that summer an interrogator told him "he would give me something that will make me talk."

However, the watchdog was unable "to correlate this information with records and documents pertaining to [the detainee's] interrogations."

Responding to the completion of the investigation in August 2009, [J. Alan Liotta](#), the principal director in DoD's Office of Detainee Policy, warned in a letter to the inspector general signing off on the document, "The release of this report is likely to generate media attention."

"Please keep our office informed as to when it will be released and efforts to craft talking points regarding the release," Liotta wrote, signing off on the report.

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Jason Leopold is lead investigative reporter of Truthout. He is the author of the Los Angeles Times bestseller, [News Junkie](#), a memoir. Visit [jasonleopold.com](#) for a preview. His most recent investigative report, "From Hopeful Immigrant to FBI Informant: The Inside Story of the Other Abu Zubaidah," is now available as an [ebook](#). Follow Jason on Twitter: [@JasonLeopold](#).

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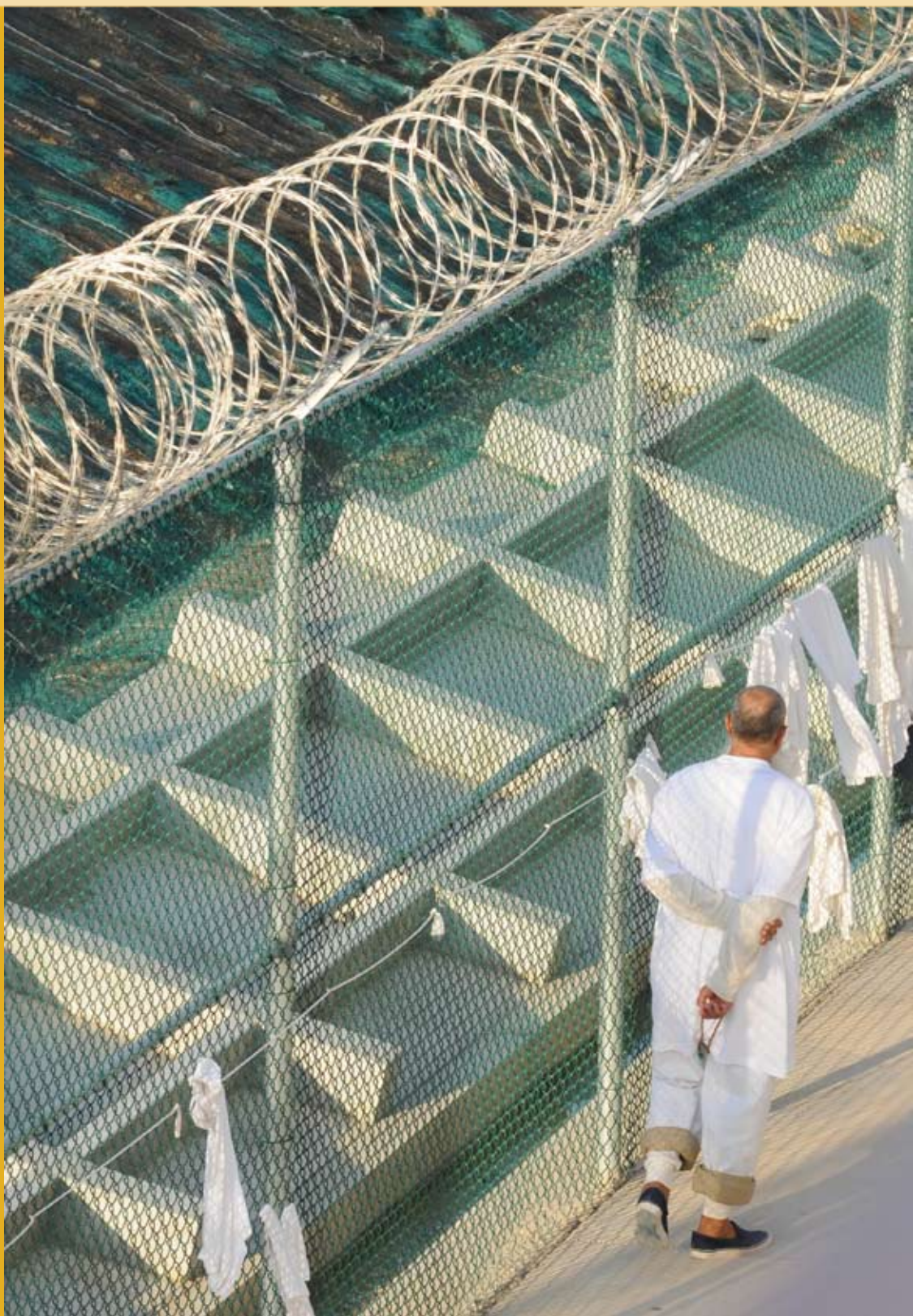
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# APPENDIX

8



# Punishment Before Justice: Indefinite Detention in the US



## ABOUT PHYSICIANS FOR HUMAN RIGHTS

Physicians for Human Rights (PHR) is an independent, non-profit organization that uses medical and scientific expertise to investigate human rights violations and advocate for justice, accountability, and the health and dignity of all people. We are supported by the expertise and passion of health professionals and concerned citizens alike.

Since 1986, PHR has conducted investigations in more than 40 countries around the world, including Afghanistan, Congo, Rwanda, Sudan, the United States, the former Yugoslavia, and Zimbabwe:

- 1988 — First to document Iraq's use of chemical weapons against Kurds
- 1996 — Exhumed mass graves in the Balkans
- 1996 — Produced critical forensic evidence of genocide in Rwanda
- 1997 — Shared the Nobel Peace Prize for the International Campaign to Ban Landmines
- 2003 — Warned of health and human rights catastrophe prior to the invasion of Iraq
- 2004 — Documented and analyzed the genocide in Darfur
- 2005 — Detailed the story of tortured detainees in Iraq, Afghanistan and Guantánamo Bay
- 2010 — Presented the first evidence showing that CIA medical personnel engaged in human experimentation on prisoners in violation of the Nuremberg Code and other provisions

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Lisa Ratanaprasatporn and Linda Ratanaprasatporn, medical students at Alpert Medical School, Brown University, contributed an initial literature review for this report.





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## Executive Summary

The United States government's reliance on indefinite detention in both national security and immigration contexts reflects an abdication of its legal and moral responsibility to treat those in its custody humanely, as well as an abdication of its responsibility to protect its military and civilians from retaliation on account of its continued refusal to honor the rule of law.

Non-governmental organizations (NGOs), activists, and lawyers have long raised concerns about the due process and human rights violations that indefinite detention causes as a matter of civil and political rights, and Physicians for Human Rights (PHR) and other NGOs have carefully documented the medical and psychological injuries detainees have suffered as a result of the torture and other cruel, inhuman, or degrading treatment and persecution to which they have been subjected. The effect on an individual's health caused by the indeterminacy of an indefinite detention, independent of the health effects of specific abuses, is less well-developed. This report attempts to fill that gap.

The medical literature provides convincing evidence that the indeterminacy of an indefinite detention creates a degree of uncertainty, unpredictability, and uncontrollability that causes severe harms in healthy individuals independent of other aspects or conditions of detention. The harmful psychological and physical effects of indefinite detention include:

- Severe and chronic anxiety and dread;
- Pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well on the central nervous system;
- Depression and suicide;
- Post-traumatic stress disorder; and
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.

Furthermore and most concerning, for national security detainees who have been traumatized by torture and for asylum seekers who have been traumatized by torture or persecution in their home countries, the harms associated with indefinite detention threaten to severely exacerbate existing severe physical and psychological symptoms, perpetuate mental suffering, and thereby foreclose any opportunity for healing.

Individuals who are indefinitely detained are, by definition, individuals against whom no charges have been brought and therefore against whom no conviction has been obtained. Unlike individuals convicted of crimes, whose sentences are a form of lawful punishment so long as it is not cruel or unusual, detainees may not, consistent with due process, be punished at all. The US government's obligation to ensure that detainees do not suffer severe mental and physical harm is accordingly greater than the government's obligation to protect prison inmates from such harms. This report demonstrates, however, that the harms endured by individuals held indefinitely are unconstitutionally punitive, thus violating detainees' rights to due process. Moreover, the serious harm that already traumatized populations face constitutes cruel, inhuman, or degrading treatment, in violation of domestic and international law.

Of added concern is the fact that indefinite detention operates primarily in the immigration and national security contexts, and consequently imposes hardships on individuals who have no vote, and hence, no voice. These policies therefore permit politicians to appear tough on national security and immigration matters while sidestepping political fallout they may fear would develop if they advocated solutions to these difficult problems that were grounded in the US Constitution and our international human rights and humanitarian obligations. Moreover, the

lines between these policy concerns may be intentionally blurred for political purposes by, for example, conflating questions of immigration and asylum with concerns about terrorism and economic refugees. Because the judiciary has historically been hesitant to intrude on legislative and executive decision-making in these areas, such policies are likely to remain as insulated from serious legal challenge as the policy-makers are from their affected constituents. In light of the harms indefinite detention causes, this deference is unwarranted.

Indefinite detention is an unconstitutional practice that represents a regrettable continued departure from the United States' traditional respect for the rule of law, and constitutes cruel, inhuman, or degrading treatment for those who have already been subjected to torture or other ill-treatment. Continued disregard for the rule of law must finally end for the United States to reestablish its global moral authority and democratic legitimacy.

## Conclusions and Recommendations

This paper establishes that the profound uncertainty and lack of control characteristic of an indeterminate, indefinite, detention causes severe physical and psychological harm, regardless of the purported legal justification or conditions of a particular detention. In light of these unavoidable and serious health effects, policies mandating or permitting indefinite detention must be abolished.

While recognizing that these policies are attempts to respond to difficult questions of national security and immigration policy, Physicians for Human Rights nevertheless urges the US government to take the following affirmative steps to end indefinite detention:

### **Regarding National Security Detainees at Guantánamo and Other Sites, the United States Government Should:**

- Reject solutions to national security problems that permit or rely on indefinite detention and take affirmative efforts to end its current practice.
- Support trials in Article III courts for individuals detained at Guantánamo and coordinate the various branches of government to ensure that civilian trials for detainees are a policy priority.
- Grant a request from the Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment to investigate the detention facility at Guantánamo.
- Encourage greater international cooperation for both prosecutions and repatriation of detainees at Guantánamo.
- Until the time that indefinite detention is abolished as a matter of policy, provide measures that mitigate the social, psychological, and physical harms such detention causes among detainees.
- Permit non-governmental, independent, medical and psychological experts to evaluate the mental and physical health of detainees.

### **Regarding Individuals In Immigration Detention, the United States Government Should:**

- Strictly limit mandatory detention in the immigration setting to ensure that individuals who do not pose a security threat nor flight risk have the opportunity to pursue release from detention.
- Strictly limit the use of detention for asylum applicants.

- Make greater use of alternatives to detention, including community-based monitoring programs that have been proven effective, without increasing the total number of immigrants under active DHS supervision.
- Allow the American Bar Association and the United Nations High Commissioner for Refugees broad access to immigration detention facilities.
- Promulgate regulations that require the Department of Homeland Security to routinely update an individual in immigration detention about the stages of the detention process, including, whenever possible, time estimates regarding court proceedings. Congress should amend the Immigration and Naturalization Act to reflect the need for regular status updates for individuals in immigration detention.

President Obama issued an Executive Order on March 7, 2011, which reinstated military commission trials for individuals detained at Guantánamo Bay and established a periodic administrative review process to evaluate those who would continue to be detained.<sup>1</sup> The regular review of the continued detention of individuals represents a tacit acknowledgement that some of the hundreds of national security detainees will continue to be detained indefinitely.<sup>2</sup> While only 15 of these individuals have been designated “high value detainees,”<sup>3</sup> many of these detainees have already spent roughly 7 to 9 years<sup>4</sup> in the harshest, most restrictive and isolating conditions available<sup>5</sup> and were subjected to torture (and possibly subjected to experimentation)<sup>6</sup> by US personnel – some of which was meted out under the guise of the Bush Administration’s Enhanced Interrogation Techniques (EITs); some of which was pursuant to brutal tactics that lacked even that false imprimatur of legitimacy.<sup>7</sup>

The US government also indefinitely detains thousands of refugee and non-refugee immigrants, detentions whose purported justifications include national security, immigration and foreign policy concerns.<sup>8</sup> Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many other intending immigrants have languished in detention for years vainly waiting for the day that they will finally be deported or released.<sup>9</sup>

- 1 Executive Order, March 7, 2011 available at <http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders> (“March 7, 2011 Executive Order”). See also FINAL REPORT GUANTÁNAMO REVIEW TASK FORCE, January 22, 2010 at 3, (“GUANTÁNAMO TASK FORCE”) [describing recommendations for continued detention of certain detainees], available at [www.justice.gov/ag/guantanamo-review-final-report.pdf](http://www.justice.gov/ag/guantanamo-review-final-report.pdf).
- 2 Approximately 170 individuals remain in US custody in Guantánamo, 89 of whom have already been approved for release and approximately 50 of whom the United States intends to continue to detain indefinitely. Human Rights First, *Guantánamo by the Numbers*, Updated February 28, 2011. The number of individuals detained at other sites, such as Bagram Airfield in Afghanistan, is unknown.
- 3 The Guantánamo Docket: High Value, NYTIMES available at <http://projects.nytimes.com/guantanamo/detainees/high-value>.
- 4 The first detainees were transferred to Guantánamo on January 11, 2002. The Guantánamo Docket: A History of the Detainee Population, NYTIMES, available at <http://projects.nytimes.com/guantanamo>.
- 5 G. Brenner, *The Expected Psychiatric Impact of Detention in Guantánamo Bay, Cuba, and Related Considerations*, 11 JOURNAL OF TRAUMA & DISSOCIATION 469, 471 (2010) (noting that Guantánamo detainees are held for “22 hr per day, in small rooms with minimal exercise or stimulation. Nearly 80% are isolated, often for years. In maximum security areas, there is minimal activity, companionship, or physical exercise”).
- 6 PHR, *AIDING TORTURE: HEALTH PROFESSIONALS’ ETHICS AND HUMAN RIGHTS VIOLATIONS REVEALED IN THE MAY 2004 CIA INSPECTOR GENERAL’S REPORT*, August 2009, available at <http://physiciansforhumanrights.org/library/reports/aiding-torture-2009.html>; V. Iacopino, S. Allen and A. Keller, *Bad Science Used to Support Torture and Human Experimentation*, 331 SCIENCE 34, January 7, 2011.
- 7 PHR, *BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT 2008*, available at <http://physiciansforhumanrights.org/library/reports/broken-laws-torture-report-2008.html>; PHR, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES*, 2005, available at: <http://physiciansforhumanrights.org/library/reports/us-torture-break-them-down-2005.html>; PHR/HRF, *LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY*, 2007, available at <http://physiciansforhumanrights.org/library/reports/leave-no-marks-report-2007.html>.
- 8 Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security, responsible for administering US immigration policy, detains more than 400,000 individuals every year. Heartland Alliance National Immigrant Justice Center *et al.*, *YEAR ONE REPORT CARD: HUMAN RIGHTS AND THE OBAMA ADMINISTRATION’S IMMIGRATION DETENTION REFORMS*, October 16, 2010, available at <http://immigrantjustice.org/icereportcard>. See also N. Bernstein, *Immigration Detention System Lapses Detailed*, NYTIMES, December 3, 2009. From 2001 to 2010, the average daily detention population rose from approximately 20,000 non-citizens to over 30,000. C. Haddad and A. Siskin, *Immigration-Related Detention: Current Legislative Issues*, CONGRESSIONAL RESEARCH SERVICE, January 27, 2010 at 12. In 2003, at least 5,000 of those held in immigration detention were asylum seekers. A. Keller *et al.*, *Mental health of detained asylum seekers*, 362 LANCET 1721, 1721 (2003).
- 9 PHR, *Bellevue/NYU Program for Survivors of Torture, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS*, 2003, at 38; M. Dow, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS*, U. of California Press: 2004 at 223 (“AMERICAN GULAG”).

Physicians for Human Rights and other non-governmental organizations (NGOs) have devoted considerable resources to documenting the human rights abuses suffered by both national security detainees and asylum-seeking detainees. Independent evaluations of current detainees' medical records and forensic medical and psychological evaluations of former detainees, confirmed by first-hand accounts of military personnel and lawyers, have demonstrated that national security detainees were tortured by the US government;<sup>10</sup> similar evaluations of asylum seekers have established that many were tortured at the hands of state and non-state actors within their home countries.<sup>11</sup>

In addition, these NGOs have collectively and powerfully made the case that mandatory, indefinite detention schemes such as those at issue here violate domestic and international laws concerning the civil and political right to be free from arbitrary arrest and detention.<sup>12</sup> This combined effort of medical and legal advocacy has yielded concrete results. Upon taking office, the Obama Administration:

- standardized interrogation practices, making them consistent with those described in the Army Field Manual in a first step toward ending the use of EITs;<sup>13</sup>
- called for the closing of all CIA Black Sites in which detainees were secreted;<sup>14</sup>
- began the process of reviewing the evidence the government had developed against each of the Guantánamo detainees;<sup>15</sup> and
- in both the national security and immigration contexts, embarked on the lengthy process of analyzing existing detention policies and crafting new ones that would, the Administration promised, satisfy domestic concerns about immigration and national security while comporting with the US Constitution and our obligations under international law.<sup>16</sup>

The Administration's analysis of current procedures has resulted in it promulgating rules that contemplate more frequent reviews (before military tribunals) of the government's justification for detaining those held on national security grounds, as well as statements of intent to reform the civil detention scheme applicable to immigrants and asylum seekers.<sup>17</sup> As a matter of process, however, a system that permits the government to hold people year after year, review after review, on the grounds that the individual poses a threat to the nation without the govern-

10 See, e.g., PHR, *AIDING TORTURE*, *supra* n. 6; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; PHR, *BREAK THEM DOWN*, *supra* n. 7; PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7. See also Iacopino, *supra* n. 6.

11 See, e.g., PHR, *FROM PERSECUTION TO PRISON*, *supra* n. 9.

12 See, e.g., Human Rights Watch, "US: Prolonged Indefinite Detention Violates International Law Current Detention Practices at Guantánamo Unjustified and Arbitrary," January 24, 2011, available at <http://www.hrw.org/en/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law>.

13 Executive Order, January 22, 2009, available at <http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations>.

14 *Id.*

15 Executive Order, January 22, 2009, available at <http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities>.

16 Executive Order, January 22, 2009, available at <http://www.whitehouse.gov/the-press-office/review-detention-policy-options> (national security detainees); U.S. Immigration and Customs Enforcement, "Fact Sheet: 2009 Immigration Detention Reform," available at <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (immigration detainees).

17 March 7, 2011 Executive Order, *supra* n. 1; A/HRC/WT.6/9/USA/1 at ¶ 93 (National report submitted by the United States to the Human Rights Council Working Group on the Universal Periodic Review, 1-12 November 2010) ("DHS issued revised parole guidelines, effective January 2010, for arriving aliens in expedited removal found to have a credible fear of persecution or torture. The new guidelines firmly establish that it is not in the public interest to detain those arriving aliens found to have a credible fear who establish their identities, and that they pose neither a flight risk nor a danger to the community"). The phrasing used by the government in this reports suggests that the asylum seeker bears the burden of "prov[ing] the negative," i.e., that he is not dangerous." *Artway v. New Jersey*, 81 F.3d 1235, 1251 (3rd Cir. 1996). Such a scheme raises serious due process concerns. *Cf. id.*

ment ever being required to prosecute or release the detainee, does not make the detention any less arbitrary or indefinite.

More importantly, these policies beg two critical questions: First, can an explicitly contemplated or *de facto* detention of an indeterminate duration cause severe physical and psychological harms even in the absence of torture? Second, as applied to individuals who *were* tortured, can such detentions exacerbate the severe physical and psychological harms these individuals suffered as a consequence of having been tortured?

In an effort to address these largely unanswered questions and thereby to fill a gap in the literature, PHR determined to review the available clinical data concerning the physical and psychological consequences of the indeterminacy of indefinite detention. This review revealed evidence strongly suggesting that indefinite detention comes at an unacceptably high cost because:

- i) it causes psychological and physical traumas that appear to be *independent* of the conditions of detention or the abuse to which those in indefinite detention have been subjected, and
- ii) it not only delays – indefinitely – the opportunity for torture victims to begin to heal from the suffering they have already endured, but likely exacerbates the effects of that ill-treatment thus constituting unlawful cruel, inhuman, or degrading treatment.

The government's reliance on continued detention schemes as a panacea for resolving the difficult balance between national security or immigration policies and the rule of law is not only misguided, but it will yield new due process violations and violations of domestic and international rules prohibiting cruel, inhuman, and degrading treatment. In addition, the US government's continued disregard for the rule of law places the safety of US citizens in jeopardy by fostering a similar disregard for the rule of law in the treatment of US citizens by foreign governments and by potentially provoking retaliatory violence.

## Methodology and Purpose of Report

As used in this report, "indefinite detention" refers to the government's restriction of an individual's liberty for reasons other than public health or the commission of any chargeable crime by the individual. The term encompasses custody arrangements that explicitly contemplate a detention of an indefinite term, as well as those that may result in detention of an indefinite term, including "preventive detention,"<sup>18</sup> "executive custody,"<sup>19</sup> "security detention,"<sup>20</sup> "military detention,"<sup>21</sup> "prolonged detention,"<sup>22</sup> "administrative detention,"<sup>23</sup> "conditional detention,"<sup>24</sup> or, under the March 7 Executive Order, "continued law of war detention."<sup>25</sup>

18 See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 691 [2001]; *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 [9th Cir. 2009] *cert. granted*, *Ashcroft v. al-Kidd*, No. 10-98 [refusing to dismiss complaint against former US Attorney alleging that he "developed, implemented, and set into motion a policy and/or practice under which the FBI and DOJ would use the material witness statute to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further"] (emphasis in original).

19 *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 [1953] (Jackson, J., *dissenting*) ("Mezei").

20 ICRC, *Contemporary challenges to IHL – security detention: overview* [Oct. 29, 2010], available at <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/security-detention/overview-security-detention.htm>

21 B. Wittes and J. Goldsmith, *Ghailani verdict makes stronger case for military detentions*, WASHINGTON POST (editorial), November 20, 2010.

22 P. Finn and A. Kornblut, *Obama Administration readies indefinite detention order for Guantánamo detainees*, WASHINGTON POST, Dec. 21, 2010.

23 AMERICAN GULAG, *supra* n. 9 at 223.

24 GUANTÁNAMO TASK FORCE, *supra* n. 1 at 12.

25 March 7, 2011 Executive Order, *supra* n. 1. See also A. Caldwell, *Executive Order for Detainee Review Being Drafted*, WASHINGTON POST, Dec. 22, 2010.

For both practical and ethical reasons, relatively little clinical research has focused specifically on the health effects of the indefinite duration of detention as opposed to the conditions of detention or the abuses to which detainees may be subjected.<sup>26</sup> This report therefore draws on research concerning:

- i) the experiences of analogous populations such as political prisoners and prisoners of war,<sup>27</sup> the wrongfully convicted,<sup>28</sup> and inmates held in administrative segregation for non-disciplinary reasons;<sup>29</sup>
- ii) the physical and psychological effects of uncertainty, uncontrollability, and unpredictability as evidenced by those subjected to conditions of sensory deprivation<sup>30</sup> and confronted with medical uncertainty;<sup>31</sup> and
- iii) the physical and psychological effects of being isolated from one's social, linguistic, cultural and familial networks.<sup>32</sup>

In the first instance, this report trains a narrow lens on the harms associated with the indeterminacy of detention, independent of other conditions or mistreatment, in order to highlight the common denominators likely to affect all individuals held indefinitely. The literature review raises serious doubts about the possibility of crafting an indefinite detention policy that is humane and harm-neutral.<sup>33</sup> This finding is significant for individuals languishing in a state of indefinite detention on account of alleged immigration violations, for national security detainees who may be taken into custody in the future (and who may therefore be spared the devastating consequences of the kinds of harsh interrogation tactics employed in the early years following September 11 if loopholes in Appendix M of the Army Field Manual are closed, as described later in this report), and for policy makers who believe that it is the harsh conditions of detention rather than the nature of indefinite detention itself that is problematic.

It is only when these harms are understood in the context in which they are experienced, however, that they become truly meaningful. Abusive conditions and treatments rarely exist in isolation. Furthermore, researchers suspect that the combined effects of abusive conditions and treatments on the human psyche and body are multiplicative, and not simply additive.<sup>34</sup> For

26 G. Coffey et al., *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, 70 SOCIAL SCIENCE & MEDICINE 2070, 2071 (2010) ("Very little is known about how detainees attempt to adapt to the institutional environment of detention centres and deal with the indeterminate nature of their confinement, or how the measures they take affect their well-being and integration into society on release").

27 See, e.g., B. Griffeth and R. Bally, *Language and Cultural Barriers in the Assessment of Enemy Prisoners of War and Other Foreign Nationals*, 57 PSYCHIATRIC SERVICES 258, 258 (2006); B. Saab et al., *Predictors of psychological distress in Lebanese hostages of war*, 57 SOC SCI & MED 1249-57 (2003).

28 See, A. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME AND JUSTICE 1 (2005).

29 See, e.g., Bruce Arrigo, *THE ETHICS OF TOTAL CONFINEMENT* (Oxford U. Press: pending) at 94 ("Perhaps one of the greatest concerns regarding administrative segregation is that an inmate may be placed there indefinitely ... placement in this type of solitary confinement relies solely on the discretion of correctional administrators and staff ... [because this isn't considered "disciplinary segregation," there is no process associated with it].

30 See, e.g., C. Haney, *Issues in Solitary, Supermax Confinement*, 49 CRIME & DELINQUENCY 124 (2003); PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.

31 L. Johnson et al., *The Illness Uncertainty Concept: A Review*, 13 CURRENT PAIN AND HEADACHE REPORTS 133 (2009); J. Reich et al., *Uncertainty of Illness Relationships with Mental Health and Coping Processes in Fibromyalgia Patients*, 29 JOURNAL OF BEHAVIORAL MEDICINE 307 (2006).

32 Griffeth *supra* n. 27 at 258.

33 See, e.g., PHR, *FROM PERSECUTION TO PRISON*, *supra* n. 9 at 82-83 (describing interviews with formerly detained asylum seekers who, after being granted asylum and despite describing the conditions of their detention as reasonably good with responsive staff, nevertheless reported continued intrusive nightmares, ongoing depression, and pervading despondency).

34 See, e.g., M. Basoglu, *A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture*, 79 AM. J. OF ORTHOPSYCHIATRY 135, 135 (2009); S. Miles, *Profane Research Versus Researching the Profane: Commentary on Basoglu* (2009), 79 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 146, 147 (2009) ("Torture is always administered as a set of abuses. The idea that research might distill some set of



these reasons, this report ultimately focuses on the consequences of indefinite detention for the populations that, poignantly, are those most likely to be subjected to these policies as well as those most vulnerable to their damaging effects: national security detainees who have already endured years of isolation, torture, and possible experimentation at the hands of US personnel, and asylum seekers who arrive in the hands of US immigration authorities already traumatized by the act of exile as well as by torture and other persecution in their home countries.

## **Indefinite Detention Places Individuals at an Unreasonable Risk of Serious Psychological and Physical Harm**

To understand the serious physical and psychological effects that indefinite detention causes the most vulnerable populations, we begin by attempting to identify, in broader terms, the specific characteristics of indefinite detention that give it the power to harm healthy individuals and the kinds of harms that appear to be associated with those characteristics.

### **The Nature of Indefinite Detention**

By definition, indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee – and perhaps without the governmental custodian having decided – when or whether the detainee will be released. Indefinite detention therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody.<sup>35</sup> Whereas a criminal trial imposes on the government a rigorous burden of proving that a defendant engaged in conduct that meets carefully and constitutionally defined standards and which results in either a conviction and sentence or an acquittal and freedom, indefinite detention schemes permit the government to keep a detainee in a dead zone of prolonged custody on the basis of facts or suspicions about the detainee's associations, affiliations, inclinations, religious or political beliefs, national or ethnic identity, that the detaining authority asserts makes the detainee dangerous.<sup>36</sup> Many of these factors are ones that are neither susceptible to evidentiary standards of proof nor over which the detainee has substantial control.

Accordingly, in addition to indefinite detention being, by its nature, a condition marked by profound uncertainty about its duration, it is also characterized by a profound lack of control over the duration of that detention, and concomitantly renders the detainee incapable of predicting

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torturous abuse (e.g., waterboarding) from nontorturous abuse (e.g., beating a person with a phonebook) neglects this reality. Torture is inflicted in a complete environment, a total institution, in which many forms of abuse are threatened and used").

- 35 Pretrial detention, for example, is typically limited by statute or case law to a period of 60 or 90 days, while individuals convicted of crimes are sentenced to fixed terms, whether measured in months, years or lifespans.
- 36 See Matsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 DUKE FORUM FOR LAW AND SOCIAL CHANGE 71, 76-77 (2010) [arguing that like the internment of Japanese-Americans during World War II, the United States has "indefinitely detained a large number of persons in the name of 'national security,' while investigating the equivalent of their 'loyalty.'" The criteria for arrest were never specified, but it appears that immigration status, country of origin, and religious or political association, played a primary role in the selection of detainees"]; C. Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STANFORD L. REV. 238, 259 (1954) [noting similarities between Emergency Detention Act of 1950 and legislation in Britain during World War II, which targeted individuals suspected of Nazi or Fascist affiliations, suspicions that were later determined to have turned largely on the individuals' "enemy" nationality]; D. Silove *et al.*, *No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia*, 44 TRANSCULTURAL PSYCHIATRY 359, 360 (2007) [noting that the detention of asylum seekers often reflects a policy adopted by Western countries to deter non-Westerners from seeking refuge]. *Cf. In re Lawrence*, 190 P.3d 535, 564 (Cal. 2008) [governor violated statutory and constitutional due process principles that promise inmates genuine opportunity for parole by practice of reversing parole board decisions on the basis of a "current dangerousness" assessment that relied entirely on "the immutable and unchangeable circumstances of [inmate's] commitment offense," without presenting any evidence that inmate "remains a current threat to public safety"].

what factors might affect its duration.<sup>37</sup> These additional characteristics contribute to the detainee experiencing his captivity as capricious and arbitrary.

The lack of control over the duration of detention and a detainee's inability to predict what might shorten the duration of his detention echoes the lack of control over and the inability most detainees have to anticipate the risk of being taken into custody in the first place, factors that the literature suggests have meaningful and deleterious consequences. It has long been recognized that asylum seekers arrive at the border seeking and expecting solace and refuge, and are shocked to be arrested instead. More recently, it has become widely accepted that the majority of national security detainees held at Guantánamo since January 2002 were never suspected of being actively engaged in terrorist or other hostile activities against the United States, but instead came into US custody after having been picked up by bounty hunters operating in Pakistan and Afghanistan who were motivated by greed – i.e., by promises of cash – or by self-interest – i.e., in order to create false trails that would lead US investigators away from the bounty hunters themselves.<sup>38</sup>

The lack of information and uncertainty inherent in indefinite detention is similar to the lack of information and uncertainty inherent in situations of sensory deprivation. In the case of sensory deprivation, the subject is deprived of information about his or her environment; in the case of indefinite detention, the subject is deprived of information about his or her fate: Will he remain locked up in a detention facility for the rest of his life or will the doors be thrown open tomorrow? Should he try to hold onto his spouse and children's affections in the hope that they will be reunited soon, or should he tell them to move on with their lives without him? Does anyone know about her whereabouts or has she become, for all intents and purposes, invisible to all but her captors? If her captors can keep her locked up for life, what prevents them from abusing, torturing, raping, or killing her?<sup>39</sup> As one researcher put it, indefinite detention places people

*in a situation which is uncontrollable in any meaningful way; unpredictable in any consistent way; and in which he/she is deprived of establishing an effective mode of confronting these conditions because of the apparent unaccountability of others with whom he/she is in contact.*<sup>40</sup>

This constellation of properties, inherent in the nature of a detention of an indeterminate duration, is of concern because together they have been shown to cause severe and chronic states of stress, helplessness, hopelessness, depression, anxiety and dread – states that may have persistent adverse consequences for detainee psychological and physical health.<sup>41</sup>

37 See, e.g., *Basardh v. Obama*, 612 F.Supp.2d 30, 32 (D.D.C. 2009) [granting habeas corpus petition of a Yemeni who, it was undisputed, had been a government informant – albeit an unreliable one – for the entire seven years of his detention]. Basardh, along with twelve others whose habeas petitions have been granted, may still be detained at Guantánamo. Center for Constitutional Rights, *Guantánamo Habeas ScoreCard*, updated February 9, 2011. See also GUANTÁNAMO TASK FORCE, *supra* n. 1 at 10–11.

38 See, e.g., M. Denbeaux and J. Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, (2006), available at [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf); D. Cole and J. Lobel, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR [New York: The New Press (2007)]: 105–06 (noting that “[a]ll but 5 percent of the [Guantánamo] detainees were captured by non-US forces, often in exchange for generous bounties” using flyers such as one that read, “Get wealth and power beyond your dreams ... You can receive millions of dollars helping the anti-Taliban forces catch al-Qaeda and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people”). See also J. Mayer, *The Hard Cases*, THE NEW YORKER, February 23, 2009; Alex Gibney, director, *TAXI TO THE DARK SIDE*, 2007 [documentary film] (describing death of an Afghani in US custody who had been falsely identified to US authorities as perpetrator of bombing attack, by the Afghan patrol that had perpetrated attack).

39 These are precisely the concerns that animated the court's decision in *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003), as well as Justice Jackson's dissent in *Mezei*.

40 J. Levin, *Intervention in detention: Psychological, ethical and professional aspects*, 74 SOUTH AFR. MED. JOURNAL 460, 460 (1988).

41 L.J. West, *Effects of Isolation on the Evidence of Detainees*, DETENTION AND SECURITY LEGISLATION IN SOUTH AFRICA.

Without any information about or ability to control the fact or terms of their confinement, detainees develop feelings of helplessness and hopelessness that lead to debilitating depressive symptoms, chronic anxiety, despair, dread of what may or may not happen in the future, as well as to PTSD and suicidal ideation.<sup>42</sup> Many detainees act on that suicidal ideation by attempting – and sometimes succeeding in their attempts – to commit suicide.<sup>43</sup> In addition, the uncertainty and uncontrollability of the detention renders detainees peculiarly vulnerable to the kinds of pathological levels of stress that have been shown to result in people who are socially isolated.

## ***Chronic Uncertainty Causes Severe Psychological Trauma***

Individuals deprived of information about when or whether they will be released from detention and who are deprived, as well, of any information that might justify so isolating and indefinite a detention, suffer from high rates of severe anxiety, despair, depression, PTSD, and dread.<sup>44</sup>

It should come as no surprise that where indefinite detention and sensory deprivation share a basic attribute – i.e., where they both induce states of profound uncertainty – that they would have the power to cause similar psychological harms. Sensory deprivation, a recognized form of psychological torture that has been proven to cause “high levels of negative arousal, discomfort, and distress,” is an extreme form of imposed uncertainty.<sup>45</sup> Whereas sensory deprivation provokes an acute state of fear, the uncertainty that indefinite detainees are subjected to is chronic and insidious – more akin to a malignant tumor than a blunt trauma wound. Uncertainty creates a state of constant and heightened anxiety about unknown and unknowable dangers and outcomes, creating a state of deep stress that has no fixed source or object. Uncertainty primes people for pain, which means that detaining authorities can elicit many of the physiological and psychological responses to pain without ever touching the detainee.<sup>46</sup>

This theoretical construct has been demonstrated in the actual experience of certain detained populations who endure indefinite detentions with eyes wide open. Research has shown, for example, that individuals who are detained by repressive regimes on account of their political activities tend to survive the experience with fewer short and long term health consequences than individuals who are shocked to find themselves in custody.<sup>47</sup> This suggests that those who actively assume the risk of detention when they engage in certain activities enter detention somewhat shielded from the damaging effects of uncertainty and unpredictability.<sup>48</sup>

This hypothesis is further bolstered by evidence suggesting that research subjects who are told

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PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF NATAL, September 1982 (A. Bell and R. Mackie, eds.) (1985): 69-80, at 71.

42 I. Robbins, *et al.*, *The Psychiatric Problems of Detainees under the 2001 Anti-Terrorism Crime and Security Act*, 29 PSYCHIATRIC BULLETIN 407, 408 (2005) [helplessness and hopelessness are “integral aspect[s] of indefinite detention”]. See also K. Robjant, *et al.*, *Mental health implications of detaining asylum seekers: systematic review*, 194 BR JOURNAL PSYCH 306, 309 (2009); Z. Steel and D. Silove, *The mental health implications of detaining asylum seekers*, 175 MEDICAL J OF AUSTRALIA 596 (2001). See also C. Pourgourides, *A second exile: the mental health implications of detention of asylum seekers in the UK*, 21 PSYCHIATRIC BULL. 673, 674 (1997).

43 PHR, FROM PERSECUTION TO PRISON, *supra* n. 9 at 57; Steel and Silove, *supra* n. 42. See also Pourgourides, *supra*, n. 42.

44 Levin, *supra* n. 40 at 481; Silove, *supra* n. 36 at 366.

45 J. Reich *supra* n. 31 at 307. See also PHR/HRF, LEAVE NO MARKS, *supra* n. 7 at 30-33; Haney, *supra* n. 30 at 130; Brenner, *supra* n. 5.

46 J. Wright *et al.*, *The Illness Uncertainty Concept: A Review*, 13 CURRENT PAIN AND HEADACHE REPORTS 133, 134 (2009).

47 Saab, *supra* n. 27 at 1250 (“[I]deological and political commitment alleviates the development of psychological distress [and] a strong belief in a cause may protect the core of the personality of POWs”) (internal citations omitted); Basoglu, *supra* n. 34 at 137. See also Leslie Koopowitz and Sotoodeh Abhary, *Psychiatric aspects of detention illustrative case studies*, 38 AUSTRALIAN AND NEW ZEALAND J OF PSYCH 495, 499 (2004).

48 *Id.*

that they will be subjected to non-painful stimulation report, not surprisingly, that they felt no pain.<sup>49</sup> Meanwhile, individuals who are warned that they will receive a painful stimulus and who are also provided with information about the degree of pain they can expect to feel, report experiencing pain in expected degrees. By contrast, subjects who are kept in the dark about

- i) whether a stimulus will be painful and
- ii) if painful, how painful it will be, react to non-painful stimuli as if it were painful and typically report pain ratings that exceed those of their informed peers.<sup>50</sup>

These findings led researchers to theorize that uncertainty leaves people “prime[d] ... to pay greater attention to pain and experience more pain than patients who are less certain.”<sup>51</sup> Hence, a detainee who is unprepared for the possibility of being taken into custody or being indefinitely detained – which is the case for many of those in both immigration and national security detention – is particularly susceptible to suffering from PTSD and other psychiatric disorders on account of the uncertainty associated with his detention.<sup>52</sup>

Anxiety and uncertainty go hand in hand. Whereas a concrete, recognizable threat provokes an active fight or flight response, an unknown, uncertain, unrealized threat appears to produce free-floating, chronic anxiety. Moreover, “uncertainty itself can be considered threatening, therein promoting or maintaining anxiety and exacerbating the perception of threat.”<sup>53</sup> In its strongest form, however, anxiety – a state of excessive uneasiness and apprehension about the unknown – becomes a state of dread: a great and oppressive “fear of the unknown, the apprehension of a future heavy with the possibility of danger.”<sup>54</sup>

### **Dread is among the more disabling states a detainee endures.**

Dread is among the more disabling states a detainee endures, as it represents the accumulation of fears that arise as a result of the detainee being unable to

*control or predict events .... The smallest abuse can evoke dread as it all too clearly demonstrates the impotence and vulnerability of the captive ....*

*Dread is a type of continuing and pervasive fear that is made up of all the small fears a captive is entitled to have; a fear that the captivity will continue indefinitely, fear of what the captors might do, fear of the safety of one's loved ones. There is nothing quite as frightening as the unknown, especially where your freedom is concerned. Indefinite confinement is a terrible, terrible thing; prisoners will tell you that as soon as one can set a limit on captivity, even if it is five or ten years, it becomes easier. Indefinite confinement, even if it is for a matter of days or weeks, can be fearsome indeed. With regard to what the captors may do, a little bit of abuse can be terribly frightening because it demonstrates to you that you have no recourse. If the captor rolls up a newspaper and tells you to keep your arms up and then when you are beginning*

<sup>49</sup> Wright, *supra* n. 46 at 134.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Indefinite detention may also be a condition capable of causing Cotard's syndrome. In this “rare psychotic disorder with multiple etiologies (severe depression, schizophrenia ... and trauma, for example), a constellation of symptoms are spun into a core delusion of nihilism, in which the person denies his own existence or holds to the belief that he or she is dead.” R. Christensen, *Dead men walking: Reflections on Cotard's syndrome and homelessness*, 68 PHAROS ALPHA OMEGA ALPHA HONOR MED. SOC. 33 (2005). Although the literature on Cotard's syndrome is built primarily of case studies or reviews that analyze the presenting symptoms of those diagnosed with the disorder rather than its underlying causes, see, e.g., G. Berrios, R. Luque, *Cotard's syndrome: analysis of 100 cases*, 91 ACTA PSYCHIATRICA SCANDINAVICA 185, 186 (1995), there is anecdotal evidence that it can be triggered by severely dislocating and threatening experiences, such as those created by homelessness, by torture – and, perhaps, by indefinite detention. See, e.g., Christensen, *supra*; PHR, *BREAK THEM DOWN*, *supra* n. 7 at 55 (noting former detainee's report of “feeling that one is already dead”); F. Davidoff, 145 *Homeless*, ANNALS OF INTERNAL MEDICINE 75, 76 (2006).

<sup>53</sup> R. Carleton et al., *Anxiety sensitivity and intolerance of uncertainty: Requisites of the fundamental fears?* 45 BEHAVIOUR RESEARCH AND THERAPY 2307, 2307 (2007).

<sup>54</sup> G. Craft, *The Persistence of Dread in Law and Literature*, 102 YALE LAW JOURNAL 521, 521 (1992).

to ache and you start to droop then he whacks you across the head with the newspaper, it is frightening because although it will not leave a scar, it makes clear that he could do the same thing with a club if he chose.<sup>55</sup>

People become vulnerable to developing PTSD when they experience a traumatic event that poses an actual or potential threat of injury or death, and then subsequently have an experience of fear (or its stronger form, dread) and helplessness.<sup>56</sup> In light of research suggesting that many more individuals in the general population have suffered traumatic events sufficient to satisfy the diagnostic criteria for PTSD than researchers and clinicians once believed, the likelihood of a detainee developing PTSD is very high.<sup>57</sup>

The length of detention as well as the cultural and religious background of a detainee can affect the severity of a detainee's symptoms and suffering. Detainees held for longer than six months – a milestone that most current indefinite detainees long ago passed – show higher proportions of meeting “diagnostic cut-offs for PTSD, depression, and moderate to severe mental health-related disability than those who ha[ve] been detained for” less time or not at all.<sup>58</sup> The risk of temporally-induced mental disturbances is unacceptably high for those whose detention truly is indefinite. Meanwhile, for detainees from Islamic countries or other cultures for whom exhibiting or acknowledging mental health problems is stigmatizing and suicide is prohibited, the anxiety, despair, helplessness, and dread triggered by the uncertainty of indefinite detention may be experienced as even more isolating and paralyzing,<sup>59</sup> particularly for deeply religious Muslims who may interpret feelings of hopelessness and despair as a lack of faith.<sup>60</sup>

### ***Social Isolation Contributes to Pathological Levels of Distress***

Research over the last 30 years has demonstrated that being isolated from one's community of friends and family causes debilitating stress and can seriously impair one's ability to cope with stressful situations.<sup>61</sup> One explanation is that stressful events activate a basic psychological need for warmth, support and protection. Simply put, “when people are uncertain and afraid they seek the company of others.”<sup>62</sup> Without a date certain on which they know they will be set free, detainees wake up each day facing what may be a lifetime of detention with no hope of release, hence this basic need for comfort in the face of extreme stress feeds on itself, creating a greater and a necessarily insatiable need for community and family. This theory of the relationship between stress and social isolation is painfully intuitive.

55 Levin, *supra* n. 40 at 461 (quoting West, *supra* n. 41 at 72-73).

56 M. Friedman *et al.*, *Considering PTSD for DSM-5*, 0 DEPRESSION AND ANXIETY 1 (2010) (describing symptoms of and diagnostic criteria for PTSD). See also PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7 at 44-45 (describing prevalence of PTSD among torture victims and long-term prognosis for sufferers of PTSD). For some detainees, the traumatic event may be the shock of arrest or capture; for others it may have been persecution or torture.

57 T. Keane, A. Marshall and C. Taft, *Posttraumatic Stress Disorder: Etiology, Epidemiology, and Treatment Outcome*, 2 Annu. Rev. Clin. Psychology 161, 164 (2006) (noting that “the prevalence of exposure to traumatic events in the United States is far more common than anticipated in 1980 when the diagnosis of PTSD was incorporated in the diagnostic nomenclature”).

58 Robjant, *supra* n. 42 at 308.

59 *Id.*

60 V. Cornell, *A Muslim to Muslims: Reflections after September 11*, 101 SOUTH ATLANTIC QUARTERLY 325, 333 (2002) (“Hopelessness and despair have long been regarded as major sins in Islam, because they imply a lack of faith. The desire to take one's life out of despair is a sign of disbelief”).

61 G. Tyson, *The Psychological Effects of Detention*, DETENTION AND SECURITY LEGISLATION IN SOUTH AFRICA. PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF NATAL, September 1982 [A. Bell and R. Mackie, eds.] (1985): 81-84, at 82 (noting that Vietnam Veterans reported isolation “as being amongst the most serious problems they experienced in captivity”); Coffey, *supra* n. 26 at 2071.

62 Tyson, *supra* n. 61 at 82.

Other research suggests, however, that there is more to the association between social isolation and stress than the primal urge to seek comfort. Coping and adapting to new, frightening and stressful situations – the two skills necessary to survive such experiences psychologically intact – are not skills that detainees have at their disposal. Coping with a stressful situation implies that a person is able to “manipulat[e] the environment in the service of self.”<sup>63</sup> The detainee, however, has no control over his environment, while the detaining authority exercises absolute control over every detail of his environment: from the clothes he wears; to the number of hours he sleeps; to the degree of light or darkness in his cell; to the food he eats; to the sounds he hears; to the amount and quality of the fresh air he breathes; to the degree of physical activity or inactivity in which he engages; and the people with whom he communicates. Meanwhile, the ability to adapt to one’s environment requires an inner resiliency that, research suggests, depends on the existence of social support.<sup>64</sup> Detainees have few of these tools at their disposal and without them, their ability to cope or adapt to the very stressful experience of being indefinitely detained may be severely compromised.

Not only are detainees abruptly and completely cut off from friends and families, they are often similarly cut off from their cultural, religious, and language communities. The inability to communicate with others in his own language or to understand what little information is available to him about his circumstances exacerbates the stress a detainee experiences by adding to his sense of isolation.<sup>65</sup> In addition, even when detaining authorities provide detainees with access to medical or mental health care workers, they often overlook the fact that linguistic barriers may make it impossible for the professional to ameliorate a detainee’s stress or suffering.<sup>66</sup>

### **Indefinite Detention Causes Physical Harm in Healthy Individuals**

In addition to causing psychological harm, indefinite detention causes physical harms that are independent of the harms that detainees suffer as a consequence of the conditions in which they are detained or any abuse to which they may be subjected while in custody. Some of the physical harms to which indefinite detainees are vulnerable reflect the body’s manifestation of the psychological harms and social isolation that detainees endure; others represent purely physical risks to which detainees are vulnerable simply on account of being detained for an indefinite term.

#### ***Chronic Stress and Anxiety Have Deleterious Effects on Every System in the Body***

Stress has measurable and deleterious effects on several core physiologic systems, leading to a domino effect of illness and disease. Stress adversely affects

*the immune system, the cardiovascular system, and the adipose tissue and muscle. Compromise of the immune system can exacerbate the metastatic spread of cancer and of viral infections; whereas, in the cardiovascular system, plaque formation leads to atherosclerosis and plaque rupture and platelet aggregation result in myocardial infarction and often in sudden death.*<sup>67</sup>

Chronic stress has also been found to be a significant contributing factor in the development

<sup>63</sup> S. Cobb, *Social Support as a Moderator of Life Stress*, 38 *PSYCHOSOMATIC MEDICINE* 300, 311 (1976).

<sup>64</sup> *Id.*

<sup>65</sup> Robjant, *supra* n. 42 at 308; Human Rights First, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON, 2009 at 54-54.

<sup>66</sup> See, e.g., Pourgourides, *supra* n. 42 at 674 (noting that for asylum seekers detained by British authorities, “an adequate level of care is almost impossible to implement given the language difficulties and lack of adequate interpretation facilities”); Griffeth, *supra* n. 27 at 258 (describing attempts to care for Iraqi casualties during early months of war using interpreters who spoke Arabic but who were unable to translate words for “depressed” or “flashback,” difficulties exacerbated by the fact that these terms were unfamiliar to the traumatized casualties, as well).

<sup>67</sup> B. McEwen and E. Stellar, *Stress and the Individual*, 153 *ARCH INTERN MED* 2093, 2096 (1993).



of “asthma, diabetes, gastrointestinal disorders, viral infections and autoimmune disorders.”<sup>68</sup> Moreover, physical and psychological reactions to stress, such as anxiety, helplessness, aggression, risk-taking, and self-damaging behavior, as well as the body’s attempts to adapt to stress, cause the body to secrete adrenal steroids that, while protective in the short run, subjects the nervous system to damaging “wear and tear” over the long run.<sup>69</sup> Evidence has also shown that endured over long periods, chronic stress can cause neurological damage that mirrors that suffered by victims of stroke,<sup>70</sup> and that “neuronal atrophy and cell death” associated with “prolonged stress [manifests its] most pronounced effects ... in brain regions that are responsible for higher order executive functions.”<sup>71</sup> It is highly doubtful that these physiological and neurological changes, occurring at the cellular level, are entirely reversible once the stressor has been eliminated.<sup>72</sup>

### ***Indefinite Detention Deprives Individuals of Protective Effects of Social Networks***

Although research to date has demonstrated only a weak association between social networks and the incidence or onset of disease, social relationships have been found to be strongly protective of mortality from established disease, particularly hypertensive disorders and cardiovascular disease.<sup>73</sup> Accordingly, detainees with pre-existing heart conditions may be more likely to suffer a cardiovascular event as a result of the stress they endure on account of the uncertainty, lack of control and unpredictability associated with indefinite detention, while the lack of social relationships may make it less likely that the detainee will survive the event. Evidence that many detainees have succumbed to cardiac-related deaths throws this risk into stark relief.<sup>74</sup>

In addition, there is evidence that it is the quality of the connections or relationships that is relevant, not their quantity. One study, for example, tested the hypothesis “that what mattered was not the number of social interactions, nor the degree to which other people provided practical benefit, but the degree to which social interactions satisfied an individual’s specific, subjective need for connection.”<sup>75</sup> Researchers found that loneliness – that is, the absence of qualitatively

68 *Id.* at 2098-99.

69 B. McEwen, *Allostasis and Allostatic Load: Implications for Neuropsychopharmacology*, 22 NEUROPSYCHOPHARMACOLOGY 108, 109 (1999) (noting “inherent paradox” in the fact “that the systems that react to stress – the autonomic nervous system and the adrenocortical system – are important protectors of the body in the short run but cause damage and accelerate disease when they are active over long periods of time”).

70 McEwen, *supra* n. 67 at 2096 (stress identified as causing “[d]amage or destruction of neurons [that] can impair brain function and compromise physiologic control mechanisms”).

71 B. Compas, *Psychobiological Processes of Stress and Coping*, 1094 ANN. N.Y. ACAD. SCI. 226, 229 (2006).

72 Cf. P. Tough, *The Poverty Clinic: Can a stressful childhood make you a sick adult?* THE NEW YORKER, March 21, 2011 at 25-32 (describing a clinic in San Francisco whose director is evolving her practice to take account of the extent to which her urban poor children patients’ neurological, physical, and psychological problems may be caused by anxiety, and noting the limits of interventions as those stressors become more rooted in a remote past).

73 I. Kawachi *et al.*, A prospective study of social networks in relation to total mortality and cardiovascular disease in men in the USA, 50 J EPIDEMIOLOGY COMMUNITY HEALTH 245, 250 (1996). See also J. House *et al.*, *Social Relationships and Health*, 241 SCIENCE 540, 542 (1988). Social relationships are believed to have this protective effect by “activate[ing] the anterior hypothalamic zone (stimulating release of human growth hormone) and inhibit[ing] the posterior hypothalamic zone (and hence secretion of adenocorticotrophic hormone, cortisol, catecholamines, and associated sympathetic autonomic activity).” *Id.* Although cause and effect has not been proven to a scientific certainty, the degree of scientific certainty exceeds that which prompted the Surgeon General to declare, in 1964, that cigarette smoking caused mortality and morbidity, as well as the “certification ... [that] the Type A behavior pattern [was] a risk factor for coronary heart disease.” *Id.* at 543. See also L. Berkman, Assessing social networks and social support in epidemiological studies, 35 REV. EPIDEM. 46, 48-49 (1987) (The association between social disconnection and increased mortality risk persists while controlling for baseline physical health status, social class, health practices, such as cigarette smoking, alcohol consumption, physical activity, obesity, and certain eating and sleep patterns [as well as] independent of a wide range of psychological factors”).

74 See, e.g., J. Rizzo, *Documents raise questions on treatment of detainees*, CNN.com, January 22, 2011. See also *Afghan detainee dies after exercise at Guantánamo*, Associated Press, February 3, 2011 (reporting cardiac-related death of 48-year old Awal Gul, an Afghan detainee who “had been held for eight years without charge”).

75 J. Cacioppo and W. Patrick, *LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTION* (New York: WW. Norton & Company; 2008) at 94, 105-106.

and subjectively satisfying connections – was associated

- i) with increases in the stress hormone epinephrine;
- ii) with rises in levels of salivary cortisol, a stress-induced steroid that affects metabolism and immune function, and
- iii) with “changes in DNA transcription that in turn made changes in the cell’s sensitivity to circulating cortisol, dampening the ability to shut off the [body’s] inflammatory response.”<sup>76</sup>

In other words, the fact of being cut off from meaningful contact with people with whom the detainee has close relationships, and the possibility that the situation may endure indefinitely, may result in physical changes that hold the potential to exacerbate pre-existing conditions and to compromise the detainee’s ability to heal from or survive acute traumas.

### ***Psychological Distress May Manifest as Physical Disease***

Somatization, the manifestation of physical symptoms in the absence of an organic cause, has long been observed in traumatized populations.<sup>77</sup> For example, while some people evidence psychological trauma in the form of depression, anxiety, or PTSD, others evidence the same trauma by way of physical symptoms and illnesses, such as breathing difficulties, nausea, back pain and skin disorders.<sup>78</sup> Originally dismissed by psychiatrists as a form of hysteria, clinicians

now recognize that somatization does not indicate that a patient’s symptoms are any less real or his suffering less debilitating, but rather that an appropriate treatment must address both the patient’s physical symptoms and their psychological roots.

Although there is no perfect predictor for whether a person will manifest psychological trauma as physical illness, there are certain clusters of cultural and psychological factors that have been observed in individuals who manifest psychological trauma as physical distress. For example, there is

**Being cut off from meaningful contact with people with whom the detainee has close relationships, and the possibility that the situation may endure indefinitely, may result in physical changes.**

evidence that men whose cultures “emphasize social integration more than autonomy,” and in which “the man is required to play the superior, confident, dignified role,” may find the shame of admitting to feelings of helplessness, anxiety, and depression so great that they “report fewer symptoms, aside from pain, or ... deny symptoms altogether.”<sup>79</sup> This conclusion draws in part on observations that Egyptian psychiatric patients had “higher rates of conversion disorder (that is, physical manifestations of psychiatric symptoms) ... than among patients in the West,” as well as the observation that Iraqi casualties of war depended much more heavily on narcotics and sedatives than “[a]llies with similar injuries.”<sup>80</sup>

There is a strong possibility, therefore, that at least a sizeable subset of detainees of non-West-

<sup>76</sup> *Id.*

<sup>77</sup> PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7 at 27, 31, 61, 68.

<sup>78</sup> See, e.g., Andrew Ryder *et al.*, *The Cultural Shaping of Depression: Somatic Symptoms in China, Psychological Symptoms in North America?* 117 J. OF ABNORMAL PSYCHOLOGY 200 (2008); A. Kagee and A. Naidoo, *Reconceptualizing the Sequelae of Political Torture: Limitations of a Psychiatric Paradigm*, 41 TRANSCULTURAL PSYCHIATRY 46, 49 (2004) (noting that “many traumatized African people present with somatic symptoms such as back and chest pains or feelings of faintness or dizziness given the integrative worldview of African culture in which psyche-soma or body-mind splits are absent”). See also D. Bichescu *et al.*, *Long-term consequences of traumatic experiences: an assessment of former political detainees in Romania*, 1 CLINICAL PRACTICE AND EPIDEMIOLOGY IN MENTAL HEALTH 17, 25 (2005) (study of long-term somatic symptoms of Romanian political prisoners who were subjected to abuse and torture similar to what the Guantánamo detainees have endured).

<sup>79</sup> Griffeth, *supra* n. 27 at 259.

<sup>80</sup> *Id.* (this observation led the medical team to “question whether the somatic treatment was in part addressing the unconscious dependency needs of patients with conversion disorder”).



ern backgrounds with physical complaints of pain and distress have somaticized the anxiety and stress caused by the uncertainty and unpredictability of their indefinite detention.

### ***Indefinite Detention Places Detainees at Special Risk of Abuse***

All detainees are at risk of abuse from other detainees or, to the extent housed within a general prison population, from inmates. However, there are a few types of abuses to which individuals in indefinite detention are particularly vulnerable. For example, the fact that detainees are likely to languish in detention for months or years may foster an atmosphere of lawlessness and vigilantism on the part of detention facility personnel, making detainees more vulnerable to physical abuse and violence at the hands of the detaining authority.<sup>81</sup> There is also mounting evidence that women detainees are regular targets of sexual threats, coercion, and abuse precisely because their circumstances are so rife with uncertainty.<sup>82</sup>

## **Harmful Effects of Indefinite Detention are not Resolved Upon Release**

A small but developing body of evidence involving several populations – such as formerly detained asylum seekers, individuals freed from prison after a wrongful conviction, and Vietnam veterans – as well as forensic evaluations of and interviews with former Guantánamo detainees, suggests that physical, social and emotional problems continue to plague individuals long after their release from some form indefinite detention.<sup>83</sup> Taken as a whole, the literature supports the conclusion that the harms that develop during detention do not resolve once the detainee is freed, and that indefinite detention makes detainees vulnerable to new physical, social, and emotional harms after they are released.

### **Indefinite Detention Causes Enduring Personality Change**

Indefinite detention appears to cause fundamental and radical changes in self-perception and drive. One study found that immigration detainees “had changed irrevocably as [people] ... [and

81 Levin, *supra* n. 40 at 460. See also D. Cole and J. Dempsey, *TERRORISM AND THE CONSTITUTION: FIRST AMENDMENT FOUNDATION* 2006, at 177 (arguing that “policy of preventive detention led to the practice of coercive interrogation”); B. Morentin, L. Callado and M. Itxaso Idoyaga, *A follow-up study of allegations of ill-treatment/torture in incommunicado detainees in Spain*, 18 *TORTURE VOLUME* 87, 91 (2008) (noting that “incommunicado detention creates conditions that facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman, or degrading treatment or even torture”).

82 See, e.g., *AMERICAN GULAG*, *supra* n. 9 at 52 (“Sexual abuse of prisoners is a common practice and INS detainees are especially vulnerable for the simple reason that they can be deported. As a 1993 Justice Department investigation ‘concluded’ [in one specific case, “Detainee’s], version of rape and forced oral sex is corroborated only by her ... statements to public health service personnel ... Moreover, [she] has been deported to Haiti. Under these circumstances, this matter lacks prosecutorial merit”). See also B. Arrigo and J. Bullock, *The Psychological Effect of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 *INT’L J OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY* 622, 634 (2008); M. Ichikawa, S. Nakahara, S. Wakai, *Effect of post-migration detention on mental health among Afghan asylum seekers in Japan*, 40 *AUSTRALIAN AND NEW ZEALAND JOURNAL OF PSYCHIATRY* 341, 342 (2006); HRW, *DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION*, August 2010 (detailing examples of sexual abuse of detainees by private detention facility personnel).

83 See PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; Human Rights Center/International Human Rights Law Clinic, University of California, Berkeley, *RETURNING HOME: RESETTLEMENT AND REINTEGRATION OF DETAINEES RELEASED FROM THE U.S. NAVAL BASE IN GUANTÁNAMO BAY, CUBA*, 3-7 (March 2009). See also “Guantánamo: Beyond the Law” (database containing government allegations, personal information and interviews with 66 detainees who have been released from Guantánamo) available at <http://detainees.mcclatchydc.com/>. Because of pressing concerns about the torture and cruel, inhuman, and degrading treatment to which Guantánamo detainees were subjected, these reports rarely attempt to distinguish between harms resulting from overt abuse and harms resulting from the indeterminate nature of the detention.

demonstrated a] general loss of agency.”<sup>84</sup> These enduring, permanent effects of detention mirror changes that have been observed among individuals deemed to have been wrongfully convicted of crimes – a population whose circumstances parallel those of indefinite detainees insofar as they wake up each day with the same kind of uncertainty and lack of control about when or whether they will finally be exonerated and released.

Ten years after being released from their wrongful imprisonment, the men in one such study were found to suffer “continuing distress, disability and social dysfunction,” irreversible personality changes that at best, were persistent, and at worst, had been exacerbated by the passage of time.<sup>85</sup>

*[T]he men had marked features of estrangement, loss of capacity for intimacy, moodiness, inability to settle, loss of a sense of purpose and direction, and a pervasive attitude of mistrust toward the world. They were withdrawn, unable to relate closely ....[and exhibited] characteristics that were not previously seen, such as a hostile ... attitude toward the world ... feelings of emptiness or hopelessness [and] a chronic feeling of threat.*<sup>86</sup>

A British resident and former Guantánamo detainee described himself in similar terms:

*You have to speak with people again and you have to become normal, because I was locked up more than five years, and most of those years I was in isolation cells. So it was very difficult to learn how to communicate again with people, to talk in a normal way and socialize in a normal way. It was difficult to go back to work, to wake up in a normal way, to sleep in a normal way. We had and we still do experience lots of psychological hardships, dreams, bad dreams. Sometimes some incidents trigger memories, back inside the cells. Our emotions is different, psychologically our feelings, we're more cold than when we used to be. We can't express our feelings easily to our families and friends. Suspicion, and we suspect everyone and everything ... [T]he physical damage that was caused to us probably is more apparent and is hard, but the psychological wounds and injuries inside each one of us is more deeper and probably longer than the physical abuse.*<sup>87</sup>

Likewise, families of individuals released from prison many years after having been wrongfully convicted said that the men “were not the people they used to be; they were withdrawn, unable to relate.” One mother observed, “He’s like a complete stranger. I don’t understand him at all;” siblings described a new “emotional coldness;” wives reported that their husbands, who were “warm, family men” before prison, returned home different men: “We were really shocked ... It’s very distressing ... he is not the same person ... he just [is] not able to fit into family life.”<sup>88</sup>

## Indefinite Detention Shatters Familial Bonds

Being indefinitely detained has devastating emotional, social and economic consequences for detainees, their children, their spouses and extended family, which makes it very difficult for families to navigate their way back toward wellness and stability even when they are fortunate enough to be reunited.

<sup>84</sup> Coffey, *supra* n. 26 at 2076.

<sup>85</sup> Grounds, *supra* n. 28 at 41–42 (hypothesizing that the “diagnostic category of PTSD most accurately describes responses to single catastrophic events rather than responses to very prolonged trauma. In cases where either the trauma itself is chronic or the long-term psychological effects persist over many years, the condition becomes more accurately regarded as an enduring personality change”).

<sup>86</sup> *Id.* at 22.

<sup>87</sup> O. Deghayes, *Omar Deghayes and Terry Holdbrooks Discuss Guantánamo (Part Three): Deaths at the Prison*, available at <http://www.andyworthington.co.uk/2010/06/03/omar-deghayes-and-terry-holdbrooks-discuss-guantanamo-part-three-deaths-at-the-prison/>.

<sup>88</sup> Grounds, *supra* n. 28 at 23.

For many detainees and their families, indefinite detention means a complete and utter lack of contact, which can be the result of onerous rules governing a particular type of detention or on account of the geographic challenges that result when detention centers are built in remote locations.<sup>89</sup> Detainees who are privileged to have even limited contact with spouses and children are not in a markedly better position, however. Detainees report feeling uncertain about what role they can or should play in the lives of their children, including worrying about whether it is in the best interests of their children to suffer from feelings of abandonment (if detainees keep their distance) or from feelings of shame or fear at seeing their parent locked up like a criminal (if detainees try to maintain some semblance of normal contact).<sup>90</sup> Questions about what one can expect from one's spouse or partner also abound: with a future plagued by uncertainty, the long odds of a speedy reunification may shatter expectations of faithfulness, thus splintering otherwise stable bonds. Guilt and worry about a spouse's mental health have also been shown to exacerbate the mental health problems of detainees, a factor that adds yet another weight to the already heavy toll that indefinite detention places on a marriage.<sup>91</sup>

This worry operates in both directions. Clinical evaluations of a small group of women whose husbands were indefinitely detained in the United Kingdom on national security grounds indicated that all of the women suffered from clinical depression, while one woman manifested symptoms of PTSD, triggered by her husband's arrest, "and another ha[d] a phobic anxiety state," all of which the clinicians attributed "directly to the incarceration of their husbands and its indefinite nature."<sup>92</sup> Children also suffer when they witness, or believe, that a loved one has been persecuted, and "may develop dysfunctional beliefs, such as that he/she is responsible for the bad events or that he/she has to bear the parent's burdens. These types of beliefs can lead to long-term problems with loyalty conflicts, guilt, personal development, and maturing into an independent adult."<sup>93</sup>

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**Indefinite detainees often emerge from detention having "lost a generation of family life."**

Complicating the situation even more, indefinite detainees, like those who are wrongfully imprisoned, often emerge from detention having "lost a generation of family life."<sup>94</sup> Many return home to find that their parents died while they were in custody; others must reconcile themselves to the fact that although they were young men with young children when first taken into custody, they have emerged "middle-aged men with grandchildren."<sup>95</sup> In short, during detention, detainees struggle with the fear that their life may be "wast[ing] away;" while release forces them to confront the fact that both the life they knew and all hope of the life they might have lived are now gone.<sup>96</sup>

89 Department of Homeland Security Office of the Inspector General, *Management of Mental Health Cases in Immigration Detention*, OIG-11-62 ("OIG Report"), March 2011 at 10; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 55.

90 Human Rights Watch, *Findings: Arbitrary and Indefinite Detention of Unadjusted Refugees*, in JAILING REFUGEES, December 29, 2009, available at <http://www.hrw.org/en/node/87369/section/7> [describing the situation of a refugee indefinitely detained in Arizona, "hundreds of miles away [from his wife and two young children who] he says he calls ... often, but, "It is kind of stressful. They ask me the same questions: 'When are you coming home?'" None of his family has visited [the detainee] since his detention. "I don't want them to waste the time to drive 12-15 hours for a 25 minute visit"; and quoting another refugee indefinitely detained in Arizona whose his nine-year-old (based in California) "does not know that [his father] is in detention. 'He knows I'm away. He's a smart kid. But I didn't want to tell him"; another, speaking of his three young children, "I don't want them to visit. For them, dad is somewhere on vacation. I told [my fiancée], 'Tell them what you gotta tell them but don't tell them I'm in here'"].

91 Robbins, *supra* n. 42 at 408.

92 *Id.*

93 PHR, EXAMINING ASYLUM SEEKERS [2001] at 93.

94 Grounds, *supra* n. 28 at 22.

95 *Id.*

96 AMERICAN GULAG, *supra* n. 9 at 294-95 ["If they don't want me in this country, send me back. If Cuba don't want me back, send me to the jungle .... I would like INS to get me in a plane, give me a parachute, and drop me in the jungle. Somewhere. I'll survive. I'd rather be in the jungle, in the desert, in the middle of the ocean, than be locked

*I worry about my future. I am now 39 years old. The train I might have caught has left without me on board, and now it is too late to catch it .... It is the train that leads to the destination of marriage and a family. I will be too old to be a father in the future.*<sup>97</sup>

For families, the consequences are equally grave. The loss of productivity among “heads of families inevitably work[s] privation and hardship upon their dependents,” hence the chance that a family has succeeded in remaining intact while it awaits the return of a formerly bread-earning detainee is remote.<sup>98</sup> One recent study, although specifically focused on difficulties former Guantánamo detainees face as they try to reintegrate themselves back into their communities, describes the economic and educational hardships experienced by families on account of their loved ones’ indefinite detentions, hardships that seem entirely generalizable: children abandon their educations in order to work so that family members can eat; assets – homes, shops, etc., – are sold to make ends meet; families go into deep debt in order to track down the detained family member and “to finance efforts to secure their release.”<sup>99</sup> In short, the “[c]onsequences for family relationships are devastating.”<sup>100</sup>

### Individuals Released from Indefinite Detention Carry the “Stain” of Detention

Release from indefinite detention is almost never accompanied by a full airing of the evidence that supposedly justified a detainee’s prolonged detention nor any kind of public exoneration concerning his alleged wrongdoing or dangerousness. Hence, being released rarely clears the stain of detention from the detainee’s reputation.<sup>101</sup> Indeed, as Justice Jackson recognized more than 50 years ago, an immigrant indefinitely detained by the US government on account of secret evidence may find himself in a Catch-22: Having marked the immigrant as “an unwanted man,” the government’s efforts to find another country willing to accept him are remote, which prolongs the detainee’s detention, making the stain on the detainee’s reputation even more indelible, making repatriation less and less likely.<sup>102</sup>

PHR and other NGOs have documented these very effects on the lives of detainees released from Guantánamo. Communities, potential and former employers and home-governments often view these individuals as dangerous. These views persist despite the fact that the US government released the detainee without having charged him of any crime and long before the hostilities between the United States and al Qaeda have ended – a release that powerfully suggests that the United States found neither any basis for the detainee’s original detentions nor any evidence of wrong-doing or dangerousness sufficient to hold him until the end of hostilities.<sup>103</sup>

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up. You know how much suffering you see here? You know what it is like to sit in here and you see your life waste away?”) (Mariel Cuban detainee after 20 years in detention). It is a sad testament to the detention system that some detainees who served prison sentences prior to being placed in immigration detention have sought leave to be transferred back to prison where they at least had access to educational and reading materials as well as opportunities for exercise and for low-pay work. *Id.* at 275.

97 Coffey, *supra* n. 26 at 2075.

98 Cotter, *supra* n. 36 at 249.

99 UC Berkley, RETURNING HOME, *supra* n. 83 at 5.

100 HRW, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTÁNAMO (2008) at 14-15.

101 Cotter, *supra* n. 36 at 264 (“[O]n release, [the detainee] is a marked man. Suspicion clings to him which he will never be able to clear”).

102 Mezei, 345 U.S. at 219-220 (Jackson, J., *dissenting*).

103 See, e.g., PHR, BROKEN LAWS, BROKEN LIVES, *supra* n. 7 at 92-93; UC Berkeley, RETURNING HOME, *supra* n. 83 at 3-5.

# Indefinite Detention has Grave Consequences for Individuals Traumatized by Torture and Ill-Treatment

Taken as a whole, the literature strongly suggests that the uncertainty of an indefinite detention has the potential to cause physical disease and psychological disorders in healthy individuals. As noted above, however, context matters. It is therefore necessary to evaluate the harm that such a detention imposes on those most vulnerable to its harmful effects, namely, those who are suffering the ill effects of torture and other cruel, inhuman, or degrading treatment. National security detainees held at Guantánamo who, in addition to having been subjected to ill-treatment, are held in conditions of extreme isolation, and asylum seekers fleeing persecution, are two such vulnerable populations who are also specific targets of US policies that contemplate or permit indefinite detention.

## National Security Detainees are Indefinitely Detained and Vulnerable to Harm

Approximately 175 individuals – only 15 of whom are considered “high value detainees” – are being held at Guantánamo in what is likely to remain a state of indefinite detention.<sup>104</sup> Sixty-five of these individuals having already been approved for transfer but that does not render their continued detention any less “indefinite”: political resistance to transferring any detainee into the United States means that these detainees will not be released unless government officials successfully establish or exploit diplomatic ties with the detainees’ countries of origin or, alternatively, find other foreign governments willing to take them.<sup>105</sup> At a time when thousands of immigrants, including many detained on account of immigration, not criminal, violations, languish in detention facilities pending the state department’s ability to negotiate their transfer, the prior administration’s effective – if false – branding of every detainee as the “worst of the worst” presages that diplomatic efforts on their behalf will fail more often than they succeed.<sup>106</sup>

For the rest of the detainees who have neither been approved for transfer nor deemed suitable for prosecution, the creation of Periodic Review Boards pursuant to the March 7 Executive Order does little more than provide a veneer of process to what is likely to remain for many or most detainees a revolving door of indefinite detention – a state reminiscent of the outcomes available to K., the protagonist in the *The Trial*.<sup>107</sup> The experience of a recently released detainee from Bagram drives this point home:

104 GUANTÁNAMO TASK FORCE, *supra* n. 1 at 3. The report notes that of the 240 detainees whose situations the Task Force reviewed, 44 had already been transferred to foreign countries and the Attorney General had announced that the government would be prosecuting 12 others, while more recent reports from independent sources that concerning Guantánamo detainees indicate that as of November 2010, 174 detainees remained. A. Worthington, “Who Are the Remaining Prisoners in Guantánamo? Part Eight: Captured in Afghanistan (2002-07),” *available at* <http://www.andyworthington.co.uk/category/a-list-of-the-remaining-guantanamo-prisoners-new/>. See also “The Guantánamo Docket: High Value Detainees,” *supra* n.

105 GUANTÁNAMO TASK FORCE, *supra* n. 1 at 26-28 (describing presidential mandate issued to Secretaries of State and Defense to engage in diplomatic efforts with foreign nations to resettle detainees designated for release). *But see* 112th Congress, 1st Sess., H.R. 1473, § 1112(2)(c)(1), April 14, 2011 (complicating those efforts by making any resettlement plan contingent on there being no instance of a former Guantánamo detainee being released to a particular country and who then engaged in terrorist activities).

106 See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 684, 696 (2001) (noting the seven years of “sensitive repatriation negotiations” in which government had already engaged in its effort to transfer immigrant awaiting release from detention).

107 F. Kafka, *THE TRIAL* (Project Gutenberg: 2003) at 157-160. Here, K. is advised that “deferment” may be a better outcome than an “apparent acquittal” because “deferment ... consists of keeping proceedings permanently in their earliest stages .... Compared with an apparent acquittal, deferment has the advantage that the defendant’s future is less uncertain, he’s safe from the shock of being suddenly re-arrested and doesn’t need to fear the exertions and stress involved in getting an apparent acquittal just when everything else in his life is the most difficult ... [and] both have in common that they prevent the defendant being convicted ... [even if] they also prevent his being properly acquitted.”

*I was released a few weeks ago. At my release an American colonel apologized to me. He said that they had concluded that I was innocent and that I had worked for the good of Afghanistan. He said that after 2.5 years! ... According to Afghan and international law you can detain a person for three months, but they hold people for years and years without any decision. Since the demonstrations, there are now reviews every six months, but there are so many people who have already been kept for years and who are still in the prison. Their detention just gets extended every time... In the end I was sent to two Afghan courts. They decided to release me. Two months after that the Americans released me. They don't care about the Afghan courts.... I wasted 2.5 years of my life.<sup>108</sup>*

- Medical storeowner, recently released from Bagram.

### ***National Security Detainees Suffer from Psychiatric Disorders Due to Torture and Other Cruel, Inhuman, or Degrading Treatment***

Since 2005, PHR has documented evidence of severe and prolonged physical and mental trauma among nearly all former national security detainees it has had the opportunity to evaluate. These traumas are consistent with torture even when tested against the more restrictive definition advanced by the Office of Legal Counsel in 2002.<sup>109</sup> The practices that caused these injuries include enhanced interrogation techniques authorized by the Bush Administration as well as unauthorized forms of cruelty made possible by a permissive command environment in which US personnel were encouraged to “take the gloves off.”<sup>110</sup> These practices included:

- sensory deprivation;
- isolation;
- sleep deprivation;
- forced nudity;
- the use of military working dogs to instill fear;
- sexual humiliation, molestation and assault;
- religious exploitation;
- mock executions and threats of harm with handguns and power drills;
- the threat of violence or death toward detainees or their loved ones, including sexual assault of female family members, and murder of detainee’s children;
- waterboarding;
- exposure to extreme cold (including induced hypothermia);
- stress positions;
- extreme sensory deprivation and overload; and
- shaking, striking, and other physical abuse including the application of pressure to the arteries on the sides of a detainee’s neck resulting in near loss of consciousness.<sup>111</sup>

Given PHR’s consistent findings of trauma among former detainees and the government’s continued prohibition against independent medical and psychiatric evaluation of currently held detainees,<sup>112</sup> there is reason to be concerned that the practices that caused the documented

<sup>108</sup> Martine van Bijlert, *Stories people tell (2): Bagram prison; not a single good day*, Afghanistan Analysts Network, available at <http://aan-afghanistan.com/index.asp?id=1543>.

<sup>109</sup> See Iacopino, *supra* n. 6 at 34; PHR, *AIDING TORTURE*, *supra* n. 6; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; PHR, *BREAK THEM DOWN*, *supra* n. 7; PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.

<sup>110</sup> PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 2 at 7.

<sup>111</sup> See Iacopino, *supra* n. 6 at 34; PHR, *AIDING TORTURE*, *supra* n. 6; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; PHR, *BREAK THEM DOWN*, *supra* n. 7; PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.

<sup>112</sup> Brenner, *supra* n. 5 at 470.



injuries have been the rule rather than the exception for the seven to nine years that most of these detainees have been in US custody.

Ill-treatment of the kinds to which these detainees have been subjected has been shown to be associated with severe depression, anxiety, and PTSD.<sup>113</sup> Independent evaluations of detainee medical records, corroborated by reports from lawyers and reporters indeed reveal a high prevalence of “depression, anxiety, psychosis, and personality disorders.”<sup>114</sup> These symptoms are highly consistent with torture, particularly where they develop in detainees who had no history of psychological problems prior to being detained.<sup>115</sup> Moreover, reports of increased dissociation, schizophrenia and psychosis among Guantánamo detainees suggest that their mental status has been additionally and severely compromised by conditions of detention more restrictive and isolating than conditions at Supermax facilities here in the United States as well as – surprisingly – at Bagram Air Base in Afghanistan.<sup>116</sup> This highly traumatized population is most vulnerable to the harms caused by the ongoing uncertainty, uncontrollability, and unpredictability of indefinite detention.

### ***Indefinite Detention Exacerbates Torture-Induced Mental Pain and Psychological Disabilities***

*Now I am in a bad situation. I feel like half my life is gone. My economic situation is bad, my savings are gone. My health is not well. My legs hurt, I don't know why, maybe because of the lack of exercise ... I don't feel well at all. I am afraid that, because this happened once for no reason, it may happen again. Who can guarantee me that I will not be unlucky again? When I was arrested I was engaged. I still am, but I have no money or income. So much happened in those years, I cannot remember it all .... There was not one good day in all those years. We were not treated like humans. Even though we had done nothing wrong and they had no information against us.*<sup>117</sup>

- Medical storeowner, recently released from Bagram

As the debate over indefinite detention intensifies, the example of Ali Saleh Kahlah al-Marri, detained for 6 years without charge, may prove cautionary to those who think that detention can be designed in a humane way. A Charleston lawyer who now speaks to Marri by phone every few days and visits him in person every other week believes that nothing has been tougher on his client than the uncertainty of not knowing if he would ever been released. The lawyer said, “He would have preferred beatings. He’d say, ‘Andy, it’s worse than beating.’ He wanted to be sent to Egypt to be renditioned. He’d say, ‘Torture me - but end it.’”<sup>118</sup>

113 See, e.g., Basoglu, *supra* n. 34.

114 Brenner, *supra* n. 5 at 470.

115 PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 1 at 68 [describing PHR’s physical and psychological evaluation of Rasheed, whose medical file lacks any indication of psychiatric disorder upon his arrival at Guantánamo [after being transferred there from Bagram and Kandahar prisons in Afghanistan] but that, over the course of his four years of detention at Guantánamo, evidence medical observation of increasingly severe psychopathology]. See also V. Iacopino and S. Xenakis, *Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series*, 8, 3 PLoS Med. 1, 3 (April 2011) [“medical records indicate that, prior to detention in GTMO, none of the detainees had any past psychological history or family history of psychological problems”].

116 “Scientific studies name hallucinations, psychotic states and regressive behavior as frequent and typical effects of isolation.” *BROKEN LAWS, BROKEN LIVES*, *supra* n. 1 at 68. That these effects would be observed in Guantánamo detainees should come as no surprise where, for example, “none of the men currently held at Guantánamo have been allowed to receive a visit from a family member or friend, and few have even been allowed to make a phone call home.” HWR, *LOCKED UP ALONE*, *supra* n. 100 at 15, 22-23. By contrast, inmates at the federal Supermax prison, including convicted criminals like Zacarias Moussaoui, the September 11 conspirator, are permitted several visits per month from family and friends, regular phone calls and recreation opportunities, while detainees at Bagram Air Base are permitted video conference calls with family members. *Id.*

117 van Bijlert, *supra* n. 108.

118 Mayer, *supra* n. 38 [describing case of al-Marri who was indefinitely detained in isolation in South Carolina for six years before finally being charged and prosecuted in federal court in 2009]. al-Marri is currently serving an 8-year

It is well known that healthy individuals can develop psychopathology when subjected to the isolating and restrictive conditions of Supermax facilities.<sup>119</sup> It has also been widely acknowledged that those same conditions of confinement exacerbate the symptoms of inmates with pre-existing mental illnesses, causing them “severe psychiatric morbidity, disability, suffering, and mortality.”<sup>120</sup>

Likewise, indefinite detention, which can create severe psychological distress and physical disease in healthy individuals, must be understood to exacerbate and perpetuate the suffering of detainees with psychiatric disorders like PTSD, depression and other psychopathology. Unlike mentally ill inmates, however, whose psychiatric disorders predate their Supermax confinement (and may have contributed to them having committed the underlying offense and serving time in a Supermax facility), national security detainees at Guantánamo appear, on the whole, to have had no prior history of psychiatric disorders, hence the mental suffering exacerbated and perpetuated by indefinite detention is mental suffering caused by the treatment and conditions they have endured in US custody.<sup>121</sup>

Helplessness and fear are two of the principal triggers of PTSD,<sup>122</sup> and inducing feelings of dread, dependency, helplessness, and futility was the purpose and effect of the interrogation tactics used on national security detainees.<sup>123</sup> The uncertainty, uncontrollability, and unpredictability created by indefinite detention likewise provoke feelings of dread and helplessness.<sup>124</sup> Clinicians and researchers have noted that the cumulative effect of multiple forms of maltreatment must be understood in exponential terms, rather than linear, with each form of abuse amplifying the effect of other forms of abuse. As one report noted:

*In interviews, former detainees used words like “futile,” “desperate,” “helpless,” and “hopeless” to describe their feelings as they reflected on their incarceration at Guantánamo. As months turned into years, the cumulative effect of indefinite detention, environmental stressors, and other forms of abuse began to exact an increasing psychological toll on many detainees.*<sup>125</sup>

For national security detainees who continue to suffer the mental and physical effects of torture, and who are also subjected to extreme conditions of detention known to cause extreme

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prison sentence in the US Penitentiary, Florence in Colorado (a Supermax facility), having been convicted of one count of conspiracy to provide material support or resources to a foreign terrorist organization.

119 See, e.g., Haney, *supra* n. 30.

120 Arrigo, *supra* n. 82 at 633 (quoting *Jones ‘El v. Berge*, 164 F.Supp. 2d 1096, 1101 (W.D. Wis. 2001)); HWR, *LOCKED UP ALONE*, *supra* n. 100 at 20-21.

121 Iacopino and Xenakis, *supra* n. 115 at 3.

122 Friedman, *supra* n. 56 at 0.

123 PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7 at 6, 16, 28; Army Regulation 15-6: *Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* (the Schmidt Report) 1 Apr 05 (Amended 9 Jun 05), at 7-8, 15-16 (describing sexual humiliation of detainees as accepted “futility” techniques); J. Mayer, *The Black Sites: A rare look inside the CIA’s secret interrogation program*, *THE NEW YORKER*, August 13, 2007 (describing CIA paradigm as starting with isolation and then moving to “eliminate the prisoners’ ability to forecast the future – when their next meal is, when they can go to the bathroom – [causing the detainee to experience] dread and dependency”).

124 *Id.* See also Tyson, *supra* n. 61 at 81; Levin, *supra* n. 40 at 460. See also Pourgourides, *supra* n. 42 at 673. Pourgourides’ clinical study of asylum detainees in the UK “found that detainees are rendered hopeless and powerless in detention. They have to reconcile the contradiction of seeking sanctuary in a climate of ongoing threat and hostility. The unknown duration and reasons for detention mean they are unable to make sense of their predicament and deal with it in a meaningful way. The unpredictable outcome of detention, in particular the fear of deportation is a constant cause of stress. Detention denies asylum seekers the resources to cope with adversity, blocks adaptation to the host society and impairs psychological healing. The responses to detention, including despondency, demotivation, anxiety and depression are understandable responses to an abnormal situation. They can manifest in constellations of symptoms consistent with diagnoses of [PTSD], depression, anxiety, and psychosis. However, they can also be understood as universal manifestations of misery and suffering. This misery and suffering are generated by the practice of detention.”

125 Human Rights Center *et al.*, *GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES*, August 2008 at 3-4 (emphasis in original).



psychopathology, the anxiety, helplessness, dread, and hopelessness caused by the uncertainty of their detention rises to the level of cruel, inhuman, or degrading treatment.<sup>126</sup>

Forensic evaluations indicate that even after being released and reunited with their families and re-integrated into their communities, detainees continue to suffer from the psychological, social, and physical wounds caused by their ill-treatment. These findings comport with clinical observations of prisoners of war and Holocaust survivors.<sup>127</sup> Furthermore, prisoners released from captivity have been found to be at risk of long-term PTSD, with possible contributors being “persistent persecution after release, and lack of rehabilitation and of social support.”<sup>128</sup> Although treatment for PTSD may not guarantee full recovery, and some symptoms of PTSD such as “level of intrusion, somatization, and major depression” appear to be particularly resistant to treatment, significant improvements have been noted in terms of “posttraumatic hyperarousal and avoidance, substance abuse, and dissociation” in former detainees who had regular access to competent psychological support.<sup>129</sup> Without access to care and so long as the psychological wounds continue to be re-opened by fresh harms, indefinite detention forecloses any opportunity for detainees to heal.

### ***National Security Detainees Are At Special Risk of Continued Psychological and Physical Abuse***

In addition to perpetuating the trauma caused by past ill-treatment, indefinite detention leaves national security detainees vulnerable to several specific types of physical and psychological abuse. For example, because Guantánamo detainees lack the kinds of procedural avenues for raising legitimate complaints, they are more likely than inmates in US jails and prisons to resort to hunger strikes as a form of protest.<sup>130</sup> And notwithstanding government officials’ tendency to dismiss hunger strikes as mere acting out, the link between hunger strikes and the indefinite nature of these detainees’ detention is, as military personnel have conceded, explicit: in 2002 and again in 2005, US personnel at Guantánamo described detainee hunger strikes as “protest[s] rooted in uncertainty over their indefinite detention and their fate.”<sup>131</sup> This form of protest places detainees at serious risk of physical and psychological harm. As a former prison doctor put the point:

*[t]he lack of ... protections and alternative means of resolution of legitimate disputes in US detention facilities such as Guantánamo is the faulty foundation that actually sets the stage for*  
*1) more hunger strikes, and*  
*2) hunger strikes that are clinically more difficult [to] resolve ... without the use of force.*<sup>132</sup>

126 PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n.7 at 99 (“it must be recognized that multiple abusive techniques were usually used in combination presumably for the intended effect of amplifying physical and psychological pain”). See also Basoglu, *supra* n. 34 at 135. That there is as much research on the effects of torture reflects the sad truth that the field of torture studies has exploded since 2001: A search of PubMed for articles with the term “torture” in the title or abstract yielded 1258 results since September 11, 2001; when restricted to the 100 years prior to September 11, 2001, the same search produced 0 results.

127 PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7 at 44-45; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7 at 118.

128 H. Johnson and A. Thompson, *The development and maintenance of post-traumatic stress disorder (PTSD) in civilian adult survivors of war trauma and torture: A review*, 28 *CLINICAL PSYCHOLOGY REVIEW* 36, 25 (2007).

129 Bichescu, *supra* n. 78 at 25.

130 A. Leighton, *What will happen to us?* Associated Press, March 3, 2002 (quoting the commander of Guantánamo naval base as identifying the “underlying complaint” motivating hunger strikers as concern about the future. “The single biggest complaint is that they want to know what will happen to them”). See also PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 1 at 65 (Guantánamo detainee who “was reported as participating in a hunger strike demand[ed]: “Either send me home or prosecute me”).

131 Leighton, *supra* n. 130; T. Golden, *Tough U.S. Steps in Hunger Strike at Camp in Cuba*, *NY TIMES*, Feb. 9, 2006 (“military officials and the lawyers agreed that when another wave of hunger strikes began in early August [2005] they were more generally focused on the indefinite nature of the detentions and that it was harder for the authorities there to address”).

132 S. Allen, “The challenge of hunger strikes and the risk of medical complicity in abuse and torture in U.S. detention

While a “successful” hunger strike may result in the detainee’s death, forced feeding, the typical response on the part of US officials, causes psychological scars and places the striker at risk of “major infections, pneumonia, and collapsed lungs.”<sup>133</sup>

Unfortunately, despite President Obama’s intention to break sharply with Bush-era tactics, an intention expressed most forcefully in the first days of his administration, some of the policies pursuant to which those tactics were implemented – as well as key personnel responsible for their implementation – remain in place today.<sup>134</sup> As PHR and other NGOs have noted in correspondence with Defense Department personnel, Appendix M of Army Field Manual 2-22.3, describes interrogation techniques in language that “give[s] rise to human rights concerns or that risk[s] sowing ambiguity.”<sup>135</sup> Specifically, Appendix M employs permissive and vague language concerning sleep manipulation and sensory deprivation.<sup>136</sup> These two techniques have consistently been shown to cause “high levels of depression, anxiety, paranoia ... impaired cognition, susceptibility to suggestion [and] dissociative states” even in individuals who voluntarily engage in activities such as polar expeditions or space exploration that they understand will expose them to these conditions.<sup>137</sup> In light of what is now known about the use of torture and abuse to “soften” detainees as well as the efforts undertaken by the Office of Legal Counsel to manipulate language and exploit legal loopholes in an attempt to legitimate such treatment, government assurances that permissive and ambiguous language will not be misused are hollow, at best.

Likewise, the continued presence of behavioral science consultation teams (commonly known by the acronym “BSCT”) that are known to have exploited medical information about detainees’ psychological vulnerabilities for purposes of crafting targeted interrogation strategies that would “break” the detainee physically and psychologically, gives at least the appearance that despite a change of administration, nothing has actually changed at Guantánamo Bay.<sup>138</sup> PHR fears that policies that may be interpreted as permitting torture and the presence of personnel associated with facilitating torture create the opportunity for these acts to continue.

### **Asylum Seekers Are Especially Vulnerable to Harm When Indefinitely Detained**

Since assuming responsibilities formerly delegated to the Immigration and Naturalization Service, Immigration and Customs Enforcement (ICE) (an arm of the Department of Homeland Security (DHS)), has detained tens of thousands of people who fled persecution in their countries of origin and sought asylum in the United States. In 2008, the last year in which DHS issued its semi-annual report to Congress, 8,480 asylum seekers were detained.<sup>139</sup> Although

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facilities,” Testimony before U.S. Helsinki Commission on Medical Evidence of Torture, available at <http://physiciansforhumanrights.org/library/statements/statement-2008-7-25.html>.

133 ACLU Letter to Defense Secretary Gates in Response to Force-Feeding of Guantánamo Detainees, January 9, 2009, available at <http://www.aclu.org/human-rights/aclu-letter-defense-secretary-gates-response-force-feeding-guantanamo-detainees>.

134 See PHR, *BREAK THEM DOWN*, *supra* n. 7 at 47 (reporting on behavioral science consultation teams’ (BSCTs) roles in conveying information about detainees’ physical and psychological vulnerabilities to interrogators so that interrogators might exploit those weaknesses); Iacopino and Xenakis, *supra* n. 115 at 3. See also United States Army Medical Command, OTSG/MEDCOM Policy Memo 09-053, January 7, 2010 and US Army Behavioral Science Consultation To Detention Operations, Intelligence Interrogation, Detainee Debriefing, and Tactical Questioning, 1-29 (suggesting a current, continuing tactical role for Behavioral Science Consultation Teams in interrogations); Department of Defense Directive, Number 3115.13 at 10, December 9, 2010 (defining “mobile interrogation team” as including “behavioral science experts” that “is organized, trained, equipped, and dispatched by the [interagency body responsible for interrogating high-value detainees] to interrogate [those] detainees”).

135 Appendix M Letter, Nov 29 2010, Letter from PHR & affiliated orgs with recommended updates and changes to Appendix M, available at <http://physiciansforhumanrights.org/site-search/search.jsp?query=appendix%20m>

136 *Id.*

137 Brenner, *supra* n. 5 at 472.

138 See *supra* n. 134.

139 DHS/ICE Detention and Removal Operations Report Required by Section 903 of the Haitian Refugee Immigration

some asylum seekers are detained for days, others languish in detention for months or even years and, most importantly, none know when they will be released, rendering all of their confinements “indefinite.”<sup>140</sup> On the day that an asylum seeker is taken into custody by ICE, she has no way of knowing when she will be released or whether she will be released freely into the United States or sent back to the country from which she fled.

DHS has issued guidelines that state the agency’s intention to shift the presumption away from mandatory detention for at least some sets of asylum seekers.<sup>141</sup> Unlike regulations, however, guidelines are not binding on the agency, which means that chances are high that two identically situated asylum seekers will be treated differently depending on how and where they enter the United States and on the disposition of the particular officers they meet.<sup>142</sup> Furthermore, the guidelines appear to provide immigration officials with unfettered discretion to detain asylum seekers that an agent believes may be “dangerous to the community,” discretion that invites determinations based entirely on prejudice and instinct rather than evidence, thus contributing to the asylum seeker’s experience of indefinite detention being rife with uncertainty, uncontrollability, and unpredictability.<sup>143</sup>

### ***Asylum Seekers Are a Traumatized Population***

Asylum seekers arrive on US shores having escaped persecution, illegal confinement, torture, rape, and loss, followed by the stress of fleeing their home and often being forced to abandon their family.<sup>144</sup> The numbers are stunning: in one study of detained asylum seekers, investigators found that 74% had been tortured before arriving in the US; 67% had been imprisoned in their country of origin; 59% reported the murder of a family member or friend, and 26% reported having been sexually assaulted prior to immigrating.<sup>145</sup> Although conditions of immigration detention tend not to be nearly as restrictive as the conditions in which national security detainees are held, asylum seekers are another population that is especially vulnerable to the harmful physical and psychological effects of an indefinite, indeterminate detention.

### ***Indefinite Detention Exacerbates Asylum Seekers’ Existing Psychological and Physical Vulnerabilities***

*Because of being detained, not knowing when I will be allowed to get out, or whether I will get out ... If I were not in detention, these stresses would be decreased because I would be free and I would be able to occupy myself... I never expected this was what was going to happen to me. I thought I was going to a place where things would get better, but life is even more difficult [now] because I am here. I am not free. I feel powerless and I don’t know what is going to happen to me.*<sup>146</sup>

- Detained Asylum Seeker

*When I am talking to you now it is as if you are shaking, (he said while waving his hand back and forth to express the motion he sees). When I’m nervous, I shiver from the inside and sweat... When I’m doing something and then it comes to my mind that I’m in prison and I don’t know what will happen to me, I feel as if my heart... it starts pumping very fast. I feel like some-*

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Fairness Act (PL 105-277), December 4, 2009, at 3 & 1/21.

140 See, *id.* at 17/21 (indicating that 100 asylum seekers, including many who met the “credible fear” standard, were still in custody one year after being detained).

141 A/HRC/WT.6/9/USA/1, *supra* n. 17 at ¶ 93.

142 See HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 33.

143 A/HRC/WT.6/9/USA/1, *supra* n. 17.

144 Pourgourides, *supra* n. 42 at 673.

145 Keller, *supra* n. 8; PHR, FROM PERSECUTION TO PRISON, *supra* n. 9 at 50-51.

146 PHR, FROM PERSECUTION TO PRISON, *supra* n. 9 at 67.

one who just received a message that his relative died ... When I think of all these things I'm going through, I feel so restless I don't want anyone to come near me.<sup>147</sup>

- Detained Asylum Seeker

The main problem is that we don't know what is going to happen. At least with a prison sentence you know you are lessening your time. But here, even after three years they may still send you back .... In my country I was in prison for five days and there were beatings, but then they release you after five days. But you get here to a democratic country, and it goes on and on with no release. It's another kind of torture – mental torture....No one knows we're here.<sup>148</sup>

- Asylum detainee in US detention facility after 6 months of detention

The most threatening aspect [of detention] is loss of liberty for an indeterminate period of time – detention without trial imposed on people fleeing injustice in a context where no crime has been committed.<sup>149</sup>

- Physician/researcher detained in Australian Refugee Detention Center

[D]etention without time limit, no matter how reasonable the conditions, is extremely stressful. When combined with an uncertain future, language difficulties, a perceived or real lack of information and the fact that some detainees appear to be terrified at the prospect of being deported, the stress increases.<sup>150</sup>

- British Inspector of Prisoners

**Detention can induce fear, isolation and hopelessness, and exacerbate the severe psychological distress frequently exhibited by asylum seekers who are already traumatized.**

PHR and others have long observed that “[d]etention can induce fear, isolation and hopelessness, and exacerbate the severe psychological distress frequently exhibited by asylum seekers who are already traumatized.”<sup>151</sup> For some asylum seekers, the clinical signs of depression, anxiety and PTSD with which they present at the start of detention worsen over the length of their detention, with detentions of longer durations causing long-term health effects years after release.<sup>152</sup> For others, detention results in the development of “significant psychotic symptoms ... [that] were not present prior to detention.”<sup>153</sup>

In one study, a (detained) Australian medical doctor documented several stages of depression among his fellow asylum detainees. He observed that detainees entered detention facilities shocked at having been locked up rather than granted the refuge they sought. Shock typically gave way to “hope that confinement [would] be short-lived,” but as detainees realized “that they face[d] a serious threat of forcible repatriation or detention for an indeterminate period, or both,” they tended to develop “major depressive disorder[s] ... dominated by hopelessness, passive acceptance and an overwhelming fear of being targeted or punished by the managing

<sup>147</sup> *Id.* at 65-66.

<sup>148</sup> *Id.* at 7.

<sup>149</sup> A. Sultan and K. O’Sullivan, *Psychological disturbances in asylum seekers held in long term detention: a participant observer account*, 175 *Med J of Australia* 593 (2001).

<sup>150</sup> Pourgourides, *supra* n. 42 at 674.

<sup>151</sup> PHR, *FROM PERSECUTION TO PRISON* at 9.

<sup>152</sup> Keller, *supra* n. 8 at 1722; Robjant, *supra* n. 42 at 310 (“The detention experience incapacitates detainees, in that it does not allow utilisation of usual coping skills, and constitutes a meaningless environment. Detainees are therefore preoccupied by time and experience extreme boredom and frustration as well as a sense of having no future ... detention itself is an ongoing trauma”).

<sup>153</sup> Robbins *supra* n. 42 at 408. See also Ichikawa, *supra* n. 82 at 345 (reporting that “post-migration detention of Afghan asylum seekers in Japan was independently related to their worsened mental health”).

authorities.”<sup>154</sup> Many detainees responded to the stress of detention by becoming pathologically passive; others engaged in aggressive behavior against themselves or others, resulting in a high prevalence of self-harm.

Over the years, several groups of researchers have hypothesized that the worsening of asylum seekers’ mental health and the development of more debilitating symptoms was “clearly linked to a sense of helplessness and hopelessness which is an integral aspect of indefinite detention.”<sup>155</sup> As one clinician noted, “[t]he experience of detention compounds the misery of refugees. Captivity is stressful in any context but is particularly debilitating when it occurs over an indeterminate period and to people who have had previously traumatic experiences of detention.”<sup>156</sup>

One explanation for the exacerbating effect of indefinite detention is the extent to which the trauma of being taken into custody triggers memories of the trauma an asylum seeker endured – or witnessed a loved one endure – in his country of origin.<sup>157</sup> For example, unlawful disappearance is a common method employed by security forces to control a civilian population through fear and a mistrust of authority. An asylum seeker who suffers from PTSD caused by having being unlawfully disappeared (or from having lost a family member to an unlawful disappearance) is likely to re-live that underlying trauma upon being suddenly and unexpectedly taken into custody and handcuffed by US officials, sent to an unknown location and provided with no information about whether or when he will be released or deported. Moreover, as the research suggests, individuals who are genuinely shocked at finding themselves in custody (as opposed to the detention of individuals who engage in activities they know are likely to result in detention) are the most vulnerable to the damaging effects of uncertainty and unpredictability.<sup>158</sup>

For asylum seekers, the uncertain duration of their detention, with all of its attendant health and social consequences, is compounded by the fact that conditions and events surrounding immigration detention are unpredictable, thus aggravating the detainees’ sense that their situation lacks any control. Immigration detainees, including many legal immigrants, are “transferred heedlessly,” with ICE “subjecting detainees to a chaotic game of musical chairs [that can only be described as] haphazard.”<sup>159</sup> Many of these transfers take place in the middle of the night and with full knowledge (on the part of ICE) that the transfer will place the detainee out of reach of his attorney, family, and community support, distant from exonerating evidence, and into jurisdictions that interpret federal legislation in ways more hostile to immigrants’ rights.<sup>160</sup> There is also evidence that ICE has deported people in the middle of the night, without prior notice to deportees, their lawyers, or family members, and, on occasion, with the forced admin

154 Sultan and O’Sullivan, *supra* n. 149 [noting that “[p]re-detention factors such as torture or a predisposition to depression play a critical role” in certain stage of depression in detained refugees].

155 Robbins *supra* n. 42 at 408. See also Silove, *supra* n. 36 at 367 [noting “the evidence suggests that the indeterminacy of detention makes detention considerably more difficult to endure”].

156 Pourgourides, *supra* n. 42 at 673.

157 Steel and Silove, *supra* n. 42.

158 Saab, *supra* n. 27 at 1250. See also Koopowitz, *supra* n. 47 at 499.

159 Bernstein, *supra* n. 8. Compare Griffeth, *supra* n. 27 at 259 [noting that one team of researchers working with Iraqi citizens and prisoners of war realized significant gains of cooperation and improvement in mental health status when they were able to provide detainees in their care with warnings about transfers, written information about where exactly they were being detained and where exactly they were being transferred to, information that measurably decreased anxiety and “helped defuse fear of the unknown”].

160 Bernstein, *supra* n. 8 [reporting that “the jurisdictions receiving the most transferred detainees is the Federal Court of Appeals for the Fifth Circuit, covering Louisiana, Mississippi, and Texas – which is widely known for decisions hostile to the rights of noncitizens and has the worst ratio of immigration lawyers to detainees”].

istration of drugs.<sup>161</sup> Footsteps approaching a detainee's bunk at night may therefore herald an unexpected transfer to another location or a plane ride back to the country where he was persecuted.

The diffuse and partially-privatized nature of the immigration detention system has consequences, insofar as they heighten and amplify the consequences of stress, anxiety, and social isolation associated with the indeterminacy of indefinite detention. Many immigration detention centers housing asylum seekers are located in rural areas, long distances from urban communities and even further from whatever familial, social, or linguistic ties an asylum seeker may have.<sup>162</sup> Asylum seekers would appear, therefore, to be particularly susceptible to the physical risks of social isolation, including the aggravation of cardiovascular disease, rises in stress-related hormones and physiological changes that can adversely affect the body's immune symptom, and to its psychological risks, which threaten to compromise the detainees' ability to cope and adapt to the stress and distress associated with being in an uncertain, uncontrollable, and unpredictable situation.<sup>163</sup>

Because asylum seeking detainees are often held in prison facilities, detainees who are suicidal or experiencing acute episodes of mental illness risk being placed in segregation units intended to discipline or punish prisoners, a practice that even the Office of Inspector General (OIG) recognizes "exacerbates mental illness, ... is counterproductive to stabilizing a detainee ... [and is associated with] increased levels of depression and anxiety."<sup>164</sup> Indeed, the OIG has warned that "[i]t is not possible to make segregation into a therapeutic setting in which a mentally ill [asylum seeking] detainee's condition would improve."<sup>165</sup>

Finally, a problem unique to asylum seekers is the fact that not only do some family connections shatter on account of the forced separation, but family connections can be shattered by the trauma of being indefinitely detained together. Observations from Australia, a country that instituted mandatory detention of asylum seekers long before such policies were instituted in the United States, reveal that parents age visibly as they suffer the physical and psychological consequences of the uncertainty of detention, and are wracked by guilt at having exposed their family to such conditions, situations that may lead to "role reversal – where young children ha[ve] to care for distressed or incapacitated parents."<sup>166</sup>

## Legal Analysis

PHR has issued several reports documenting evidence that national security detainees were subjected to torture and abuse at the hands of US personnel, and in those reports, PHR has outlined the ways in which this ill-treatment violates US domestic law as well as international treaties to which the US is a signatory.<sup>167</sup> In addition, many NGOs have forcefully argued that in-

161 AMERICAN GULAG, *supra* n. 9 at 69-84 (describing report of detainee being forcibly sedated in order to be subdued for deportation and another deportation being accomplished in the middle of the night).

162 OIG Report, *supra* n. 89 at 10; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 55.

163 Government and non-governmental organizations have also raised concerns about ICE's ability to manage and even keep track of the mental health of the asylum seekers in its care. To the limited extent ICE is responsible for staffing detention centers (i.e., 18 out of nearly 250 total centers), mental health vacancies are reportedly hovering at 50%, with remote and undesirable locations blamed for some of those vacancies. In addition, ICE exercises little oversight and collects very little data about the mental health of detainees held at the approximately 230 detention centers that are run by private contractors or other state or local entities. See OIG Report, *supra* n. 89 at 1, 5-6; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 52.

164 OIG Report, *supra* n. 89 at 15.

165 *Id.*

166 Silove, *supra* n. 24 at 368.

167 See, e.g., PHR, BREAK THEM DOWN, *supra* n. 7 at 101-122; PHR/HRF, LEAVE NO MARKS, *supra* n.7 at 37-41.



definite detention violates prohibitions against arbitrary detention under both domestic and international law.<sup>168</sup> The legal arguments advanced by these organizations provide a blueprint for advocates and policy makers alike on these two critical and troubling aspects of United States immigration, foreign and national security policy.

The legal discussion that follows supplements these prior analyses with an argument focused specifically on the physical and psychological harms associated with indefinite detention. This discussion begins by arguing that individuals in indefinite detention – i.e., individuals who are not being detained for the purpose of prosecuting alleged crimes – are entitled to the most vigorous protections of the due process clause of the Fifth Amendment, which prohibits the government from subjecting detainees to treatment that has a punitive purpose or effect, and that they should not be limited to the much weaker protections of an imported Eighth Amendment standard.<sup>169</sup> The discussion goes on to argue, however, that the amplifying and exacerbating effect of indefinite detention on the physical and psychological health of previously traumatized populations rises to the level of cruel, inhuman, or degrading treatment, and thus violates even the Eighth Amendment's deliberate indifference standard, as well as domestic and international law prohibiting such treatment.

### **Indefinite Detention Violates the Due Process Rights of Detainees**

Evidence that the indeterminacy of indefinite detention causes serious physical and psychological harm in healthy individuals and exacerbates pre-existing psychological injuries in vulnerable individuals raises the question whether government policies purportedly justifying such detentions are unlawful and whether government officials implementing such policies are liable for the resulting harms. Answering these questions in a complete and comprehensive way would require an exhaustive analysis of legal considerations that define the scope of the detaining authority's obligations to detainees, the nature of detainees' rights, and the array of available remedies, as well as an exhaustive analysis of the fact-specific considerations that would affect that legal analysis – both of which are beyond the scope of this report.<sup>170</sup>

168 Inter-American Commission on Human Rights, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS, December 30, 2010, available at <http://cidh.org/countryrep/USImmigration/TOC.htm>; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 33; PHR, From Persecution to Prison, *supra* n. 9 at 156-166.

169 See *infra*, Part VI(A)(4) for a discussion of the applicability of the Eighth Amendment's "deliberate indifference" standard to the treatment of detainees.

170 The detaining authority's obligations and the scope of detainees' rights ultimately turns on factors not otherwise covered in this paper, including legal consideration such as

(i) whether the detainee is being held pursuant to immigration or national security legislation or policies;  
(ii) whether, apart from the mental and physical injuries it causes, indefinite detention is ever constitutional, see, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (declining to consider constitutional concerns raised by possibility of indefinite detention under the AUMF on the facts presented); *Zadvydas*, 533 U.S. at 689 (avoiding constitutional question); Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?* 116 HARV. L. REV. 1868, 1870 (2003) (arguing that the entry fiction, which treats aliens paroled into the United States as being forever knocking at the gate and hence not entitled to the protection of Fifth Amendment, violates the unconstitutional conditions doctrine, which forbids the government from "condition[ing] entry into the United States on the relinquishment of one's right to be free from indefinite detention"); as well as

(iii) whether statutes (such as § 7 of the Military Commissions Act of 2006 (MCA)) which purport to strip federal courts of jurisdiction to hear claims concerning the treatment and conditions of detention of certain classes of detainees, are constitutional. See, e.g., *al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 109 (D.D.C. 2010) (ruling that jurisdiction stripping provision of MCA prohibited court from reaching merits of detainee's claims). But see R. Fallon, Jr. and D. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror*, 120 HARV. L. REV. 2029, 2063 (2007) (arguing that the MCA's "total preclusion of judicial review of challenges to conditions of confinement is unconstitutional").

Those legal considerations would, in turn, be affected by fact-specific considerations including, e.g.,

(i) whether the detainee is being held within the geographic boundaries of the United States, at Guantánamo Naval Bay in Cuba, at Bagram Airfield in Afghanistan or at some other site controlled to some degree by US personnel, see, e.g., B. Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 481-95 (2010) (building the case for why *Boumediene's* reasoning that the Constitution applies to Guantánamo Naval Base should apply with equal force to Bagram Airfield in Afghanistan);

The goal of this section is therefore to develop a general framework for how claims based on the injuries identified in this report ought to be evaluated and how such claims might be prosecuted. This framework is grounded principally in the substantive liberty interest protected by the Due Process Clauses of the Fifth Amendment.

### ***Indefinite Detention Implicates the Due Process Clause of the Fifth Amendment***

The Fifth Amendment to the United States Constitution provides that “No person shall be ... deprived of ... liberty ... without due process of law.” The right to liberty protected by this clause is implicated when federal authorities detain individuals who have not been convicted of crimes.<sup>171</sup> More important for present purposes, it is the substantive aspect of this constitutional right that is implicated when government authorities detain these individuals in a way that places them at a substantial risk of serious harm.<sup>172</sup> In other words, if a detention scheme is unconstitutional as a matter of substantive law because it causes serious harm, then the scheme itself is illegitimate, and no amount of process by which a detainee can demonstrate that he is an inappropriate victim of that scheme can cure the constitutional defect. Accordingly, the Periodic Review Boards established by the Obama Administration’s March 7 Executive Order, which merely add layers of process to what will continue to be detention of an indefinite nature, cannot cure the substantive constitutional defects of such a scheme.

Most of the individuals indefinitely detained by the United States are currently entitled to claim due process protections; *all* should be. The use of the term “person” in the Due Process Clause has long been understood to include all persons within the territory of the United States, regardless of their legal status.<sup>173</sup> And while the Supreme Court has not entirely settled the question regarding the extent to which constitutional guarantees apply to aliens detained at Guantánamo,<sup>174</sup> where the Court has recognized that

1) Article 1, § 9, c. 2 of the Constitution applies to Guantánamo Bay on account of the United States exercising *de facto* control over the base;<sup>175</sup> and that

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(ii) whether the detainee is a citizen and if not, what his legal status is;

(iii) who the custodians of the detention facility are and, importantly,

(iv) whether there is evidence that, in addition to suffering the harms associated with the uncertainty of their detention, a detainee has been subjected to torture or other cruel, inhuman, and degrading treatment or punishment.

171 *Bell v. Wolfish*, 441 U.S. 520 (1979). Parallel proscriptions apply to state custodians under the Fourteenth Amendment.

172 *Wilkins v. May* 872 F.2d 190, 195 (7th Cir. 1989) (“[I]f ever there were a strong case for ‘substantive due process,’ it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the Fourth Amendment – as no one doubts – and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the Eighth Amendment – as no one doubts – it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process”). See also *Miller v. Fairman*, 872 F.Supp. 498, 503 (N.D. Ill. 1994) (“the pretrial detainee’s right against punishment is a substantive due process right. No matter what procedures are used to punish an unconvicted pretrial detainee, [the Supreme Court’s decision, *Bell v. Wolfish*] would hold such punishment unconstitutional”).

173 *Zadvydas*, 533 U.S. at 693 (“the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”); *Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003) (rejecting government’s contention that detention of excludable aliens did not implicate the Fifth Amendment: “We could not more vehemently disagree. Excludable aliens – like all aliens – are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments”).

174 Jennifer K. Elsea, CRS Report for Congress, “Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Courts,” 3 (January 26, 2010).

175 See *Boumediene v. Bush*, 553 U.S. 723, 770-71 (2008): It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our



2) Guantánamo detainees have a right to habeas corpus,<sup>176</sup> “any limitations on the applicability of the Constitution ... fly in the face of this Court’s long-held ... commitment to apply the Constitution’s due process and equal protection guarantees to all individuals within the reach of our sovereignty.”<sup>177</sup>

### ***Detainees Are Entitled to More Protective Treatment Than Convicted Prisoners***

Indefinite detention implicates the Fifth rather than the Eighth Amendment.<sup>178</sup> This is significant for purposes of determining the scope of the government’s obligations as the detaining authority and the nature and scope of an individual’s rights as a detainee.

The government is entitled to great deference in its administration of prisons and its care and treatment of prisoners (i.e., individuals who have been convicted of crimes), and the hurdle that prisoners must clear to successfully challenge those conditions is concomitantly high.<sup>179</sup> A prison sentence is intended to be punitive and accordingly the government’s care and treatment of prisoners must simply satisfy the Eighth Amendment’s prohibition against punishment that is “cruel and unusual.” To succeed on their claims that prison conditions violate this prohibition, prisoners must establish that

- 1) the conditions are objectively foul and inhuman,<sup>180</sup> and
- 2) that prison officials were “deliberately indifferent” to the physical and mental risks these conditions created.<sup>181</sup>

This latter subjective element effectively requires that prisoners establish a malicious or sadistic intent on the part of prison officials in order to prevail.

The deference to which the government is entitled in its administration of facilities in which individuals who have *not* been convicted of crimes are detained and the concomitant hurdle detainees must clear to successfully challenge those conditions must therefore be lower. Indefinite detainees are ordinarily detained pursuant to civil or regulatory, not criminal, proceedings and hence their detention may not have either a punitive purpose or effect.<sup>182</sup> Accordingly, the conditions of detention for detainees and the harms to which they are vulner-

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Government. Under these circumstances the lack of a precedent on point is no barrier to our holding. (internal citation omitted).

176 *Id.*

177 *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall, J., *dissenting*). See also *In re Guantánamo Detainee Cases*, 355 F.Supp.2d 443, 464 (D.D.C. 2005) (ruling that Guantánamo detainees are entitled to due process under the Fifth Amendment). This ruling was subsequently brought into doubt by several decisions of the DC Circuit, but later still it formed part of the context for the Court’s decision in *Boumediene*, in which it held that the Suspension Clause of the Constitution indeed applied to Guantánamo Naval Base.

178 *Ingraham v. Wright*, 430 U.S. 651, 671-72, n. 40 (1977) “[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law”).

179 See, e.g., *Alfred v. Bryant*, 378 Fed. Appx. 977, 980 (11th Cir. 2010) (affirming dismissal of inmate’s “frivolous” claim that sleeping on the ground for 18 days and lacking a functioning toilet violated the 8th Amendment, citing as support other dismissed conditions-related claims including, e.g., “sleeping on [an] unsanitary eating table or on a dirty mattress on the floor,” spending one month “in a filthy roach-infested cell without toilet paper for five days or soap, a toothbrush and toothpaste for ten days,” “sleeping on a steel bed without a mattress for eighteen days;” being housed in a blood and excretion covered cell where “prisoner received cleaning supplies”).

180 *Hudson v. McMillan*, 503 U.S. 1, 9 (1992) (conditions must constitute “extreme deprivation” to violate the Eighth Amendment).

181 See, e.g., *Hernandez v. Velasquez*, 522 F.3d 556, 560-61 (5th Cir. 2008) (rejecting inmate’s claim that being denied access to the outdoor recreation for more than a year violated the 8th Amendment because even if the inmate established that he suffered serious harm as a result of this deprivation, he was unable to establish that the prison officials were aware of facts from which they could draw an inference concerning the harm he was personally suffering but that they actually drew the inference and then ignored it).

182 See, e.g., *Hamdi*, 542 U.S. at 509 (reviewing authorization for non-penal detention of prisoners under the Authorization for Use of Military Force [AUMF], 115 Stat. 224); *Zadvydas*, 533 U.S. at 690 (deportation proceedings “are civil, not criminal, and we assume that they are nonpunitive in purpose and effect”).

able as a consequence are measured not by the Eighth Amendment's "minimum standard of care"<sup>183</sup> but by the "more protective fourteenth [or fifth] amendment standard."<sup>184</sup>

The Supreme Court has identified two lodestars for guiding courts' analysis with respect to whether the conditions of detention violate detainees' due process rights:

*First, persons who have been involuntarily committed [in a civil proceeding] are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, may not be punished prior to an adjudication of guilt in accordance with due process of law.*<sup>185</sup>

Unfortunately, the Court has offered little in the way of concrete guidance to lower courts about how much latitude they can factor into their assessment without veering entirely off course.<sup>186</sup> Indeed, Justice Marshall questioned whether at least one of these lodestars might not be fundamentally flawed: Because incarceration and its effects represent an "infamous punishment," "determining whether a given restraint constitutes punishment is an empty semantic exercise [where the incarceration of pretrial detainees] is in many respects no different from the sanction society imposes on convicted criminals."<sup>187</sup>

Consequently, applying the due process standard in a way that fulfills the promise of it being "more protective" of detainees' rights has proved to be a challenge for courts heavily schooled in Eighth Amendment jurisprudence – i.e., courts inundated with complaints from prisoners and yet often inured to the deplorable conditions in which so many of our country's prisoners are held.<sup>188</sup> Evidence of this is found in the countless decisions from jurisdictions all over the country in which, after noting that detainees retain Fifth Amendment liberty interests (interests that are somewhat sacrificed by prisoners upon conviction), courts test the objective constitutionality of conditions of detention against cases upholding the constitutionality of conditions in which convicted prisoners are held. These cases often go on to inappropriately require detainees to meet the Eighth Amendment's subjective component by establishing that custodians were deliberately indifferent to the harms that resulted from those conditions.<sup>189</sup>

183 *Padilla v. Yoo*, 633 F.Supp.2d 1005, 1035 (N.D. Cal. 2009) ["In light of the Supreme Court's observation that the due process rights of pretrial detainees are at least as great as the Eighth Amendment protections available to a convicted prisoner, we have recognized that, even though the pretrial detainees' rights arise under the Due Process Clause, the guarantees of the Eighth Amendment provide a *minimum standard of care* for determining their rights"] (emphasis in original).

184 *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). See also *Youngberg v. Romeo*, 457 U.S. at 316 ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntary committed – who may not be punished at all – in unsafe conditions").

185 *Jones*, 393 F.3d at 931-32 (emphasis in original), quoting *Youngberg*, 457 U.S. at 321-22, and *Bell*, 441 U.S. at 535.

186 *Seling v. Young*, 531 U.S. 250, 266 [2001] illustrates this point. *Seling* concerned a challenge to Washington's sexually violent predator statute and was decided 22 years after the seminal case of *Bell v. Wolfish*, yet the *Seling* court noted that much about this area of the law remained unsettled: "This case gives us no occasion to consider how the civil nature of a confinement scheme relates to other constitutional challenges, such as due process, or to consider the extent to which a court may look to actual conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil [i.e., non-punitive] in nature."

187 *Bell*, 441 U.S. at 569 & 569 n. 7 (Marshall, J., dissenting) [citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)].

188 See, e.g., *Stevenson v. Carroll*, 495 F.3d 62, 69 n. 4 (3rd Cir. 2007) [reinstating pretrial detainees' complaint concerning conditions of detention after it was improperly analyzed by District Court according to Eighth Amendment standard]; *Wilson v. Cook County Board of Commissioners*, 878 F.Supp. 1163, 1167 (N.D. Ill. 1995) (noting that the 7th Circuit looks to Eighth Amendment cases "to define the term punishment and the state of mind required to find that a detention facility official's actions amount to punishment.")

189 See, e.g., *Manarite v. Springfield*, 957 F.2d 953, 957-58 (1st Cir. 1992) [affirming ruling that, despite undisputed evidence that police chief

(i) had promulgated suicide prevention policies that required police to confiscate shoelaces from all individuals taken into custody, and

(ii) had been briefed on four shoelace-related suicides since the policy had been put in place, indicating that policy was not being enforced,

Cases construing the Eighth Amendment's requirements may, in egregious circumstances, be useful in illustrating the floor below which conditions of detention may not sink. However, if "detainees cannot be punished because they have not yet been convicted, then [they] cannot be subjected to conditions of confinement substantially worse than they would face upon [conviction]" or, as one court put it, "purgatory cannot be worse than hell."<sup>190</sup> To be true to the spirit of the Supreme Court's teaching, therefore, meeting the Eighth Amendment's lowest common denominator cannot be the end of the due process inquiry:

*[T]he Supreme Court in Bell did not endorse the notion that jail authorities have carte blanche to subject pretrial detainees to the same level of discomfort that would be acceptable under the Eighth Amendment for convicts. The proper inquiry under due process is whether the jail conditions bear a reasonable relationship to a legitimate goal, or whether they are arbitrary and purposeless.*<sup>191</sup>

Where a detention scheme has a civil rather than a penological purpose, the conditions should not have a punitive effect.<sup>192</sup>

### ***Application of Due Process Factors Suggests that Indefinite Detention is Unconstitutionally Punitive***

Among the factors that courts have identified as relevant to the determination whether a detention scheme that is civil or regulatory on its face is unconstitutionally punitive, three stand out as particularly applicable to the problem of indefinite detention:

- a) whether detainees are treated worse than convicted prisoners;<sup>193</sup>
- b) whether detainees are exposed to the challenged conditions for an extended period of time;<sup>194</sup> and
- c) whether the sanction "has historically been regarded as a punishment."<sup>195</sup>

Applying these factors to policies purporting to justify indefinite detention, the balance tips powerfully toward a conclusion that the effects of such policies render them unconstitutionally punitive.<sup>196</sup>

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estate of individual who hung himself with laces [who had been taken into protective custody on account of public drunkenness] failed to prove that police chief had actual knowledge of the risk of suicide and hence had not been "deliberately indifferent". But see *Jones*, 393 F.3d at 933 ("If an incapacitated *criminal* defendant need not prove 'deliberate indifference' to state a substantive due process claim, then neither should a *civil* detainee, who retains greater liberty protections than his criminal counterpart") (emphasis in original).

190 *Jones*, 393 F.3d at 933, quoting *Lynch v. Baxley*, 744 F.2d 1452, 1461 [11th Cir. 1984].

191 *Miller v. Fairman*, 872 F.Supp. 498, 504 [N.D. Ill. 1994].

192 *Hamdi*, 542 U.S. at 518 ("It is now recognized that [c]aptivity [in war] is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character") (internal quotation marks and citations omitted); *Zadvydas*, 533 U.S. at 690 (detention of individuals pending deportation proceedings "are civil, not criminal, and we presume that they are nonpunitive in purpose and effect"); *Basardh v. Obama*, 612 F.Supp.2d 30, 34 (D.C. 2009) (relying on *Hamdi* and granting Guantánamo detainee's habeas petition on grounds that AUMF "speaks only to the prevention of *future* acts of international terrorism against the United States; it does not authorize unlimited, unreviewable detention. Instead, the AUMF requires some nexus between the force [i.e., detention] and its purpose [i.e., preventing individuals from rejoining the enemy to commit future hostile acts]").

193 *Jones*, 393 F.3d at 932.

194 *Bell*, 441 U.S. at 524, n. 3 & 542-43.

195 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 161, n. 16 [1963] (holding that "civil" statute stripping citizenship from individuals who left the country for the "purpose of evading or avoiding training and service" in times of declared war was undeniably punitive, a conclusion supported by the fact that the "drastic consequences of statelessness have led to reaffirmation in the [UDHR] of the right of every individual to retain a nationality").

196 Indefinite detention may also meet the definition of unlawful punishment for purposes of a claim that it constitutes an unlawful Bill of Attainder. See, e.g., *Artway v. New Jersey*, 81 F.3d 1235, 1247 [3rd Cir. 1996] ("Under the Bill of Attainder Clause, legislatures are forbidden to engage in legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial") (internal quotations omitted).

### > Are detainees treated worse than convicted prisoners?

Indefinite detention exposes detainees to harms from which convicted prisoners are protected.<sup>197</sup> Individuals convicted of crimes serve sentences of fixed terms of a known duration, and are therefore able to avoid the psychological harms (e.g., the dread, chronic anxiety, and uncertainty) and the physical consequences (e.g., the physiological changes associated with chronic stress) of indefinite detention. Even inmates sentenced to life terms without parole are granted the privilege of knowing more about their immediate and long-term fate than the detainee who is indefinitely detained. This knowledge can provide the inmate with at least a starting point from which he can learn to cope and adapt to his circumstances.

National security detainees are treated worse than convicted prisoners in another significant respect. The US

- i) created the opportunity for national security detainees to be abused by placing them in the legal black hole of indefinite detention;<sup>198</sup>
- ii) countenanced the abuse to which these individuals were subsequently subjected while indefinitely detained;<sup>199</sup> and is now
- iii) exacerbating the physical and psychological harms caused by that abuse by subjecting them to a detention of an indeterminate duration.

The legitimacy, transparency and accountability evidenced by our judicial system in meting out prison sentences of a fixed term following a properly obtained conviction, along with the legal standards that protect prisoners from abuse stand in sharp contrast to the cycle of abuse and unconscionable mistreatment of indefinite detainees.<sup>200</sup>

### > What is the duration of detainees' exposure to these conditions?

This factor represents the linchpin of the analysis. As several courts have recognized, a detention of indefinite duration raises serious due process concerns because it violates detainees' liberty interests.<sup>201</sup> As this report demonstrates, however, in addition to violating a detainee's liberty interests, indefinite detention causes serious physical and psychological harm. The question in this context is therefore whether the duration of detainees' exposure to these harmful conditions is punitive, a question that operates on two levels.

First, the fact that detainees have no way of knowing how long they will have to endure the dread, chronic anxiety, and uncertainty caused by the indeterminate duration of their detention makes them vulnerable to – or, in the case of national security and asylum detainees, exac-

197 *Jones*, 393 F.3d at 932 (treatment of civil detainee is presumptively punitive when he is "confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held").

198 D. Cole and J. Dempsey, *TERRORISM AND THE CONSTITUTION: FIRST AMENDMENT FOUNDATION* 2006, at 177 (arguing that "policy of preventive detention led to the practice of coercive interrogation").

199 Iacopino and Xenakis, *supra* n. 115 at 3.

200 See, e.g., *Ford v. Clarke* -- F.Supp.2d ---, 2010 WL 3860635, \*11 (D.Mass.) (ruling that detainee's substantive due process rights were violated by placing pretrial detainee in Disciplinary Unit [a restrictive, Supermax-type facility] to "complete" disciplinary sentence he had received while previously incarcerated, where "continuation of a DDU sanction following the completion of a criminal sentence is inconsistent with how all other prisoners are treated").

201 See, e.g., *Hamdi*, 542 U.S. at 521 (explaining, in response to Hamdi's contention that the AUMF does not authorize indefinite detention, "we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel"); *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem"). See also *Mezei*, 345 U.S. at 218-19 (Jackson, J. *dissenting*) ("Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by judgment of his peers or by the law of the land").

erbates existing – physical and psychological injuries.<sup>202</sup> Second, the actual duration of many immigration and national security-related detentions can be measured in years, rather than in days or weeks.

This is one of the few factors about which courts have been more definitive and expansive. For example, in rejecting a claim that double-bunking violated the due process rights of pretrial detainees, the Supreme Court emphasized that detainees were typically released within 60 days, but it cautioned that confining detainees “in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment.”<sup>203</sup> In another case, a 15-day delay in the statutorily mandated transfer of mentally incapacitated criminal defendants to a state mental hospital was deemed presumptively punitive because the defendants “have a high risk of suicide, and the longer they are deprived of treatment, the greater the likelihood they will decompensate and suffer unduly.”<sup>204</sup> Indefinite detention meets the durational standard for treatment that has an unconstitutionally punitive effect.

#### > Has it “historically been regarded as a punishment”?

Determining whether a civil sanction is unconstitutionally punitive may turn, in part, on whether the sanction has historically been regarded as punishment – i.e., if it “can only be explained as also serving either retributive or deterrent purposes.”<sup>205</sup> Locking individuals in jail or, in the case of the Guantánamo detainees, in facilities modeled on Supermax prisons, and throwing away the key without ever having charged the individual with a crime, would seem the epitome of the kind of treatment historically understood as punishment. Moreover, one of the factors that courts may look to in determining whether a civil sanction has an unlawful retributive or deterrent purpose is whether the sanction is an anomaly in the law – i.e., whether it strays beyond what has come to be understood as within the historic range of acceptable and appropriate civil sanctions.<sup>206</sup> Indefinite detention fails that test.<sup>207</sup>

### ***Indefinite Detention Violates Due Process Rights of Traumatized Detainees Even When Tested Against 8th Amendment’s Deliberate Indifference Standard***

Despite widespread recognition that detainees are entitled to better treatment than prisoners, in practice, many courts import the Eighth Amendment standards into their Fifth Amendment analysis by requiring that detainees prove that the detaining authority was deliber-

202 Cf. *Kennedy*, 372 U.S. at 160-61 (emphasizing the risks to individuals who have been rendered stateless by citizenship-stripping statute: “Such individuals as do not possess any nationality enjoy, in general, no protection whatever, and if they are aggrieved by a State they have no means of redress, since there is no State which is competent to take up their case. As far as the Law of Nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty ... no restriction whatever to cause a State from maltreating to any extent such stateless individuals. The calamity is not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever”) (internal quotation marks and citations omitted).

203 *Bell*, 441 U.S. at 524, n. 3 & 542-43.

204 *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003).

205 *Artway*, 81 F.3d at 1257 (quoting *Austin v. United States*, 509 U.S. 602 (1993)).

206 *Id.* at 1258-1259 (discussing *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), in which the Court held that a tax with rates up to 400 percent on illegal drugs and equipment “constituted ‘punishment’ because it was ‘a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for purposes of Double Jeopardy analysis’”).

207 See, e.g., *Mezei*, 345 U.S. at 218-19 (Jackson, J. dissenting) (“Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since King John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by judgment of his peers or by the law of the land”). See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (declining to consider constitutional concerns raised by possibility of indefinite detention under the AUMF on the facts presented); *Zadvydas*, 533 U.S. at 689 (avoiding constitutional question).

ately indifferent to a risk of serious harm, creating an often insurmountable hurdle for detainees to clear.<sup>208</sup> Where, as here, however, indefinite detention both exacerbates the psychological disabilities and physical distress of populations that have already been traumatized by torture and ill-treatment and perpetuates the mental pain suffered as a consequence of that treatment, even a flawed due process analysis should, with the development of an appropriate factual basis, result in a finding that indefinite detention violates a detainee's right to due process.

In order to succeed on a claim that the detaining authority was deliberately indifferent to a detainee's health and safety, the detainee must establish that the detaining authority knows "that inmates face a substantial risk of substantial harm and disregards that risk by failing to take reasonable measures to reduce that harm."<sup>209</sup> The standard has both objective and subjective components: detainees "must show that the conditions to which they are subjected are 'sufficiently serious' ... and that the defendants are deliberately indifferent to inmates' health or safety."<sup>210</sup>

Indefinite detention presents such a serious condition for national security detainees. In addition to suffering the trauma of torture, of possibly unlawful experimentation and of being detained in facilities even more isolating and restrictive than US Supermax facilities, the uncertainty, helplessness, chronic anxiety, and stress created by the indeterminacy of detention exacerbates detainees' existing psychiatric disorders like depression, suicidal ideation, and PTSD.<sup>211</sup>

In order to satisfy the subjective prong of the deliberate indifference test, detainees also have to establish that an

*official [is] both ... aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. If the circumstances suggest that the prison officials were exposed to information about the risk and thus must have known about it, that evidence could be sufficient to allow a trier of fact to find actual knowledge.*<sup>212</sup>

Establishing this subjective element requires the development of individualized facts, but in these cases, would likely present a substantial but not insurmountable evidentiary hurdle for the following five reasons:

- First, the government's prohibition against independent medical evaluations of national security detainees means that one of the principal sources of information about their mental status is the military's own observations of the detainees.
- Second, those observations indicate that detainees had no prior history of psychiatric disorders when first taken into custody.
- Third, those observations likewise document the fact that detainees have developed severe psychiatric disorders over the course of their detention.
- Fourth, it appears, from evidence obtained by PHR and other NGOs, that the purpose of

208 See, e.g., *Telles v. Stanislaus County*, WL 643358, \*6 (E.D.Cal. 2011) (recognizing that it was unclear from the record whether plaintiff was a prisoner or a pre-trial detainee at the time of the alleged mistreatment, and recognizing further that the difference in status entitled him to different protections, yet concluding that "[r]egardless [of his status], with issues related to health and safety, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes. Therefore, the Court will look to the Eighth Amendment to determine Plaintiff's right to adequate medical care") (internal quotations and citation omitted).

209 *Jones'El v. Berge*, 164 F.Supp. 2d 1096, 1117 (W.D. Wis. 2001).

210 *Id.*

211 *Id.* at 1118 ("Without exception, Prisoners 1 through 7 have suffered intensified symptoms, whether increased depression, severe hopelessness, attempts at suicide, command hallucinations, or bizarre behavior"); *Madrid v. Gomez*, 889 F.Supp. 1146, 1264 (N.D. Cal. 1995) ("If the particular conditions of [confinement] being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence – indeed, they have crossed into the realm of psychological torture").

212 *Id.* at 1121 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).



the multiple abuses to which detainees were subjected was to induce the kind of dread and hopelessness that leads to the harms associated with an indeterminate, indefinite detention.

- Fifth and finally, the more “widely disseminated” information about the harmful effects of indefinite detention, both in the field of corrections and among the military, the more likely a detainee would be entitled to “a fair inference that despite [officials’] denials, they did know” that already traumatized detainees are at a substantial risk of serious harm on account of being indefinitely detained.<sup>213</sup>

The efforts of PHR and other NGOs along with countless lawyers, advocates, researchers, clinicians, academic scholars, journalists and former detainees to expose the abuse perpetrated by US personnel and to document the physical and psychological suffering that detainees continue to endure while indefinitely detained play a central role in this regard.

### ***Available Judicial Remedies for Constitutional Violations are Unclear***

Having a federal right does not, however, necessarily entitle detainees to a federal remedy. There are two principal remedial schemes pursuant to which federal courts might adjudicate a detainee’s claim that indefinite detention violated his substantive due process rights: a petition for habeas corpus and a *Bivens*-type civil rights action.<sup>214</sup> In addition to being devilishly intricate,<sup>215</sup> the availability and scope of each of the schemes is the subject of active political debate, pending judicial review,<sup>216</sup> and an important Supreme Court decision, the full measure of which has not yet been established.<sup>217</sup> In addition, determining the best mechanism (and likeliest avenue of success) for pressing a claim that indefinite detention violates a detainee’s Fifth

213 See *Scarver v. Litscher*, 434 F.3d 972, 976 (7th Cir. 2006).

214 See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing private cause of action against federal officers for Fourth Amendment violation). See also *Carlson v. Green*, 446 U.S. 14 (1980) [same for Eighth Amendment violation]; *Davis v. Passman*, 442 U.S. 228 (1979) [same for Fifth Amendment violation].

215 *Cook v. Texas Dep’t of Criminal Justice Transitional Planning*, 37 F.3d 166, 168 (5th Cir. 1994) (“The core issue in determining whether a prisoner must pursue habeas corpus relief rather than a civil rights action is to determine whether the prisoner challenges the ‘fact or duration’ of his confinement or merely the rules, customs, and procedures affecting ‘conditions’ of confinement.”). But see *Bell*, 441 U.S. at 526, n. 6 (“leave[ing] for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself”).

216 For example, on March 2, 2011, the Supreme Court heard oral arguments in an appeal from a Ninth Circuit decision that recognized a *Bivens* action against former US Attorney John Ashcroft on account of his alleged role in the government misusing the material witness statute for purposes of preventive detention. *Ashcroft v. al-Kidd*, No. 10-98. In addition, the scope of habeas review for Guantánamo and other war-related detainees continues to be the subject of debate and consideration within the judiciary and with Congress.

217 In *Boumediene*, 535 U.S. at 792, the Supreme Court ruled that the procedures available to detainees pursuant to Combat Status Review Tribunals were an inadequate substitute for habeas corpus review, and hence the provision of the Military Commissions Act of 2006 (28 U.S.C.A. § 2241(e)(2)) that purported to strip federal courts of jurisdiction to hear habeas petitions represented an unconstitutional suspension of the writ of habeas corpus. The facts of *Boumediene* did not, however, present any question concerning the scope of the habeas review to which detainees were entitled, nor did it therefore present an opportunity for the Court to decide the constitutionality of a separate provision of the MCA that purports to strip federal courts of jurisdiction to adjudicate claims concerning “any aspect of the detention, transfer, treatment, trial, or conditions of confinement.” District Court decisions of the DC Circuit have since ruled that *Boumediene* cannot be read to have invalidated this separate provision of the MCA and have therefore summarily dismissed claims brought by detainees concerning conditions of detention. See, e.g., *al-Zahrani* 684 F.Supp. 2d at 109. In light of the fact that this question has not been presented squarely before and hence not resolved by the Supreme Court, it can be argued that the DC Circuit’s rulings represent an abdication of judicial responsibility. As one court put it,

*[t]hat the Supreme Court’s recognition of a right establishes that right’s existence for lower courts ... tells us nothing about the existence of rights that the Court has not yet addressed. [It is] an indefensible premise that the absence of a Supreme Court opinion on the existence of a particular right means that a particular right does not exist.*

*Johnson v. Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2003). Cf. *Munaf v. Geren* 553 U.S. 674, 706-707 [2008] (Souter, J., concurring). (“where federally protected rights [are threatened], it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief”) (Souter, J., concurring).

Amendment rights will turn on the circumstance-specific factors mentioned earlier including, for example, the location in which the detainee is held, the detainee's citizenship or legal status and the identity of his custodians. For all of these reasons, providing a detailed roadmap to federal court would be an unmanageable feat in the context of this report.

It is important to note, however, that as significant as those procedural and fact-specific issues are, they may not represent the greatest challenge to detainees in securing an effective judicial remedy for violations of their rights to due process. Because the populations being held indefinitely are largely (although not exclusively) made up of non-citizens and individuals appropriately or inadvertently swept into custody in the course of the war with al Qaeda, indefinite detention policies implicate immigration, foreign relations, and national security policies – precisely the kinds of policies whose content and consequences courts are most reluctant to review with any kind of searching inquiry.<sup>218</sup> Some argue that this represents an abdication of the powerful role that the judiciary ought to play to vindicate the rights of individuals as well as to validate the very principles that underlie such policies.<sup>219</sup> Others argue that such recusals may be inevitable and, perhaps, appropriate, so long as the legislative and executive branches of government rise to the challenge. However, rising to the challenge requires that the legislative and executive branches act with restraint so as not to exploit the judicial deference they are assured of receiving. As one commentator put it:

*[The judiciary, which is] in normal times peculiarly competent to weigh the competing claims of individuals and government [is] ill-equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency. A war emergency is even more difficult for a court to navigate. It is for this reason that although we have three branches of government, the deference that a court must give to the other branches means that legislatures and executives must act conservatively.*<sup>220</sup>

Such restraint is regrettably absent from the measures proposed and adopted by both political branches in the last several months concerning the transfer, prosecution and continued detention of national security detainees.<sup>221</sup>

218 See, e.g., *Zadvydas*, 533 U.S. at 696 (although ruling that 8 U.S.C. § 1231(a)(6) of the Immigration and Nationality Act did not authorize the indefinite detention of certain aliens, the Court left open the possibility that “terrorism or other special circumstances [might warrant] special arguments ... for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”). See also S. Gladbeck, *The Detention Power*, 22 YALE LAW & POLICY REV. 153, 174 (2004) (noting that despite the fact that cases challenging the internment of Japanese-Americans during World War II were “replete with serious constitutional questions, the dispositive issue in all three, due largely to the Court’s reluctance to confront the constitutional issues head-on, was the legality of the exclusion orders themselves and the Act of Congress criminalizing violations thereof, and not the constitutionality of [or authority for] the detention”).

219 See, e.g., *Hamdi*, 542 U.S. at 535 (“[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government”); *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., *dissenting*) (warning against “judicial validation of a policy that is otherwise constitutionally repugnant”).

220 Cotter, *supra* n. 36 at 286. See also International Commission of Jurists, ICJ Submission of the Universal Periodic Review of the United States of America 9th Session of the Working Group on the Universal Periodic Review (April 2010) (citing *al-Zahrani v. Rumsfeld*, 684 F.Supp. 2d 103 (D.D.C. 2010), and calling for the Working Group of the Human Rights Council to urge the United States to provide detainees who are victims of human rights violations with effective remedies by, for example, amending the MCA or drafting new legislations).

221 March 7 Executive Order, *supra* n. 1; 112th Congress, 1st Sess., H.R. 1473, §§ 1112-1114, April 14, 2011.



## Indefinite Detention of Traumatized Populations Constitutes Cruel, Inhuman, or Degrading Treatment Under Domestic and International Laws

Domestic statutes, including the Detainee Treatment Act (DTA) and the War Crimes Act (WCA), and international treaties to which the United States is a party, including Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture, criminalize torture as well as cruel, inhuman, or degrading treatment.<sup>222</sup> Although these domestic and international laws tend to specifically define what is meant by “torture,” they generally fail to provide distinct or precise definitions for what constitutes cruel, inhuman, or degrading treatment.<sup>223</sup> Most authorities and courts take the position, however, that the prohibition against cruel, inhuman, or degrading treatment “is conceptually linked to torture by shades of misconduct discernible as a continuum.”<sup>224</sup> Cruel, inhuman, or degrading treatment is therefore understood as including “acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture’ or do not have the same purposes as ‘torture’,”<sup>225</sup> with the determination of whether particular conduct rises to this level turning on case-specific factors.<sup>226</sup>

On their own, the physical harms and mental suffering caused by a detention of an indefinite term might not constitute cruel, unusual or degrading treatment. However, where those harms are inflicted upon individuals like national security detainees held at Guantánamo

- i) who have already been subjected to treatment that meets even the Bush-Administration’s operational definition of torture, and
- ii) who are, in addition, subjected to conditions of detention sufficiently isolating to cause severe pathology in health individuals, the exacerbating effect of the dread and uncertainty of not knowing when or whether detention will end unquestionably causes mental suffering, anguish, and fear sufficient to meet both domestic and international standards of cruel, inhuman, or degrading treatment.

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222 The Detainee Treatment Act of 2005, 42 U.S.C.S § 2000dd (2006), prohibits the “cruel, inhuman, or degrading treatment or punishment” [acts that violate the Fifth, Eighth, and Fourteenth Amendments] of detainees. The War Crimes Act, as amended by the Military Commissions Act of 2006, 18 U.S.C. § 2441 (2006), prohibits “cruel or inhuman treatment.” Common Article 3 of the Geneva Conventions, an article found in all four Geneva Conventions, defines core obligations to be respected in all armed conflicts and not just in wars between countries. It prohibits violence to life and person including murder, mutilation, cruel treatment and torture, outrages upon personal dignity, and in particular humiliating and degrading treatment.

223 *Tachiona v. Mugabe*, 234 F.Supp.2d 401, 437-38 (S.D.N.Y. 2002) [finding that the dragging of a corpse through a public street constituted cruel, inhuman, or degrading treatment for the loved ones and neighbors of the deceased who witnessed the desecration because it would have inflicted “severe emotional pain and indignity[y]”).

224 *Id.*

225 *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1348 (N.D. Ga. 2002).

226 See *Doe v. Qi*, 349 F.Supp.2d 1258, 1321 (N.D.Cal. 2004) [although ruling that particular allegations did not rise to level of cruel, inhuman, or degrading treatment, collecting domestic and international cases applying where conduct was found to rise to that level]; *Jama v. United States Immigration and Naturalization Serv.*, 22 F.Supp.2d 353, 363 (D.N.J. 1998) [physical, emotional, and sexual abuse of immigration detainees constituted cruel, inhuman, and degrading treatment].

## Conclusions and Recommendations

This paper establishes that the profound uncertainty and lack of control characteristic of indefinite detention causes severe physical and psychological harm, and that these harms follow from the nature of the detention, without regard for the purported legal justification or conditions of a particular detention. In light of these serious health effects, policies mandating or permitting indefinite detention must be abolished.

While recognizing that these policies are attempts to respond to difficult questions of national security and immigration policy, Physicians for Human Rights nevertheless urges the US government to take the following affirmative steps to end indefinite detention.

### Regarding National Security Detainees at Guantánamo and Other Sites

- ***The United States government*** should reject solutions to national security problems that permit or rely on indefinite detention and take affirmative efforts to end its current practice.

As this paper has demonstrated, indefinite detention causes new, and exacerbates and perpetuates existing, mental suffering in detainees with a history of torture or ill-treatment. The United States government must not adopt indefinite detention as a solution for the handling of detainees it is reluctant to charge or release. Given the serious harms that it causes, the Obama Administration and Congress should ensure that indefinite detention becomes a relic of the past and not a hallmark of US national security policy.

- ***The United States government*** must support trials in Article III courts for individuals detained at Guantánamo Bay and coordinate the various branches of government to ensure that civilian trials for detainees are a policy priority.

As both recent and historic prosecutions of terrorist suspects demonstrate, United States federal district courts are well-equipped to secure convictions for terrorist activities, thus furthering the government's interest in and obligation to protect the country, its citizens and military personnel from terrorism while meeting its obligation to do so in a timely manner that comports with national and international legal standards of justice.

Federal prosecutors have secured convictions against 400 individuals charged with acts of terrorism in federal courts since the attacks of September 11, 2001, alone. The recent trial of Ahmed Khalfan Ghailani, a Tanzanian citizen who received a life sentence for his involvement in a conspiracy relating to the 1998 bombings of US embassies in Kenya and Tanzania, reaffirms that our legal system is fully capable of, and is a legitimate forum for, trying individuals charged with acts of terrorism. Beginning civilian trials for others currently detained at Guantánamo will end their indefinite detention and provide justice for victims. In order to facilitate civilian prosecutions for terrorism suspects, the United States Congress should end bans on funding transfers of individuals from Guantánamo Bay to facilities in the United States.

- ***The United States government*** should grant a request from the Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment to be allowed to investigate the detention facility at Guantánamo.

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment, Juan Mendez, has requested permission from the United States government to conduct a visit to the Guantánamo Bay facility. In support of the Rapporteur's mission of investigating and ending acts of torture and other forms of cruel, inhuman, and degrading

treatment, which the government publicly embraces, the United States should move quickly to facilitate his visit.

- *The United States government should encourage greater international cooperation for both prosecutions and repatriation of detainees at Guantánamo.*

In order to end the indefinite detention of individuals in Guantánamo, the United States should encourage prosecutions and repatriation of detainees under its control. While transfer to the United States for trials should be a clear priority, the US government should also encourage other countries, without violating US international human rights obligations including non-refoulement protections, to assist with prosecuting individuals and to ensure safe repatriation of those detainees who have been cleared by the US government for release.

- *Until the time that indefinite detention is abolished as a matter of policy, the United States government should provide measures that mitigate the social, psychological, and physical harms such detention causes among detainees.*

In order to mitigate the serious harms caused by indefinite detention, the United States government should institute intermediate steps on the path toward abolishing policies that contemplate or permit indefinite detention. Detainees held indefinitely should have greater access to family members, medical and psychological services, religious and spiritual leaders, and each other. Denying detainees access to those with whom they share or might establish meaningful relationships and denying them medical and religious services serves no legitimate national security goal while exacerbating the psychological trauma these individuals have already experienced by heightening the inherent risks associated with indefinite detention. In order to provide a measure of comfort for those detained indefinitely, the US government should encourage these forms of meaningful, positive and healthy contacts.

- *The United States government should permit non-governmental, independent medical and psychological experts to evaluate the mental and physical health of detainees.*

In light of evidence that national security detainees currently suffer from severe physical, psychological, and mental disabilities as a result of the abuse and conditions to which they have already been subjected, and the evidence in this report concerning the exacerbating effects of indefinite detention on those detainees as well as the evidence that indefinite detention increases morbidity and mortality rates from underlying diseases, the United States government should permit non-governmental, independent medical and psychological experts to evaluate and monitor the health of detainees.

## **Regarding Individuals In Immigration Detention**

- *Strictly limit mandatory detention in the immigration setting to ensure that individuals who do not pose a security threat nor flight risk have the opportunity to pursue release from detention.*

Two 1996 laws greatly expanded the use of mandatory detention by the Department of Homeland Security. The Anti-terrorism and Effective Death Penalty Act (AEDPA) required mandatory detention for non-citizens who had certain criminal histories, even those based on minor offenses or very old convictions sustained by people whose records have remained clean. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) expanded the categories of offenses that triggered mandatory detention, and also required the detention of all new and recently-arrived and apprehended immigrants, including asylum seekers and other survivors of abuse requesting protection at or near our borders. These

laws greatly expanded the use of detention for noncitizens who are awaiting removal proceedings. Congress should strictly limit mandatory detention so that individuals who do not pose a security threat nor flight risk will not needlessly face detention for an indeterminate amount of time while their immigration cases are pending.

- *Strictly limit the use of detention for asylum applicants.*
- *Make greater use of alternatives to detention, including community-based monitoring programs, without increasing the total number of immigrants under active DHS supervision.*

Many asylum seekers arrive in the United States after fleeing violence or persecution, and arrive already traumatized, and hence these individuals are particularly susceptible to the harms caused by indefinite detention. Asylum seekers who pose neither a security threat nor a flight risk should therefore not be subjected to any form of indefinite detention, particularly where alternatives to detention not only exist but have established records of ensuring that individuals report for court proceedings. These alternatives, including, for example, community-based monitoring and regular reporting requirements, eliminate any need for the indefinite detention of asylum seekers as well as any ostensible justification for incurring its corresponding health risks.

- *Allow the American Bar Association and the United Nations High Commissioner for Refugees broad access to immigration detention facilities.*

The American Bar Association (ABA) and United Nations High Commissioner for Refugees (UNHCR) annually review the conditions at selected immigration detention centers. These reviews include in-person inspections and interviews with detainees and personnel. Full reports and recommendations are then submitted to the Department of Homeland Security (DHS). Presently these visits only take place on the condition that the reports will be confidentially submitted to DHS and not made public. These visits and their limited scope and audience do not benefit detainees to the greatest extent possible. More frequent visits to a greater number of facilities will not only more accurately assess conditions of detention, but will let detainees held indefinitely know that groups other than the detaining authority have their interests in mind and are aware of their detention.

- *Promulgate regulations that require the Department of Homeland Security to routinely update an individual in immigration detention about the stages of the detention process including, whenever possible, time estimates regarding court proceedings. Congress should amend the Immigration and Naturalization Act to reflect the need for regular status updates for individuals in immigration detention.*

The uncertainty and lack of control those detained indefinitely experience can be ameliorated by routine updates on an individual's case. Regular dissemination of information will mitigate the harms caused by the uncertainty of indefinite detention.



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# APPENDIX

9

EDWARD CONLON: THE POLICE-ENTERTAINMENT COMPLEX

# HARPER'S

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**THE GUANTANAMO “SUICIDES”**  
A Camp Delta Sergeant Blows the Whistle  
*By Scott Horton*

**MAMMON FROM HEAVEN**  
The Prosperity Gospel in Recession  
*By Benjamin Anastas*

**THAT’LL BE TWO DOLLARS  
AND FIFTY CENTS PLEASE**  
*A story by Myla Goldberg*

*Also: William H. Gass and Philip Levine*

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# THE GUANTANAMO “SUICIDES”

A Camp Delta sergeant blows the whistle  
By Scott Horton

## I. “ASYMMETRICAL WARFARE”

When President Barack Obama took office last year, he promised to “restore the standards of due process and the core constitutional values that have made this country great.” Toward that end, the president issued an executive order declaring that the extra-constitutional prison camp at Guantánamo Naval Base “shall be closed as soon as practicable, and no later than one year from the date of this order.” Obama has failed to fulfill his promise. Some prisoners there are being charged with crimes, others released, but the date for closing the camp seems to recede steadily into the future. Furthermore, new evidence now emerging may entangle Obama’s young administration with crimes that occurred during the George W. Bush presidency, evidence that suggests the current administration failed to investigate seriously—and may even have continued—a cover-up of the possible homicides of three prisoners at Guantánamo in 2006.

*Scott Horton is a contributing editor of Harper’s Magazine. His last article for the magazine, “Justice After Bush,” appeared in the December 2008 issue.*

Late on the evening of June 9 that year, three prisoners at Guantánamo died suddenly and violently. Salah Ahmed Al-Salami, from Yemen, was thirty-seven. Mani Shaman Al-



Utaybi, from Saudi Arabia, was thirty. Yasser Talal Al-Zahrani, also from Saudi Arabia, was twenty-two, and had been imprisoned at Guantánamo since he was captured at the age of seventeen. None of the men had been charged with a crime, though all three had been engaged in hunger strikes to protest the conditions of their imprisonment. They were being held in a cell block, known as Alpha Block, reserved for particularly troublesome or high-value prisoners.

As news of the deaths emerged the

following day, the camp quickly went into lockdown. The authorities ordered nearly all the reporters at Guantánamo to leave and those en route to turn back. The commander at Guantánamo, Rear Admiral Harry Harris, then declared the deaths “suicides.” In an unusual move, he also used the announcement to attack the dead men. “I believe this was not an act of desperation,” he said, “but an act of asymmetrical warfare waged against us.” Reporters accepted the official account, and even lawyers for the prisoners appeared to believe that they had killed themselves. Only the prisoners’ families in Saudi Arabia and Yemen rejected the notion.

Two years later, the U.S. Naval Criminal Investigative Service, which has primary investigative jurisdiction within the naval base, issued a report supporting the account originally advanced by Harris, now a vice-admiral in command of the Sixth Fleet. The Pentagon declined to make the NCIS report public, and only when pressed with Freedom of Information Act demands did it disclose parts of the report, some 1,700 pages of documents so heavily redacted as to be nearly in-

comprehensible. The NCIS documents were carefully cross-referenced and deciphered by students and faculty at the law school of Seton Hall University in New Jersey, and their findings, released in November 2009, made clear why the Pentagon had been unwilling to make its conclusions public. The official story of the prisoners' deaths was full of unacknowledged contradictions, and the centerpiece of the report—a reconstruction of the events—was simply unbelievable.

According to the NCIS documents, each prisoner had fashioned a noose from torn sheets and T-shirts and tied it to the top of his cell's eight-foot-high steel-mesh wall. Each prisoner was able somehow to bind his own hands, and, in at least one case, his own feet, then stuff more rags deep down into his own throat. We are then asked to believe that each prisoner, even as he was choking on those rags, climbed up on his washbasin, slipped his head through the noose, tightened it, and leapt from the washbasin to hang until he asphyxiated. The NCIS report also proposes that the three prisoners, who were held in non-adjointing cells, carried out each of these actions almost simultaneously.

Al-Zahrani, according to the report, was discovered first, at 12:39 A.M., and taken by several Alpha Block guards to the camp's detention medical clinic. No doctors could be found there, nor the phone number for one, so a clinic staffer dialed 911. During this time, other guards discovered Al-Utaybi. Still others discovered Al-Salami a few minutes later. Although rigor mortis had already set in—indicating that the men had been dead for at least two hours—the NCIS report claims that an unnamed medical officer attempted to resuscitate one of the men, and, in attempting to pry open his jaw, broke his teeth.

The fact that at least two of the prisoners also had cloth masks affixed to their faces, presumably to prevent the expulsion of the rags from their mouths, went unremarked by the NCIS, as did the fact that standard operating procedure at Camp Delta required the Navy guards on duty after midnight to “conduct a visual search” of each cell and detainee every ten

minutes. The report claimed that the prisoners had hung sheets or blankets to hide their activities and shaped more sheets and pillows to look like bodies sleeping in their beds, but it did not explain where they were able to acquire so much fabric beyond their tightly controlled allotment, or why the Navy guards would allow such an obvious and immediately observable deviation from permitted behavior. Nor did the report explain how the dead men managed to hang undetected for more than two hours or why the Navy guards on duty, having for whatever reason so grievously failed in their duties, were never disciplined.

A separate report, the result of an “informal investigation” initiated by Admiral Harris, found that standard operating procedures were violated that night but concluded that disciplinary action was not warranted, because of the “generally permissive environment” of the cell block and the numerous “concessions” that had been made with regard to the prisoners' comfort, “concessions” that had resulted in a “general confusion by the guard and the JDG staff over many of the rules that applied to the guard force's handling of the detainees.” According to Harris, even had

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## THE JUSTICE DEPARTMENT FACES A CHOICE BETWEEN THE RULE OF LAW AND THE EXPEDIENCE OF POLITICAL SILENCE

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standard operating procedures been followed, “it is possible that the detainees could have successfully committed suicide anyway.”

This is the official story, adopted by NCIS and Guantánamo command and reiterated by the Justice Department in formal pleadings, by the Defense Department in briefings and press releases, and by the State Department. Now four members of the Military Intelligence unit assigned to guard Camp Delta, including a decorated non-commissioned Army officer who was on duty as sergeant of the guard the night of June 9, have furnished an account dra-

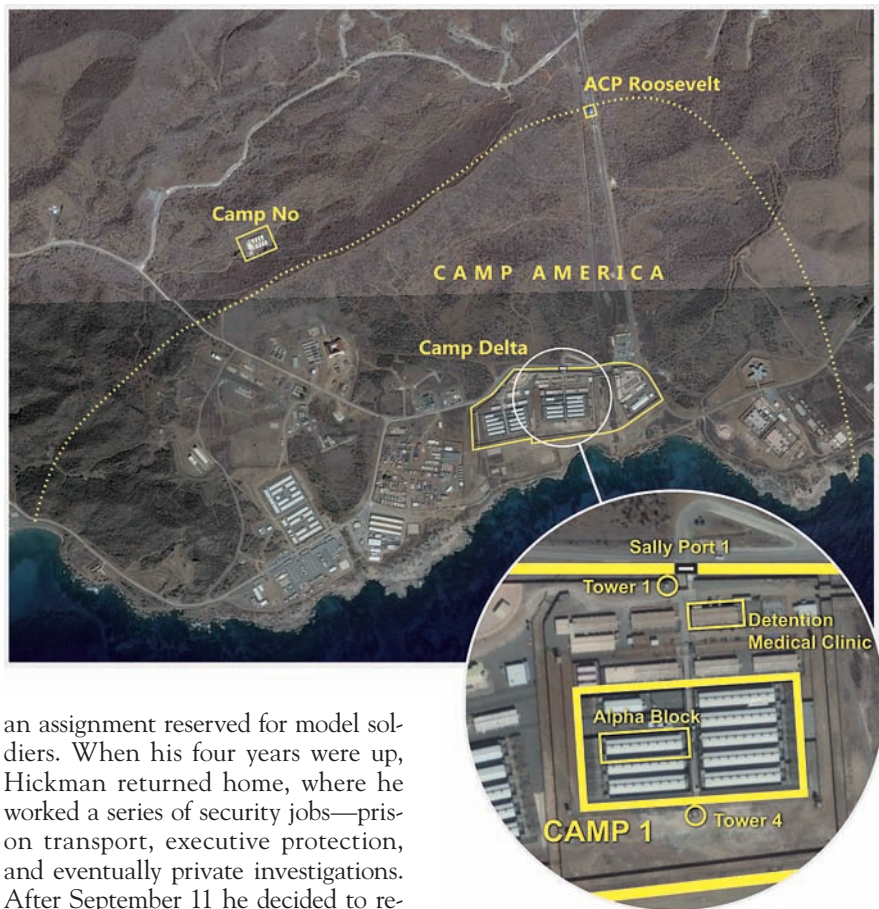
matically at odds with the NCIS report—a report for which they were neither interviewed nor approached.

All four soldiers say they were ordered by their commanding officer not to speak out, and all four soldiers provide evidence that authorities initiated a cover-up within hours of the prisoners' deaths. Army Staff Sergeant Joseph Hickman and men under his supervision have disclosed evidence in interviews with *Harper's Magazine* that strongly suggests that the three prisoners who died on June 9 had been transported to another location prior to their deaths. The guards' accounts also reveal the existence of a previously unreported black site at Guantánamo where the deaths, or at least the events that led directly to the deaths, most likely occurred.

### 2. “CAMP NO”

The soldiers of the Maryland-based 629th Military Intelligence Battalion arrived at Guantánamo Naval Base in March 2006, assigned to provide security to Camp America, the sector of the base containing the five individual prison compounds that house the prisoners. Camp Delta was at the time the largest of these compounds, and within its walls were four smaller camps, numbered 1 through 4, which in turn were divided into cell blocks. Life at Camp America, as at all prisons, was and remains rigorously routinized for both prisoners and their jailers. Navy guards patrol the cell blocks and Army personnel control the exterior areas of the camp. All observed incidents must be logged. For the Army guards who man the towers and “sally ports” (access points), knowing who enters and leaves the camp, and exactly when, is the essence of their mission.

One of the new guards who arrived that March was Joe Hickman, then a sergeant. Hickman grew up in Baltimore and joined the Marines in 1983, at the age of nineteen. When I interviewed him in January at his home in Wisconsin, he told me he had been inspired to enlist by Ronald Reagan, “the greatest president we've ever had.” He worked in a military intelligence unit and was eventually tapped for Reagan's Presidential Guard detail,



an assignment reserved for model soldiers. When his four years were up, Hickman returned home, where he worked a series of security jobs—prison transport, executive protection, and eventually private investigations. After September 11 he decided to re-enlist, at thirty-seven, this time in the Army National Guard.

Hickman deployed to Guantánamo with his friend Specialist Tony Davila, who grew up outside Washington, D.C., and who had himself been a private investigator. When they arrived at Camp Delta, Davila told me, soldiers from the California National Guard unit they were relieving introduced him to some of the curiosities of the base. The most noteworthy of these was an unnamed and officially unacknowledged compound nestled out of sight between two plateaus about a mile north of Camp Delta, just outside Camp America's perimeter. One day, while on patrol, Hickman and Davila came across the compound. It looked like other camps within Camp America, Davila said, only it had no guard towers and was surrounded by concertina wire. They saw no activity, but Hickman guessed the place could house as many as eighty prisoners. One part of the compound, he said, had the same appearance as the interrogation centers at other prison camps.

The compound was not visible from the main road, and the access road was chained off. The Guardsman who told Davila about the compound had said, "This place does not exist," and Hickman, who was frequently put in charge of security for all of Camp America, was not briefed about the site. Nevertheless, Davila said, other soldiers—many of whom were required to patrol the outside perimeter of Camp America—had seen the compound, and many speculated about its purpose. One theory was that it was being used by some of the non-uniformed government personnel who frequently showed up in the camps and were widely thought to be CIA agents.

A friend of Hickman's had nicknamed the compound "Camp No," the idea being that anyone who asked if it existed would be told, "No, it doesn't." He and Davila made a point of stopping by whenever they had the chance; once, Hickman said, he heard a "series of screams" from within the compound.

Hickman and his men also discovered that there were odd exceptions to their duties. Army guards were charged with searching and logging every vehicle that passed into and out of Camp Delta. "When John McCain came to the camp, he had to be logged in." However, Hickman was instructed to make no record whatsoever of the movements of one vehicle in particular—a white van, dubbed the "paddy wagon," that Navy guards used to transport heavily manacled prisoners, one at a time, into and out of Camp Delta. The van had no rear windows and contained a dog cage large enough to hold a single prisoner. Navy drivers, Hickman came to understand, would let the guards know they had a prisoner in the van by saying they were "delivering a pizza."

The paddy wagon was used to transport prisoners to medical facilities and to meetings with their lawyers. But as Hickman monitored the paddy wagon's movements from the guard tower at Camp Delta, he frequently saw it follow an unexpected route. When the van reached the first intersection to the east, instead of heading right—toward the other camps or toward one of the buildings where prisoners could meet with their lawyers—it made a left. In that direction, past the perimeter checkpoint known as ACP Roosevelt, there were only two destinations. One was a beach where soldiers went to swim. The other was Camp No.

### 3. "LIT UP"

The night the prisoners died, Hickman was on duty as sergeant of the guard for Camp America's exterior security force. When his twelve-hour shift began, at 6:00 P.M., he climbed the ladder to Tower 1, which stood twenty feet above Sally Port 1, the main entrance to Camp Delta. From there he had an excellent view of the camp, and much of the exterior perimeter as well. Later he would make his rounds.

Shortly after his shift began, Hickman noticed that someone had parked the paddy wagon near Camp 1, which houses Alpha Block. A moment later, two Navy guards emerged from Camp 1, escorting a prisoner. They put the prisoner into





the back of the van and then left the camp through Sally Port 1, just below Hickman. He was under standing orders not to search the paddy wagon, so he just watched it as it headed east. He assumed the guards and their charge were bound for one of the other prison camps southeast of Camp Delta. But when the van reached the first intersection, instead of making a right, toward the other camps, it made the left, toward ACP Roosevelt and Camp No.

Twenty minutes later—about the amount of time needed for the trip to Camp No and back—the paddy wagon returned. This time Hickman paid closer attention. He couldn't see the Navy guards' faces, but from body size and uniform they appeared to be the same men.

The guards walked into Camp 1 and soon emerged with another prisoner. They departed Camp America, again in the direction of Camp No. Twenty minutes later, the van returned. Hickman, his curiosity piqued by the unusual flurry

of activity and guessing that the guards might make another excursion, left Tower 1 and drove the three quarters of a mile to ACP Roosevelt to see exactly where the paddy wagon was headed. Shortly thereafter, the van passed through the checkpoint for the third time and then went another hundred yards, whereupon it turned toward Camp No, eliminating any question in Hickman's mind about where it was going. All three prisoners would have reached their destination before 8:00 P.M.

Hickman says he saw nothing more of note until about 11:30 P.M., when he had returned to his preferred vantage at Tower 1. As he watched, the paddy wagon returned to Camp Delta. This time, however, the Navy guards did not get out of the van to enter Camp 1. Instead, they backed the vehicle up to the entrance of the medical clinic, as if to unload something.

At approximately 11:45 P.M.—nearly an hour before the NCIS claims the

first body was discovered—Army Specialist Christopher Penvose, preparing for a midnight shift in Tower 1, was approached by a senior Navy NCO. Penvose told me that the NCO—who, following standard operating procedures, wore no name tag—appeared to be extremely agitated. He instructed Penvose to go immediately to the Camp Delta chow hall, identify a female senior petty officer who would be dining there, and relay to her a specific code word. Penvose did as he was instructed. The officer leapt up from her seat and immediately ran out of the chow hall.

Another thirty minutes passed. Then, as Hickman and Penvose both recall, Camp Delta suddenly “lit up”—stadium-style floodlights were turned on, and the camp became the scene of frenzied activity, filling with personnel in and out of uniform. Hickman headed to the clinic, which appeared to be the center of activity, to learn the reason for the commotion. He asked a distraught medical corpsman what had happened. She said three dead prisoners had been

delivered to the clinic. Hickman recalled her saying that they had died because they had rags stuffed down their throats, and that one of them was severely bruised. Davila told me he spoke to Navy guards who said the men had died as the result of having rags stuffed down their throats.

Hickman was concerned that such a serious incident could have occurred in Camp 1 on his watch. He asked his tower guards what they had seen. Penrose, from his position at Tower 1, had an unobstructed view of the walkway between Camp 1 and the medical clinic—the path by which any prisoners who died at Camp 1 would be delivered to the clinic. Penrose told Hickman, and later confirmed to me, that he saw no prisoners being moved from Camp 1 to the clinic. In Tower 4 (it should be noted that Army and Navy guard-tower designations differ), another Army specialist, David Carroll, was forty-five yards from Alpha Block, the cell block within Camp 1 that had housed the three dead men. He also had an unobstructed view of the alleyway that connected the cell block itself to the clinic. He likewise reported to Hickman, and confirmed to me, that he had seen no prisoners transferred to the clinic that night, dead or alive.

#### 4. “HE COULD NOT CRY OUT”

The fate of a fourth prisoner, a forty-two-year-old Saudi Arabian named Shaker Aamer, may be related to that of the three prisoners who died on June 9. Aamer is married to a British woman and was in the process of becoming a British subject when he was captured in Jalalabad, Afghanistan, in 2001. United States authorities insist that he carried a gun and served Osama bin Laden as an interpreter. Aamer denies this. At Guantánamo, Aamer’s fluency in English soon allowed him to play an important role in camp politics. According to both Aamer’s attorney and press accounts furnished by Army Colonel Michael Bumgarner, the Camp America commander, Aamer cooperated closely with Bumgarner in efforts to bring a 2005 hunger strike to an end. He persuaded several prisoners to break their

strike for a while, but the settlement collapsed and soon afterward Aamer was sent to solitary confinement. Then, on the night the prisoners from Alpha Block died, Aamer says he himself was the victim of an act of striking brutality.

He described the events in detail to his lawyer, Zachary Katznelson, who was permitted to speak to him several weeks later. Katznelson recorded every detail of Aamer’s account and filed an affidavit with the federal district court in Washington, setting it out:

On June 9th, 2006, [Aamer] was beaten for two and a half hours straight. Seven naval military police participated in his beating. Mr. Aamer stated he had refused to provide a retina scan and fingerprints. He reported to me that he was strapped to a chair, fully restrained at the head, arms and legs. The MPs inflicted so much pain, Mr. Aamer said he thought he was going to die. The MPs pressed on pressure points all over his body: his temples, just under his jawline, in the hollow beneath his ears. They choked him. They bent his nose repeatedly so hard to the side he thought it would break. They pinched his thighs and feet constantly. They gouged his eyes. They held his eyes open and shined a mag-lite in them for minutes on end, generating intense heat. They bent his fingers until he screamed. When he screamed, they cut off his airway, then put a mask on him so he could not cry out.

The treatment Aamer describes is noteworthy because it produces excruciating pain without leaving lasting marks. Still, the fact that Aamer had his airway cut off and a mask put over his face “so he could not cry out” is alarming. This is the same technique that appears to have been used on the three deceased prisoners.

The United Kingdom has pressed aggressively for the return of British subjects and persons of interest. Every individual requested by the British has been turned over, with one exception: Shaker Aamer. In denying this request, U.S. authorities have cited unelaborated “security” concerns. There is no suggestion that the Americans intend to charge him before a military commission, or in a federal criminal court, and, indeed,

they have no meaningful evidence linking him to any crime. American authorities may be concerned that Aamer, if released, could provide evidence against them in criminal investigations. This evidence would include what he experienced on June 9, 2006, and during his 2002 detention in Afghanistan at Bagram Airfield, where he says he was subjected to a procedure in which his head was smashed repeatedly against a wall. This torture technique, called “walling” in CIA documents, was expressly approved at a later date by the Department of Justice.

#### 5. “YOU ALL KNOW”

By dawn, the news had circulated through Camp America that three prisoners had committed suicide by swallowing rags. Colonel Bumgarner called a meeting of the guards, and at 7:00 A.M. at least fifty soldiers and sailors gathered at Camp America’s open-air theater.

Bumgarner was known as an eccentric commander. Hickman marveled, for instance, at the colonel’s insistence that his staff line up and salute him, to music selections that included Beethoven’s Fifth Symphony and the reggae hit “Bad Boys,” as he entered the command center. This morning, however, Hickman thought Bumgarner seemed unusually nervous and clipped.

According to independent interviews with soldiers who witnessed the speech, Bumgarner told his audience that “you all know” three prisoners in the Alpha Block at Camp 1 committed suicide during the night by swallowing rags, causing them to choke to death. This was a surprise to no one—even servicemen who had not worked the night before had heard about the rags. But then Bumgarner told those assembled that the media would report something different. It would report that the three prisoners had committed suicide by hanging themselves in their cells. It was important, he said, that servicemen make no comments or suggestions that in any way undermined the official report. He reminded the soldiers and sailors that their phone and email communications were being monitored. The

meeting lasted no more than twenty minutes. (Bumgarner has not responded to requests for comment.)<sup>1</sup>

That evening, Bumgarner's boss, Admiral Harris, read a statement to reporters:

An alert, professional guard noticed something out of the ordinary in the cell of one of the detainees. The guard's response was swift and professional to secure the area and check on the status of the detainee. When it was apparent that the detainee had hung himself, the guard force and medical teams reacted quickly to attempt to save the detainee's life. The detainee was unresponsive and not breathing. [The] guard force began to check on the health and welfare of other detainees. Two detainees in their cells had also hung themselves.

When he finished praising the guards and the medics, Harris—in a notable departure from traditional military decorum—launched his attack on the men who had died on his watch. “They have no regard for human life,” Harris said, “neither ours nor their own.” A Pentagon press release issued soon after described the dead men, who had been accused of no crime, as Al Qaeda or Taliban operatives. Lieutenant Commander Jeffrey Gordon, the Pentagon's chief press officer, went still further, telling the *Guardian's* David Rose, “These guys were fanatics like the Nazis, Hitlerites, or the Ku Klux Klan, the people they tried at Nuremberg.” The Pentagon was not the only U.S. government agency to participate in the assault. Colleen Graffy, a deputy assistant secretary of

state, told the BBC that “taking their own lives was not necessary, but it certainly is a good P.R. move.”

The same day the three prisoners died, Fox News commentator Bill O'Reilly completed a reporting trip to the naval base, where, according to his account on *The O'Reilly Factor*, the Joint Army Navy Task Force “granted the *Factor* near total access to the prison.” Although the Pentagon began turning away reporters after news of the deaths had emerged, two reporters from the *Charlotte Observer*, Michael Gordon and photographer Todd Sumlin, had arrived that morning to work on a profile of Bumgarner, and the colonel invited them to shadow him as he dealt with the crisis. A Pentagon spokesman later told the *Observer* it had been expecting a “puff piece,” which is why, according to the *Observer*, “Bumgarner and his superiors on the base” had given them permission to remain.

Bumgarner quickly returned to his theatrical ways. As Gordon reported in the June 13, 2006, issue of the *Observer*, the colonel seemed to enjoy putting on a show. “Right now, we are at ground zero,” Bumgarner told his officer staff during a June 12 meeting. Referring to the naval base's prisoners, he said, “There is not a trustworthy son of a bitch in the entire bunch.” In the same article, Gordon also noted what he had learned about the deaths. The suicides had occurred “in three cells on the same block,” he reported. The prisoners had “hanged themselves with strips of knotted cloth taken from clothing and sheets,” after shaping their pillows and blankets to look like sleeping bodies. “And Bumgarner said,” Gordon reported, “each had a ball of cloth in their mouth either for choking or muffling their voices.”

Something about Bumgarner's *Observer* interview seemed to have set off an alarm far up the chain of command. No sooner was Gordon's story in print than Bumgarner was called to Admiral Harris's office. As Bumgarner would tell Gordon in a follow-up profile three months later, Harris was holding up a copy of the *Observer*: “This,” said the admiral to Bumgarner, “could get me relieved.” (Harris did not respond to requests for comment.) That same day, an in-

vestigation was launched to determine whether classified information had been leaked from Guantánamo. Bumgarner was suspended.

Less than a week after the appearance of the *Observer* stories, Davila and Hickman each heard separately from friends in the Navy and in the military police that FBI agents had raided the colonel's quarters. The MPs understood from their FBI contacts that there was concern over the possibility that Bumgarner had taken home some classified materials and was planning to share them with the media or to use them in writing a book.

On June 27, two weeks later, Gordon's *Observer* colleague Scott Dodd reported: “A brigadier general determined that ‘unclassified sensitive information’ was revealed to the public in the days after the June 10 suicides.” Harris, according to the article, had already ordered “appropriate administrative action.” Bumgarner soon left Guantánamo for a new post in Missouri. He now serves as an ROTC instructor at Virginia Tech in Blacksburg.

Bumgarner's comments appear to be at odds with the official Pentagon narrative on only one point: that the deaths had involved cloth being stuffed into the prisoners' mouths. The involvement of the FBI suggested that more was at issue.

## 6. “AN UNMISTAKABLE MESSAGE”

On June 10, NCIS investigators began interviewing the Navy guards in charge of Alpha Block, but after the Pentagon committed itself to the suicide narrative, they appear to have stopped. On June 14, the interviews resumed, and the NCIS informed at least six Navy guards that they were suspected of making false statements or failing to obey direct orders. No disciplinary action ever followed.

The investigators conducted interviews with guards, medics, prisoners, and officers. As the Seton Hall researchers note, however, nothing in the NCIS report suggests that the investigators secured or reviewed the duty roster, the prisoner-transfer book, the pass-on book, the records of phone and radio communications,

<sup>1</sup> After this report was published on *Harpers.org* on January 18, Bumgarner did send an email to the Associated Press. “This blatant misrepresentation of the truth infuriates me,” he wrote. “I don't know who Sgt. Hickman is, but he is only trying to be a spotlight ranger.” In fact, Bumgarner should have no trouble remembering Hickman. As camp commander, he awarded him a commendation medal for defusing a prison riot. In his email, Bumgarner also said Hickman “knows nothing about what transpired in Camp 1, or our medical facility. I do, I was there.” By his own sworn testimony, however, Bumgarner did not arrive at Camp 1 until 12:48 A.M. on June 10. “On the night of 09JUN06, I was not in the camp,” he told the NCIS. “I had spent the evening at Admiral Harris's house.” As of press time, Bumgarner has not returned my calls seeking clarification on the matter.





or footage from the camera that continuously monitored activity in the hallways, all of which could have helped them authoritatively reconstruct the events of that evening.

The NCIS did, however, move swiftly to seize every piece of paper possessed by every single prisoner in Camp America, some 1,065 pounds of material, much of it privileged attorney-client correspondence. Several weeks later, authorities sought an after-the-fact justification. The Justice Department—bolstered by sworn statements from Admiral Harris and from Carol Kisthardt, the special agent in charge of the NCIS investigation—claimed in a U.S. district court that the seizure was appropriate because there had been a conspiracy among the prisoners to commit suicide. Justice further claimed that investigators had found suicide notes and argued that the attorney-client materials were being used to pass communications among the prisoners.

David Remes, a lawyer who opposed the Justice Department's ef-

forts, explained the practical effect of the government's maneuvers. The seizure, he said, "sent an unmistakable message to the prisoners that they could not expect their communications with their lawyers to remain confidential. The Justice Department defended the massive breach of the attorney-client privilege on the account of the deaths on June 9 and the asserted need to investigate them."

If the "suicides" were a form of warfare between the prisoners and the Bush Administration, as Admiral Harris charged, it was the latter that quickly turned the war to its advantage.

#### 7. "YASSER COULDN'T EVEN MAKE A SANDWICH!"

When I asked Talal Al-Zahrani what he thought had happened to his son, he was direct. "They snatched my seventeen-year-old son for a bounty payment," he said. "They took him to Guantánamo and held him pris-

oner for five years. They tortured him. Then they killed him and returned him to me in a box, cut up."

Al-Zahrani was a brigadier general in the Saudi police. He dismissed the Pentagon's claims, as well as the investigation that supported them. Yasser, he said, was a young man who loved to play soccer and didn't care for politics. The Pentagon claimed that Yasser's frontline battle experience came from his having been a cook in a Taliban camp. Al-Zahrani said that this was preposterous: "A cook? Yasser couldn't even make a sandwich!"

"Yasser wasn't guilty of anything," Al-Zahrani said. "He knew that. He firmly believed he would be heading home soon. Why would he commit suicide?" The evidence supports this argument. Hyperbolic U.S. government statements at the time of Yasser Al-Zahrani's death masked the fact that his case had been reviewed and that he was, in fact, on a list of prisoners to be sent home. I had shown

Al-Zahrani the letter that the government says was Yasser's suicide note and asked him whether he recognized his son's handwriting. He had never seen the note before, he answered, and no U.S. official had ever asked him about it. After studying the note carefully, he said, "This is a forgery."

Also returned to Saudi Arabia was the body of Mani Al-Utaybi. Orphaned in his youth, Mani grew up in his uncle's home in the small town of Dawadmi. I spoke to one of the many cousins who shared that home, Faris Al-Utaybi. Mani, said Faris, had gone to Baluchistan—a rural, tribal area that straddles Iran, Pakistan, and Afghanistan—to do humanitarian work, and someone there had sold him to the Americans for \$5,000. He said that Mani was a peaceful man who would harm no one. Indeed, U.S. authorities had decided to release Al-Utaybi and return him to Saudi Arabia. When he died, he was just a few weeks shy of his transfer.

Salah Al-Salami was seized in March 2002, when Pakistani authorities raided a residence in Karachi believed to have been used as a safe house by Abu Zubaydah and took into custody all who were living there at the time. A Yemeni, Al-Salami had quit his job and moved to Pakistan with only \$400 in his pocket. The U.S. suspicions against him rested almost entirely on the fact that he had taken lodgings, with other students, in a boarding house that terrorists might at one point have used. There was no direct evidence linking him either to Al Qaeda or to the Taliban. On August 22, 2008, the *Washington Post* quoted from a previously secret review of his case: "There is no credible information to suggest [Al-Salami] received terrorist related training or is a member of the Al Qaeda network." All that stood in the way of Al-Salami's release from Guantánamo were difficult diplomatic relations between the United States and Yemen.

## 8. "THE REMOVAL OF THE NECK ORGANS"

Military pathologists connected with the Armed Forces Institute of

Pathology arranged immediate autopsies of the three dead prisoners, without securing the permission of the men's families. The identities and findings of the pathologists remain shrouded in extraordinary secrecy, but the timing of the autopsies suggests that medical personnel stationed at Guantánamo may have undertaken the procedure without waiting for the arrival of an experienced medical examiner from the United States. Each of the heavily redacted autopsy reports states unequivocally that "the manner of death is suicide" and, more specifically, that the prisoner died of "hanging." Each of the reports describes ligatures that were found wrapped around the prisoner's neck, as well as circumferential dried abrasion furrows imprinted with the very fine weave pattern of the ligature fabric and forming an inverted "V" on the back of the head. This condition, the anonymous pathologists state, is consistent with that of a hanging victim.

The pathologists place the time of death "at least a couple of hours" before the bodies were discovered, which would be sometime before 10:30 p.m. on June 9. Additionally, the autopsy of Al-Salami states that his hyoid bone was broken, a phenomenon usually associated with manual strangulation, not hanging.

The report asserts that the hyoid was broken "during the removal of the neck organs." An odd admission, given that these are the very body parts—the larynx, the hyoid bone, and the thyroid cartilage—that would have been essential to determining whether death occurred from hanging, from strangulation, or from choking. These parts remained missing when the men's families finally received their bodies.

All the families requested independent autopsies. The Saudi prisoners were examined by Saeed Al-Ghamdy, a pathologist based in Saudi Arabia. Al-Salami, from Yemen, was inspected by Patrice Mangin, a pathologist based in Switzerland. Both pathologists noted the removal of the structure that would have been the natural focus of the autopsy: the throat. Both pathologists contacted the Armed Forces

Institute of Pathology, requesting the missing body parts and more information about the previous autopsies. The institute did not respond to their requests or queries. (It also did not respond to a series of calls I placed requesting information and comment.)

When Al-Zahrani viewed his son's corpse, he saw evidence of a homicide. "There was a major blow to the head on the right side," he said. "There was evidence of torture on the upper torso, and on the palms of his hand. There were needle marks on his right arm and on his left arm." None of these details are noted in the U.S. autopsy report. "I am a law enforcement professional," Al-Zahrani said. "I know what to look for when examining a body."

Mangin, for his part, expressed particular concern about Al-Salami's mouth and throat, where he saw "a blunt trauma carried out against the oral region." The U.S. autopsy report mentions an effort at resuscitation, but this, in Mangin's view, did not explain the severity of the injuries. He also noted that some of the marks on the neck were not those he would normally associate with hanging.

## 9. "I KNOW SOME THINGS YOU DON'T"

Sergeant Joe Hickman's tour of duty, which ended in March 2007, was distinguished: he was selected as Guantánamo's "NCO of the Quarter" and was given a commendation medal. When he returned to the United States, he was promoted to staff sergeant and worked in Maryland as an Army recruiter before eventually settling in Wisconsin. But he could not forget what he had seen at Guantánamo. When Barack Obama became president, Hickman decided to act. "I thought that with a new administration and new ideas I could actually come forward," he said. "It was haunting me."

Hickman had seen a 2006 report from Seton Hall University Law School dealing with the deaths of the three prisoners, and he followed their subsequent work. After Obama was inaugurated in January 2009, he called Mark Denbeaux, the professor who had led the Seton Hall team. "I



learned something from your report," he said, "but I know some things you don't."

Within two days, Hickman was in Newark, meeting with Denbeaux. Also at the meeting was Denbeaux's son and sometime co-editor, Josh, a private attorney. Josh Denbeaux agreed to represent Hickman, who was concerned that he could go to prison if he disobeyed Colonel Bumgarner's order not to speak out, even if that order was itself illegal. Hickman did not want to speak to the press. On the other hand, he felt that "silence was just wrong."

The two lawyers quickly made arrangements for Hickman to speak instead with authorities in Washington, D.C. On February 2, they had meetings on Capitol Hill and with the Department of Justice. The meeting with Justice was an odd one. The father-and-son legal team were met by Rita Glavin, the acting head of the Justice Department's Criminal Division; John Morton, who was soon to become an assistant secretary at the Department of Homeland Security; and Steven Fagell, counselor to the head of the Criminal Division. Fagell had been, along with the new attorney general, Eric Holder, a partner at the elite Washington law firm of Covington & Burling, and was widely viewed as "Holder's eyes" in the Criminal Division.

For more than an hour, the two lawyers described what Hickman had seen: the existence of Camp No, the transportation of the three prisoners, the van's arrival at the medical clinic, the lack of evidence that any bodies had ever been removed from Alpha Block, and so on. The officials listened intently and asked many questions. The Denbeauxs said they could provide a list of witnesses who would corroborate every aspect of their account. At the end of the meeting, Mark Denbeaux recalled, the officials specifically thanked the lawyers for not speaking to reporters first and for "doing it the right way."

Two days later, another Justice Department official, Teresa McHenry, head of the Criminal Division's Domestic Security Section, called Mark Denbeaux and said that she was heading up an investigation and

wanted to meet directly with his client. She went to New Jersey to do so. Hickman then reviewed the basic facts and furnished McHenry with the promised list of corroborating witnesses and details on how they could be contacted.

The Denbeauxs did not hear from anyone at the Justice Department for at least two months. Then, in April, an FBI agent called to say she did not have the list of contacts. She asked if this document could be provided again. It was. Shortly thereafter, a Justice official and two FBI agents interviewed Davila, who had left the Army, in Columbia, South Carolina.<sup>2</sup> The official asked Davila if he was prepared to travel to Guantánamo to identify the locations of various sites. He said he was. "It seemed like they were interested," Davila told me. "Then I never heard from them again."

Several more months passed, and Hickman and his lawyers became increasingly concerned that nothing was going to happen. On October 27, 2009, they resumed dealings with Congress that they had initiated on February 2 and then broken off at the Justice Department's request; they were also in contact with ABC News. Two days later, Teresa McHenry called Mark Denbeaux and asked whether he had gone to Congress and ABC News about the matter. "I said that I had," Denbeaux told me. He asked her, "Was there anything wrong with that?" McHenry then suggested that the investigation was finished. Denbeaux reminded her that she had yet to interview some of the corroborating witnesses. "There are a few small things to do," Denbeaux says McHenry answered. "Then it will be finished."

Specialist Christopher Penvose told me that on October 30, the day

following the conversation between Mark Denbeaux and Teresa McHenry, an official showed up at Penvose's home in south Baltimore with some FBI agents. She had a "few questions," she told him. Investigators working with her soon contacted two other witnesses.

On November 2, 2009, McHenry called Mark Denbeaux to tell him that the Justice Department's investigation was being closed. "It was a strange conversation," Denbeaux recalled. McHenry explained that "the gist of Sergeant Hickman's information could not be confirmed." But when Denbeaux asked what that "gist" actually was, McHenry declined to say. She just reiterated that Hickman's conclusions "appeared" to be unsupported. Denbeaux asked *what* conclusions exactly were unsupported. McHenry refused to say.

#### 10. "THEY ACCOMPLISHED NOTHING"

One of the most intriguing aspects of this case concerns the use of Camp No. Under George W. Bush, the CIA created an archipelago of secret detention centers that spanned the globe, and authorities at these sites deployed an array of Justice Department-sanctioned torture techniques—including waterboarding, which often entails inserting cloth into the subject's mouth—on prisoners they deemed to be involved in terrorism. The presence of a black site at Guantánamo has long been a subject of speculation among lawyers and human-rights activists, and the experience of Sergeant Hickman and other Guantánamo guards compels us to ask whether the three prisoners who died on June 9 were being interrogated by the CIA, and whether their deaths resulted from the grueling techniques the Justice Department had approved for the agency's use—or from other tortures lacking that sanction.

Complicating these questions is the fact that Camp No might have been controlled by another authority, the Joint Special Operations Command, which Bush's defense secretary, Donald Rumsfeld, had hoped to transform into a Pentagon version of the CIA. Under Rumsfeld's direction, JSOC began to take on many tasks tradition-

<sup>2</sup> After this report was published on *Harpers.org* on January 18, a Justice Department spokesman wrote to complain that two of the witnesses interviewed by the department had misremembered the names of the lawyers present at those meetings. She refused to address any of the other allegations in the article. Instead, she insisted I note that Justice had "conducted a thorough inquiry into this matter, carefully examined the allegations, found no evidence of wrongdoing and subsequently closed the matter." Then she told me, as she had when I was reporting the story, that she would not arrange an interview with any of the officials involved in the matter.

ally handled by the CIA, including the housing and interrogation of prisoners at black sites around the world. The Pentagon recently acknowledged the existence of one such JSOC black site, located at Bagram Airfield in Afghanistan, and other suspected sites, such as Camp Nama in Baghdad, have been carefully documented by human-rights researchers.

In a Senate Armed Services Committee report on torture released last year, the sections about Guantánamo were significantly redacted. The position and circumstances of these deletions point to a significant JSOC interrogation program at the base. (It should be noted that Obama's order last year to close other secret detention camps was narrowly worded to apply only to the CIA.)

Regardless of whether Camp No belonged to the CIA or JSOC, the Justice Department has plenty of its own secrets to protect. The department would seem to have been involved in the cover-up from the first days, when FBI agents stormed Colonel Bumgarner's quarters. This was unusual for two reasons. When Pentagon officials engage in a leak investigation, they generally use military investigators. They rarely turn to the FBI, because they cannot control the actions of a civilian agency. Moreover, when the FBI does open an investigation, it nearly always does so with great discretion. The Bumgarner investigation was widely telegraphed, though, and seemed intended to send a message to the military personnel at Camp Delta: Talk about what happened at your own risk. All of which suggests it was not the Pentagon so much as the White House that hoped to suppress the truth.

In the weeks following the 2006 deaths, the Justice Department decided to use the suicide narrative as leverage against the Guantánamo prisoners and their troublesome lawyers, who were pressing the government to justify its long-term imprisonment of their clients. After the NCIS seized thousands of pages of privileged communications, the Justice Department went to court to defend the action. It argued that such steps were warranted by the extraordinary facts surrounding the June 9 "suicides." U.S. District Court

Judge James Robertson gave the Justice Department a sympathetic hearing, and he ruled in its favor, but he also noted a curious aspect of the government's presentation: its "citations supporting the fact of the suicides" were all drawn from media accounts. Why had the Justice Department lawyers who argued the case gone to such lengths to avoid making any statement under oath about the suicides? Did they do so in order to deceive the court? If so, they could face disciplinary proceedings or disbarment.

The Justice Department also faces questions about its larger role in creating the circumstances that led to the use of so-called enhanced interrogation and restraint techniques at Guantánamo and elsewhere. In 2006, the use of a gagging restraint had already been connected to the death on January 9, 2004, of an Iraqi prisoner, Lieutenant Colonel Abdul Jameel, in the custody of the Army Special Forces. And the bodies of the three men who died at Guantánamo showed signs of torture, including hemorrhages, needle marks, and significant bruising. The removal of their throats made it difficult to determine whether they were already dead when their bodies were suspended by a noose. The Justice Department itself had been deeply involved in the process of approving and setting the conditions for the use of torture techniques, issuing a long series of memoranda that CIA agents and others could use to defend themselves against any subsequent criminal prosecution.

Teresa McHenry, the investigator charged with accounting for the deaths of the three men at Guantánamo, has firsthand knowledge of the Justice Department's role in auditing such techniques, having served at the Justice Department under Bush and having participated in the preparation of at least one of those memos. As a former war-crimes prosecutor, McHenry knows full well that government officials who attempt to cover up crimes perpetrated against prisoners in wartime face prosecution under the doctrine of command responsibility. (McHenry declined to clarify the role she played in drafting the memos.)

As retired Rear Admiral John Hutson, the former judge advocate

general of the Navy, told me, "Filing false reports and making false statements is bad enough, but if a homicide occurs and officials up the chain of command attempt to cover it up, they face serious criminal liability. They may even be viewed as accessories after the fact in the original crime." With command authority comes command responsibility, he said. "If the heart of the military is obeying orders down the chain of command, then its soul is accountability up the chain. You can't demand the former without the latter."

The Justice Department thus faced a dilemma; it could do the politically convenient thing, which was to find no justification for a thorough investigation, leave the NCIS conclusions in place, and hope that the public and the news media would obey the Obama Administration's dictum to "look forward, not backward"; or it could pursue a course of action that would implicate the Bush Justice Department in a cover-up of possible homicides.

Nearly 200 men remain imprisoned at Guantánamo. In June 2009, six months after Barack Obama took office, one of them, a thirty-one-year-old Yemeni named Muhammed Abdallah Salih, was found dead in his cell. The exact circumstances of his death, like those of the deaths of the three men from Alpha Block, remain uncertain. Those charged with accounting for what happened—the prison command, the civilian and military investigative agencies, the Justice Department, and ultimately the attorney general himself—all face a choice between the rule of law and the expedience of political silence. Thus far, their choice has been unanimous.

Not everyone who is involved in this matter views it from a political perspective, of course. General Al-Zahrani grieves for his son, but at the end of a lengthy interview he paused and his thoughts turned elsewhere. "The truth is what matters," he said. "They practiced every form of torture on my son and on many others as well. What was the result? What facts did they find? They found nothing. They learned nothing. They accomplished nothing." ■

# APPENDIX

## 10



Seton Hall University School of Law

## Center for Policy & Research

# DOD CONTRADICTS DOD

**An Analysis of the Response to  
*Death in Camp Delta***

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## EXECUTIVE SUMMARY

The Seton Hall School of Law Center for Policy and Research Report, *Death in Camp Delta*, analyzed the official investigation into the June 9-10, 2006 deaths of three detainees at Guantanamo Bay Naval Base Detention Facility. The Center found a deeply flawed investigation, which failed to resolve serious questions about what really happened that night that resulted in the deaths of three men in U.S. military custody. In response to an article in *Harper's Magazine* which built on the Seton Hall study and independently investigated the events at Camp Delta, the Department of Defense (DOD) provided further information. Unfortunately, this response, like the initial investigation itself, is disturbingly flawed. While the response confirms at least some of Seton Hall's criticisms of the earlier investigation in the course of providing new information, it also contradicts factual claims in its own investigation, raising new questions as to whether the DOD can be trusted to investigate its own conduct. In analyzing the DOD's response, the Center finds that:

### **The Department of Defense defends the NCIS investigation by contradicting several of its own key findings.**

- DOD now asserts only one detainee had a rag in his throat at the time of death, but the NCIS investigation shows all three had rags in their throats.
- DOD asserts that more than 100 interviews were conducted during the first three days of the investigation; however, only 24 personnel were interviewed on June 10 and none on June 11, 12, and 13. No more than 45 individuals were interviewed during the entire investigation.
- DOD now asserts that NCIS reviewed all available video footage, and found nothing of evidentiary value. The record shows NCIS had a videotape of the events. Since either activity in the camp or lack of activity would be relevant to the conflicting claims, it is implausible that there is nothing of evidentiary value on the tape.
- DOD now asserts that the detainees hanged themselves while lights were dimmed. The Admiral concluded the detainees hanged themselves with the lights on. The DOD does not explain this discrepancy.

The centerpiece of the DOD's response is the assertion that over 100 interviews were conducted within the first three days. This assertion ignores that all of the guards on the block that night gave prior statements that NCIS considered false. All of those prior false statements are still missing. Additionally, most of the statements either refute or do not corroborate the NCIS findings. In light of the DOD's responses, there must be another investigation into the events of June 9-10, 2006.

## INTRODUCTION

On June 9, 2006 three men, Yassar Talal Al Zahrani, Mani Shaman Turki Al Habardi Al Tabi, and Ali Abdullah Ahmed, died while detained on Alpha Block in Camp 1 at the detention facility at Guantanamo Bay Naval Base. Within hours, the military announced that their deaths were suicides, acts of “asymmetrical warfare” against the United States. This announcement came as the official investigations were only just getting underway. The conclusions of those investigations would not be released publicly for more than two years, and then only after a court ordered their release. When the files were released, they were heavily redacted, but the conclusion had not changed from the morning after the deaths had occurred: a coordinated suicide.

The Seton Hall School of Law Center for Policy and Research analyzed the investigative file in the report *Death in Camp Delta*. What the Center found was startling. The evidence gathered over the course of the investigation did not support the ultimate conclusions. The men were dead for more than two hours before they were reportedly found hanging in their cells. Their hands were bound; at least one man’s feet were bound; their faces masked; cloth or rags were in their mouths and throats. According to the government’s findings, the men did all of this to themselves, behind blankets draped across their cells in violation of standard operating procedures, and stepped off a sink to commit suicide, all under constant supervision of highly trained Navy guards. The ultimate conclusions of the Admiral in charge of the camp, Admiral Harry B. Harris, were that, while there were SOP violations, those violations merited no disciplinary measures whatsoever.

Seton Hall thoroughly analyzed the investigation materials, witness statements, autopsy reports, and investigative methodology used. The Center concluded that the investigation was severely flawed, and the conclusions reached were not supported by the evidence.

Shortly after publication of *Death in Camp Delta*, four Army guards assigned to the watchtowers in Camp Delta that night (referred to as “Tower Guards”) came forward with a version of events that contradicts the official conclusions while helping to resolve some of the issues the Center found. The Tower Guards are quoted in a *Harper’s Magazine* article “The Guantanamo “Suicides”: A Camp Delta Sergeant Blows the Whistle”. Most relevant to the Center’s Report, these witnesses state that no bodies were ever brought from Alpha Block to the clinic.

Seven weeks after Seton Hall’s Report was published, the Department of Defense issued a statement purporting to address flaws in the Report, what the DOD referred to as “factual errors.” The DOD’s statement suggests its own lack of any knowledge as to the facts of the Department’s own investigation. As evidenced by misunderstandings of the circumstances and misstatements of facts, DOD’s assertions are as flawed as the infirm investigation they seek to defend.

The DOD asserts that only one detainee had a rag in his throat. Multiple witness statements found throughout the voluminous materials compiled by Naval Criminal Investigation Service (NCIS), Southern Command (SOUTHCOM), and Criminal Investigation Task Force (CITF) confirm that each individual detainee had some form of cloth lodged in his throat.

The DOD contends that because NCIS conducted more than one hundred interviews, their conclusions are sound. The DOD confounds number of interviews with number of interviewees. Many interviewees were interviewed multiple times. Those with first-hand knowledge—the guards who transported the bodies, the medics and the commanding officer and the Senior Medical officer in the clinic—did not observe or report that anyone died of hanging or that anyone committed suicide. The other witnesses interviewed were the guards on duty on Alpha Block that night. Their interviews came after they had all been officially warned about making false statements to investigators.

On the contrary, as demonstrated in *Death in Camp Delta*, an analysis of the statements gathered reveals conflicting timelines, contradictions as to facts, and a general sense of disarray. Clinic staff claim that, when the detainee's bodies were brought in, they were stiff with rigor mortis, they had ropes tight around their necks, and they had cloth lodged in their throats. The clinical staff never asked the guards what had happened, and the guards never told them. Therefore, any statements by the clinic staff can speak only to what happened after the bodies arrived.

Standard Operating Procedure (SOP) requires every person involved in the incident to write a sworn statement. Several individuals began to do so, but they were ordered to stop – in direct contravention of SOP. Those partial statements, started in the immediate aftermath of the incident while events were fresh in the minds of the witnesses, are not produced in the NCIS files. Many of the statements produced are third-person interview summaries. Many suggest that the interviewee was asked questions to elicit answers that would corroborate other witnesses. Overall, the witness statements provoke many more questions than they answer and do not satisfactorily support DOD's conclusions.

The DOD claims to have reviewed videotape of the night of the deaths but then claims the footage was of no evidentiary value. The NCIS investigation confirms at least one tape exists. It was delivered into the custody of NCIS, and was the only videotape NCIS reported that it possessed relevant to this incident. The investigation does not contain a summary of the video recording, a notation of its running time, or any other indication that it was viewed. If this videotape exists, and if it shows the dead men being cut down from hanging in their cells, or strapped to backboards in the hallway, or carried from Alpha Block to the Clinic, it would definitively disprove the Tower Guards' claims. Conversely, if the tape showed no such activity, it would tend to confirm the Tower Guards' story. In short, this tape would certainly be of evidentiary value, and yet the DOD claims not to have anything of the kind.

For the purposes of this report, the Center has taken the DOD statement to *Harper's Magazine* as an official response to *Death in Camp Delta* as well and has analyzed it as such. The full statement is attached as an appendix and addressed point by point in the body of this report. When evaluated in light of what has been learned in the process of studying the full investigation, many of DOD's assertions are directly contradictory to NCIS's investigation. *Put in their proper context, several of the points they make actually support Seton Hall's conclusions.* If, three and a half years after the three men died, and seven weeks after Seton Hall revealed the failings of the investigation, this is the strongest response the DOD could muster, there is reason to suspect that no good response exists. The initial investigation into the deaths of three detainees on June 9, 2006, was flawed, the DOD's response is flawed, and a new investigation is necessary to find out what really happened that night.



## Background

On December 7, 2009, Seton Hall University School of Law's Center for Policy and Research (the Center) published its analysis of the Department of Defense's (DOD) investigation into the alleged suicides committed by three Guantanamo Bay Naval Base (GTMO) detainees on the night of June 9-10, 2006, in a report titled *Death in Camp Delta*.<sup>1</sup>

On January 18, 2010, *Harper's Magazine* published *The Guantanamo "Suicides": A Camp Delta Sergeant Blows the Whistle*.<sup>2</sup> This article was the result of *Harper's* independent analysis of the events analyzed in the Center's report.

Both the *Harper's* article and the Center's report concluded that the various investigations conducted by the DOD produced findings that were unsupported.

Following the January 18 publication of *Harper's* article, the DOD has asserted that both *Harper's* article and the Center's report are "factually incorrect."

The DOD submitted to the editorial staff of *Harper's Magazine* a list of assertions defending its investigation into the three detainee deaths that occurred at GTMO on the night of June 9, 2006. The Center analyzed DOD's conclusions and found, like the original NCIS investigation, that they were unsupported by the evidence produced within its own investigative files.

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<sup>1</sup> "Death in Camp Delta," [hereinafter "Report"] Center for Policy and Research, Seton Hall University School of Law (Dec. 7, 2009), available at [http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/gtmo\\_death\\_camp\\_delta.pdf](http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/gtmo_death_camp_delta.pdf)

<sup>2</sup> Horton, Scott. "The Guantánamo "Suicides": A Camp Delta sergeant blows the whistle." *Harper's Magazine* 18 Jan 2010: n. pag. Web. 30 Jan 2010, <http://harpers.org/archive/2010/01/hbc-90006368>.

**DOD Statement: *NCIS special agents who investigated this case found no evidence to suggest that the three detainees died by means other than suicide.***

The NCIS investigation never allowed for the possibility that the men died by means other than suicide. As evidenced by the immediate announcement by the military that the three detainees hanged themselves in their cells, an announcement made before the investigation had really begun, the NCIS investigation started with the premise that the men committed suicide, and proceeded from there. Indications to the contrary were ignored.

Only such a mind-set could explain the failure of the investigation to uncover information revealed by *Harper's*. Most obvious, the Tower Guards were never interviewed, and several now contradict NCIS' version of events.<sup>3</sup> One might well ask whether, if the investigation were thorough, how at least four witnesses have emerged with divergent views of the events of that night.

When those on duty were asked to complete official sworn written statements, as per Standard Operating Procedures (SOPs), they began to do so but were subsequently ordered to stop.<sup>4</sup> This order was in direct contravention of SOP. Neither in its current defense of the NCIS investigation or in the original investigation itself is this explained. The original uncompleted statements do not appear in the unredacted portion of the NCIS file. Additionally, no official sworn statements or first-person accounts of June 10, 2006, are available in the NCIS investigative file. Rather, third person interviews (not handwritten statements) appear to have been conducted, which directly contradicts SOPs.

A number of the statements that were given are questionable in their veracity. Six military personnel were accused of failures to obey direct orders and/or suspected of making false official statements. These six were the only guards responsible for Alpha Block on June 9-10, 2006. Official warnings against making false official statements of not one, but all six of the people with the only direct knowledge of the most important events of that night, casts serious doubt on the statements' trustworthiness. In turn the suspect statements are nowhere to be found in the investigative file. All statements now present generally corroborate each other.<sup>5</sup>

There are other reasons to consider some other statements to be of questionable evidentiary value. At the end of Colonel Bumgarner's eleven-page sworn statement just above his signature: "This statement, consisting of this page and two other pages. . . ."<sup>6</sup> But the document in the file is an eleven-page statement. It is not clear where the additional information came from, or whether the Colonel attested to it. There are corrections and changes made throughout the eleven pages, indicated by redacted initials before and after nearly every paragraph.

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<sup>3</sup> Scott Horton, *The Guantanamo Suicides: A Camp Delta sergeant blows the whistle*, *Harper's Magazine*, Jan. 18, 2009, available at <http://www.harpers.org/archive/2010/01/hbc-90006368>. For full list of interviewed respondents subjects see: SJA at 92-94.

<sup>4</sup> SOP 32-1 (e) (10) (2004).; *see also* SOP 6-15 (d)(2)(2004). NCIS at 944, 1086; CITF at 41.

<sup>5</sup> *See* [the part with the statements with leading questions]

<sup>6</sup> NCIS at 1064.

There is also physical evidence that suggests the detainees died by means other than suicide. Ahmed presented with a broken hyoid bone; a distinct sign of manual strangulation.<sup>7</sup> “‘There is considerable folklore about the neck injury in judicial hanging, including the notion that radical displaced fractures occur. So, common misconception allows that there will be fractures of some sort of internal neck injury in people who hang themselves.’ In fact, in suicidal hanging, there is scarcely ever any internal evidence of neck injury at all.”<sup>8</sup> This suggests that Ahmed at the least may have died by means other than suicide.

Even as the events unfolded on June 9, 2006, it was not readily apparent that the men had committed suicide. Seven days after the deaths, Colonel Bumgarner stated in his official NCIS statement, “I was still not sure how it had happened. While I suspected that had all [sic] been found hanging, I told the Admiral [sic] was not sure if they had been found hanging, but I pointed out the ligature marks on each detainee.”<sup>9</sup> This uncertainty suggests that the cause of death was not obvious to an observer who arrived shortly after the men had arrived at the clinic.

**DOD Statement:** *On the contrary, it was clear from interviews and forensic evidence that these detainees wanted to end their lives and methodically took steps to accomplish that goal.*

It is not evident that the detainees wanted to end their lives. There is no evidence of state of mind, nor any unredacted mental health examinations that would provide a basis for this statement. Colonel Bumgarner’s official NCIS statement says, “Two of the three had been cleared by Behavioral Health Services just the week prior [to their deaths] and were noted to be in good spirits.”<sup>10</sup>

NCIS’s conclusion claims as evidence of a conspiracy that an unnamed detainee walked up and down the block on June 9, 2006, saying, “tonight’s the night.”<sup>11</sup> There is no evidence, statement, or any information in the NCIS investigative file to support this assertion. This story is not attributed to any source, and the supposed detainee was never interviewed by NCIS. The undocumented event appears only in the NCIS post-investigation statement issued in 2008.

NCIS and CITF interviewed as many as 21 detainees,<sup>12</sup> and none stated that they were aware that the three men planned their suicides. Conversely, multiple detainees stated that, had they known, they would have informed Camp Delta personnel out of compassion and concern.

If this was in fact a coordinated effort, the NCIS investigative file presents no evidence of the detainee’s ability to collaborate or act in concert. Detainees are not allowed to pass notes or anything else between cells. They are not allowed to talk to one another.<sup>13</sup> They are never

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<sup>7</sup> Clinically Oriented Anatomy, 6th Ed. by Keith L. Moore, Arthur F. Dalley II, Anne M. R. Agur. Autopsy Report for ISN 693 at 13.

<sup>8</sup> SJA at 226 citing Hawkey, Dean, *Death by Strangulation*.

<sup>9</sup> NCIS at 1060.

<sup>10</sup> NCIS at 1063.

<sup>11</sup> NCIS Summary at 1-2.

<sup>12</sup> See Report, App’x G. CITF reported 15 detainee interviews. NCIS reports 6. It is unknown if there were multiple interviews of any of the detainees.

<sup>13</sup> NCIS at 732.

supposed to be left together in the same place at the same time in Camp 1.<sup>14</sup> The NCIS file provides no evidence that any of these SOPs were violated.

The alleged “suicide notes,” addressed elsewhere in this report, may provide some evidence of conspiracy, but it is hardly conclusive. For example, the SOUTHCOM file includes 40 pages of both translated and non-translated notes that allegedly declare the intent of each detainee to end his life.<sup>15</sup> However, not one of the notes indicates that collaboration was involved. Some of the notes are addressed to a detainee with a redacted name who was a member of the 2005 detainee “council.”<sup>16</sup> The true nature of these documents is far from certain.

The only other steps one might consider methodical would be the tearing of cloth, braiding of rope and use of other materials as “mannequins” to deceive the guards. No forensic examination of these materials exists in the unredacted portion of the NCIS file. No other forensic evidence is produced in the file that addresses this assertion.

**DOD Statement: *To hang themselves, they did not need to jump off the sinks as suggested by the author, but only had to apply the necessary pressure to the neck to cut off blood flow.***

With this assertion, the DOD appears to shift ground from the clear message of the manner of death in the NCIS report. Several eyewitness accounts produced in the NCIS report indicate or suggest that men jumped from the sink: “It appeared to me that he climbed onto the sink and tied himself off and then jumped from the sink.”<sup>17</sup>

Each portion of the investigation explicitly stated that the detainees were discovered hanging within close proximity to the sinks (also referred to as a “fountain”) located within their cells.<sup>18</sup> Further, the investigations found that the detainees were fully suspended when they were discovered.<sup>19</sup>

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<sup>14</sup> See SOP 2-2(c) (2004). Two detainees may be allowed to be in the exercise yard together; however, they are heavily supervised. See SOP 6-8.

<sup>15</sup> SOUTHCOM at 609–649.

<sup>16</sup> Id. at 609, 632, and 637.

<sup>17</sup> NCIS at 991.

<sup>18</sup> See NCIS at 1004 (noting that “ISN-693 was suspended approximately six (6) inches from the deck. No part of his body was in contact with the deck”; NCIS at 1031 (“I saw the detainee’s feet off the ground approximately one and a half inches with no shoes on”); NCIS at 950 (“The detainee was suspended above the floor on the side of the cell...”); NCIS at 975 (“...I saw the detainee hanging fully suspended off the floor of his cell”). See also CITF at 45 (in which one guard stated that he “saw ISN 093 hanging from the ceiling”).

<sup>19</sup> SJA at 54. See also “Detainee Information Management Entries” SJA at 254 (“Further investigation revealed that Cells A5, A12, and A8 were all setup in the same manner with a sheet and blanket in the same back corner of the cell by the drinking fountain and the beds were setup to look as if someone was sleeping. ISN#000588, ISN#000693, ISN#000093 were all tied up and hanging behind blanket. [sic] All in the same manner.”); SJA at 51 (“The detainee was [suspended] totally upright against the cell wall between cells A-8 and REDACTED next to the sink.”); NCIS at 1042 (“I saw a blanket hanging up near the sink area”); NCIS 1039 (“As I turned to walk towards A5, I glanced at cell A12, and realized that something was wrong, because at this point I could see the blanket hanging in the back corner of the cell where the sink is located.”); NCIS at 990 (“The blanket covered a diagonal portion of the cell that contained the sink but not the toilet”); CITF at 1010 (“The placement of the blanket effectively shielded the sink section of the cell from view”).

It is remarkable that, in response to Seton Hall's *Death in Camp Delta* report and the Harper's article, DOD for the first time raises an alternative hypothesis. To the extent that it may be true, it is consistent with the findings of *Death in Camp Delta*: "What is clear is that the true circumstances surrounding the detainees' deaths cannot be discerned from the investigative file or the statement of findings."<sup>20</sup> But it is by no means clear that the hypothesis is correct, and the DOD offers no support for it.

The Center has consistently maintained the position that the three detainees did not necessarily die in the manner concluded by the DOD's investigators, and that the evidence in the NCIS file does not support the government's conclusions. Based on the investigative files, the expert consultant produced during the Staff Judge Advocate investigation conducted by Admiral Harris, and this new assertion set forth in DOD's statement, it is likely that there are plausible alternative manners of death.<sup>21</sup>

**DOD Statement: *The knots, which bound their hands (and in one case, the decedent's feet), were not elaborate, but were indeed possible to make by each of the detainees who died.***

The Center agrees with the DOD that there is no reason to believe that the detainees were unable to tie knots. However, the knots themselves are irrelevant to the Center's conclusions. Rather than focus on the knots, the Center's analysis in *Death in Camp Delta* questioned the materials supposedly used. More specifically, the knot used to create a noose was a corded knot which was tied to the upper mesh of the wall and was wrapped multiple times around each detainee's neck.<sup>22</sup> NCIS submitted fabric materials recovered from the cells of the detainees along with each body to the pathologist(s).<sup>23</sup> The materials were created out of "braided rope made from bed sheets and tee shirts."<sup>24</sup> Each segment of fabric was knotted with proximity to the end of each fabric segment and secured by additional braided materials.<sup>25</sup> Further, each autopsy report remarked that each detainee's neck was encircled with a deep furrow that featured abrasions.<sup>26</sup> The abrasions were described as "intricate weave-type patterns."<sup>27</sup> Additionally, it was observed that the three detainees covered their faces with masks<sup>28</sup> and that all three men were gagged.<sup>29</sup>

JTF-GTMO JDG restricts the number of permissible cell items for both compliant and non-compliant detainees.<sup>30</sup> Detainees are not provided with implements capable of cutting fabric. Additionally, detainees are provided with a limited amount of fabric.<sup>31</sup> In addition to the use of

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<sup>20</sup> *Death in Camp Delta* at P. 54.

<sup>21</sup> SJA at 226 citing Hawkley, Dean, *Death by Strangulation*.

<sup>22</sup> SJA at 49-50.

<sup>23</sup> See Autopsy of Detainee 588 Mani Shaman Turki Alutaybi (Al-Tabi), 093; Autopsy of Detainee 093 Yasir T. Al Zahrani; and Autopsy of Detainee 693 Ahmed, Ali Abdulla. See also NCIS at 1202; CITF at 2.

<sup>24</sup> NCIS Statement of Findings from Suicide Investigation at 1.

<sup>25</sup> Id.

<sup>26</sup> Autopsy of Detainee 588; Autopsy of Detainee 093; Autopsy of Detainee 693.

<sup>27</sup> Id.

<sup>28</sup> SJA at 254.

<sup>29</sup> See, e.g., NCIS at 938, 950, 958, 959, 966, 975, 1024, 1025, 1073-74, 1079, 1091, 1093, 1097; CITF at 32, 49, 50.

<sup>30</sup> See "Basic Cell Items" and "Comfort Cell Items" SOP (b) (15) (2004).

<sup>31</sup> See *Death in Camp Delta* for a comprehensive analysis.

the “tee shirt like material” which was intricately braided and knotted to create the alleged death implements, the investigations state that multiple pieces of fabric were used to conceal the detainees’ activities. For example, Al Zahrani allegedly tied to his cell (a minimum of) a blanket, three sheets, and the noose itself; found within his cell were a wash cloth a white color cloth, clothes, a blanket, a rug, and multiple non-fabric cell items.<sup>32</sup>

In short, the braided ropes were elaborate because they were manufactured with enough precision to leave fine patterns on the skin of the three men and were secured by multiple knots. In light of the items discovered in each detainee’s cell, there is a serious question as to how so many impermissible items were kept in the cell of each detainee in the absence of additional derelictions by the guards. In addition, the ability of three detainees to produce such a quantity of homemade ropes and bindings raises even more pointed questions about the supervision over the extended period of time necessary for such work.

Neither the original NCIS report nor the most recent DOD response explains how three men — detained within a maximum security military prison under supposedly constant supervision — were able to:

1. Procure enough material to cover significant areas of their cells
2. Intricately weave fabric bindings
3. Repeatedly knot the bindings
4. Tie the binding material at a point in the cell high enough so that each detainee would be able to suspend fully without their feet touching the ground
5. Wrap the binding around their necks several times
6. Create knots to bind their limbs and torso
7. Gag themselves
8. And somehow hang to death while fully suspended without discovery by the guard force

The Admiral Harris SJA (Staff Judge Associate) investigation explicitly stated that, although there were “minor” SOP violations, the guard force could not have prevented the June 9-10 “suicides.”<sup>33</sup>

The Center finds the DOD’s lack of an explanation incredible.

**DOD Statement:** *In addition, a short written statement declaring their intent to be martyrs was found in the pockets of each of the detainees. Lengthier written death declarations were also found.*

The investigations include copies of “possible suicide notes” found on the bodies of the three dead detainees<sup>34</sup> as well as longer “apparent suicide notes” found in the cells of other detainees, only two of which were identified as written by the detainees who died June 10.<sup>35</sup> All

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<sup>32</sup> NCIS at P. 1245-6

<sup>33</sup> See SJA AR 15-6 at 1-5.

<sup>34</sup> NCIS at 1239.

<sup>35</sup> NCIS at 2. See NCIS at 1310–1313.

Arabic language documents in the investigative files were accompanied by English translations prepared by unnamed persons.<sup>36</sup> The Center's Report did not seek to verify the translations' accuracy, and accepted the government's translations as accurate.

On several of the translations, notes indicate the translator's opinions as to the cultural significance of the content of the documents, and most of these comments do not treat the language as suggesting the intent to commit suicide. The documented translations do speak of the authors' souls being ready for whatever is to come, and other similar rhetoric (one describes Uncle Sam tightening a rope around the writer's neck), so it is possible that these documents may indeed be the "suicide notes." However, even assuming accuracy of translation, these documents could merely reflect Islamic religious writing or expressions of oppression or other personal emotions.

Furthermore, there is no evidence in any of these documents of a conspiracy between the three dead men. At no time do any of the alleged notes mention meetings, or planning, or coordination of any kind. The final report simply states that the fact that all three men had written documents in their cells and/or on their persons is an indication of conspiracy, and makes no further attempt to support that conclusion.

It is also unknown how many other detainees were in possession of similar documents; materials which would have been collected at the same time as those included in the investigative files. Whether or not the written notes in question are suicide notes, their translations provide no evidence of a conspiracy between the three dead men.

**DOD Statement: *The rulings of the Armed Forces Institute of Pathology (AFIP), which determined the cause and manner of death, were wholly consistent with the NCIS investigative findings.***

Despite the DOD's statement, there are several unexplained inconsistencies between the autopsy reports and the NCIS investigative findings.

Most importantly, the autopsy reports conclude that each detainee was dead for hours before being found. "The medical examiner from the Armed Forces Institute of Pathology concludes that detainees Al Tabi and Ahmed were deceased for 'at least a couple hours prior to the discovery.'"<sup>37</sup> NCIS does not mention this fact in its investigative findings.

According to autopsies, only Ahmed had rags in his throat.<sup>38</sup> In contrast, NCIS interviews reveal multiple sources stating that each of the deceased detainees had rags in his throat upon discovery. Statements to the NCIS describe rags or cloths of some kind being removed from the mouths and throats of all three detainees, but only Ahmed's autopsy mentions a rag in the throat.

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<sup>36</sup> See SOUTHCOM 609-648, 655-663, 664-672; NCIS at 1239.

<sup>37</sup> Report at page 21.

<sup>38</sup> See Autopsy Report for ISN 693.

Further, only Al Tabi's autopsy reveals no internal hemorrhaging in the neck. This conflicts with NCIS's conclusion that all three men died in the same way and the difference between the forensic evidence and the supposed common method of death is not explained by either the pathologist or NCIS. The only sign of hanging the examiner found was a "circumferential dried abrasion collar around the neck."<sup>39</sup> The pathologist finds support for his finding of death by hanging in reliance on a report that "... he was discovered in his secure cell suspended by the neck by braided segments of material."<sup>40</sup>

NCIS interviews and the autopsy reports corroborate that all three detainees were dead for at least two hours before being found. Each body was found in rigor mortis, a post mortem condition from which one cannot be resuscitated.<sup>41</sup> Despite this, the autopsy states that, after being found, detainees were given invasive treatment, including use of oral-gastric tubes, orally placed endotracheal tubes, intravenous catheter with attached urinary bladder bag, puncture marks on arms and hands, use of electrocardiogram pads, and defibrillator pads.<sup>42</sup> The autopsy conclusions rely on earlier reports that a suicide occurred and that the enumerated treatments were used to attempt resuscitation. Neither the NCIS investigation nor the most recent DOD response explain why invasive life-saving procedures would be performed on persons in rigor mortis who have been passed the point of possible revival for more than an hour.

The morning following the three deaths, June 10, 2006, the military announced that all three had committed suicide in a coordinated act of "asymmetrical warfare." Interestingly, no autopsies had yet been performed at the time of this statement. In fact, the first autopsy was not performed until 18:30 on June 10, or 6:30pm, and the last on June 11, at 11:00am.<sup>43</sup> The pathology rulings and the NCIS investigation fall in line with this predetermined conclusion. Indeed, the pathologist(s) based the rulings at least in part upon some information that NCIS provided. "After an extensive investigation there is no evidence to suggest that anyone else was involved in this death. *Based on the information available*, the manner of death is suicide."<sup>44</sup> "Opinion: 30 year-old detainee died of hanging; *[B]y report*, he was discovered in his secure cell suspended by the neck by braided segments of material."<sup>45</sup> Autopsy reports also confirm that an NCIS Special Agent was present for all three autopsies. In short, these were not investigative efforts independent of one another; they were two arms of the same investigation, one which started with the pre-determined conclusion of suicide.

**DOD Statement: "2. Regarding rags found in the mouth, there was only one rag lodged down the throat of one of the detainees."**

This statement directly contradicts multiple statements in the NCIS investigation.<sup>46</sup> It is clear from official statements made under oath that all three men had rags in their throats or in

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<sup>39</sup> Autopsy Report for ISN 093 at 4; Autopsy Report for ISN588 at 25; Autopsy Report for ISN 693 at 15.

<sup>40</sup> *Id.*

<sup>41</sup> Report at 19; *See also* NCIS at 1071, 1078-9.

<sup>42</sup> *See* Autopsy Report for ISN 093; Autopsy Report for ISN 588; Autopsy Report for ISN 693.

<sup>43</sup> Autopsy Report for ISN 093 at 1; Autopsy Report for ISN 588 at 1; Autopsy Report for ISN 693 at 1.

<sup>44</sup> Autopsy of Detainee 093 Yasir T. Al Zahrani. (emphasis added).

<sup>45</sup> Autopsy of Detainee 588 Mani Shaman Turki Alutaybi (Al-Tabi). (emphasis added).

<sup>46</sup> *See, e.g.*, NCIS at 938, 950, 958, 959, 966, 975, 1024, 1025, 1073-74, 1079, 1091, 1093, 1097; CITF at 32, 49, 50.



their mouths and throats. *Death in Camp Delta* specifically documented evidence from NCIS and CITF for a rag in the mouth, throat, or mouth and throat of each of the three detainees:

### **Al Zahrani**

Al Zahrani was hanging behind blankets with a sheet wrapped around his neck and his hands were bound together. Someone shackled his arms, and AG1 and AG2 both reported shackling his legs. AG3 recalls that zip ties were used on Al Zahrani's wrists and ankles instead of shackles. *The NCO tried to pull the cloth lodged in the detainee's mouth and throat.* AG1 and the NCO both tried to obtain a pulse, but there was none.<sup>47</sup> . . . An ambulance arrived to take Al Zahrani to the Naval Hospital located on the edge of Camp Delta. While en route, the EMTs discovered that cloth was lodged in Al Zahrani's mouth and throat, blocking his airway.<sup>48</sup>

### **Ahmed**

As far as can be determined from the heavily redacted statements, Ahmed was in exam room 10:

After loading the first detainee into the ambulance I went back into the clinic and this was when I first realized that there were other detainees in the clinic being treated. I looked into the first exam room on the left and I saw there were enough people in there treating that detainee. I did not go into this room at all. I then went into the second exam room on the left and I saw a third detainee being worked on by two Corpsmen. . . . The[n] he tried to tube him but we could not get his jaw open. [REDACTED] used a laryngoscope...blade, which is made of metal, to pry the detainee's mouth open and in doing so broke some of the detainee's teeth. *Once the mouth was open we saw that there was a big piece of cloth lodged in the back of the detainee's mouth.* [REDACTED] extracted it with the forceps and it appeared to take a good amount of force to get it out. Once it was out I saw that it was folded repeatedly on itself and nearly as big as a wash cloth that was folded once in half. . . .In the aftermath of all that had happened *I heard that the second detainee had something in his mouth. The cloth we removed from the third detainee (second one I worked on) was clamped to his shirt with the forceps and someone took a picture of it.*<sup>49</sup>

From a different sworn statement:

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<sup>47</sup> Report at 29, citing NCIS at 950, 958, 966, 975. (emphasis added).

<sup>48</sup> Report at 32, citing NCIS at 1071, 1103, CITF 49, 50. According to NCIS EMIT statements, the rag was removed from Al Zahrani's throat in the ambulance. *See also*: "the first detainee had what appeared to be a t-shirt wrapped around his hands and blue marks on his neck. The detainee also had what appeared to be a shredded t-shirt inside of his mouth that [REDACTED]." NCIS at 1097; *see also* SJA at 254.

<sup>49</sup> NCIS 1078-79; *See also* Report at 33. (emphasis added).

At that time the Senior Medical Officer (SMO) entered examination room (10) and attempted to intubate the detainee. [REDACTED] however, was unable to do so because the detainee's jaw was locked shut and he could not open it. I assisted [REDACTED] to open the detainee's mouth. While struggling to open his mouth, we broke at least one (1) of the detainee's teeth. We eventually opened the detainee's mouth and *discovered what I believe to be a white nylon sock inserted into the back of the detainee's mouth*. [REDACTED] extracted the sock [from] the detainee's mouth, and again attempted to intubate the detainee.<sup>50</sup>

Another report states:

ISN 693 [Ahmed] was the third detainee brought in and *appeared to have a white cloth in his mouth*.<sup>51</sup>

### **Al Tabi**

Al Tabi, ISN 588, was housed in cell Alpha 12. One statement recalled, "I do remember 588 having a mask made from sheets that was *in hi[s] mouth* and wrapped around his head."<sup>52</sup> Another guard stated: "When I got to Alpha 12, I saw a blanket hanging up near the sink area. ...The detainee's eyes were open, he had some sort of white cloth around his mouth..."<sup>53</sup> Still another recalls the "attempt to intubate this detainee and found *what appeared to be either gauze or white fabric lodged in the back of the detainees throat*, which [was] removed."<sup>54</sup>

In sum, the abundant body of evidence in the unredacted portion of the investigative file demonstrates beyond a doubt that all three of the detainees had some form of cloth in their mouth, throat, or mouth and throat.<sup>55</sup> DOD's contention is in direct contradiction with its own investigation. If the DOD now has some reason to doubt the NCIS report in this regard, the implications for doubting the overall report are obvious.

**DOD Statement: "Rather than being 'proof' of homicide, this was due to the detainee himself positioning the rag in his mouth in order not to make any noise so as to alert the guards. The rag was inhaled as a natural reaction to death by asphyxiation."**

The Center's Report never stated that the rags were "proof of homicide," which makes the DOD's use of the word "proof" in quotes an exercise in creating a strawman. The Report

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<sup>50</sup> NCIS at 1091. (emphasis added).

<sup>51</sup> CITF at 1065. See also NCIS 1088, 1090, 1015, 1044, 1077, 1073. (emphasis added).

<sup>52</sup> NCIS at 966.

<sup>53</sup> NCIS at 1042.

<sup>54</sup> NCIS 1073-74. (emphasis added).

<sup>55</sup> The great weight of evidence in the NCIS file points to all three having rags in their throats. Nowhere is it suggested that only one had a rag in his throat. Conversely, a single source, the DIMS provided on P. 254 of the SJA report, states that only 2 of the detainees had rags in their throats. Thus, the DOD's witnesses, investigative file, and recording systems are rife with inconsistencies, an indication that the DOD cannot say with certainty how many detainees died with rags in their throats.

criticized the NCIS because the investigation never addressed the reason why each detainee had a rag deep in his throat, evidence which should immediately raise the suspicions of an investigator. Because all three dead men were found to have died of asphyxiation and with rags lodged in their mouth and/or throat, the relevance of the rags is obvious.

The medics began resuscitation attempts on each detainee after his arrival. According to descriptions from the guards, medics, and autopsy reports, all three detainees were cold to the touch, bluish in color, and in a state of rigor mortis, indicating that each had been dead for more than two hours at the time of discovery. Their eyes were rolled back in their sockets and they had no pulse. Rigor mortis locked their jaws and impeded resuscitation attempts. In the case of one detainee, his jaw had to be pried open with a metal instrument that broke his teeth. At that time, medical personnel discovered that he had a cloth deep in his mouth and down his throat. The same condition was discovered in the other two bodies. The investigations did not explain why the detainees had rags in their throats.<sup>56</sup>

The DOD's current claim that each detainee placed a rag in his mouth "*in order not to make any noise so as to alert the guards*" is a possible hypothesis. But it appears to be so theorized for the first time in the current response. Nowhere in the unredacted portion of the NCIS investigation was this explanation asserted, nor was any evidence for this conclusion given.

The assertion that inhaling a rag is a natural reaction to death by asphyxiation is never addressed by the NCIS investigation. Nowhere in the three autopsies do the only medical experts consulted address the role of the rags in the men's throats in their deaths. Admiral Harris' conclusions do not mention the rags. NCIS does not present scientific evidence that inhaling an obstruction is a natural reaction to death by asphyxiation, especially when that asphyxiation is supposed to have been brought about by hanging.<sup>57</sup> It is unclear how a man can inhale a rag (or a sock, or a washcloth) after constricting his airway with a noose around his neck, drawn tight enough to cut off all air. This statement both goes beyond the scope of and contradicts the medical findings of NCIS's investigation.

**DOD Statement: "*Blankets and sheets had been used to obstruct the guards' views and to create the appearance that the detainees were asleep in their cells. During its investigation, NCIS discovered that detainees were allowed to hang sheets for privacy;...*"**

It is entirely plausible that blankets and sheets could have been used to obstruct the guards' views into the cells<sup>58</sup> or to create the appearance that the detainees were asleep in their cells. In order for this to be true, however, the detainees would have to have been violating the

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<sup>56</sup> Report at 5.

<sup>57</sup> However, SJA at 223-232 states that the presence of the rag expedites asphyxiation. Thus, the DOD's consulted expert concluded a more logical alternative based on scientific fact which the DOD chose to ignore.

<sup>58</sup> See NCIS at 1245-46 for Al Zahrani cell description; 1261-63 for Al Tabi cell description; 1279 -80 for Ahmed cell descriptions.

SOPs. “Blankets or sheets may be temporarily hung up, no higher than half way up the cell walls, to provide privacy while using the toilet. Once the detainee has completed using the toilet, the blankets and sheets must be taken down.”<sup>59</sup> This issue was dealt with directly in the Seton Hall report:

Despite strict SOPs stating that detainees may only hang items to dry no higher than half way up the cell walls, the guard statements allege that they were unable to see the detainees hanging as sheets and blankets were arranged to obstruct their view. According to SOPs, —‘[d]etainees may only hang wet clothing and linen items in cell windows so that they may dry. Once dry, they must be removed.’<sup>60</sup>

Thus, the assertion that the detainees hung blankets and sheets for several hours is questionable considering the SOPs and guard practice. Assuming the truth of this, the question remains why such a grievous breach of SOPs with fatal results did not warrant some kind of disciplinary action.

**DOD Statement:** “...[T]hey were allowed to have extra linens and/or blankets;...”

The SOPs do state that, as a reward for good behavior, detainees are allowed to obtain comfort items including extra blankets and/or sheets.<sup>61</sup> Two of the deceased detainees had ended hunger strikes only days before their deaths, raising questions as to whether they would have been considered to have been on “good behavior” and thus able to earn a substantial number of comfort items. The fact that sufficient amounts of such comfort items were given each of the three detainees as a result of his good behavior raises serious questions.

More generally, Camp 1 had been on lockdown following the riots on May 18. “In the weeks leading up to the three deaths, the guards and officers were on high alert. According to NCIS, there had been 44 reported suicide attempts prior to June 9, 2006, and more recent events including a detainee riot on May 18, 2006, increased the need for special vigilance.”<sup>62</sup> Just days before the deaths, Colonel Bumgarner even stated in an interview with Bill O’Reilly that the detainees were more violent than ever and were planning attacks on guards at every moment.<sup>63</sup> Thus, there is a serious question whether the detainees *were* actually given extra blankets and sheets, and if so, whether giving such items conformed to the SOPs in place.

**DOD Statement:** “...[S]ome of the lights in the detention facility were dimmed at night to permit better sleep. This explains how the detainees were able to obscure their actions and why the guards did not discover the deceased detainees right away.”

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<sup>59</sup> SOP 6-21(d) (2004).

<sup>60</sup> *Death in Camp Delta*, at 18.

<sup>61</sup> Report at A-51.

<sup>62</sup> Report at 24.

<sup>63</sup> Report at 36.

This might be true, but if so, it is contrary to Admiral Harris's findings of fact. Based on the pathologist's estimated time of death, he surmised: "[I]f a couple of hours was more than two and a half hours, then the detainees hanged themselves while the tier was fully illuminated."<sup>64</sup>

Of course, it is possible that Harris was wrong. "[A] couple of hours" put the time of death at 10:00pm or later, which meant that some lights were likely turned off. The JTF GTMO procedures up through June 9, 2006, were to shut out the overhead lights on one side of the tier at 2220.<sup>65</sup> "The SOP related to lighting in cells during darkness in Camp 1 is to turn off half the lights on the tier. Camp 1 does not have lights inside the cell. The lights are on the ceiling of the tier and shine into the cells. So one side of the tier is lit and the other is not."<sup>66</sup> It is not known from the unredacted materials which side of the tier was left lit on the night of June 9.

If the DOD reference to "dimmed" lights referring to the half the lights being turned off, it may be correct, but necessarily impeaches Harris findings. In any event, even if the SOP were followed, the guards were nonetheless required to see skin or movement for *every* detainee *at least* every three hours.<sup>67</sup> In addition, guards were required to walk the block every ten minutes in order to maintain a continuous presence on the block at all times.<sup>68</sup> While reduced lighting could have made it more difficult to see the detainees, it does not explain why no guard noticed three detainees hanging in their cells for hours given the fact such strict monitoring procedures were required of them.

**DOD Statement:** *"All available video footage was reviewed by NCIS, and nothing of evidentiary value was discovered."*

DOD's use of the caveat "available" is telling. This statement does not describe what angles were available or whether video-monitoring equipment in the cell blocks recorded the reported incident at all. It does not state the duration of the recording. DOD contends that the Tower Guards are wrong, that three detainees were indeed cut down from hanging in their cells and carried from Alpha Block to the clinic. If video evidence exists at all, it can show two possible scenarios. Either it shows three detainees being cut down from hanging in their cells and carried to the clinic, thus confirming the DOD's position, or it shows that detainees were not cut down and carried to the clinic, thus confirming the story the Tower Guards told *Harper's Magazine*. Either of these possibilities is of enormous evidentiary value.

To accept the DOD's statement at face value would mean that, despite numerous cameras in Camp Delta, there are no recordings:

- of the guards removing the detainees from the cells
- of the detainees being taken by backboard through the prison hallways
- of detainees being carried out of the cell block and into the clinic

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<sup>64</sup> SJA AR 15-6 Investigation at 30. (citation omitted).

<sup>65</sup> NCIS at 949.

<sup>66</sup> Bumgarner on NCIS 1056.

<sup>67</sup> Report at 16.

<sup>68</sup> SOP 6-1(d) 2004.

- of guards running around yelling for help, coordinating medical support and ordering guards to inspect other cells

These activities are all things that should have been captured on one or more of the many cameras. There is no explanation as to why “nothing of evidentiary value was discovered.”

NCIS was provided all videotapes on or about June 13, 2006, but there is no indication in the unredacted file that NCIS reviewed them.<sup>69</sup> It is clear from a statement by Rear Admiral Mark H. Buzby that hallway and common area video monitoring at Guantánamo is standard practice.<sup>70</sup> A memorandum dated June 15, 2006, confirms that SOUTHCOM delivered on June 14 “a videotape of the events of 10 Jun 06....The video is the only tape the command holds relating to the events under investigation.”<sup>71</sup> Aside from the two memoranda in the SOUTHCOM file that mention delivery of the videotapes to NCIS, the government never refers to any videos in the investigative documents. Further, audio recordings of the radio and telephone calls were apparently not reviewed.<sup>72</sup>

The NCIS report recounts the statement of a guard who began to videotape the events in the clinic and was told to stop taping. “Someone called for a combat camera. I am combat camera qualified so I volunteered to videotape the event. I ran the video camera for approximately two (2) minutes until I was instructed by [REDACTED] to halt taping.”<sup>73</sup> What makes the lack of video evidence even more surprising is the fact that video monitoring is required by the SOPs in many circumstances. The SOPs require video recording during self-harm attempts, during completions of serious incident reports, and whenever IRF teams are used.<sup>74</sup> This is another documented violation of SOPs for which no one was ever disciplined.

**DOD Statement: NCIS conducted over 100 interviews during the first three days of the investigation, including interviews with all the guards who worked in the cellblock that day and all the detainees who were housed there. None of those interviewed told of any detainees being taken away or alleged homicide.**

While NCIS and CTF may have conducted 100 interviews, they interviewed no more than 45 people, and most of those interviewed did not have first-hand knowledge of the core events.<sup>75</sup> The record reflects multiple interviews of the same person. For example, the SJA

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<sup>69</sup> Report at 50, *citing* SOUTHCOM at 837.

<sup>70</sup> White, Josh. Defendants' Lawyers Fear Loss of Potential Evidence at Guantanamo Bay, WASH. POST. February 14, 2008, available at <http://www.washingtonpost.com/wpdyn/content/article/2008/02/13AR2008021303164.html> (“Buzby’s declaration, filed in federal cases Friday and yesterday, said the video recordings were part of a surveillance system used to monitor the camps and were mostly of mundane operations.”)

<sup>71</sup> Report at 50, *citing* SOUTHCOM at 839.

<sup>72</sup> The Dictaphone recording system, which records emergency calls throughout the camp, was reported to have been inactive and not available for the investigators to review. NCIS at 926 (“Reporting Investigator and [name redacted] logged into the Dictaphone recording system and discovered it had experienced a power failure and had not been properly reactivated. Because the Dictaphone was deactivated, it did not record any calls from 03MAY06 until about 2100 on 10JUN06, when power was restored during maintenance.”).

<sup>73</sup> NCIS, at 1004.

<sup>74</sup> Report at 16, 17, 33.

<sup>75</sup> See Report at App’s A.

report logs six interviewees from Block Duty Personnel on June 9-10, 2006, each of whom provided three statements, for a total of 18 statements from only six interviewees.<sup>76</sup> Further, one member of Naval Hospital Medical Personnel provided two statements, another guard provided a total of four statements, and a second guard provided three.<sup>77</sup>

### **First Three Days of the Investigation**

NCIS did not interview 100 people within the first three days of the investigation. During the first three days of the investigation only 24 people were interviewed,<sup>78</sup> but none of them gave first-person statements. NCIS began collecting first-person statements on June 14, more than three days after the detainees died and after the official announcement that they hanged themselves.

### **Interviewees**

At most, 45 individuals,<sup>79</sup> excluding detainees, were interviewed: 26 guards, escorts, and officers, 16 medics, and 3 civilians. Of those interviewed, only 36 gave written first-person statements;<sup>80</sup> the rest are summaries of interviews written by the investigators. Of the 36, six were the guards on duty on Alpha Block that night. These six were the key witnesses to the events of June 9-10 as told by the NCIS investigation. All six were suspected by NCIS of making false statements, calling the credibility of their resulting statements into question. The false statements are not included in the NCIS investigation and remain missing.

The individuals interviewed were only a select group of guards, including the six who were suspected of making false statements by NCIS itself. Only one Sally port guard was interviewed, and no tower guards were interviewed, although many may have seen activity within the camp to confirm the response in the wake of the deaths. Additionally, the NCIS file contains only one interview with a June 9 day-shift guard, although four other guards were on duty earlier that day who may have noticed suspicious activity earlier in the day.<sup>81</sup>

**DOD Statement:** *AFIP sent a senior medical examiner to Guantanamo to perform the autopsies. In addition, an independent, state-level, senior medical examiner flew to Guantanamo to observe the autopsies, standard operating procedure for AFIP in high profile cases.*

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<sup>76</sup> SJA at 146.

<sup>77</sup> SJA at 145, 147.

<sup>78</sup> This number does not include detainees, some of whom later than June 10.

<sup>79</sup> Non-detainees.

<sup>80</sup> There are two interviews dated June 12, 2006 from the Department of the Navy on different forms than the NCIS used. These two interviews were attached to the SOUTHCOM file. See SOUTHCOM at 928-932. These two interviews were not counted in the overall count as to who was interviewed because the forms indicate the statements were made for an internal review not statements made for the external NCIS investigation.

<sup>81</sup> See Report at App'x A.

The Center Report examined the autopsy reports, and never contested that autopsies were in fact performed. Five personnel were present at each autopsy, and it appears likely that they were the same five people each time; however, all names of the medical examiners were redacted from the files. Only their titles—“NCIS Special Agent,” “Medical Examiner,” “Autopsy Assistant,” “Medical Photographer,” and “Medical Examiner Investigator”—were left.<sup>82</sup> As detainee autopsies become part of the public record upon completion of the reports, it is unclear why the examiner names are redacted.

In addition, “The medical examiner from the Armed Forces Institute of Pathology concludes that detainees Al Tabi and Ahmed were deceased for ‘at least a couple hours prior to the discovery.’”<sup>83</sup> NCIS does not mention this fact in its investigation.

**DOD Statement:** *All the materials released to date have been highly redacted. While Seton Hall students may have done the best they could with what they had, the fact is they only had available to them a small fraction of the reports.*

Our report stressed that we only had access to the unredacted portion and that the redacted portion may contain more answers.<sup>84</sup> However, existence of information to which the Center did not have access does not change the fact that the unredacted portions contain many contradictions and unusual events that cannot be redressed through additional information. See *Death in Camp Delta* for a thorough analysis.

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In addition to the response Major Shawn Turner provided to *Harper’s*, he is also cited as the source of a statement on a blog website, which appeared online January 29, 2010.<sup>85</sup> This seems odd because the statement is not otherwise publicly available, and has not been reported in any other media source. The statement is largely identical to the one sent to Harper’s, with two additional assertions set forth

**DOD Statement:** *The bodies were thoroughly examined for signs of torture. None was found.*

The autopsy reports never mention any specific measures taken to seek out signs of torture. The NCIS statement of findings released in August 2008 does not state any conclusions regarding torture. None of the statements in the investigation file mentions torture. There is no way to verify this statement from what is available in the unredacted NCIS file.

The examiners accepted that the detainees had been found hanging dead in their cells and premised their examination on this information. All three detainees had rags in their throats when they died. This was never investigated further by the autopsy examiners.

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<sup>82</sup> See pages AFME 1, 9, 10, 11, 12, 19, 20, 21, 22, 28, 29, 30.

<sup>83</sup> Page 21.

<sup>84</sup> See page 6.

<sup>85</sup> *Harper’s Is Wrong on GTMO Suicides*, available at <http://www.humanevents.com/article.php?id=35388>



This is further evidence that the investigation appears to have been based from the beginning on the premise that the deaths were all suicides, and each step of the investigation was meant only to support that predetermined conclusion.

**DOD Statement:** *A thorough, years-long investigation by NCIS concluded unequivocally that the detainees' deaths were the result of suicide. In addition, the Justice Department took this matter very seriously and a number of experienced department attorneys and agents extensively and thoroughly reviewed the allegations and found no evidence of wrongdoing.*

The three men died on June 9, 2006. No interviews were conducted after July 11, 2006. None of the tower guards were interviewed, despite the fact that they had visual command of Camp Delta and Alpha Block, as well as the clinic and the path from Alpha Block to the Clinic, throughout the night. Commanding Officer, Rear Admiral Harry B. Harris, signed off on his assessment of the completed investigation on September 6, 2006, less than 90 days after the deaths occurred.<sup>86</sup> There is no indication that NCIS took any investigative measures after this date. This investigation was far from “years-long;” indeed, it can barely be described as “months-long.” The brevity of the investigation undercuts the DOD’s present claims of thoroughness and calls into question whether the investigation truly was a serious effort to discern the truth.

Additionally, the cause of death was announced as suicide within hours of the deaths, and the government had already labeled the deaths as “asymmetrical warfare” and “a good PR move.”<sup>87</sup> In a conference call with reporters on June 10, mere hours after the deaths and before the autopsies had been completed, Admiral Harris stated that “[t]hey hung themselves with fabricated nooses made out of clothes and bed sheets,” despite the press releases of the same day stating that the manner of death was under investigation.<sup>88</sup> This is evidence to show the investigation started with the presumption of suicide and proceeded from there.

### ***Colonel Bumgarner’s Statement to AP***

While not formally a part of any DOD response, Colonel Bumgarner gave a statement to the Associated Press in the wake of the *Harper’s* article, stating that he would have to get clearance from the Defense Department to speak, but commenting:

*“This blatant misrepresentation of the truth infuriates me. I don’t know who Sgt. Hickman is, but he is only trying to be a spotlight ranger. He knows nothing about what transpired in Camp 1, or our medical facility. I do, I was there.”*

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<sup>86</sup> STAFF JUDGE ADVOCATE (SJA) DETAINEES DEATH INVESTIGATION, (Sep. 2006), *available at* [http://www.dod.mil/pubs/foi/detainees/death\\_investigation/index.html#SJA2](http://www.dod.mil/pubs/foi/detainees/death_investigation/index.html#SJA2). This assessment, accompanied by the investigation report and recommendations from NCIS to Admiral Harris, were not released until April of 2009, after Seton Hall had already begun its investigation.

<sup>87</sup> Report at 3.

<sup>88</sup> *Three Detainees Commit Suicide at Guantanamo Bay*, Fox News (June 10, 2006), *available at* <http://www.foxnews.com/story/0,2933,199001,00.html>.

Apparently, Colonel Bumgarner never received a clearance, as he made no further statements. This statement itself, however, is indicative of the problems in the official investigation. The relevant point to the Center's Report is the claim that he (Colonel Bumgarner) knew what transpired in Camp 1 because he was there. This claim is demonstrably false if taken literally, according to Colonel Bumgarner's own prior sworn statement to NCIS investigators, which the Seton Hall report analyzed.<sup>89</sup>

That statement claims that on June 9, 2006, the colonel spent the evening at Admiral Harris's home, far from the camp.<sup>90</sup> At 00:48, the DOC called Colonel Bumgarner, who had by then returned to his quarters, to the Camp, and he immediately drove to the DET Clinic, following the ambulance into the Camp.<sup>91</sup> Before he left, however, he called Admiral Harris to inform him that a suicide attempt had occurred.<sup>92</sup> There was no doctor at the clinic when he arrived; only guards and medical personnel attended to the three lifeless detainees.<sup>93</sup> Again, Colonel Bumgarner called Admiral Harris, this time stating he believed all three were dead.<sup>94</sup> After the second detainee was declared dead at 01:16, Colonel Bumgarner notified the Joint Operations Center (JOC) of the deaths, and Admiral Harris arrived minutes later.<sup>95</sup>

Colonel Bumgarner did not know how the detainees had died but he did notice the indentations on Al Tabi's and Ahmed's necks: "While I suspected that had all been [sic] found hanging, I told the Admiral [sic] was not sure if they had been found hanging, but I pointed out the ligature marks on each detainee, and the material that had [REDACTED] of ISN 588..."<sup>96</sup>

Other statements by Bumgarner to NCIS further establish that he was not present when the bodies were discovered, or indeed, when they were first brought to the clinic. Therefore, he could not have known what happened firsthand.<sup>97</sup>

"I was still not sure of how it happened."

"I wanted to know how much of Camp 1 had been checked and to understand the circumstances surrounding the discovery of the detainees."

"At approximately 0117 I stepped outside so I could place the cell phone call to the JOC to make notifications of the deaths."

Further undermining Bumgarner's claim that he knew what was actually happening, this phone call was made to JOC before all three had been officially pronounced dead.<sup>98</sup>

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<sup>89</sup> See Report at 36, citing NCIS pages 1059-1060.

<sup>90</sup> NCIS at 1059.

<sup>91</sup> NCIS at 1059.

<sup>92</sup> NCIS at 1059.

<sup>93</sup> NCIS at 1059.

<sup>94</sup> NCIS at 1059.

<sup>95</sup> NCIS at 1060.

<sup>96</sup> NCIS at 1060.

<sup>97</sup> NCIS at 1060.

<sup>98</sup> NCIS at 1060. Colonel Bumgarner made the call at 01:16. Al Zahrani was declared dead at 01:50.

## APPENDIX A

*Harper's Magazine* printed and replied to the DOD's statement on January 26, 2010.<sup>99</sup> The DOD statement is reconstructed from that reply.

Statement was issued by: Major Shawn Turner, Osd.mil

1. NCIS special agents who investigated this case found no evidence to suggest that the three detainees died by means other than suicide. On the contrary, it was clear from interviews and forensic evidence that these detainees wanted to end their lives and methodically took steps to accomplish that goal. To hang themselves, they did not need to jump off the sinks as suggested by the author, but only had to apply the necessary pressure to the neck to cut off blood flow. The knots, which bound their hands (and in one case, the decedent's feet), were not elaborate, but were indeed possible to make by each of the detainees who died. In addition, a short written statement declaring their intent to be martyrs was found in the pockets of each of the detainees. Lengthier written death declarations were also found. The rulings of the Armed Forces Institute of Pathology (AFIP), which determined the cause and manner of death, were wholly consistent with the NCIS investigative findings.

2. Regarding rags found in the mouth, there was only one rag lodged down the throat of one of the detainees. Rather than being "proof" of homicide, this was due to the detainee himself positioning the rag in his mouth in order not to make any noise so as to alert the guards. The rag was inhaled as a natural reaction to death by asphyxiation.

3. Blankets and sheets had been used to obstruct the guards' views and to create the appearance that the detainees were asleep in their cells. During its investigation, NCIS discovered that detainees were allowed to hang sheets for privacy; they were allowed to have extra linens and/or blankets; some of the lights in the detention facility were dimmed at night to permit better sleep. This explains how the detainees were able to obscure their actions and why the guards did not discover the deceased detainees right away. All available video footage was reviewed by NCIS, and nothing of evidentiary value was discovered.

4. According to the Harper's article, Sergeant Hickman was stationed on the exterior perimeter of the Camp, including Tower 1, the night of the detainees' deaths. From this location, he had no visibility into the cellblock and cells where the deaths occurred, a fact confirmed by FBI and DOJ investigators who were specifically tasked to look into Sergeant Hickman's allegations. NCIS conducted over 100 interviews during the first three days of the investigation, including interviews with all the guards who worked in the cellblock that day and all the detainees who were housed there. None of those interviewed told of any detainees being taken away or alleged homicide.

5. AFIP sent a senior medical examiner to Guantanamo to perform the autopsies. In addition, an independent, state-level, senior medical examiner flew to Guantanamo to observe the autopsies, standard operating procedure for AFIP in high profile cases.

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<sup>99</sup> <http://harpers.org/archive/2010/01/hbc-90006455>

6. All the materials released to date have been highly redacted. While Seton Hall students may have done the best they could with what they had, the fact is they only had available to them a small fraction of the reports.

In the end, the theory of a “grand conspiracy”—the participants of which include the Obama and Bush Administrations as well as the Army, the Navy, U.S. Southern Command, the Armed Forces Institute of Pathology, NCIS, the Department of Justice, the FBI, and the CIA—is not supported by the facts.

[Maj. Turner] note[d] in closing that Harper’s Magazine has done “a serious disservice to the honorable men and women who serve at Guantanamo Bay and in the U.S. military.”

***The State's Failure to Release Prisoners  
Approved for Transfer***

# APPENDIX

11

**The New York Times**

January 28, 2013

# Office Working to Close Guantánamo Is Shuttered

By **CHARLIE SAVAGE**

FORT MEADE, Md. — The State Department on Monday reassigned [Daniel Fried](#), the special envoy for closing the prison at [Guantánamo Bay](#), Cuba, and will not replace him, according to an internal personnel announcement. Mr. Fried's office is being closed, and his former responsibilities will be "assumed" by the office of the department's legal adviser, the notice said.

The announcement that no senior official in President Obama's second term will succeed Mr. Fried in working primarily on diplomatic issues pertaining to repatriating or resettling detainees appeared to signal that the administration does not currently see the closing of the prison as a realistic priority, despite repeated statements that it still intends to do so.

Mr. Fried will become the department's coordinator for sanctions policy and will work on issues including Iran and Syria.

The announcement came as Khalid Shaikh Mohammed and four other Guantánamo Bay detainees facing death penalty charges before a [military tribunal](#) over the Sept. 11 attacks made their first public appearance since October on Monday, sitting quietly in a high-security courtroom at the naval base in Cuba as pretrial hearings resumed. A closed-circuit feed of the proceedings was shown at Fort Meade.

Mr. Mohammed, with a red-dyed beard and a turban, wore a camouflage jacket over white garb. All five detainees spoke briefly in telling the judge, Col. James Pohl of the Army, that they understood their right not to attend future days of the hearing. Only one detainee, Walid bin Attash, spoke further, complaining through an interpreter that the defendants were not motivated to attend because "the prosecution does not want us to hear or understand or say anything."

The session mainly focused on technical matters like nuances in an order on handling classified information. At one point, the video feed was censored for nearly a minute. It was not clear why; Colonel Pohl appeared upset and said no classified information had been

Mr. Fried's special envoy post was created in 2009, shortly after Mr. Obama t promised to close the prison in his first year. A career diplomat, Mr. Fried trav

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negotiating the repatriation of some 31 low-level detainees and persuading third-party countries to resettle about 40 who were cleared for release but could not be sent home because of fears of abuse.

But the outward flow of detainees slowed almost to a halt as Congress imposed restrictions on further transfers, leaving Mr. Fried with less to do. He was eventually assigned to work on resettling a group of Iranian exiles, known as the M.E.K., who were living in a refugee camp in Iraq, in addition to his Guantánamo duties.

Ian Moss, a spokesman for Mr. Fried's office, said its dismantling did not mean that the administration had given up on closing the prison. "We remain committed to closing Guantánamo, and doing so in a responsible fashion," Mr. Moss said. "The administration continues to express its opposition to Congressional restrictions that impede our ability to implement transfers."

Besides barring the transfer of any detainees into the United States for prosecution or continued detention, lawmakers prohibited transferring them to other countries with troubled security conditions, like Yemen or Sudan. In the most recent defense authorization act, enacted late last year, lawmakers extended those restrictions and expanded them to cover even detainees scheduled to be repatriated under a plea deal with military prosecutors.

Mr. Obama had threatened to veto the bill, but instead he signed it while [issuing a signing statement claiming that he had the constitutional power, as commander in chief, to lawfully override such statutory restrictions](#) on the handling of wartime prisoners. Mr. Obama's intentions were not clear, however, even to internal administration officials.

Last July, before the latest statute, the Pentagon [repatriated a Sudanese man](#), Ibrahim al Qosi, after he pleaded guilty before a tribunal to conspiracy and supporting terrorism and served out his sentence as part of a deal.

Another Sudanese man who pleaded guilty to similar charges, Noor Uthman Muhammed, is scheduled to be repatriated in about a year. There is now doubt, however, about whether the military can live up to that agreement.

In recent months, the federal appeals court in Washington has vacated guilty verdicts by tribunals against two other detainees convicted of [similar charges](#) — the only two detainees to date to be convicted after a trial, rather than through a plea deal — because the offenses were not international war crimes.

Attorney General Eric H. Holder Jr. decided to continue arguing in court that it was lawful to



bring such charges before a military commission. That has led to a growing split between the administration and Brig. Gen. Mark S. Martins, the chief prosecutor of the tribunals, who objected to that decision and [unsuccessfully sought permission](#) to withdraw conspiracy from the list of charges against the Sept. 11 defendants.

On Sunday, on the eve of the hearing, General Martins [addressed](#) recent [coverage](#) of the split. He argued that any disagreement was a good thing because it showed that tribunal officials were not “moving in lock step,” but rather were independent, which “if anything bolsters, rather than undermines, confidence in the military commissions system.”

# APPENDIX

## 12

**POLITICO**

## Under the Radar Blog

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# U.S. names 55 Gitmo prisoners cleared to go

By JOSH GERSTEIN |  
9/21/12 1:44 PM EDT

The U.S. Government has for the first time issued a public list of Guantanamo prisoners cleared for release or transfer, but who remain at the island prison because of difficulties finding a country willing to take them or because of concerns about sending them to their home countries.

The list (posted [here](http://images.politico.com/global/2012/09/gitmolist55.pdf) (<http://images.politico.com/global/2012/09/gitmolist55.pdf>) ) was filed in a series of federal court cases Friday morning and includes the names and serial numbers of 55 detainees. That's almost exactly one-third of the 167 men currently imprisoned at Guantanamo Bay.

A significant number of the men are believed to be Yemeni. **President Barack Obama suspended further transfers to Yemen in January 2010** (<http://www.politico.com/news/stories/0110/31173.html>) , stating that conditions in the country were too "unsettled" to ensure that detainees wouldn't return to or embark on terrorist activities.

Since 2009, the U.S. Government has kept under wraps the list of detainees approved for release. In a court filing back then (posted [here](http://images.politico.com/global/2012/09/gtmolist09fried.pdf) (<http://images.politico.com/global/2012/09/gtmolist09fried.pdf>) ), the State Department's envoy for Guantanamo, Ambassador Daniel Fried, cited a need to coordinate diplomatic efforts to resettle the war-on-terror prisoners.

However, in the new court filings Friday, Justice Department lawyers said that need no longer merited keeping the list secret. They didn't quite concede that the resettlement process has stalled, but that was the implication. Congress has also greatly complicated releases from Guantanamo with a series of legislative measures attached to budget bills that Obama signed into law.

"In the over two years since the [Guantanamo Bay Review] Task Force completed its status reviews, circumstances have changed such that the decisions by the Task Force approving detainees for transfer no longer warrant protection," the DOJ lawyers wrote in their notice to the court (posted [here](http://images.politico.com/global/2012/09/gtmolistunsealfiling.pdf) (<http://images.politico.com/global/2012/09/gtmolistunsealfiling.pdf>) ).

"The efforts of the United States to resettle Guantanamo detainees have largely been successful – they have resulted in 40 detainees being resettled in third countries because of treatment or other concerns in their countries of origin since 2009. In addition, 28 detainees have been repatriated to their countries of origin since 2009. Consequently, the diplomatic and national security harms identified [by Fried in a 2009 court filing] are no longer as acute. In Respondents' view, there is no longer a need to withhold from the public the status of detainees who have been approved for transfer."

It's unclear whether the list was ever officially classified, but it was designated as "protected" by the U.S. Government—a designation in Guantanamo cases that effectively keeps certain court records from the public.

A note on the list indicates that more than 55 detainees may actually be cleared for release, but the status of any additional prisoners ordered released has been placed under seal by the U.S. Court of Appeals for the D.C. Circuit.

UPDATE: Two civil liberties groups have issued statements reacting to the list's disclosure.

"These men have been cleared for release for at least three years (longer in many cases), and yet they have been held at Guantanamo now for eleven years and counting. It's unconscionable that so few of these cleared men have been released by this administration over the last three years," said Shane Kadidal of the Center for Constitutional Rights. "The list is clearly incomplete, and based on the total numbers seems to not include the Yemenis cleared for conditional release. Moreover, the government notes in its brief that for a number of cleared men it still needs to seek formal court approval to release their names. That should not be a problem but will take time, and people reading the list should know that some cleared men are not listed only because of this legal technicality."

"Today's release is a partial victory for transparency, and it should also be a spur to action," said Zachary Katznelson of the American Civil Liberties Union. "These men have now spent three years in prison since our military and intelligence agencies all agreed they should be released. Not on the list, of course, is Adnan Latif, who died in his cell earlier this month despite having been repeatedly approved for release from Guantánamo. It is well past time to release and resettle these unfairly imprisoned men."

CORRECTION (Friday, 9:21 P.M.): This post has been corrected to clarify the reasons Obama gave for suspending transfers to Yemen in 2010.

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# APPENDIX

## 13

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE:

GUANTANAMO BAY  
DETAINEE LITIGATION

Misc. No. 08-442 (TFH)

Civil Action Nos.

04-CV-1164, 04-CV-1166, 04-CV-1194, 04-CV-2215,  
05-CV-0280, 05-CV-0329, 05-CV-0359, 05-CV-0429,  
05-CV-0492, 05-CV-0877, 05-CV-0892, 05-CV-0999,  
05-CV-1353, 05-CV-1429, 05-CV-1457, 05-CV-1490,  
05-CV-1497, 05-CV-1504, 05-CV-1509, 05-CV-1555,  
05-CV-1645, 05-CV-2088, 05-CV-2104, 05-CV-2199,  
05-CV-2223, 05-CV-2349, 05-CV-2367, 05-CV-2384,  
05-CV-2385, 05-CV-2386, 06-CV-1668, 06-CV-1766,  
06-CV-1767, 07-CV-2337, 07-CV-2338, 08-CV-1101,  
08-CV-1233, 08-CV-1236, 08-CV-1237, 08-CV-2019,  
09-CV-0745, 09-CV-0904, 10-CV-1411

**RESPONDENTS' NOTICE LIFTING PROTECTED INFORMATION DESIGNATION OF  
DECISIONS BY THE GUANTANAMO BAY REVIEW TASK FORCE APPROVING  
DETAINEES FOR TRANSFER**

On January 22, 2009, the President issued Executive Order 13492, calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base. *See* Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). On January 22, 2010, the Guantanamo Bay Review Task Force ("Task Force") issued its final report announcing that it had reviewed the status of 240 detainees and approved 126 detainees for transfer. *See* Guantanamo Bay Task Force Final Report (Jan. 22, 2010), *available at* [www.justice.gov/ag/guantanamo-review-final-report.pdf](http://www.justice.gov/ag/guantanamo-review-final-report.pdf). During the one-year period when the Task Force conducted its status reviews, Respondents notified the Court and petitioners' counsel on a rolling basis as the Task Force approved individual detainees for transfer. *See, e.g., Jabbarov v. Bush*, 05-CV-2386 (RBW) (Minute Order; June 23, 2009) (directing Respondents to notify the

Court when a Guantanamo Bay detainee had been approved for transfer). When providing such notice, Respondents designated the decisions of the Task Force to approve individual detainees for transfer as “Protected Information” pursuant to the Protective Order and Procedures For Counsel Access To Detainees At The United States Naval Station, Guantanamo Bay, Cuba, 577 F. Supp. 2d 143, 151-152 (D.D.C. 2008), and filed that information with the Court under seal. *See id.* at 154-55.

In support of Respondents’ request for Protected Information status of the Task Force’s transfer decisions, Respondents submitted a declaration of Ambassador Daniel Fried, the State Department’s Special Envoy for the Closure of the Guantanamo Bay Detention Facility. *See* Exhibit 1. Ambassador Fried stated that “indiscriminate public disclosure of the decisions resulting from reviews by Guantanamo Review Task Force will impair the U.S. Government’s ability effectively to repatriate and resettle Guantanamo detainees” under Executive Order 13,492. *Id.* at ¶ 2. That policy was critical given the need to utilize “every tool of statecraft at [the government’s] disposal, including the ability to develop and implement a comprehensive strategy under which potential destination countries are asked to focus on those detainees whom the U.S. government considers to be the best fit for those countries.” *Id.* at ¶ 4. Ambassador Fried explained that if “petitioners’ counsel or other organizations acting on behalf of dozens of detainees approach the same small group of governments [with the Task Force decisions approving individual detainees for transfer]. . . it could confuse, undermine, or jeopardize our diplomatic efforts with those countries and could put at risk our ability to move as many people to safe and responsible locations as might otherwise be the case.” *Id.* at ¶ 5.

In the over two years since the Task Force completed its status reviews, circumstances have changed such that the decisions by the Task Force approving detainees for transfer no longer

warrant protection. The efforts of the United States to resettle Guantanamo detainees have largely been successful – they have resulted in 40 detainees being resettled in third countries because of treatment or other concerns in their countries of origin since 2009. In addition, 28 detainees have been repatriated to their countries of origin since 2009. Consequently, the diplomatic and national security harms identified in the Fried Declaration are no longer as acute. In Respondents' view, there is no longer a need to withhold from the public the status of detainees who have been approved for transfer.

For the convenience of the Court and petitioners, Respondents have prepared a chart listing the current Guantanamo Bay detainee-petitioners approved for transfer, including the detainee's Internment Serial Number (ISN), name, and habeas civil action number.<sup>1</sup> See Exhibit 2.

Dated: September 21, 2012

Respectfully submitted,

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Assistant Attorney General

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<sup>1</sup> The chart does not include any current Guantanamo Bay detainees approved for transfer whose transfer status is protected by sealed orders issued by the Court of Appeals. The government will move to unseal the transfer status of any such detainees by motion in the Court of Appeals and ensure notification of this Court, as needed, if such motions are granted.



DECLARATION OF DANIEL FRIED

I, Daniel Fried, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I have been the Special Envoy for the Closure of the Guantanamo Bay Detention Facility since accepting my appointment on May 15, 2009. In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009. Prior to accepting these appointments, I was the Department of State's Assistant Secretary for European and Eurasian Affairs from May, 2005-May, 2009 and the Special Assistant to the President and NSC Senior Director for European and Eurasian Affairs from January, 2001-May-2005. I also served as Ambassador to Poland from 1997-2000 and prior to that in various posts at the State Department, at overseas posts, and at the NSC starting in 1977.

2. This declaration is submitted in support of the Government's motion to maintain the decisions resulting from reviews by the Guantanamo Review Task Force as "Protected Information" under the protective orders entered in the Guantanamo Bay habeas litigation. For the reasons discussed below, indiscriminate public disclosure of the decisions resulting from reviews by Guantanamo Review Task Force will impair the U.S. Government's ability effectively to repatriate and resettle Guantanamo detainees in accordance with the procedures established by Executive Order 13,492.

DF

3. As Special Envoy, my primary task is to implement the mission set forth in Executive Order 13,492 of finding dispositions for individuals who are approved for repatriation or resettlement in a manner that is consistent with the national security and foreign policy interests of the United States, and that will allow the U.S. government to achieve the closure of the Guantanamo Bay Detention Facility as soon as practicable and in any event not later than January 22, 2010. In this task I am guided by the U.S. government's policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. In light of these policies, there are certain individuals who have been (or will be) approved for transfer out of U.S. custody but who the U.S. government determines cannot be safely and/or responsibly returned to their home countries.

4. While there have been some recent signs of progress in our efforts to identify appropriate resettlement options for approved Guantanamo detainees who cannot be repatriated, the task of identifying such options has up to this point been challenging. In order to find safe and responsible options for these individuals within the one year timeframe ordered by the President, the United States Government will need every tool of statecraft at its disposal, including the ability to develop and implement a comprehensive strategy under which potential destination countries are asked to focus on those detainees whom the U.S. government considers to be the best fit for those countries. Although I am aware that decisions by the Department of Defense Administrative Review Board (ARB) approving specific detainees for transfer or release were previously disclosed publicly, in my judgment the current circumstances and diplomatic climate render it necessary to maintain control over the dissemination of the decisions resulting

DP

from review by the Guantanamo Review Task Force in order to enhance the U.S. Government's efforts to repatriate and transfer detainees as soon as practicable. Particularly given the pace at which the Executive Order review must proceed in order to meet the deadline set by the President, if large numbers of approved individuals (acting through, *inter alia*, counsel or non-government organizations) approach the same group of governments at the same time seeking resettlement, it could cause complications for and in some cases jeopardize our ability to implement a coherent diplomatic strategy.

5. More specifically, we have already seen a tendency of many of the detainees who are approved by the review process to express a preference for resettlement in certain European countries, even in cases where the U.S. government has determined that they can be returned to their home countries consistent with our humane treatment and security policies. Given that these European countries have in many cases expressed to the U.S. government that their capacity to absorb detainees is limited, it is important to the U.S. goal of closing Guantanamo to be able to focus diplomatic discussions with those countries on detainees for whom there is a compelling reason not to return them to their home countries. If petitioners' counsel or other organizations acting on behalf of dozens of detainees approach the same small group of governments at the same time, particularly if they relay information about formal U.S. government decisions resulting from review by the Guantanamo Review Task Force, it could confuse, undermine, or jeopardize our diplomatic efforts with those countries and could put at risk our ability to move as many people to safe and responsible locations as might otherwise be the case.

DF



6. I am aware that counsel for many petitioners have conducted their own efforts to repatriate and resettle detainees by way of, *inter alia*, lobbying efforts and asylum applications to foreign governments. These efforts do not, however, involve petitioners' counsel conveying official U.S. Government information to a foreign country regarding the transfer status of a particular petitioner. It is the provision of this additional information— *i.e.*, the fact that a particular Guantanamo detainee has been approved for repatriation or resettlement as a result of review by the Guantanamo Review Task Force – by someone other than a representative of the U.S. Government that has the potential to create confusion and mixed messages. This is not to say that petitioner's counsel and non-government organizations have no role to play in the transfer process. In cases where the U.S. government considers it helpful, we may choose to reach out to petitioners' counsel, non-government organizations, and other interlocutors in order to seek to work collaboratively; indeed, we have done so on several occasions. In general, however, given the foreign policy and national security equities at stake in closing Guantanamo, it is important for the U.S. government to retain the prerogative to “speak with one voice” and to have the latitude to manage resettlement efforts without the problems potentially created by inconsistent signals from petitioners' counsel or other organizations.

7. As Special Envoy, I also have responsibility for conducting repatriation and resettlement discussions in a manner that comports with the foreign policy interests of the United States. Despite making a determination that we cannot repatriate a detainee to a particular country because of post-transfer security or humane treatment considerations, the U.S. government may nevertheless have an important bilateral and strategic relationship with that country that it is in the foreign policy interests of the United States to maintain. The friction

OR

caused by a decision to resettle detainees from the country of origin in a third country can be significant if not properly handled, and in particular if there is a failure to pursue resettlement efforts in a manner that is non-public and that minimizes embarrassment to the country of origin. The involvement of petitioners' counsel or other organizations in resettlement discussions may be considered on a case-by-case basis, but such involvement must be weighed carefully against the increased the risk of premature public disclosure of resettlement efforts in a manner that could result in friction of this nature and potentially undermine the bilateral relationship between the United States and the country of origin.

8. Premature disclosure of resettlement efforts also presents an opportunity for the country of origin to seek to undermine those resettlement efforts. Examples of this occurring go beyond the publicized instances of China exerting pressure on other countries not to accept the Chinese Uighurs currently at Guantanamo. I have been told by a number of European governments that such pressure exists and has complicated their ability to accept certain detainees. Because efforts of this nature have the potential for slowing and ultimately undermining our resettlement efforts, it is important for the U.S. government to have the latitude to approach potential destination countries in a discreet and confidential manner, in order to minimize the risk of undue publicity for as long as can be managed.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 9, 2009.

A handwritten signature in blue ink, appearing to read "Daniel Fried", written over a horizontal line.

Daniel Fried

**Current Guantanamo Bay Detainee-Petitioners Approved For Transfer (Sept. 21, 2012)\***

ISN	Detainee's Name	Civil Action Number
34	Al Khadr Abdallah Muhammad Al-Yafi	05-CV-2386
35	Idris Ahmad Abdu Qadir Idris	09-CV-0745
36	Ibrahim Othman Ibrahim Idris	05-CV-1555
38	Ridah Bin Saleh Al-Yazidi	07-CV-2337
152	Asim Thabit Abdullah Al-Khalaqi	05-CV-0999
153	Fayiz Ahmad Yahia Suleiman	10-CV-1411
163	Khalid Abd Elgabar Mohammed Othman	05-CV-2088
168	Adel Al-Hakeemy	05-CV-0429
170	Sharif Al-Sanani	05-CV-2386
174	Hisham Sliti	05-CV-0429
189	Falen Gharebi	04-CV-1164
197	Younous Chekkouri	05-CV-0329
200	Saad Al-Qahtani	05-CV-2384
224	Mahmoud Al-Shubati	07-CV-2338
238	Nabil Said Hadjarab	05-CV-1504
239	Shaker Aamer	04-CV-2215
249	Mohammed Abdullah Mohammed Ba Odah	06-CV-1668
254	Muhammed Ali Husayn Khunaina	05-CV-2223
255	Said Muhammad Salih Hatim	05-CV-1429
257	Omar Hamzayavich Abdulayev	05-CV-2386
259	Fadhel Hussein Saleh Hentif	06-CV-1766
275	Abdul Sabour	05-CV-1509
280	Khalid Ali	05-CV-1509
282	Sabir Osman	05-CV-1509
288	Motai Saib	05-CV-1353
290	Ahmed Bin Saleh Bel Bacha	05-CV-2349
309	Muieen Adeem Al-Sattar	08-CV-1236
326	Ahmed Adnan Ahjam	09-CV-0745
327	Ali Al Shaaban	05-CV-0892
329	Abdul Hadi Omar Mahmoud Faraj	05-CV-1490
502	Abdul Bin Mohammed Ourgy	05-CV-1497
511	Suleiman Awadh Bin Aqil Al-Nahdi	05-CV-0280
553	Abdulkhalik Ahmed Al-Baidhani	04-CV-1194
554	Fahmi Salem Al-Assani	05-CV-0280
564	Jalal Bin Amer Awad	04-CV-1194
566	Mansour Mohamed Mutaya Ali	08-CV-1233
570	Sabry Mohammed	05-CV-2385
572	Saleh Mohammad Seleh Al-Thabbi	05-CV-2104
574	Hamood Abdullah Hamood	06-CV-1767
575	Saad Nasir Mukbl Al-Azani	08-CV-2019
680	Emad Abdallah Hassan	04-CV-1194
684	Mohammed Abdullah Taha Mattan	09-CV-0745

\*The chart does not include any current Guantanamo Bay detainees approved for transfer whose transfer status is protected by sealed orders issued by the Court of Appeals.

**Current Guantanamo Bay Detainee-Petitioners Approved For Transfer (Sept. 21, 2012)\***

ISN	Detainee's Name	Civil Action Number
686	Abdel Ghaib Ahmad Hakim	05-CV-2199
689	Mohammed Ahmed Salam Al-Khateeb	09-CV-0745
690	Abdul Qader Ahmed Hussein	05-CV-2104
691	Mohammed Al-Zarnouqi	06-CV-1767
722	Jihad Dhiab	05-CV-1457
757	Ahmed Abdel Aziz	05-CV-0492
894	Mohammed Abdul Rahman	05-CV-0359
899	Shawali Khan	08-CV-1101
928	Khiali Gul	05-CV-0877
934	Abdul Ghani	09-CV-0904
1015	Hussain Salem Mohammad Almerfedi	05-CV-1645
1103	Mohammad Zahir	05-CV-2367
10001	Belkacem Bensayah	04-CV-1166

\*The chart does not include any current Guantanamo Bay detainees approved for transfer whose transfer status is protected by sealed orders issued by the Court of Appeals.

# APPENDIX

14





# **FINAL REPORT**

## **GUANTANAMO REVIEW TASK FORCE**

**January 22, 2010**

**Department of Justice**

**Department of Defense**

**Department of State**

**Department of Homeland Security**

**Office of the Director  
of National Intelligence**

**Joint Chiefs of Staff**

## EXECUTIVE SUMMARY

On January 22, 2009, the President issued Executive Order 13492, calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there. The Executive Order was based on the finding that the appropriate disposition of all individuals detained at Guantanamo would further the national security and foreign policy interests of the United States and the interests of justice.

One year after the issuance of the Executive Order, the review ordered by the President is now complete. After evaluating all of the detainees, the review participants have decided on the proper disposition—transfer, prosecution, or continued detention—of all 240 detainees subject to the review.

Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review: the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff.

### **Review Process**

To implement the President's order, the Attorney General, as the coordinator of the review, established the Guantanamo Review Task Force and a senior-level Review Panel. The Task Force was responsible for assembling and examining relevant information on the Guantanamo detainees and making recommendations on their proper dispositions. The Review Panel, consisting of officials with delegated authority from their respective agencies to decide the disposition of each detainee, reviewed the Task Force's recommendations and made disposition decisions on a rolling basis. Where the Review Panel did not reach consensus, or where higher-level review was appropriate, the agency heads ("Principals") named in the Executive Order determined the proper disposition of the detainee.

Key features of the review process included:

- **Comprehensive Interagency Review.** The Task Force consisted of more than 60 career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies within the intelligence community.
- **Rigorous Examination of Information.** The Task Force assembled large volumes of information from across the government relevant to determining the proper disposition of each detainee. Task Force members examined this information critically, giving careful consideration to the threat posed by the detainee, the reliability of the underlying information, and the interests of national security.

- **Unanimous Decision-Making by Senior Officials.** Based on the Task Force’s evaluations and recommendations, senior officials representing each agency responsible for the review reached unanimous determinations on the appropriate disposition for all detainees. In the large majority of cases, the Review Panel was able to reach a consensus. Where the Review Panel was not able to reach a unanimous decision—or when additional review was appropriate—the Principals met to determine the proper disposition.

## **Results of the Review**

The decisions reached on the 240 detainees subject to the review are as follows:

- **126 detainees** were approved for transfer. To date, 44 of these detainees have been transferred from Guantanamo to countries outside the United States.
- **44 detainees** over the course of the review were referred for prosecution either in federal court or a military commission, and **36 of these detainees** remain the subject of active cases or investigations. The Attorney General has announced that the government will pursue prosecutions against six of these detainees in federal court and will pursue prosecutions against six others in military commissions.
- **48 detainees** were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government’s authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.
- **30 detainees** from Yemen were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.

## **Looking Ahead**

With the completion of the review, an essential component of the effort to close the Guantanamo detention facilities has been accomplished. Beyond the review, additional work remains to be done to implement the review decisions and to resolve other issues relating to detainees. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.

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## **I. Introduction**

An essential component of the President's order calling for the closure of the detention facilities at the Guantanamo Bay Naval Base was the initiation of a new and rigorous interagency review of all individuals detained there. The purpose of the review was to collect and examine information from across the government to determine which detainees the United States should transfer or release from custody, prosecute, or otherwise lawfully detain.

This review is now complete. After carefully considering each case, the agencies responsible for the review—the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff—have unanimously agreed on the proper disposition of all 240 detainees subject to the review. While there remain other steps outside the scope of the review that must be taken before the detention facilities at Guantanamo can be closed, the completion of the review fulfills a central element of the President's order.

This report describes the process by which the review was conducted over the past year, the decisions resulting from the review, and the progress made toward implementing those decisions.

## **II. Background**

Following the terrorist attacks of September 11, 2001, the United States was faced with the question of what to do with individuals captured in connection with military operations in Afghanistan or in other counterterrorism operations overseas. Starting in January 2002, the military began transferring a number of these individuals to the detention facilities at Guantanamo. By the end of 2002, 632 detainees had been brought to Guantanamo. In 2003, 117 additional detainees were brought to the base, with 10 more detainees added in 2004, 14 detainees in 2006, five detainees in 2007, and one detainee in 2008. Since 2002, a total of 779 individuals have been detained at Guantanamo in connection with the war against al-Qaida, the Taliban, and associated forces.

From 2002 through 2008, most of the individuals detained at Guantanamo were transferred or released from U.S. custody, with the vast majority being repatriated to their home countries and others resettled in third countries willing to receive them. Of the 779 individuals detained at Guantanamo, approximately 530—almost 70 percent—were transferred or released from U.S. custody prior to 2009. The countries to which these detainees were transferred include Afghanistan, Albania, Algeria, Australia, Bahrain, Bangladesh, Belgium, Bosnia, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Somalia (Somaliland), Spain, Sudan, Sweden, Tajikistan, Tunisia, Turkey, Uganda, the United Arab Emirates, the United Kingdom, and Yemen.

By January 20, 2009, the population of detainees at Guantanamo had been reduced to 242. Of the 242 remaining detainees, 59 had been approved for transfer by the prior administration and were awaiting implementation of their transfers.

### **III. The President's Executive Order**

On January 22, 2009, the President issued an Executive Order requiring the closure of the detention facilities at Guantanamo within one year. Noting the length of the detentions and the significant concerns they had raised both within the United States and internationally, the President determined that the "prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice."

Accordingly, the President ordered the Executive Branch to conduct a prompt and comprehensive interagency review of the factual and legal bases for the continued detention of all individuals remaining at Guantanamo. The President ordered that the review be coordinated by the Attorney General and conducted with the full cooperation and participation of the Secretary of Defense, Secretary of State, Secretary of Homeland Security, Director of National Intelligence, and Chairman of the Joint Chiefs of Staff.

The first task given to the review participants under the Executive Order was to assemble, to the extent reasonably practicable, all information in the possession of the federal government pertaining to any individual then detained at Guantanamo and relevant to determining his proper disposition.

The Executive Order then set forth the following framework for the review participants to follow in determining the disposition of each detainee:

- First, on a rolling basis and as promptly as possible, determine whether it is possible to transfer or release the detainee consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect the detainee's transfer or release;
- Second, with respect to any detainee not approved for transfer or release, determine whether the federal government should seek to prosecute the detainee for any offenses he may have committed, including whether it is feasible to prosecute such individual in a court established pursuant to Article III of the United States Constitution (*i.e.*, federal court); and
- Third, with respect to any detainee whose disposition is not achieved through transfer, release, or prosecution, select other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee.

The Executive Order further directed that the Secretary of Defense, the Secretary of State, and other review participants work to effect promptly the release or transfer of all individuals for whom release or transfer is possible, and that the Secretary of State expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement the order.

Finally, the Executive Order required that any individuals who remained in detention at Guantanamo at the time of the closure of the detention facilities be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

#### **IV. Implementing the Executive Order: The Guantanamo Review Task Force**

##### **A. Establishment of the Task Force**

To implement the Executive Order, the Attorney General established the Guantanamo Review Task Force and appointed an Executive Director of the Task Force on February 20, 2009. The Task Force was charged with assembling and reviewing relevant information on the Guantanamo detainees and making recommendations to senior-level officials on the proper disposition of each detainee pursuant to the framework set forth in the Executive Order. To ensure that the expertise and perspectives of each participating agency were brought to bear on the review process, the Task Force was established as an interagency entity. Further, to maximize collaboration and exchange of information among Task Force members, all Task Force staff were located together in a secure facility, on a single floor devoted to Task Force work, and connected electronically through a stand-alone classified network.

##### **B. Task Force Structure**

With the assistance of the participating agencies, the Task Force assembled a staff of over 60 career professionals, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Federal Bureau of Investigation, Central Intelligence Agency, and National Counterterrorism Center. Included in this wide range of representatives were senior military officers, federal prosecutors, FBI agents, intelligence analysts and officers, military prosecutors and investigators, national security lawyers, civil litigators, paralegals, and administrative assistants. During their tenure at the Task Force, these staff members worked full-time on the Task Force review.

The Task Force staff was initially organized into two review teams. The transfer team was responsible for evaluating whether detainees could be transferred or released consistent with the national security and foreign policy interests of the United States.<sup>1</sup>

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<sup>1</sup> The term “release” is used to mean release from confinement without the need for continuing security measures in the receiving country, while the term “transfer” is used to mean release from confinement subject to appropriate security measures.

The team primarily evaluated the degree of threat posed by the detainee to U.S. national security, whether the threat could be mitigated through appropriate security measures, and the potential destination countries where it appeared possible to safely transfer the detainee. The transfer team was composed of representatives from each agency listed in the Executive Order.

The prosecution team was responsible for recommending whether the government should seek to prosecute certain detainees in either federal court or the military commission system. The prosecution team was staffed predominantly by experienced federal prosecutors, investigative agents, and criminal appellate specialists from the Department of Justice,<sup>2</sup> as well as military commission prosecutors and investigative agents from the Department of Defense.

The work of the transfer and prosecution teams often overlapped, and the two teams worked in close coordination over the course of the review. As described below, after an initial review of all the detainees, the transfer and prosecution teams merged to conduct a further review of detainees whose cases had been deferred during the initial review.

The interagency makeup of the review teams was designed to ensure that all relevant agency viewpoints—including military, intelligence, homeland security, diplomatic, and law enforcement—were considered in the review process. Thus, proposed recommendations for transfer or continued detention were drafted, reviewed, and vigorously discussed in group deliberations by representatives of each of the participating agencies. After these extensive discussions on each detainee, any dissenting views of the agency representatives were noted in the recommendations or otherwise made known to the Review Panel.

### **C. Guantanamo Review Panel**

The Task Force's recommendations, which contained detailed classified assessments of each detainee, were submitted on a rolling basis to the interagency Guantanamo Review Panel. The Review Panel was established in February 2009 along with the Task Force and was composed of senior-level officials from each of the agencies identified in the Executive Order.<sup>3</sup> Review Panel members were delegated authority from their respective agency heads ("Principals") to decide the disposition of each detainee. Review Panel members were also responsible for ensuring that their respective agencies made relevant information in their possession available to the Task Force and

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<sup>2</sup> Specifically, federal prosecutors on the Task Force were drawn from United States Attorneys' Offices in the Southern District of New York, Eastern District of New York, Western District of New York, District of Columbia, Eastern District of Virginia, Central District of California, Northern District of California, and District of Maine, and from the Counterterrorism Section of the National Security Division in the Department of Justice.

<sup>3</sup> Senior officials from the Central Intelligence Agency and Federal Bureau of Investigation also regularly attended the Review Panel meetings to further inform the decision-making process.



provided the Task Force with personnel and other resources necessary for the Task Force to complete its review within the one-year time frame mandated by the President.

Beginning in March 2009, the Review Panel met on a weekly basis to consider the recommendations of the Task Force. The Review Panel made disposition decisions only by unanimous agreement of the agencies identified in the Executive Order. Thus, each of the participating agencies had an equal voice in disposition decisions, and no decisions were made by the Review Panel over the objection of any agency. In the large majority of cases, the Review Panel was able to achieve consensus and reach decisions regarding the detainees considered. When Review Panel members did not reach consensus, or when higher-level review was appropriate, the cases were referred to the Principals for a decision. All of the cases referred to the Principals also ultimately garnered the unanimous agreement of the participating agencies.

Once a final decision was made regarding the disposition of a particular detainee, the decision was passed to the appropriate agencies for implementation. If a detainee was approved for transfer to a foreign country as a result of the review, the Department of State and Department of Defense worked together to make appropriate arrangements to effect the transfer in a manner consistent with the national security and foreign policy interests of the United States, including U.S. policies concerning humane treatment. If a decision was made by the Review Panel for prosecution, the case was referred to the Department of Justice for further investigation and review under a joint protocol established by the Department of Justice and Department of Defense to determine whether to pursue prosecution of the case in federal court or a military commission. The Review Panel was regularly updated on the implementation of transfer decisions and prosecution referrals, as well as any issues arising out of the implementation of these decisions requiring further interagency consideration.

#### **D. Task Force Information Collection**

In accordance with the Executive Order, the Task Force's initial responsibility was to collect all government information, to the extent reasonably practicable, relevant to determining the proper disposition of each detainee. The government did not have a preexisting, consolidated repository of such information. Rather, each federal agency stored information concerning Guantanamo detainees in its own systems, consistent with its particular mission and operating protocols.

Accordingly, soon after it was formed, the Task Force initiated an effort to collect detainee information and make it available for review by Task Force members. As a result of this complex effort, the Task Force consolidated a large volume of information from the Department of Defense, Central Intelligence Agency, Federal Bureau of Investigation, Department of Justice, National Security Agency, National Counterterrorism Center, Department of State, and Department of Homeland Security.

The documents assembled by the Task Force include summaries of biographic and capture information; interrogation reports from custodial interviews of the detainees;

records of Department of Defense administrative proceedings involving the detainees, *i.e.*, Combatant Status Review Tribunals and Administrative Review Board proceedings; the results of name traces run for detainees in certain intelligence databases maintained by the Central Intelligence Agency and National Security Agency; the results of name traces run for detainees in law enforcement databases maintained by the Federal Bureau of Investigation; investigative records maintained by the Office of Military Commissions–Prosecution (“OMC”) and Criminal Investigative Task Force within the Department of Defense; records assembled by the Department of Justice for purposes of defending habeas litigation brought by detainees to challenge their detention; recidivism assessments concerning former detainees; finished intelligence products on the detainee population and on general topics of interest to the Task Force’s work; and information concerning potential destination countries for detainees approved for transfer or release. The Task Force also accepted written submissions made on behalf of individual detainees by their counsel or other representatives.

Additionally, the Task Force had access to a variety of external networks containing additional information on the detainees, including documentary and physical evidence recovered through counterterrorism operations, and records concerning the behavior, disciplinary infractions, and physical and mental health of the detainees during detention. Over the course of the review, the Task Force also received briefings from the intelligence community on a number of topics relevant to the review.

The review of all this information was conducted in a classified environment using secure systems.

## **E. Review Phases**

Following an initial period to stand up the Task Force and collect detainee information, the Task Force began to review detainees on March 5, 2009. The review was conducted in two phases. During the first phase, the Task Force reviewed all 240 detainees subject to the review.<sup>4</sup> In accordance with the framework set forth in the Executive Order, the purpose of the first phase of the review was to identify those detainees who could be transferred or released consistent with the national security and foreign policy interests of the United States, those detainees as to whom prosecution appeared feasible, and those detainees who required further evaluation before a decision could be made on their appropriate disposition.

The purpose of the second phase of the review was to reevaluate those detainees who had been deferred during the first phase. Each detainee reviewed in the second phase was considered for transfer, prosecution, or—in the event that neither of these dispositions was deemed appropriate—continued detention pursuant to the government’s

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<sup>4</sup> Although there were 242 detainees at Guantanamo when the Executive Order was issued, one detainee had already been convicted and sentenced to life in the military commission system in 2008, and another detainee committed suicide in June 2009. Thus, there were 240 detainees whose dispositions were reviewed under the Executive Order.

authority under the Authorization for Use of Military Force (“AUMF”) passed by Congress in response to the attacks of September 11, 2001.

## **V. Detainee Review Guidelines**

In conducting its reviews, the Task Force followed detainee review guidelines (“Guidelines”) developed specifically for the Executive Order review and approved by the Review Panel. The Guidelines set forth standards to apply in considering detainees for transfer, prosecution, or continued detention pursuant to the government’s authority under the AUMF.

### **A. Transfer Guidelines**

The Guidelines addressed three types of evaluations relevant to determining whether a detainee should be recommended for transfer or release.

The first evaluation required by the Guidelines was a threat evaluation. The Guidelines provided that a detainee should be deemed eligible for transfer if any threat he poses could be sufficiently mitigated through feasible and appropriate security measures.<sup>5</sup> The Guidelines set forth a non-exclusive list of factors to be considered in evaluating the threat posed by a detainee. In applying those factors, the Task Force was instructed to consider the totality of available information regarding the detainee, and to give careful consideration to the credibility and reliability of the available information.

The second evaluation required by the Guidelines was an evaluation of potential destination (*i.e.*, receiving) countries. The Guidelines left the Task Force with discretion whether to recommend a detainee for transfer only to specified countries or under specified conditions. As with the threat evaluation, the Guidelines provided a non-exclusive set of factors by which to evaluate potential receiving countries.

The third evaluation required by the Guidelines was a legal evaluation to ensure that any detainee falling outside the government’s lawful detention authority under the AUMF was recommended for transfer or release.

### **B. Prosecution Guidelines**

The Guidelines also required cases to be evaluated by Task Force prosecutors to determine whether a federal court or military commission prosecution should be recommended for any offenses the detainees may have committed.

For the evaluation of whether a detainee should be prosecuted in federal court, the Guidelines set forth standards used by federal prosecutors across the country to determine

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<sup>5</sup> The Guidelines further provided that a detainee should be deemed eligible for release if he does not pose an identifiable threat to the national security of the United States. Other than the 17 Chinese Uighur detainees, who were approved for “transfer or release,” no detainees were approved for “release” during the course of the review.

whether to charge a case, as set forth in the *United States Attorneys' Manual*. Consistent with these standards, the Guidelines provided that a case should be recommended for prosecution if the detainee's conduct constitutes a federal offense and the potentially available admissible evidence will probably be sufficient to obtain and sustain a conviction—unless prosecution should be declined because no substantial federal interest would be served by prosecution. Key factors in making this determination include the nature and seriousness of the offense; the detainee's culpability in connection with the offense; the detainee's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the detainee is convicted.

For the evaluation of whether a detainee should be prosecuted in a military commission, Task Force prosecutors examined the potentially available admissible evidence and consulted closely with OMC to determine the feasibility of prosecution.

Recognizing the unique nature of these cases, the Guidelines provided that other factors were also significant in determining whether to recommend prosecution, including the need to protect classified information, such as intelligence sources and methods.

### **C. Detention Guidelines**

In accordance with the Executive Order, the Guidelines provided that every effort should be made to ensure that all detainees who could be recommended for transfer, release, or prosecution consistent with national security and foreign policy interests and the interests of justice were recommended for such dispositions. Thus, the Guidelines provided that a detainee should be considered eligible for continued detention under the AUMF only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful.

The Guidelines required the Task Force to consult with the Department of Justice in conducting a legal evaluation for each detainee considered for continued detention. This legal evaluation addressed both the legal basis for holding the detainee under the AUMF and the government's case for defending the detention in any habeas litigation.<sup>6</sup>

As the Supreme Court has held, inherent within the authorization of the AUMF to "use all necessary and appropriate force" is the power to detain any individuals who fall within the scope of the statute.<sup>7</sup> As the Court observed, "by universal agreement and

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<sup>6</sup> The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons." AUMF § 2(a).

<sup>7</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J.) (dissenting).

practice,” the power to wage war necessarily includes the authority to capture and detain combatants in order to prevent them from “returning to the field of battle and taking up arms once again.”<sup>8</sup> The scope of the AUMF’s detention authority extends to those persons who “planned, authorized or committed or aided” the September 11 attacks, “harbored those responsible for those attacks,” or “were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>9</sup> Accordingly, only detainees who satisfied this standard could be designated for continued detention.

#### **D. Review of Information**

Consistent with the Guidelines’ requirement that the Task Force undertake a fresh and comprehensive evaluation of detainee information, the Task Force sought to make independent evaluations of the facts. In many instances, the Task Force largely agreed with prior threat assessments of the detainees and sometimes found additional information that further substantiated such assessments. In other instances, the Task Force found prior assessments to be overstated. Some assessments, for example, contained allegations that were not supported by the underlying source document upon which they relied. Other assessments contained conclusions that were stated categorically even though derived from uncorroborated statements or raw intelligence reporting of undetermined or questionable reliability. Conversely, in a few cases, the Task Force discovered reliable information indicating that a detainee posed a greater threat in some respects than prior assessments suggested.

Even after careful examination of the intelligence, however, it was not always possible to draw definitive conclusions regarding a detainee’s past conduct. Many of the detainees were captured in active zones of combat and were not previously the targets of investigation by U.S. law enforcement authorities or the intelligence community. Much of what is known about such detainees comes from their own statements or statements made by other detainees during custodial debriefings. The Task Force sought to ensure that the Review Panel and Principals were apprised in their decision-making of any limitations of the available information.

### **VI. Results of the Review**

#### **A. Overview of Decisions**

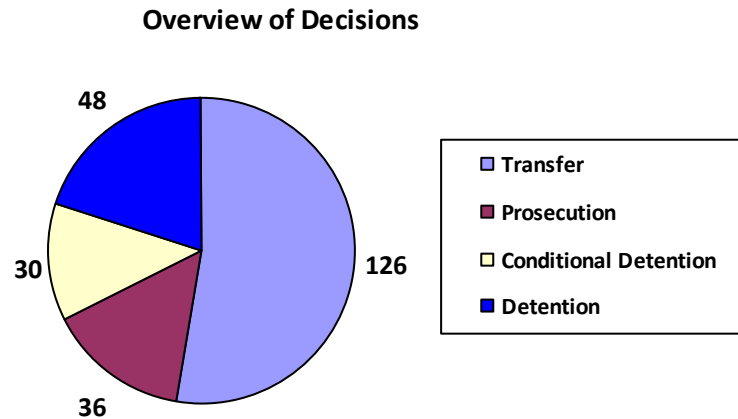
By the one-year mark of January 22, 2010, the review participants reached decisions on the appropriate disposition of all 240 detainees subject to the Executive Order. In sum, 126 detainees were approved for transfer; 36 detainees were referred for

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<sup>8</sup> *Id.* at 518; *see also id.* at 587 (Thomas, J.) (dissenting) (same).

<sup>9</sup> *See* Gov’t Filing, *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. March 13, 2009). The United States Court of Appeals for the District of Columbia recently affirmed that Guantanamo detainees who meet this standard are detainable. *See also Al-Bihani v. Obama*, --- F.3d ---, 2010 WL 10411 at \*3 (D.C. Cir. Jan. 5, 2010).

prosecution;<sup>10</sup> 48 detainees were approved for continued detention under the AUMF; and 30 detainees from Yemen were approved for “conditional” detention based on present security conditions in Yemen.



After careful deliberation, all of these decisions were reached by unanimous agreement of senior officials from each agency responsible for the review. Thus, each decision carries the approval of the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. A more detailed breakdown of the decisions follows.

#### Detainees Approved for Transfer

- 126 detainees were unanimously approved for transfer subject to appropriate security measures.
  - 63 of the 126 detainees either had been cleared for transfer by the prior administration, ordered released by a federal district court, or both.
  - 44 of the 126 detainees have been transferred to date—24 to their home countries, 18 to third countries for resettlement, and two to Italy for prosecution.
  - 82 of the 126 detainees remain at Guantanamo. Of these detainees:
    - 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies on humane treatment. The State Department and Department of Defense are working with these countries concerning the security conditions and timing of the

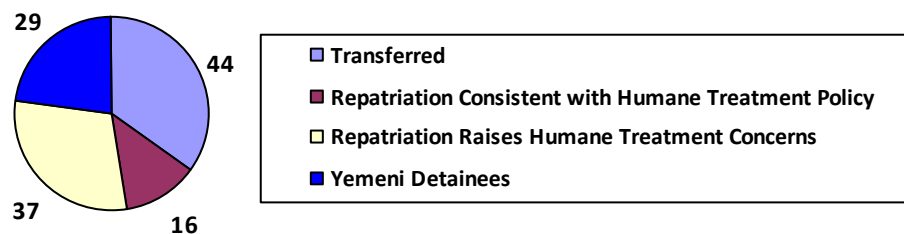
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<sup>10</sup> As explained below, 44 cases were initially referred for prosecution; 36 of those cases remain the subject of active referrals.

transfers. Some of these detainees have obtained injunctions that presently bar their repatriation and cannot be repatriated until these injunctions are lifted; litigation over the injunctions is ongoing.

- 37 cannot be repatriated at this time due to humane treatment or related concerns associated with their home countries (other than Yemen). The State Department is seeking to resettle these detainees in third countries. (A small number of these detainees may be transferred to third countries for prosecution rather than resettlement.)
- 29 are from Yemen. In light of the moratorium on transfers of Guantanamo detainees to Yemen announced by the President on January 5, 2010, these detainees cannot be transferred to Yemen at this time. In the meantime, these detainees are eligible to be transferred to third countries capable of imposing appropriate security measures.

**Detainees Approved for Transfer**

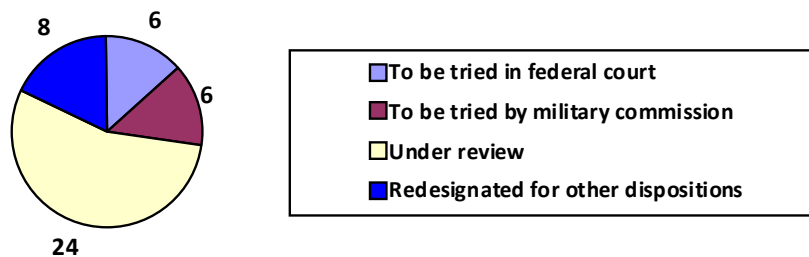


#### Detainees Referred for Prosecution

- Initially, 44 detainees were referred for prosecution. As a result of further evaluation of these cases (detailed below), there are now 36 detainees who remain the subject of active cases or investigations.
  - 1 detainee (Ahmed Ghailani) has been transferred to the Southern District of New York and will be tried for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania.
  - 5 detainees will be tried in the Southern District of New York, for their alleged roles in the September 11 attacks, as announced by the Attorney General.
  - 6 detainees will be tried for offenses under the laws of war in a reformed military commission system, as announced by the Attorney General.
  - 24 detainees remain under review pursuant to the joint Department of Justice-Department of Defense protocol. No final determination has yet been made as to whether or in what forum these 24 detainees will be charged.

- 8 other detainees were initially referred for prosecution but subsequently designated for other dispositions.
  - 1 detainee was transferred pursuant to a court order in his habeas case.
  - 7 detainees were referred back to the review participants after prosecution was deemed not feasible upon further evaluation (6 were subsequently approved for continued detention under the AUMF, and 1 was approved for transfer).

#### **Detainees Referred for Prosecution**



#### Detainees Approved for Detention

- 48 detainees were unanimously approved for continued detention under the AUMF based on a finding that they pose a national security threat that could not be mitigated sufficiently at this time if they were to be transferred from U.S. custody.
  - The Task Force concluded as to all of these detainees that prosecution is not feasible at this time in either federal court or the military commission system.
  - At the same time, the Task Force concluded that there is a lawful basis for continuing to detain these detainees under the AUMF.

#### Detainees Approved for Conditional Detention

- 30 detainees from Yemen were unanimously approved for “conditional” detention based on current security conditions in Yemen.
  - After carefully considering the intelligence concerning the security situation in Yemen, and reviewing each detainee on a case-by-case basis, the review participants selected a group of 30 Yemeni detainees who pose a lower threat than the 48 detainees designated for continued detention under the AUMF, but who should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.
  - These 30 detainees were approved for “conditional” detention, meaning that they may be transferred if one of the following conditions is satisfied: (1) the



security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available. Should any of these conditions be satisfied, however, the 29 Yemeni detainees approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.

## **B. Overview of the Guantanamo Detainee Population**

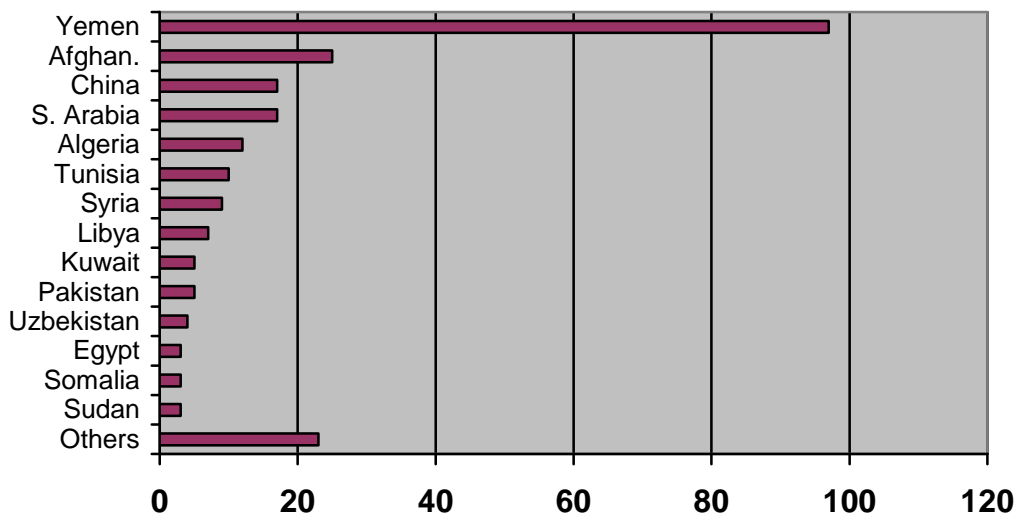
The following section provides an overview of the 240 Guantanamo detainees reviewed under the Executive Order, including their threat characteristics and more general background information, including country of origin, point of capture, and date of arrival at Guantanamo.

***Threat Characteristics.*** As reflected in the decisions made in the review, there is a substantial degree of variation among the Guantanamo detainees from a security perspective. Although not all detainees can be neatly characterized, the following groupings provide a rough overview of the recurring threat profiles seen in the population.

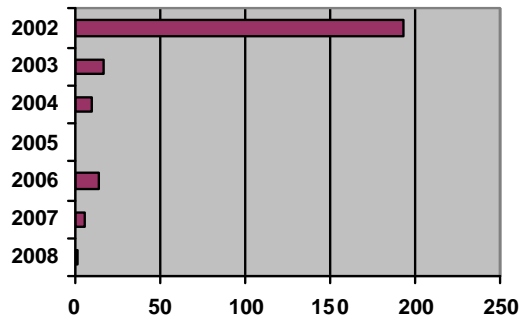
- *Leaders, operatives, and facilitators involved in terrorist plots against U.S. targets.* At the high end of the threat spectrum are leaders, planners, operatives, and facilitators within al-Qaida or associated groups who are directly implicated in terrorist plots against U.S. interests. Among the most notorious examples in this group are Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks; Ramzi bin al-Shibh, the alleged principal coordinator of the September 11 attacks; Abd al-Rahim al-Nashiri, the alleged mastermind of the attack on the U.S.S. *Cole*; Abu Faraj al-Libi, who allegedly succeeded Khalid Sheikh Mohammed as al-Qaida's chief planner of terrorist operations; Hambali, the alleged leader of an al-Qaida affiliate in Indonesia who directed numerous attacks against Western targets in Southeast Asia; and Ahmed Ghailani, an alleged key participant in the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Roughly 10 percent of the detainees subject to the review appear to have played a direct role in plotting, executing, or facilitating such attacks.
- *Others with significant organizational roles within al-Qaida or associated terrorist organizations.* Other detainees played significant organizational roles within al-Qaida or associated terrorist organizations, even if they may not have been directly involved in terrorist plots against U.S. targets. This group includes, for example, individuals responsible for overseeing or providing logistical support to al-Qaida's training operations in Afghanistan; facilitators who helped move money and personnel for al-Qaida; a cadre of Usama bin Laden's bodyguards, who held a unique position of trust within al-Qaida; and well-trained operatives who were being groomed by al-Qaida leaders for future terrorist operations. Roughly 20 percent of the detainees subject to the review fall within this category.

- *Taliban leaders and members of anti-Coalition militia groups.* The detainee population also includes a small number of Afghan detainees who occupied significant positions within the Taliban regime, and a small number of other Afghan detainees who were involved in local insurgent networks in Afghanistan implicated in attacks on Coalition forces. Less than 10 percent of the detainees subject to the review fall within this category.
- *Low-level foreign fighters.* A majority of the detainees reviewed appear to have been foreign fighters with varying degrees of connection to al-Qaida, the Taliban, or associated groups, but who lacked a significant leadership or other specialized role. These detainees were typically captured in combat zones during the early stages of U.S. military operations in Afghanistan, often by Northern Alliance troops or other allied forces, without being specifically targeted for capture by (or even known to) the U.S. military in advance. Many were relatively recent recruits to training camps in Afghanistan run by al-Qaida or other groups, where they received limited weapons training, but do not appear to have been among those selected for more advanced training geared toward terrorist operations abroad.
- *Miscellaneous others.* The remaining detainees—roughly 5 percent—do not fit into any of the above categories.

**Country of Origin.** The Guantanamo detainees reviewed included individuals from a number of different countries, including Yemen, Afghanistan, China, Saudi Arabia, Algeria, Tunisia, Syria, Libya, Kuwait, and Pakistan. Approximately 40 percent—97 detainees—were Yemeni, while over 10 percent were Afghan.



**Point of Capture.** The large majority of the detainees in the population reviewed—approximately 60 percent—were captured inside Afghanistan or in the Afghanistan-Pakistan border area. Approximately 30 percent of the detainees were captured inside Pakistan. The remaining 10 percent were captured in countries other than Afghanistan or Pakistan.



**Arrival at Guantanamo.** Most of the detainees reviewed—approximately 80 percent—arrived at Guantanamo in 2002, having been captured during the early months of operations in Afghanistan. The remaining detainees arrived in small numbers over succeeding years.

## VII. Transfer Decisions

### A. Background

As the first step in the review process, the Executive Order required the review participants to determine which Guantanamo detainees could be transferred or released consistent with the national security and foreign policy interests of the United States. The Executive Order further required the Secretary of Defense, the Secretary of State, and other review participants as appropriate, to “work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.”

Prior to the initiation of the review, 59 of the 240 detainees subject to review were approved for transfer or release by the prior administration but remained at Guantanamo by the time the Executive Order was issued. One reason for their continued detention was that more than half of the 59 detainees could not be returned to their home countries consistent with U.S. policy due to post-transfer treatment concerns.<sup>11</sup> Thus, many of the 59 detainees required resettlement in a third country, a process that takes time and requires extensive diplomatic efforts.

In addition, 29 of the detainees subject to review were ordered released by a federal district court as the result of habeas litigation. Of these 29 detainees, 18 were

<sup>11</sup> It is the longstanding policy of the United States not to transfer a person to a country if the United States determines that the person is more likely than not to be tortured upon return or, in appropriate cases, that the person has a well-founded fear of persecution and is entitled to persecution protection. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Protocol Relating to the Status of Refugees. Accordingly, prior to any transfer, the Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in the given country and the adequacy and credibility of assurances obtained from the foreign government.

ordered released after the government conceded the case.<sup>12</sup> The remaining 11 detainees were ordered released after a court reached the merits of the case and ruled, based on a preponderance of the evidence, that the detainee was not lawfully held because he was not part of, or did not substantially support, al-Qaida, the Taliban, or associated forces.<sup>13</sup> Of the 29 detainees ordered released, 18 were among the 59 who had been approved by the prior administration for transfer or release. Thus, a total of 70 detainees subject to the review were either approved for transfer during the prior administration or ordered released by a federal court.

## **B. Decisions**

Based on interagency reviews and case-by-case threat evaluations, 126 of the 240 detainees were approved for transfer by agreement of senior officials from the agencies named in the Executive Order.

The 126 detainees unanimously approved for transfer include 44 who have been transferred to date—24 to their home countries,<sup>14</sup> 18 to third countries for resettlement,<sup>15</sup> and two to Italy for prosecution. Of the 82 detainees who remain at Guantanamo and who have been approved for transfer, 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies concerning humane treatment, 38 cannot be repatriated due to humane treatment or related concerns in their home countries (other than Yemen) and thus need to be resettled in a third country, and 29 are from Yemen. Half of all detainees approved for transfer—63 of the 126—also had been approved for transfer during the prior administration, ordered released by a federal court, or both.<sup>16</sup>

There were considerable variations among the detainees approved for transfer. For a small handful of these detainees, there was scant evidence of any involvement with terrorist groups or hostilities against Coalition forces in Afghanistan. However, for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan. Thousands of such individuals are believed to have passed

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<sup>12</sup> Of the 18 cases conceded by the government, 17 were brought by the Uighur detainees and were conceded by the prior administration. Eleven of the 18 detainees have been transferred to date.

<sup>13</sup> A total of 14 detainees have won their habeas cases on the merits in district court. The government transferred three of these detainees in December 2008; thus, they were not subject to the review. Of the 11 remaining detainees who were reviewed under the Executive Order, seven have been transferred to date. Of the four who have not been transferred, the United States is appealing the district court's ruling in two of the cases, and is still within the time period to appeal the remaining two cases.

<sup>14</sup> The 24 detainees transferred to their home countries were repatriated to Afghanistan (5), Algeria (2), Chad (1), Iraq (1), Kuwait (2), Saudi Arabia (3), Somalia (Somaliland) (2), the United Kingdom (1), and Yemen (7).

<sup>15</sup> The 18 detainees transferred to third countries for resettlement were transferred to Belgium (1), Bermuda (4), France (2), Hungary (1), Ireland (2), Portugal (2), and Palau (6).

<sup>16</sup> The review participants reviewed the detainees who had been approved for transfer by the prior Administration and designated seven such detainees (all of whom were from Yemen) for conditional detention instead of transfer.

through Afghanistan from the mid-1990s through 2001, recruited through networks in various countries in the Middle East, North Africa, and Europe. These individuals varied in their motivations, but they typically sought to obtain military training at one of the many camps operating in Afghanistan; many subsequently headed to the front lines to assist the Taliban in their fight against the Northern Alliance. For the most part, these individuals were uneducated and unskilled. At the camps, they typically received limited weapons training. While al-Qaida used its camps to vet individuals for more advanced training geared toward terrorist operations against civilian targets, only a small percentage of camp attendees were deemed suitable for such operations. The low-level fighters approved for transfer were typically assessed by the review participants not to have been selected for such training. Many were relatively recent recruits to the camps, arriving in Afghanistan in the summer of 2001. After the camps closed in anticipation of the arrival of U.S. forces in October 2001, some of these individuals were transported by camp personnel or otherwise made their way to the Tora Bora mountain range, where they joined fighting units, but subsequently dispersed in the face of U.S. air attacks.

It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented. Some detainees were approved for transfer only to specific countries or under specific conditions, and a few were approved for transfer only to countries with pending prosecutions against the detainee (or an interest in pursuing a future prosecution). Each decision was made on a case-by-case basis, taking into account all of the information about the detainee and the receiving country's ability to mitigate any threat posed by the detainee. For certain detainees, the review participants considered the availability of rehabilitation programs and mental health treatment in the receiving country. The review participants also were kept informed of intelligence assessments concerning recidivism trends among former detainees.

It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee. To be sure, in some cases the review participants had concerns about the strength of the evidence against a detainee and the government's ability to defend his detention in court, and considered those factors, among others, in deciding whether to approve the detainee for transfer. For many of the detainees approved for transfer, however, the review participants found there to be reliable evidence that the detainee had engaged in conduct providing a lawful basis for his detention. The review participants nonetheless considered these detainees appropriate candidates for transfer from a threat perspective, in light of their limited skills, minor organizational roles, or other factors.

### **C. Yemeni Detainees**

From the outset of the review, it was clear that the Yemeni detainees posed a unique challenge: there were 97 Yemenis subject to the review, by far the largest group in the Guantanamo population, and the security situation in Yemen had deteriorated. Al-Qaida was gaining strongholds in certain regions of the country, and the government of Yemen was facing a rebellion in other regions. Potential options for rehabilitation programs and other security measures were carefully considered throughout the course of the review, but conditions in Yemen remained a primary concern.

Taking into account the current intelligence regarding conditions in Yemen, and the individual backgrounds of each detainee, the review participants unanimously approved 36 of the 97 Yemeni detainees for transfer subject to appropriate security measures. The decision to approve these detainees for transfer, however, did not require immediate implementation. Rather, by making each transfer decision contingent on the implementation of appropriate security measures, the review participants allowed for necessary flexibility in the timing of these transfers. Under these transfer decisions, detainees would be returned to Yemen only at a time, and only under conditions, deemed appropriate from a security perspective.

To date, only seven of the 36 Yemeni detainees approved for transfer have been transferred to Yemen.<sup>17</sup> One was transferred in September 2009 pursuant to a court order, and six were transferred in December 2009. The six who were repatriated in December 2009 were selected by the unanimous agreement of high-level officials in the agencies named in the Executive Order, after further individualized reviews of the detainees, including consideration of threat-related information, the evidence against the detainees, and the government's ability to successfully defend the lawfulness of their detentions in court. This decision involved high-level coordination within the government and reflected a determination that these six specific detainees should be returned to Yemen at that time.

There are 29 Yemenis approved for transfer who remain at Guantanamo. The involvement of Al-Qaida in the Arabian Peninsula—the branch of al-Qaida based in Yemen—in the recent attempted bombing of an airplane headed to Detroit underscored the continued need for a deliberate approach toward any further effort to repatriate Yemeni detainees. In the wake of the attempted plot, the President publicly announced a moratorium on the transfer of detainees to Yemen. Accordingly, none of the 29 Yemeni detainees remaining at Guantanamo who are approved for transfer will be repatriated to Yemen until the moratorium is lifted. These detainees may be considered for resettlement in third countries subject to appropriate security measures, if such options become available.

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<sup>17</sup> During the last administration, 14 detainees were returned to Yemen, and an additional 15 Yemeni detainees were among the 59 approved for (but still awaiting) transfer as of January 20, 2009.

## **VIII. Prosecution Decisions**

### **A. Background**

The Executive Order provides that “[i]n accordance with United States law, the cases of individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution [*i.e.*, federal court].” In a speech at the National Archives on May 21, 2009, the President reiterated that “when feasible, we will try those who have violated American criminal laws in federal courts.” As the President noted in his speech, federal prosecutors have a long history of successfully prosecuting all manner of terrorism offenses in the federal courts:

Our courts and juries of our citizens are tough enough to convict terrorists, and the record makes that clear. Ramzi Yousef tried to blow up the World Trade Center—he was convicted in our courts, and is serving a life sentence in U.S. prison. Zacarias Moussaoui has been identified as the 20<sup>th</sup> 9/11 hijacker—he was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

The President also stressed that military commissions “have a history in the United States dating back to George Washington and the Revolutionary War” and remained “an appropriate venue for trying detainees for violations of the laws of war.” Accordingly, the administration proposed, and Congress has since enacted, reforms to the military commissions system to ensure that the commissions are fair, legitimate, and effective.

In accordance with the President’s guidance, the Task Force evaluated detainees for possible prosecution wherever there was any basis to conclude that prosecution in either federal court or a military commission was appropriate and potentially feasible. The Task Force prosecutors focused their review at first on the 23 detainees who, as of the issuance of the Executive Order, were facing charges in the military commissions, as well as several other uncharged detainees whose cases were related to those of charged detainees.<sup>18</sup> The Task Force then evaluated for possible prosecution the approximately 40 additional detainees whom OMC had designated for potential prosecution. Finally, the Task Force reviewed every detainee for prosecution who was deemed ineligible for transfer.

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<sup>18</sup> As of January 22, 2009, there were 12 detainees whose cases had been referred to a military commission, including the defendants in the September 11 prosecution. In compliance with the Executive Order, their cases were halted.

In conducting its reviews, the Task Force worked closely with OMC. Task Force members had access to OMC files, and OMC prosecutors briefed the Task Force on their cases. Upon request, Department of Defense investigators and FBI agents who had worked on investigations met with Task Force members to answer their questions. The Task Force also reviewed original source information pertaining to the detainees and was able to identify previously unexploited sources of evidence.

As the Task Force completed its prosecution reviews, it identified those cases that appeared feasible for prosecution in federal court, or at least potentially feasible, if certain investigative steps were pursued with success. In this regard, the Task Force identified a number of avenues for strengthening important cases and developing them for prosecution. For example, the Task Force determined that there were more than a thousand pieces of potentially relevant physical evidence (including electronic media) seized during raids in the aftermath of the September 11 attacks that had not yet been systematically catalogued and required further evaluation for forensic testing. There were potential cooperating witnesses who could testify against others at trial, and key fact witnesses who needed to be interviewed. Finally, certain foreign governments, which had been reluctant to cooperate with the military commissions, could be approached to determine whether they would provide cooperation in a federal prosecution. Given the limited resources of the Task Force to pursue this additional work, the Review Panel referred cases that appeared potentially feasible for federal prosecution to the Department of Justice for further investigation and prosecutorial review.

The Department of Justice and Department of Defense agreed upon a joint protocol to establish a process for determining whether prosecution of a referred case should be pursued in a federal court or before a military commission. Under the protocol—titled *Determination of Guantanamo Cases Referred for Prosecution*—there is a presumption that prosecution will be pursued in a federal court wherever feasible, unless other compelling factors make it more appropriate to pursue prosecution before a military commission. The evaluations called for under the protocol are conducted by teams of both federal and military prosecutors. Among the criteria they apply are: the nature of the offenses to be charged; the identity of the victims; the location of the crime; the context in which the defendant was apprehended; and the manner in which the case was investigated and by which investigative agency. The Attorney General, in consultation with the Secretary of Defense, makes the ultimate decision as to where a prosecution will be pursued.

## **B. Decisions**

As a result of the Task Force's review, the Review Panel referred 44 cases to the Department of Justice for potential prosecution and a decision regarding the forum for any prosecution.<sup>19</sup> Decisions to seek prosecution have been announced in 12 of these cases; 24 remain pending under the protocol; and eight of the detainees initially referred were subsequently designated for other dispositions.

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<sup>19</sup> The review participants did not determine that any additional detainees were potentially feasible for prosecution solely before a military commission at this time.



On May 21, 2009, the Department of Justice announced that Ahmed Ghailani, who had previously been indicted in the United States District Court for the Southern District of New York for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania, would be prosecuted in federal court.<sup>20</sup> On June 9, 2009, Ghailani was transferred from Guantanamo to the Southern District of New York, where his case is pending.

On November 13, 2009, the Attorney General announced that the government would pursue prosecution in federal court in the Southern District of New York against the five detainees who had previously been charged before a military commission for their roles in the September 11 attacks. They are:

- Khalid Sheikh Mohammed, the alleged mastermind of the September 11 plot;
- Ramzi bin al-Shibh, the alleged coordinator of the September 11 plot who acted as intermediary between Khalid Sheikh Mohammed and the hijackers in the United States;
- Walid Muhammed Salih Mubarak Bin Attash (a.k.a. Khallad Bin Attash), an alleged early member of the September 11 plot who tested airline security on United Airlines flights between Bangkok and Hong Kong;
- Mustafa Ahmed al-Hawsawi, an alleged facilitator of hijackers and money to the United States from his base in Dubai; and
- Ali Abdul Aziz Ali (a.k.a. Ammar Baluchi), a second alleged facilitator of hijackers and money to the United States from his base in Dubai.

On the same day, the Attorney General also announced that the prosecution against Abd al-Rahim al-Nashiri, the alleged mastermind of the bombing of the U.S.S. *Cole*, would be pursued before a military commission. The Attorney General further decided that four other detainees whose cases were pending before military commissions when the Executive Order was issued would remain before the commissions: Ahmed al-Darbi, Noor Uthman, Omar Khadr, and Ibrahim al-Qosi. In January 2010, the Department of Justice announced that Obaidullah, whom OMC had charged but whose case had not yet been referred to a military commission, will remain in the military commission system.

Twenty-four of the referred cases remain pending with the Department of Justice under the protocol. No final decision has been made regarding whether or in what forum these detainees will be prosecuted.

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<sup>20</sup> The decision to pursue prosecution against Ghailani in federal court was made before the joint prosecution protocol was in effect.

Eight of the referred detainees are no longer under active consideration for prosecution. One detainee who had been referred for prosecution was transferred pursuant to a court order in his habeas case. Seven additional detainees who had been referred for prosecution were ultimately referred back to the Task Force, based on a determination that the cases were not feasible for prosecution in either federal court or the military commission system at this time. Six of these detainees were subsequently approved for continued detention under the AUMF without criminal charges, and one was approved for transfer. As a result of these subsequent decisions, there are currently 36 cases with active prosecution referrals.

### **C. Detainees Who Cannot Be Prosecuted**

The Task Force concluded that for many detainees at Guantanamo, prosecution is not feasible in either federal court or a military commission. There are several reasons for these conclusions.

First, the vast majority of the detainees were captured in active zones of combat in Afghanistan or the Pakistani border regions. The focus at the time of their capture was the gathering of intelligence and their removal from the fight. They were not the subjects of formal criminal investigations, and evidence was neither gathered nor preserved with an eye toward prosecuting them. While the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence or sufficient to satisfy a criminal burden of proof in either a military commission or federal court. One common problem is that, for many of the detainees, there are no witnesses who are available to testify in any proceeding against them.

Second, many of the detainees cannot be prosecuted because of jurisdictional limitations. In many cases, even though the Task Force found evidence that a detainee was lawfully detainable as part of al-Qaida—*e.g.*, based on information that he attended a training camp, or played some role in the hierarchy of the organization—the Task Force did not find evidence that the detainee participated in a specific terrorist plot. The lack of such evidence can pose obstacles to pursuing a prosecution in either federal court or a military commission. While the federal material support statutes have been used to convict persons who have merely provided services to a terrorist organization, *e.g.*, by attending a terrorist training camp, there are potential limitations to pursuing such a charge against the detainees.<sup>21</sup>

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<sup>21</sup> Among these limitations: First, the two relevant statutes—18 U.S.C. §§ 2339A and 2339B—were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively. Thus, material support may not be available as a charge in the federal system unless there is sufficient evidence to prove that a detainee was supporting al-Qaida after October 2001 at the earliest. Second, the statute of limitations for these offenses is typically eight years (*see* 18 U.S.C. § 3286), which may bar prosecution for offenses that occurred well before the detainee's capture. Third, because the statutory maximum sentence for material support is 15 years (where death does not result from the offense), sentencing considerations may weigh against pursuing prosecution in certain cases. Some of these considerations would not apply to material support charges brought in the military commissions; however, the legal viability of material support as a charge in the military commission system has been challenged on appeal in commission proceedings.

Notably, the principal obstacles to prosecution in the cases deemed infeasible by the Task Force typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations tied to the demands of a criminal forum, as described above.

Significantly, the Executive Order does not preclude the government from prosecuting at a later date someone who is presently designated for continued detention. Work on these cases continues. Further exploitation of the forensic evidence could strengthen the prosecution against some detainees. Other detainees may cooperate with prosecutors. If either the Department of Justice or the Department of Defense concludes in the future that prosecution of a detainee held without charges has become feasible in federal court or in a military commission, the detention decisions made in the course of this review would permit the prosecution to go forward.

## **IX. Detention Decisions**

### **A. Background**

Under the Executive Order, the review participants were required first to consider whether it was possible to transfer, release, or prosecute each detainee. With respect to any detainees who were not deemed appropriate for transfer, release, or prosecution, the review participants were required to “select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.”

In accordance with this framework, detainees were first reviewed to determine whether transfer or release was consistent with the national security and foreign policy interests of the United States and whether they could be prosecuted. If those options did not appear feasible, the review participants then considered whether the detainee’s national security threat justified continued detention under the AUMF without criminal charges, and, if so, whether the detainee met the legal requirements for detention.

### **B. Decisions**

As the result of this review, 48 detainees were unanimously approved for continued detention under the AUMF.

Although each detainee presented unique issues, all of the detainees ultimately designated for continued detention satisfied three core criteria: First, the totality of available information—including credible information that might not be admissible in a criminal prosecution—indicated that the detainee poses a high level of threat that cannot be mitigated sufficiently except through continued detention; second, prosecution of the detainee in a federal criminal court or a military commission did not appear feasible; and third, notwithstanding the infeasibility of criminal prosecution, there is a lawful basis for the detainee’s detention under the AUMF.

Broadly speaking, the detainees designated for continued detention were characterized by one or more of the following factors:

- **Significant organizational role within al-Qaida, the Taliban, or associated forces.** In contrast to the majority of detainees held at Guantanamo, many of the detainees approved for detention held a leadership or other specialized role within al-Qaida, the Taliban, or associated forces. Some provided operational, logistical, financial, or fundraising support for al-Qaida. Others were al-Qaida members who were selected to serve as bodyguards for Usama bin Laden based on their loyalty to the organization. Others were Taliban military commanders or senior officials, or played significant roles in insurgent groups in Afghanistan allied with the Taliban, such as Hezb-e-Islami Gulbuddin.
- **Advanced training or experience.** The detainees approved for detention tended to have more extensive training or combat experience than those approved for transfer. Some of these detainees were veteran *jihadists* with lengthy involvement in the training camps in Afghanistan. Several had expertise in explosives or other tactics geared toward terrorist operations.
- **Expressed recidivist intent.** Some detainees designated for detention have, while at Guantanamo, expressly stated or otherwise exhibited an intent to reengage in extremist activity upon release.
- **History of associations with extremist activity.** Some of the detainees approved for detention have a history of engaging in extremist activities or particularly strong ties (either directly or through family members) to extremist organizations.

*Lawful basis for detention.* Under the Executive Order, every detainee's disposition must be lawful. Accordingly, the Task Force consulted closely with the Department of Justice regarding every detainee approved for continued detention to ensure that the detainee fell within the bounds of the Government's detention authority under the AUMF, as described above.

*Prosecution not currently feasible.* Although dangerous and lawfully held, the detainees designated for detention currently cannot be prosecuted in either a federal court or a military commission. While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee's guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee's conduct does not constitute a chargeable offense in either a federal court or military commission. Though prosecution currently is not feasible for these detainees, designating a detainee for detention does not preclude future prosecution in either a federal court or a military commission should new evidence or other developments make a prosecution viable.

*Transfer or release not currently feasible.* Finally, none of the detainees approved for detention can be safely transferred to a third country at this time. This does

not mean that the detainee could never be safely transferred to a third country. Rather, designating the detainee for continued detention at this time indicates only that given the detainee's current threat and the current willingness or ability of potential destination countries to mitigate the threat, the detainee is not currently eligible for transfer or release. Should circumstances change (*e.g.*, should potential receiving countries implement appropriate security measures), transfer might be appropriate in the future.

### **C. Continued Reviews**

Detainees approved for continued detention under the AUMF will be subject to further reviews. First, in accordance with the Supreme Court's decision in *Boumediene v. Bush*,<sup>22</sup> each detainee has the opportunity to seek judicial review of their detention by filing a petition for a writ of habeas corpus in federal court. In such cases, the court reviews whether the detainee falls within the government's lawful detention authority. In cases where courts have concluded that the detainee is not lawfully held, the courts have issued orders requiring the government to take diplomatic steps to achieve the detainee's release. Thus far, federal district courts have ruled on cases brought by four of the 48 detainees approved for continued detention. In each of the four cases, the district court denied the habeas petition and upheld the lawfulness of the detention. Many other cases are pending in district court, and some are pending on appeal.

Second, as the President stated in his speech at the National Archives, "a thorough process of periodic review" is needed to ensure that "any prolonged detention is carefully evaluated and justified." Thus, in addition to the judicial review afforded through habeas litigation, each detainee approved for continued detention will be subject to periodic Executive Branch review.

### **X. Conditional Detention Decisions: Yemeni Detainees**

As discussed above, the review of the 97 Yemeni detainees posed particular challenges from the outset given the security situation in Yemen. After conducting a case-by-case review of the Yemeni detainees, the review participants unanimously agreed that 36 Yemenis (29 of whom remain at Guantanamo) are appropriate for transfer, subject to security measures, and that 26 Yemenis should continue to be detained under the AUMF in light of their individual threat. In addition, there are currently five Yemenis with active prosecution referrals, two of whom the Attorney General announced will be prosecuted in federal court for their roles in the September 11 attacks (Ramzi bin al-Shibh and Walid Muhammed Salih Mubarak Bin Attash).

The remaining 30 Yemeni detainees were determined to pose a lower threat than the group of detainees designated for continued detention under the AUMF. Nonetheless, the review participants determined, based on a number of factors, that these 30 detainees should not be transferred to Yemen in the near future and should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.

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<sup>22</sup> 122 S. Ct. 2229 (2008).

Thus, these 30 detainees were approved for “conditional” detention, meaning that they may be transferred if one of the following conditions is satisfied: (1) the security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available. Should any of these conditions be satisfied, however, the remaining 29 Yemeni detainees approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.<sup>23</sup>

At the time of the closure of the detention facilities at Guantanamo, the status of detainees approved for conditional detention will be reconsidered for possible transfer to Yemen, a third country, or a detention facility in the United States.

## **XI. Diplomatic Efforts**

The President’s Executive Order recognized that diplomatic efforts would be essential to the review and appropriate disposition of individuals detained at Guantanamo. To implement the review decisions approving the transfer of detainees, the order provides that the “Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.” The President emphasized this point during his speech at the National Archives, stating that for cases involving “detainees who we have determined can be transferred safely to another country . . . my Administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil.”

To fulfill this mission, the Secretary of State created an office to lead the diplomatic efforts to transfer detainees and appointed an experienced career diplomat to serve as the Special Envoy for the Closure of the Guantanamo Bay Detention Facilities. The highest levels in the administration supported these efforts. The President, Vice President, and Cabinet members—including the Secretary of State, Attorney General, and Secretary for Homeland Security—have discussed the closure of the Guantanamo detention facilities and the transfer of detainees outside the United States with their foreign government counterparts. To assist these diplomatic efforts, the National Counterterrorism Center facilitated the sharing of information about the detainees with foreign governments considering whether to accept them. In addition, the government arranged meetings between officials from interested countries and detainees at Guantanamo to facilitate resettlement and repatriation discussions.

From the outset of the review, the State Department developed a diplomatic strategy for Guantanamo, focusing on efforts to resettle detainees who could not be sent to their home countries because of post-transfer treatment concerns. In June 2009, the United States and European Union concluded a joint statement in support of the

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<sup>23</sup> Ten of the detainees approved for conditional detention had initially been approved for transfer by the review participants. Because the specific conditions placed on the transfer approvals of these 10 detainees were the equivalent of those used for the conditional detention category, the 10 detainees were later redesignated for conditional detention.

resettlement of a number of detainees in Europe, expressing the readiness of certain member states to resettle former Guantanamo detainees on a case-by-case basis. Following this joint statement, a number of European governments—such as Spain, Italy, Portugal, and Ireland—announced that they were prepared to work out arrangements to accept some detainees. In addition, the Government of Palau also announced its readiness to accept a number of Uighur detainees. Following these initial successes, the State Department intensified efforts to implement resettlements. The public offers by some European governments to resettle detainees encouraged other governments to make similar offers.

To date, the diplomatic efforts taken under the Executive Order have led to the resettlement of 18 detainees in the following seven locations: Belgium, Bermuda, France, Hungary, Ireland, Palau, and Portugal.<sup>24</sup> Resettlement negotiations are ongoing with a number of countries, *e.g.*, Spain, Switzerland, and Slovakia. In addition, Italy accepted two detainees for criminal prosecution on charges stemming from pre-9/11 activities. All efforts to resettle detainees include discussions with receiving governments about post-transfer security measures, as well as other issues such as the integration and humane treatment of resettled detainees.

The process for engaging a country on resettlement issues can be lengthy and complicated. The State Department has engaged in discussions with dozens of countries across the globe to initiate or further resettlement negotiations once it has been determined that a government is open to discussions. When this process is successful, initial receptiveness leads to discussions regarding individual detainees, foreign government interagency review, foreign government interviews of prospective resettlement candidates, the foreign government's formal decision-making process, integration plans, and, ultimately, resettlement. The length of the effort often has been influenced by political and other issues in potential resettlement countries (*e.g.*, public perceptions of current and past U.S. detention policies), third-country views (and sometimes pressure) with respect to detainee resettlement, and public views of the Guantanamo detention facility generally. Depending on how these factors affect individual cases, the process can be very lengthy.

Once a resettlement has occurred, the State Department and other agencies remain in contact with host governments following transfer on these issues. The State Department is engaged in ongoing discussions for the remaining detainees who cannot be repatriated due to post-transfer treatment concerns and is on track to find resettlement countries for most if not all of the detainees in this category.

The State Department also has worked to repatriate detainees to their home countries, in coordination with other agencies and with the National Security Council. Thus far, 24 detainees have been repatriated since last January to nine different locations—Afghanistan, Algeria, Chad, Iraq, Kuwait, Saudi Arabia, Somaliland, the United Kingdom, and Yemen. All decisions to repatriate detainees have been made in

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<sup>24</sup> From 2002-2008, a total of eight Guantanamo detainees were resettled, all in Albania.

light of the latest intelligence information and with the consent of all relevant agencies. In light of such information, and following the attempted terrorist attack on December 25, 2009, the President announced that repatriations to Yemen would be suspended for the foreseeable future. In addition, the government has adopted enhanced procedures for the implementation of repatriation decisions, requiring a cabinet-level review prior to going forward with any repatriation.

## **XII. Conclusion**

The review process established pursuant to the Executive Order is now complete. The participating agencies have reviewed and unanimously agreed on dispositions for each of the 240 detainees subject to the review. The agencies responsible for the review will continue to handle operational issues involving detainees, including the implementation of the review determinations, and the National Security Council will coordinate the resolution of policy issues pertaining to Guantanamo. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.



# APPENDIX

## 15

The U.S. Department of Justice filed the following document, *Respondents' Motion to Stay All Proceedings for Petitioner Who is Approved for Transfer or Release*, in the U.S. District Court for the District of Columbia on December 17, 2008 in the case *Ameziane v. Obama* (Civil No. 05-392). It was later filed under seal as part of the Government's Appendix in *Ameziane v. Obama* (No. 09-5236) before the U.S. Court of Appeals for the District of Columbia. All documents on the appellate record were subsequently unsealed by court order on October 5, 2012.

The Government moved to stay Mr. Ameziane's habeas case on the grounds that Mr. Ameziane was approved for transfer in 2008 and the "detention of Petitioner is no longer at issue."

**"PROTECTED INFORMATION" - FILED UNDER SEAL**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE:

GUANTANAMO BAY  
DETAINEE LITIGATION

Misc. No. 08-442 (TFH)

Civil No. 05-392 (ESH)

**RESPONDENTS' MOTION TO STAY ALL PROCEEDINGS  
FOR PETITIONER WHO IS APPROVED FOR TRANSFER OR RELEASE**

Respondents move the Court to stay all proceedings for Petitioner Djamel Ameziane (ISN 310, "Petitioner") in the above-captioned matter. The Department of Defense ("DoD") has approved Petitioner for transfer or release from United States custody at the Naval Base in Guantanamo Bay ("Guantanamo") and previously had made appropriate diplomatic arrangements to effect Petitioner's transfer from United States custody – the ultimate relief sought in this habeas case. The Court, however, has enjoined the transfer of Petitioner pending resolution of a matter currently before the Court of Appeals.<sup>1</sup> Therefore, because the detention of Petitioner is no longer at issue, and because Petitioner remains in United States custody pursuant to Court order, in the interest of judicial economy, Respondents ask that the Court stay this habeas proceeding in deference to the habeas proceedings of all other petitioners who are not slated for

<sup>1</sup> The Court enjoined the transfer of Petitioner pending the decision of the Court of Appeals in Kiyemba v. Bush, 05-5487 (consolidated with 05-5488, 05-5489, 05-5490, and 05-5491) (D.C. Cir.). See Order (under seal) of October 28, 2008 (TFH). The issue in Kiyemba is an order by the district court requiring Respondents to provide petitioners with 30-day notice of transfer.

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transfer or release.<sup>2</sup>

**BACKGROUND**

DoD previously approved Petitioner for transfer or release from United States custody at Guantanamo and made diplomatic arrangements to permit his transfer. These diplomatic arrangements were made consistent with the policies and procedures outlined in the declarations of Ambassador Clint Williamson (attached as Exhibit 1) and Deputy Assistant Secretary of Defense for Detainee Affairs Sandra Hodgkinson, which have been previously submitted to the Court in the context of litigation concerning advance notice of detainee transfers and otherwise. See Respondents' Status Report in Response to the Court's July 3, 2008 Order (Dkt. No. 57 in No. 08-MC-442). As explained there, after DoD approves a detainee for transfer or release, it then requests the assistance of the Department of State to make the appropriate diplomatic arrangements, typically with a detainee's country of citizenship. See Williamson Decl. ¶¶ 5-6.

The Department of State engages in a diplomatic dialogue to facilitate the transfer or release of individual detainees. The purpose of these discussions, inter alia, is to seek assurances that the Government considers necessary and appropriate with regard to the transferee country in question and to ensure that the transfer or release is consistent with United States policy, including its policy not to repatriate or transfer detainees to countries where it is more likely than not that the detainee will be tortured. Id. at ¶ 8. This is an elaborate, inter-agency process that involves senior level officials and includes consideration of the detainee's particular

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<sup>2</sup> Respondents conferred with Petitioner's counsel via phone and email on December 12 and 15, 2008, pursuant to Local Rule 7(m). Petitioner's counsel oppose the motion on the ground that Respondents have determined Petitioner to be an enemy combatant.

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circumstances, an informed and well-rounded analysis of the current situation on the ground in the prospective transferee country, the input of various Department of State offices with relevant knowledge, personal interactions and negotiations with senior officials of the prospective transferee government, and consideration of assurances provided by the prospective transferee country, as well as their sufficiency and any mechanisms for verifying them. *Id.* at ¶ 7. Once the process is satisfactorily completed, the Government then relinquishes custody of these detainees.

Such arrangements were made in this case, and pursuant to the Court's July 10, 2008 order requiring advance notification, Respondents provided notice to Petitioner and his counsel, who then moved to enjoin the transfer. The Court then enjoined the transfer of Petitioner pending the decision of the Court of Appeals in Kiyemba. *See* Order (under seal) of October 28, 2008 (TFH).

Furthermore, merits proceedings have been scheduled by Judge Huvelle in this case, with certain production deadlines between now and March 2009, the tentative date for the start to the merits proceeding. *See, e.g.*, Dkt. No. 125.

**ARGUMENT**

This Court has the discretion to stay proceedings in light of the particular circumstances of a case. *See United States v. Stover*, 576 F. Supp. 2d 134, \*28 (D.D.C. 2008) (citation and quotation omitted) (habeas); Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co., 569 F. Supp. 2d 113, 120 (D.D.C. 2008) (citing Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for

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counsel, and for litigants.” Air Line Pilots Ass’n v. Miller, 523 U.S. 866, 879 n.6 (1998) (quoting Landis, 299 U.S. at 254-55). “A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” Painting Co., 569 F. Supp. 2d at 120 (quoting Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979)). When circumstances may moot the case currently before the court, a stay is appropriate. See Painting Co., 569 F. Supp. 2d at 120-21.

Staying all proceedings for Petitioner will promote judicial economy and the appropriate use of the Court’s and parties’ resources in the unique circumstances of this litigation. The Guantanamo Bay Detainee Litigation includes approximately 200 pending habeas petitions. This Court has recognized the need to comply with the mandate of the Supreme Court in Boumediene that these matters be resolved expeditiously, and at the December 10, 2008 hearing regarding the Case Management Order, the Court encouraged the parties to seek ways to prioritize, group, or otherwise facilitate the efficient resolution of the Guantanamo cases.<sup>3</sup> Prioritizing cases by staying Petitioner’s habeas proceedings will serve that purpose.

In the absence of a stay, Respondents, the Court, and opposing counsel will have to dedicate limited time and resources to a habeas proceeding concerning the detention of a petitioner whom Respondents no longer wish to detain. Because Respondents have determined to relinquish custody over Petitioner but have been prevented from doing so by the Court’s order,

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<sup>3</sup> See Case Management Order at 1 (citing Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008)).

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the only issue truly remaining is the country to which Petitioner should be sent – an issue that, in the Court's view, could be impacted or resolved by a decision in the Kiyemba case in the Court of Appeals. Accordingly, the need to conduct proceedings and otherwise pursue the merits of Petitioner's habeas case is less pressing than that of the remaining detainees not set for transfer or release. Indeed, DoD has already attempted to provide the very relief that is ultimately appropriate in habeas. See Munaf v. Geren, 128 S. Ct. 2207, 2221 (2008). On the other hand, Respondents continue to maintain custody over scores of other detainees who have habeas proceedings pending before the Court and who are not similarly situated in that they have neither been approved for transfer or release nor had arrangements previously made to effectuate such transfer. A stay of all proceedings concerning Petitioner will permit the Government, the Court, and counsel representing other detainees to focus exclusively on those other cases. This focus will expedite the detainee litigation on the whole,<sup>4</sup> and will thus serve the broader purposes of judicial economy and fairness.

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<sup>4</sup> The primary remedy in habeas is release from the custody challenged. See Munaf v. Geren, 128 S. Ct. At 2221. Here, Respondents have already determined to release Petitioner. Thus, if the Court were to continue this habeas proceeding on the merits and if Petitioner prevailed, his remedy of release would not address the issue of to what country he could be released.

Petitioner has indicated his intent to pursue his habeas petition even after transfer. Respondents contest the merits of such a claim, see Qassim v. Bush, 466 F.3d 1073, 1078 (D.C. Cir. 2006) (noting that "the petitioner must demonstrate ... that his subsequent release has not rendered the petition moot"), but any uncertainty as to the ultimate merits of such a claim does not justify affording Petitioner the same priority as other detainees not approved for transfer or release. Indeed, having separately coordinated cases involving transferred detainees, the Court is already proceeding under such a framework of prioritization. See In re Guantanamo Bay Detainee Litigation, 08-MC-444 (D.D.C.).

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Finally, the consideration of the relative interests involved counsels in favor of a stay. As noted above, the Court should not force Respondents to litigate the merits of cases when they were prepared to relinquish custody over Petitioner. Any right to challenge the legality of one's detention through a habeas proceeding cannot reasonably extend so far as to require that the Government defend the merits of the detention after the Executive determines that the military rationales for enemy combatant detention no longer warrant such custody and steps are taken to arrange for the end of such custody. Comparatively, a stay of all proceedings will not unduly prejudice Petitioner, as the Government is already seeking his release. Furthermore, Respondents have filed a factual return for Petitioner. Therefore, should the status or circumstances of this case change such that further litigation is necessary or appropriate as compared to the other Guantanamo cases, the Court may lift the stay and promptly resume the proceedings. Certainly, at a minimum, the Court should not require that resources be expended litigating in the first instance a case in which Respondents seek to release the petitioner and that may become moot in the month ahead as the issue of the power of the Court to enjoin transfer is resolved, to the detriment or delay of litigation in other cases in which petitioners are not approved for transfer or release. As the Government explained in its motion seeking clarification and reconsideration of the November 6, 2008 Case Management Order, see Dkt. No. 1004 (08-MC-442), it is essential that the scores of Guantanamo cases be sequenced in a reasonable fashion if the litigation is to be feasible. Prioritizing cases by staying this habeas proceeding is one way of attempting to address that issue.

For the foregoing reasons, Respondents respectfully request that the Court stay all



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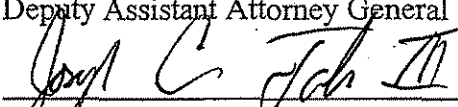
proceedings concerning this Petitioner whom Respondents have been enjoined from releasing from United States custody.

Dated: December 17, 2008

Respectfully submitted,

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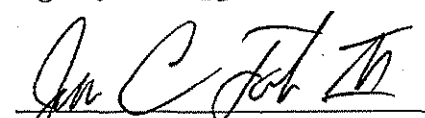
Attorneys for the Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of December, 2008, I caused copies of the foregoing (SEALED) Respondents' Motion to Stay All Proceedings for Petitioner to be served by electronic mail to counsel for Petitioner at the below listed e-mail addresses:

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