USA

CHRONICLE OF IMMUNITY FORETOLD

TIME FOR CHANGE ON COUNTER-TERRORISM VIOLATIONS AFTER ANOTHER YEAR OF BLOCKING TRUTH, REMEDY AND ACCOUNTABILITY

AMNESTY INTERNATIONAL

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INTRODUCTION – OF LAWS AND MEN

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right
US Supreme Court, *Marbury v. Madison*, 1803

It was a federal court opinion which left three dissenting judges accusing their colleagues of failing in the "judiciary's responsibility to protect individual rights under the Constitution, including a right so basic as not to be tortured by our government".[1] The majority decision of the US Court of Appeals for the Seventh Circuit, in *Vance v. Rumsfeld* on 7 November 2012, blocked a lawsuit brought by two men who alleged they were unlawfully detained and tortured in US military custody in Iraq in 2006. This decision was the latest in a series in which US courts have resolutely blocked access to a remedy by alleged victims of torture and other ill-treatment, a remedy to which victims are entitled under international law.[2]

The named defendant in this case was Donald Rumsfeld, who served as US Secretary of Defense from 2001 to 2006 under President George W. Bush. During that time, he oversaw a system under which thousands of detainees were held in indefinite military detention without charge or trial in Afghanistan, the US naval base at Guantánamo Bay in Cuba, as well as in Iraq. He approved interrogation techniques which violated the international prohibition of torture and other cruel, inhuman or degrading treatment. His lawyers nevertheless asserted that the Seventh Circuit's ruling was a "major win" which "completely vindicates Secretary Rumsfeld's leadership of the Department of Defense, while providing important protections for the national security officials charged with keeping America safe".[3]

Six months earlier, a former member of the Bush administration and now a law professor at the University of California had reacted in a similar vein to the dismissal of another lawsuit when he expressed the hope that the decision in that case would save the USA from a future in which litigation cramped "the nation's ability to fight and win the war against al Qaeda – and other enemies".[4] The plaintiff in that case, José Padilla, was seeking redress for the unlawful detention, torture and other abuse he said he suffered in custody in a military facility on the US mainland between 2002 and 2005.[5]

This earlier ruling was *Padilla v. Yoo*, issued by the US Court of Appeals for the Ninth Circuit on 2 May 2012. "That Yoo is me", wrote the Berkeley professor.[6] He is John Yoo, who served as Deputy Assistant Attorney General at the Office of Legal Counsel (OLC) of the US Department of Justice from 2001 to 2003. During that time, John Yoo worked on numerous legal opinions, including one that gave OLC approval for interrogation techniques that amounted to torture or other ill-treatment under international law for use by the Central Intelligence Agency (CIA) against detainees held in secret custody at undisclosed locations.[7]

In between these two rulings, there had been a third. In June 2012, in *Doe v. Rumsfeld*, the Court of Appeals for the District of Columbia (DC) Circuit blocked a lawsuit brought by another man alleging unlawful detention and treatment by the US military in Iraq in 2005 and 2006. Donald Rumsfeld was again the defendant. And in January 2012, in *Lebron v. Rumsfeld*, the Fourth Circuit Court of Appeals had blocked another lawsuit brought against Donald Rumsfeld and other former and current officials by José Padilla and his mother.

An unusual aspect of these lawsuits was that the four plaintiffs were US citizens. In that regard, while undoubtedly raising serious allegations, they could be said to be the exceptions to the more general rule – namely that most of those subjected by US forces since 11 September 2001 to the types of abuses alleged by these three plaintiffs have been foreign nationals. As with the US citizen lawsuits, efforts to obtain redress and accountability for human rights violations against foreign nationals have been systematically blocked, in breach

of the USA's international legal obligations.[8] A recent partial exception to this rule was the out-of-court monetary settlement reached in October 2012 in a case involving more than 70 Iraqi nationals who sued a US company which had provided interpreters for the US military in Iraq. The lawsuit, one of several that have been brought against private contractors, alleged that the company's personnel were involved in war crimes, torture and other abuses against the detainees when held in Abu Ghraib and other facilities. The settlement was reached after the US Court of Appeals for the Fourth Circuit declined to block the lawsuit from proceeding.

After the administration directly responsible for putting the USA on a slippery slope of unlawful detention and interrogation policies in the post 9/11 counter-terrorism context left office in January 2009, there was hope that things would change on the accountability front. However, President Barack Obama took up not only the flawed "global war" framework developed under his predecessor to the detriment of human rights,[9] but also adopted a forward-looking orientation to the exclusion of remedy, truth and accountability for the human rights violations committed in the context of counter-terrorism. President Obama suggested that to do otherwise would "distract us from focusing our time, our efforts, and our politics on the challenges of the future". He said that he opposed the creation of an independent commission to investigate human rights violations committed in what his predecessor had dubbed the "war on terror", because he believed that the USA's "institutions are strong enough to deliver accountability". Congress, he said, can "review abuses of our values", and the "Department of Justice and our courts can work through and punish any violations of our laws".[10] Domestic values and law, however, have been interpreted in ways that perpetuate impunity rather than deliver accountability and remedy, leaving the USA in manifest breach of its international obligations.

The three branches of government are each required under international law to ensure the USA meets its human rights obligations. Yet over the past decade, in a far from virtuous circle, these "co-equal" branches have together blocked accountability and remedy in the counter-terrorism context.[11] The executive has actively opposed lawsuits seeking a remedy for human rights violations including torture, and has undermined efforts at accountability more generally. Indeed, the Department of Justice has closed investigations into the CIA secret detention programme operated under the authority of President George W. Bush, without initiating any criminal charges, perpetuating the impunity for crimes under international law that has characterised the CIA's detention, rendition and interrogation programmes.[12] Congress has taken steps to facilitate impunity and block remedy, including in the "good faith" defence it provided interrogators under the Detainee Treatment Act of 2005.[13] This provision was then made retroactive to 11 September 2001 under the Military Commissions Act in 2006, a law which also stripped the courts of jurisdiction to hear lawsuits brought by former detainees alleging human rights violations.[14] Given the government's use of secrecy in the name of national security, it remains to be seen how much, if any, of a 6,000-page report by the Senate Intelligence Committee on the CIA detention programme will be published following the Committee's approval of the still-classified report in December 2012. Meanwhile the federal judiciary has generally passed the buck of accountability and remedy back to the elected branches of government.

This report outlines the court rulings on these civil cases brought by US citizens and puts them in the broader context. Together with cases in which claims brought by foreign nationals – alleging US abuses in Iraq (including at Abu Ghraib prison), Afghanistan (including in Bagram airbase), Cuba (at the Guantánamo naval base), and elsewhere – have been blocked, they are inserted into a chronology at the end of the report. This timeline illustrates how, from the outset, officials sought to build immunity for US government personnel involved in detentions and interrogations. Against this backdrop, the blocking of lawsuit after lawsuit, combined with the failure to bring about criminal investigations into these allegations, highlights the institutionalized nature of the accountability gap that now stretches back over a decade.

While Amnesty International believes that members of the Bush administration, including the former President himself,[15] have cases to answer about their involvement in crimes under international law, the problem did not start and finish under that administration. It has its roots in the long-standing reluctance by the USA to properly implement its international legal obligations under various treaties, including, for example, the Convention against Torture. This antipathy, coupled with the success with which the government has invoked the spectre of national security concerns to justify a wide latitude of action going far beyond that permitted under international law, not only fed the USA's unlawful detention and interrogation activities after 9/11, it continues to this day to contribute to the absence of remedy and accountability.

Ensuring accountability and genuine access to meaningful remedy as well as to the truth are binding international obligations that the US authorities must meet. President Barack Obama's first term began with the promise of real change, yet to be fulfilled, both in terms of ongoing detentions and the continuing lack of accountability and remedy.[16] As his second term begins, Amnesty International urges the US authorities finally to recognize and meet their obligations under international human rights law. It is time for that real change.

INTERNATIONAL LAW AND BEING ECONOMICAL WITH THE TRUTH

> *In fact, the US government has relied on the availability of Bivens claims in cases of government torture to help show that the US is complying with our obligations under the United Nations Convention Against Torture. A United Nations committee overseeing compliance questioned the fact that the United States had enacted virtually no new legislation to implement the Convention Against Torture. The State Department assured the United Nations that the Bivens remedy is available to victims of torture by US officials*
> *Vance v. Rumsfeld*, Seventh Circuit Court of Appeals, Judge Hamilton dissenting

A "*Bivens*" claim is one brought under a 1971 US Supreme Court decision which established that victims of constitutional violations have a right to recover damages in federal court against the official or officials in question even in the absence of a statutory route to remedy passed by Congress.[17]

In 2007 the Supreme Court set out a two-step process in *Bivens* cases. Firstly, it said that the court in question should determine whether any alternative route to remedy exists requiring the judiciary to "refrain from providing a new and freestanding damages remedy". Secondly, in the absence of an alternative, the court must make "the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed to any special factors counselling hesitation before authorizing a new kind of federal litigation".[18]

The notion of "special factors" requiring judicial "hesitation", which appeared in the original *Bivens* ruling, has been successfully used by the Bush and Obama administrations in persuading courts not to create a judicial remedy for the kind of abuses alleged by detainees in the post 9/11 counter-terrorism context. In this regard, the "special factors" asserted are factors such as national security, intelligence gathering, waging war, and foreign relations. These broad notions have smothered the pursuit of remedy for abuses committed in the counter-terrorism context like some executive-spun, court-endorsed fire blanket, with the legislature looking away.

Even in the absence of a finding of "special factors", the court may find the officials in question to be entitled to "qualified immunity" which will also block the lawsuit from being allowed to proceed. The doctrine of qualified immunity in US law protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[19] An official's conduct violates clearly established law "when, at the time of the

challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[20] The Supreme Court has said that qualified immunity "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[21] Given the blocking of lawsuit after lawsuit, as illustrated below, plaintiffs could be forgiven for concluding that the balance is institutionally weighted towards injustice.

The right to an effective remedy is recognized in all major international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992. Under Article 2.3 of the ICCPR, any person whose rights under the ICCPR have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". International law requires that remedies not only be available in theory, but accessible and effective in practice.[22] The right to an effective remedy can never be derogated from. Even in a state of emergency, "the state party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."[23] Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. [24] Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[25] Further, under article 9.5 of the ICCPR, anyone who has been subjected to unlawful detention must be provided with "an enforceable right to compensation".

The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) also specifically obliges the USA to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."[26]

All four US citizen plaintiffs in the cases outlined in this report have alleged torture and other ill-treatment as well as unlawful detention by the US military. All four lawsuits have been blocked from proceeding before the evidence of the abuses has been scrutinized on the merits, as a result of the USA's doctrine of qualified immunity or of *Bivens* "special factors".

The blocking of these lawsuits in this way clearly contravenes the USA's obligations to provide a remedy under international law. The UN Committee against Torture has emphasised that "under no circumstances may arguments of national security be used to deny redress for victims."[27] The US courts should not therefore be blocking access to a remedy for victims of torture or other ill-treatment based on "special factors" such as national security, intelligence gathering, waging war, and foreign relations.

The Committee against Torture has also underlined that "granting immunity in violation of international law, to any State or its agents or to non-state actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims."[28] Allowing officials implicated in torture or other ill-treatment of detainees to benefit from the doctrine of qualified immunity contravenes this obligation.

Dissenting from the remedy-blocking majority opinion in the *Vance v. Rumsfeld* case, Seventh Circuit Judge David Hamilton pointed out that in 2005 the US government had cited *Bivens* in seeking to persuade the UN Committee Against Torture that the USA was in compliance with its obligations under UNCAT.[29] Indeed, in its initial report to the Committee filed in 2000, the USA wrote: "Individuals who have been subjected to excessive force or cruel or unusual punishment may bring suits against federal officials for violations of their federal constitutional rights under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)."[30] Then in 2006, the Bush administration assured the Committee that among the "various avenues for seeking redress, including financial compensation, in cases

of torture and other violations of constitutional and statutory rights relevant to the Convention" was the option of "Suing federal officials directly for damages under provisions of the US Constitution for constitutional torts, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)".[31]

It might be recalled that in the same answer, the Bush administration told the Committee that the Department of Justice can "prosecute any person who, outside of the United States, commits or attempts to commit the crime of torture".[32] Similarly, in 2011, the Obama administration told the UN Human Rights Council that the USA was all for "prohibition and vigorous investigation and prosecution of any serious violations of international law", and that "We investigate allegations of torture, and prosecute where appropriate." It seems that, at least when it comes to investigating, prosecuting and providing reparation for US government involvement in torture, such answers amounted to little more than window dressing.[33]

Remedy and accountability are two sides of the same coin. Under the ICCPR, for example, according to the UN Human Rights Committee, the expert body tasked with overseeing implementation of that treaty:

> "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[34]

The UN Committee against Torture has similarly stated that satisfaction, as a reparation measure, "should include, by way of and in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of CAT:... verification of the facts and full and public disclosure of the truth... judicial and administrative sanctions against persons liable for the violations." Further, the Committee went on to say that "a State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a *de facto* denial of redress and thus constitute a violation of the State's obligations under Article 14."[35]

In the *Vance* ruling in November 2012, Judge Diane Wood added to what Judge Hamilton had pointed out in relation to the US submission in 2006 to the UN Committee Against Torture. Specifically, she wondered whether the USA would be returning to the Committee to inform it that the government had been wrong to cite *Bivens* in the way that it had when giving its assurances on remedy.[36] Amnesty International points out that the government would also need to go back to the UN Human Rights Committee. The USA's initial report to that Committee, filed by the Clinton administration in 1995, said: "Federal officials may be sued directly under provisions of the Constitution, subject only to doctrines of immunity. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)".[37] The Bush administration pointed the Human Rights Committee to this paragraph in the USA's second and third periodic reports filed jointly in 2005,[38] as did the Obama administration in the fourth periodic report lodged in December 2011, which the Committee has yet to scrutinize.[39]

The USA also has some clarifying to do to the UN Human Rights Council. In March 2011, with the USA under scrutiny during the Universal Periodic Review process, the Obama administration told the Council that "Although mechanisms for remedies are available through US courts, we cannot make commitments regarding their outcome".[40] This response to international criticism of the lack of remedy for US human rights violations in the counter-

terrorism context was economical with the truth. While the administration implied that its officials leave it to the courts to determine whether an alleged human rights violation occurred and a remedy is required, in fact, the reality is that the administration has frequently done all it can to prevent the courts from making precisely such determinations. Indeed, the month after it said this at the UN, the administration filed a brief in the US Supreme Court. The Department of Justice brief urged the Court to refuse to hear the case of five men who claim they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment as part of the USA's "rendition" programme. The administration got what it asked for when the Supreme Court, without comment, dismissed the case, leaving in place a lower court decision upholding the administration's invocation of the "state secrets privilege" as justification for dismissing the lawsuit without any review of its merits.[41]

Earlier, the Bush administration had successfully invoked the "state secrets privilege" in the case of Khaled El-Masri, who was subjected to CIA rendition from Macedonia to secret US custody in Afghanistan in 2004. With his route to remedy blocked in the USA, this German national looked to bodies outside the USA for justice. On 13 December 2012, the European Court handed down a landmark ruling in his case, finding Macedonia responsible for complicity in the torture and enforced disappearance to which Khaled El-Masri was subjected in US custody.[42] Torture and enforced disappearances are crimes under international law.[43]

The European Court's ruling once again serves to highlight the shocking absence of accountability and remedy in the USA, particularly in relation to the CIA's secret detention and rendition programmes operated during the administration of President George W. Bush. In Khaled El-Masri's case, the European Court noted that his lawsuit had been blocked in the US courts after the government had asserted the state secrets doctrine, adding that "the concept of 'State secrets' has often been invoked to obstruct the search for the truth".[44] El-Masri's case is not the only one to have had such difficulties – as noted above and in the chronology below, a number of other foreign nationals have foundered on the grounds of state secrets when trying to bring their claims for torture against US government officials. The difficulties victims of torture and enforced disappearance have faced in uncovering the truth regarding the violations they have suffered was underlined just a few days before the El-Masri ruling when a US military judge overseeing trial proceedings at the US naval base in Guantánamo Bay in Cuba issued an order that effectively prevents the detainees on trial from discussing the treatment they suffered at the hands of the US authorities, including torture and enforced disappearance.[45]

The United Nations, among others, has formally recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", referring in part to "the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred".[46] The blocking of remedy at every turn, by way of "special factors", state secrets or qualified immunity, has deprived victims, and the general public, of this right.

As the US representative at a panel discussion on the right to truth at the UN Human Rights Council in March 2010 said, respect for the right to truth serves to advance respect for the rule of law, transparency, honesty, accountability, justice and good governance – all key principles underlying a democratic society."

The USA tells the world that it is a champion of human rights, that it is committed to its international obligations and has the institutions ready and willing to do the right thing. The US government's actions do not live up to its words. Its institutionalized failures on truth, remedy and accountability tell a different story.

VANCE v. RUMSFELD

This new absolute immunity applies not only to former Secretary Rumsfeld but to all members of the military, including those who were literally hands-on in torturing these plaintiffs… The majority's immunity is even more sweeping than the government and Secretary Rumsfeld sought

Dissent in *Vance v Rumsfeld*, US Court of Appeals, 7 November 2012

In December 2006, Donald Vance filed a lawsuit against Donald Rumsfeld in US District Court. In an amended version of the complaint in February 2007, Vance was joined by a second plaintiff, Nathan Ertel. A second amended complaint in May 2008 was the version finally considered by the court. By this time, the defendants included the "unidentified" officials and agents "who ordered, carried out, and failed to intervene to prevent, the torture and unlawful detention of the Plaintiffs". The Bush administration had joined the defendants to "attend to the interests of the United States".[47] The Obama administration assumed this role after January 2009.

The lawsuit asserted that while working in Iraq in 2005 for an Iraqi security services company, Shield Group Services (SGS), Donald Vance and Nathan Ertel witnessed activities they suspected could be indicative of corruption. Donald Vance reported his concerns to the Federal Bureau of Investigation (FBI) during a trip home to Chicago, and subsequently agreed to report to the FBI any further suspicious activity he witnessed, which included concerns that SGS was involved in illegal arms trading. The lawsuit asserted that Nathan Ertel knew of and contributed to Donald Vance's whistle-blowing reports to the FBI.

After Nathan Ertel sought to resign from SGS in early April 2006, the company confiscated his and Donald Vance's Common Access Cards, a Pentagon-issued card which gave them access into Baghdad's Green Zone and various US facilities. This meant that they were effectively trapped in the SGS compound in Baghdad's Red Zone. The situation culminated in Vance and Ertel barricading themselves in a room in the SGS compound until US military forces came, extracted them and took them to the US Embassy on or around 15 April 2006.

After being debriefed at the Embassy and having been allowed to sleep for two to three hours, both men were arrested by the US military. They allege that, handcuffed and blindfolded, they were taken to a US military facility they believed to be Camp Prosperity in Baghdad, put in a cage, strip searched and fingerprinted. After about 48 hours in solitary confinement they say they were taken to Camp Cropper near Baghdad International Airport where the US military held so-called "high value detainees".

According to the lawsuit, Donald Vance and Nathan Ertel were kept in solitary confinement for the entirety of their detention at Camp Cropper. The lawsuit alleges that they were "purposefully deprived of sleep. Often, the cells were filled with heavy metal or country music at intolerably loud volumes. Guards would pound on the cell doors when they observed Plaintiffs to be sleeping". The two men were allegedly "often denied food and water completely, sometimes for an entire day", and "threatened and assaulted" by guards. For the first few weeks of their detention, according to the lawsuit, neither man was allowed to contact the outside world, with the result that during that period "their families did not know where they were, or whether they were alive or dead".

They were interrogated (separately) on a regular basis, without access to legal counsel. The lawsuit asserts that their various interrogators were military and civilian, from the FBI, the Naval Criminal Investigative Service (NCIS), and possibly from the CIA and the Defense Intelligence Agency (DIA). The interrogations allegedly focussed on a variety of topics, including SGS operations and employees, and on the two men's whistle-blowing activities.

On 20 April 2006, the men were informed that a Detainee Status Board had been convened to determine whether they were "enemy combatants", "security internees" or "innocent civilians".[48] Each man was subsequently notified that he had been determined to be a "security internee".[49] The reason given for this was that "you work for a business entity that possessed one or more large weapons caches on its premises and may be involved in the possible distribution of these weapons to insurgent/terrorist groups". On 26 April 2006, the two men were taken to appear before the Detainee Status Board. They had no legal counsel, were not allowed to see most of the purported evidence against them. They were told that they would be informed of the outcome.

On 17 May 2006, the US commander of detainee operations signed a letter authorizing the release of Nathan Ertel, who was then released 18 days after that. Donald Vance remained in detention for a further two months – the lawsuit asserts that this "extended over-detention was used to continue Mr Vance's interrogations on topics apparently of interest to the persons who detained him". He was eventually released on 20 July 2006. Neither Vance nor Ertel was charged with any crime and they returned to the USA.

The lawsuit brought by the two men against Donald Rumsfeld and unidentified others took the form of a *Bivens* claim. Donald Rumsfeld's lawyers sought dismissal of the lawsuit on the grounds of "special factors", namely that the case implicated matters of war over which the political branches held sway and which were "off-limits" for the creation of a judicial remedy. The "creation of any damages remedy in this context", the motion asserted, "should be left to the Legislative, not Judicial, Branch. Congress, however, has not created a damages remedy against federal officials for detainees held abroad".

On the specific question of their treatment in detention, the Rumsfeld motion asserted that the two men's "substantive due process rights were neither violated nor clearly established". The test, the brief asserted, was whether the alleged government conduct "shocks the conscience". Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience", but conduct "that shocks in one environment may not be so patently egregious in another", thereby requiring an "exact analysis of circumstances before any abuse of power is condemned as conscience-shocking".[50]

International law is unequivocal – torture and other cruel, inhuman or degrading treatment are always prohibited – if the conduct in question breaches this standard, then it is prohibited, no matter where, and in which context, it takes place. Even in a time of war or threat of war, even in a state of emergency which threatens the life of the nation, there can be no exemption from this obligation.[51] Indeed, in addition to the prohibition under international human rights law, in times of armed conflict torture is specifically prohibited as a grave breach of the Geneva Conventions[52]. In contrast, the former Defense Secretary's brief to dismiss the lawsuit asserted:

> "Plaintiffs have described conduct that may seem harsh when viewed in a vacuum but is not so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience when viewed in the larger context of a war."

This was the sort of specious argument used by Bush administration lawyers at the OLC of the US Department of Justice to justify the use of interrogation techniques that violated the international prohibition of torture and other ill-treatment. For example, in May 2005, the OLC advised the CIA that even if Article 16 of CAT (prohibiting cruel, inhuman or degrading treatment) was to apply to the CIA secret detention programme (which the OLC said it did not), because of the reservation the USA attached to its ratification of CAT, the relevant measure as to whether US conduct was unlawful would be the "shocks the conscience" test. The OLC advised that while the use of the sort of interrogation techniques being used by the CIA might well shock the conscience if used in "ordinary criminal investigations", it would not do so in the context of this CIA programme where the techniques were being used to

"further the Government's paramount interest in protecting the Nation".[53] This approach plainly has no justification in international law, where there is no balancing between interests when it comes to the prohibition of torture and other ill-treatment.

The OLC approach is reflected in the Rumsfeld motion to dismiss. Given that the detentions and interrogations of Vance and Ertel took place "against the backdrop" of a war zone, the brief asserted, the allegations of threats of excessive force, physical assaults and threats of indefinite detention "cannot fairly be said to shock the conscience". On the allegation of deprivation of food and water, it was argued that "it does not shock the conscience (even if it is disquieting) to learn that individuals living in a war zone sometime go without food or water for a twenty-four-hour period". Solitary confinement, the brief continued, was used in the domestic US context and at Guantánamo and, it argued, was therefore even more reasonable in Iraq given the "military's far more acute security concerns and its far fewer resources in a war zone". On the allegation that the detainees were subjected to sleep deprivation or disruption as a result of loud music, guards pounding on doors and 24-hour lighting, the Rumsfeld brief asserted that "a desire for a more restful and tranquil detention, even if understandable, is not a reasonable expectation in a military facility located amidst the chaos of armed conflict".[54]

The Vance/Ertel lawsuit did not allege that Donald Rumsfeld personally subjected the two men to the techniques and conditions they say were used against them. Rather, it traced his personal involvement in crafting policy that, it was asserted, had resulted in their treatment. Amnesty International as long ago as 2006 asserted that Secretary Rumsfeld had a case to answer in regard to his authorization of interrogation techniques that violated the international prohibition of torture and other ill-treatment.[55]

The details of the evolution of this military interrogation and detention policy, and Secretary Rumsfeld's involvement in it, will not be repeated here. In synthesis, on 2 December 2002 Secretary Rumsfeld approved, "as a matter of policy", a number of "counter-resistance" techniques for use in interrogating detainees at Guantánamo, including stress positions, sensory deprivation, prolonged isolation, the use of 20-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, and "using detainees individual phobias (such as fear of dogs) to induce stress".[56] The Vance lawsuit noted that although this particular blanket authorization was rescinded, the methods were not themselves revoked and could be used henceforth on a case by case basis. In April 2003, Secretary Rumsfeld authorized a new set of interrogation techniques, including prolonged isolation, dietary manipulation, and sleep disruption. Again, additional techniques could be used on a case-by-case basis with the Secretary's authorization.[57]

The lawsuit linked these authorizations in 2002 and 2003 to subsequent US policies in Iraq, including by reference to the dispatching by Secretary Rumsfeld to Iraq of the Guantánamo detentions commander, Major Geoffrey Miller, in August 2003 to "Gitmo-ize" detention operations there,[58] and the authorization the following month by the Commander of the US forces in Iraq, Lieutenant General Ricardo Sanchez, of techniques "which contained elements of the approved Guantánamo policy".[59] It included the use of dogs, stress positions, sensory deprivation, yelling, loud music, light control, and sleep management as interrogation techniques.[60]

Six months after the Second Amended Complaint was filed in the Vance case in May 2008, the US Senate Committee on Armed Services issued the final report of its "inquiry into the treatment of detainees in US custody". The report traced how the interrogation techniques authorized by Secretary Rumsfeld in December 2002 for use at Guantánamo had migrated to Afghanistan and Iraq.[61] Among its conclusions, the Committee found that

> "Secretary of Defense Donald Rumsfeld's authorization of aggressive interrogation techniques for use at Guantánamo Bay was a direct cause of detainee abuse there.

> Secretary Rumsfeld's December 2, 2002 approval of [Pentagon General Counsel] Mr. Haynes's recommendation that most of the techniques contained in GTMO's October 11, 2002 request be authorized, influenced and contributed to the use of abusive techniques, including military working dogs, forced nudity, and stress positions, in Afghanistan and Iraq."

While there were a number of reviews of detainee operations after the torture and other abuse of detainees in US custody at Abu Ghraib in Iraq came to light in 2004, and policies underwent a degree of revision, there remained concerns about detainee treatment in the years that followed, including during the time that Donald Vance and Nathan Ertel allege they were unlawfully detained and subjected to torture or other ill-treatment.[62]

DISTRICT COURT AND SEVENTH CIRCUIT PANEL ALLOW LAWSUIT TO PROCEED

On 5 March 2010, the US District Court issued its decision. The judge granted the Rumsfeld motion to dismiss on two of the three counts raised in the Vance/Ertel lawsuit (denial of access to the courts and to procedural due process more broadly), but ruled that the lawsuit should be allowed to proceed on the question of torture and other ill-treatment.

Judge Wayne Anderson examined the question of "whether it is plausible that Rumsfeld was personally involved in the decision to implement the class of harsh treatment methods that allegedly were used against plaintiffs Vance and Ertel". He concluded that it was: "the allegations of Rumsfeld's personal involvement in unconstitutional activity are sufficiently detailed to raise the right to relief above the speculative level and would survive a motion to dismiss". He then moved to the question of whether Donald Rumsfeld was entitled to qualified immunity.

Judge Anderson asserted that "the use of physical or mental torture on American citizens often will embody the paradigmatic example of 'shocks the conscience' conduct". He said that the allegations raised by Vance and Ertel of "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, incommunicado detention, falsified allegations and other psychologically-disruptive and injurious techniques", if substantiated, might lead a court to conclude that the treatment was indeed "torturous". The use of similar techniques on detainees at Guantánamo Bay was found by a group of UN independent experts and special rapporteurs to constitute torture.[63]

Judge Anderson found that there was no alternative route to remedy for the plaintiffs except under *Bivens*, and he noted that neither side had suggested one. He turned to whether there were any "special factors counselling hesitation". He decided that there were not:

> "When an American citizen sets out well-pled allegations of torturous behaviour by executive officials abroad, we believe that courts are not foreclosed from denying a motion to dismiss such allegations at the very first stage of the trial process… Because we do not believe that precedential or prudential concerns counsel in favour of such a 'blank check' for high-ranking officials, we do not believe that any special factors counsel hesitation sufficient to foreclose a constitutional remedy for Vance and Ertel".

On 8 August 2011, a three-judge panel of the Seventh Circuit Court of Appeals affirmed the District Court's ruling. The two judges in the majority wrote:

> "Plaintiffs have alleged in sufficient detail facts supporting Secretary Rumsfeld's personal responsibility for the alleged torture… Secretary Rumsfeld is not entitled to qualified immunity… The law was clearly established in 2006 that the treatment plaintiffs have alleged was unconstitutional. No reasonable public official could have believed otherwise".

The two judges also agreed that a *Bivens* remedy was available:

> "We see no persuasive justification in the *Bivens* case law or otherwise for defendants' most sweeping argument, which would deprive civilian US citizens of a civil judicial remedy for torture or even cold-blooded murder by federal officials and soldiers, at any level, in a war zone. United States law provides a civil damages remedy for aliens who are tortured by their own governments.[64] It would be startling and unprecedented to conclude that the United States would not provide such a remedy for its own citizens".

FULL SEVENTH CIRCUIT COURT OF APPEALS URGED TO REHEAR THE CASE

Donald Rumsfeld applied for a rehearing in front of the full Seventh Circuit court (*en banc*). Joining him were more than a dozen former US Secretaries of Defense and members of the Joint Chiefs of Staff. Among these were a number of individuals who had held office during the Bush administration, including Vice President Richard Cheney (who was also Secretary of Defence from 1989 to 1993) and former Chairman of the Joint Chiefs of Staff Richard Myers. Their brief argued that "Congress having covered the field, the courts may not now conjure up a money damage remedy against service members and government officials and second-guess the decisions made during wartime by the civilian and military officials charged with the Nation's defense." Their brief concluded:

> "No military in the world expends more effort on maintaining the good order and discipline of its soldiers and on investigating, correcting, and punishing violations, including the mistreatment of detainees".

Among those signing this brief was James Schlesinger, who served as US Secretary of Defense from 1973 to 1975. In May 2004, after the abuse of detainees in US custody in Abu Ghraib in Iraq came to light, Secretary Rumsfeld had appointed him to chair an "independent" panel to review detainee operations. The Schlesinger Panel was not critical of the interrogation techniques being employed by the US military per se, just of the failure to prevent their transfer from Afghanistan and Guantánamo to Iraq. Chairman Schlesinger claimed: "In the conditions of today, aggressive interrogation would seem essential", and "what constitutes 'humane treatment' lies in the eye of the beholder".[65] Another member of the Schlesinger Panel, former Secretary of Defense Harold Brown – who in 2011 would also join the *amicus curiae* (friend of the court) brief urging the Seventh Circuit to block the lawsuit against Rumsfeld – suggested that in the case of high-level administration officials, punishment was not an option and that the matter of their accountability rested with the electorate at election time.[66]

As chair of the panel, James Schlesinger himself had suggested that Secretary Rumsfeld's "conduct with regard to [the issue of interrogation policy] has been exemplary".[67] Yet such conduct had included the authorization of techniques such as stripping, isolation, hooding, stress positions, sensory deprivation, and the use of dogs in interrogations.[68] As another example, in November 2003, Secretary Rumsfeld had apparently authorized what amounted to an enforced disappearance – a crime under international law – by ordering military officials in Iraq to keep a detainee off any prison register.[69]

The Obama administration joined in urging a rehearing. It pointed to the dismissal by the US Court of Appeals for the DC Circuit of lawsuits brought by individuals previously held in US custody in Iraq, Afghanistan and Guantánamo, and said that that Circuit had "properly held that military detention presents a sensitive and unique context, pertaining directly to matters of national security and military affairs", and that it must be up to Congress, not the judiciary, to create the route to remedy. The Obama administration also argued that the Seventh Circuit panel had been wrong to conclude that Donald Rumsfeld was not entitled to qualified immunity.[70]

The Seventh Circuit agreed to rehear the case, and also agreed that counsel for the former

Secretaries of Defense and members of the Joint Chiefs of Staff who had joined the *amicus* brief could separately participate in the oral argument. Oral argument in front of the full court was held on 9 February 2012.

THE LAWSUIT BLOCKED

On 7 November 2012, the full Seventh Circuit Court issued its decision, overturning the panel ruling and blocking the lawsuit. The Court acknowledged that the conduct alleged by Vance and Ertel "appears to violate the Detainee Treatment Act and may violate one or more treaties". However it said that "civilian courts should not interfere with the military chain of command – not, that is, without statutory authority". When Congress does not exercise that power, "the judiciary should leave the command structure alone".

Pointing to, among other things, the Detainee Treatment Act (DTA) of 2005 and the Military Commissions Act (MCA) of 2006, the court stated that "the political branches have not been indifferent to detainees' interests". From a human rights perspective, any suggestion that Congress has fully met its obligations on detainee issues is wholly inaccurate. While there have been some efforts within the legislature to restrain executive excess and inquire into detainee treatment – the report in November 2008 of the Senate Armed Services Committee was a high point in this regard[71] – its legislative efforts have fallen short in numerous ways. One of the starkest examples of congressional failure was when it passed the MCA. Instead of taking any measures to ensure accountability for crimes under international law after President Bush confirmed on 6 September 2006 that the CIA had for the past four and a half years been running a programme of enforced disappearance and "enhanced" interrogation, a few weeks later it passed the MCA at the behest of the executive. This legislation furthered impunity, blocked remedy, sought to strip courts of habeas corpus jurisdiction, provided for unfair trials by military commission, and gave the green light, as the administration saw it, for the CIA's secret detention programme to continue.[72]

And while Section 1003 of the DTA – prohibiting the "cruel, inhuman or degrading treatment or punishment" of persons of any nationality under the custody or control of the US government anywhere in the world – was a positive step, this protection was limited to US interpretations of what constituted such ill-treatment. The latter is a product of the USA's long-standing reluctance to apply international standards to its own conduct and results from the failure of the legislative and executive branches to withdraw the reservations and other limiting conditions placed upon the USA's ratification of the ICCPR and UNCAT in 1992 and 1994 respectively. The USA considers itself bound to the prohibition of "cruel, inhuman or degrading treatment or punishment" articulated in those treaties to the extent that the term means the "cruel, unusual and inhumane" treatment or punishment prohibited under the US Constitution. The Bush administration's lawyers exploited the USA's reservations in their flawed legal arguments relating to interrogation techniques and detention conditions that violated the international prohibition of torture and other ill-treatment.[73] Indeed, in 2006, the OLC cited such reservations when advising that conditions of detention in the CIA secret detention programme – years of incommunicado detention in solitary confinement, subjected to white noise, 24-hour-a-day cell lighting, shackling, blindfolding and forced shaving, were consistent with the DTA, whether the conditions were applied singly or in combination. Such reservations were identified at the outset by the UN Human Rights Committee, reviewing the USA's initial state report following ratification, as "incompatible with the object and purpose of the Covenant", that is, unlawful under international law.[74]

Seven judges on the Seventh Circuit joined the opinion reversing the panel's decision that originally allowed the lawsuit to proceed. Congress, they said, "has not authorized awards of damages against soldiers and their superiors, and creating a right of action in common-law fashion would intrude inappropropriately into the military command structure".

Judge Wood issued a separate opinion concurring in the judgment, but asserting that the

alleged treatment of Vance and Ertel "easily" qualified as torture, adding that "this shameful fact should not be minimized by using euphemisms such as the term 'harsh interrogation techniques'. Three other judges dissented, arguing that the District Court's ruling should have been affirmed and the lawsuit allowed to proceed in order that Vance and Ertel could "try to prove their claims for torture". Judge Hamilton, joined by the other two dissenters, wrote:

> "If a victim of torture by the Syrian military can find his torturer in the United States, US law provides a civil remedy against the torturer.[75] If the victim is killed, the same US law provides his survivors a civil remedy. The same could be said for victims of torture by any other government in the world – any other, that is, except one. Under the majority's decision, civilian US citizens who are tortured or worse by our own military have no such remedy. That disparity attributes to our government and to our legal system a degree of hypocrisy that is breathtaking."

The majority had assserted that "abusive interrogation in Iraq and Afghanistan has led to courts-martial". While there have indeed been some courts-martial against members of the US military for certain abuses, these have been directed largely at low-level soldiers and the fact remains that there has been continuing impunity for higher level officials.

On the question of accountability for those unnamed defendants on the lawsuit who had actually carried out the abuse to which Vance and Ertel said they had been subjected, Judge Hamilton noted in his dissent:

> "After years of delay, the government finally complied with the district court's order to identify the individuals who slammed plaintiffs into walls, deprived them of sleep, food, water, and adequate clothing, and who subjected them to extreme cold, though after plaintiffs have been seeking the needed information in the district court for nearly six years, the government has still not provided sufficient information to serve any of those individuals with process. If this stone-walling finally ended, plaintiffs could amend their complaint to name at least some of those individuals".

DOE v. RUMSFELD

A reasonable federal official would have understood conscience-shocking physical and psychological mistreatment – including temperature, sleep, food, and light manipulation – of a United States citizen detainee to violate the detainee's constitutional right to substantive due process

US District Court, *Doe v. Rumsfeld*, 2 August 2011

In March 2008, a 52-year-old US citizen filed a *Bivens* claim in the US District Court for the District of Columbia against former Secretary of Defense Donald Rumsfeld and others for abuses he said he endured in US military custody in Iraq in 2005 and 2006.[76] An amended complaint was filed in the court in August 2011.

Named as "John Doe" for the purposes of the lawsuit, the plaintiff was identified as a veteran of the US Army who went to Iraq in December 2004 to work for a US-owned defence contracting company. He was sent as an Arabic translator to work with an intelligence unit of the US Marines operating near the Iraq-Syria border. As translator, he worked with the unit in the interrogation of detainees, the development of sources among the civilian population, and the identification of threats to US forces.

According to the lawsuit, shortly before he was due to return to the USA in early November 2005, John Doe was questioned by members of the Naval Criminal Investigation Service and another official for about four hours. He was allegedly searched, had his luggage confiscated, and was handcuffed, blindfolded, repeatedly kicked in the back, and threatened with being

shot if he tried to escape. He was then flown by helicopter, taken into military custody, strip-searched and put in a small cell on his own. After 72 hours, the lawsuit alleged that he was flown, blindfolded and hooded, to Camp Cropper. There he says he was held for the next nine months, the first three of which he was held incommunicado in solitary confinement. During these first three months, his "family did not know where he was, or whether he was alive or dead", making this part of his detention up to when he was brought before the detainee review board, if proven, an enforced disappearance.

John Doe alleged that he was "subjected to torturous conditions of confinement", including "psychologically-disruptive tactics designed to induce compliance with his interrogators' will, such as exposure to intolerable cold and continuous artificial light; extended solitary confinement in cells without any stimuli or reading material; blasting by loud heavy metal and country music pumped into his cells; and blindfolding and hooding". In addition to the "intolerably loud volumes" of the music, he alleged that when guards saw him sleeping they would "bang on the door or slam the window shut" to wake him up.

After three months in isolation, according to the complaint, he was transferred to another building in Camp Cropper where suspected al-Qa'ida members and Iraqi Ba'ath party members were housed. There guards allegedly made it known that John Doe was working for the US military prior to his arrest. He alleges that he was "attacked on multiple occasions".

On or around 22 December 2005, he was "shackled, blindfolded, and hooded" and brought before a Detainee Status Board (DSB). For the next six months he said he "heard nothing regarding his 'status' or when, if ever, he would be released". In July 2006, he received another DSB hearing. Then in early August 2006, he was taken, shackled and blindfolded, from Camp Cropper to the international airport, put on a military flight to Jordan, after which he returned to the USA. He was not charged with any criminal offence. He claimed his property was not returned to him, that he was placed on "blacklist" which prevents him being employed by any US defence contractor, and that he was put on some sort of "terrorist watch" list that leads to interrogation and searches whenever he returns from international travel.

DISTRICT COURT ALLOWS LAWSUIT TO PROCEED

In a ruling issued on 2 August 2011, District Judge James Gwin found that there was no alternative remedy outside of *Bivens* damages available to John Doe and no "special factors" that precluded the lawsuit from being allowed to proceed, adding that "judicial protection of individual liberties is appropriate here".

At this stage, Judge Gwin found, the lawsuit had "sufficiently" laid out "Rumsfeld's personal involvement" in the substantive due process claim, namely in relation to detention conditions and interrogation techniques. He held that, while "it may be unlikely that Rumsfeld evaluated the detention conditions of each detainee in detail, it is not implausible that he authorized the use of interrogation techniques on the detainee population at Camp Cropper, or even on specific detainees". While John Doe would have to substantiate his allegations with further evidence, at this stage the claim was plausible enough to allow it to continue. Moreover,

> "a reasonable federal official would have understood conscience-shocking physical and psychological mistreatment – including temperature, sleep, food, and light manipulation – of a United States citizen detainee to violate the detainee's constitutional right to substantive due process".

Judge Gwin thus rejected the assertion that Donald Rumsfeld was entitled to qualified immunity. The lawsuit could proceed on the question of torture or other ill-treatment.

DC CIRCUIT COURT OF APPEALS DISMISSES LAWSUIT

Donald Rumsfeld appealed to the US Court of Appeals for the DC Circuit. The Rumsfeld appeal filed by the US Department of Justice argued that it would be "inappropriate for a court, on its own", without congressional action, to provide a *Bivens* remedy. In any event, the Justice Department argued, Donald Rumsfeld was entitled to qualified immunity, both because John Doe had not adequately shown that the former Secretary of Defense was personally responsible for the abuse, but also because "his alleged conduct did not violate clearly established substantive due process law". At the time of that alleged conduct, "no court had held that establishing interrogation policies for the purpose of obtaining intelligence from a military detainee in a foreign war zone was unconstitutional", and this was a "sensitive context, in which courts owe considerable deference to government action".

On 15 June 2012, the DC Circuit Court of Appeals issued its ruling overturning Judge Gwin's decision:

> "Unlike the District Court, we perceive that special factors present in this case counsel against the implication of a new *Bivens* remedy… The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence… Military detainee cases implicate similar concerns regarding the conduct of war, the separation of powers, and the public scrutiny of sensitive information."

Allowing the lawsuit to proceed, the Court of Appeals said, would "hinder our troops from acting decisively in our nation's interest for fear of judicial review of every detention and interrogation". The court found that congressional inaction in creating a remedy for such cases had not been "inadvertent". For example, the Court noted that when Congress passed the Detainee Treatment Act in 2005 it did not create a route for detainees to sue government officials in federal court in relation to their treatment when in custody. It would be "inappropriate", the DC Circuit concluded, "for this Court to presume to supplant Congress's judgment in a field so decidedly entrusted to its purview".

In fact, under international law, the entitlement to a remedy for torture is absolute, even "in a case involving the military, national security, or intelligence" with "concerns regarding the conduct of war, the separation of powers, and the public scrutiny of sensitive information." The public scrutiny of state officials' involvement in human rights violations such as torture should never be restricted.

Because the DC Circuit was dismissing the lawsuit on these grounds, it said there was no need for it to consider whether Rumsfeld had qualified immunity.

LEBRON v. RUMSFELD

> *It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial inquiry*
>
> US Court of Appeals for the Fourth Circuit, *Lebron v. Rumsfeld*, 23 January 2012

Victims and the general public still await an impartial, thorough, effective and searching inquiry, with a view to accountability and redress, in relation to the human rights violations committed by the USA in the counter-terrorism context. The three branches of government have all contributed to this failure.[77]

José Padilla and his mother Estela Lebron have pursued two lawsuits for the unlawful detention and treatment to which Padilla was subjected in US military custody between 2002 and 2005.[78] Both lawsuits have now been dismissed by federal courts.[79] On 11 December 2012, with his domestic avenues for remedy cut off, a petition was filed with the

Inter-American Commission on Human Rights by Estela Lebron seeking an investigation and findings against the USA on behalf of herself and her son (see below).

José Padilla was arrested by FBI agents upon arrival at Chicago's O'Hare International Airport after flying from Pakistan via Switzerland on 8 May 2002. He was transferred to New York and held in civilian federal custody on a 'material witness' warrant issued by a US District Court judge in relation to a grand jury investigation of the attacks of 11 September 2001. José Padilla was provided access to a lawyer.

On 9 June 2002, José Padilla was transferred from civilian to military custody on the basis of an executive order signed by President Bush, ordering Secretary Rumsfeld to take custody of Padilla under the "laws of war". No prior warning of this move was given to the federal court in which José Padilla had been about to appear for a hearing and neither was his lawyer informed. He was taken to the Naval Consolidated Brig in Charleston, South Carolina. For his first 20 months in military custody, José Padilla was held incommunicado, with no access to legal counsel, his family, or the courts, in breach of the USA's international legal obligations. It became clear that the purpose of the transfer was so that he could be interrogated in indefinite incommunicado detention. In a declaration filed in court as part of the administration's effort to prevent José Padilla's access to legal counsel and to the courts, the Director of the Defense Intelligence Agency (DIA) asserted that providing Padilla access to a lawyer would break the "atmosphere of dependency and trust" that would be developed between interrogator and incommunicado detainee. He suggested that incommunicado detention in this context could last for "years".[80] International law clearly prohibits such indefinite, incommunicado detention.[81]

By the time that José Padilla was transferred to military custody, the detentions of non-US nationals labelled as "enemy combatants" at Guantánamo had been up and running for six months and the CIA's secret detention programme was into its third month of "serious" operations.[82] The first six months of Padilla's incommunicado detention coincided with the period in which the CIA obtained legal and policy approval for interrogation techniques against "high value detainees", and the military sought and got approval for "counter-resistance" techniques that violated the international prohibition of torture and other ill-treatment. The military obtained policy approval from Secretary Rumsfeld, with the involvement of others including Pentagon General Counsel Haynes, and Deputy Secretary Wolfowitz (among those who would later be named on the *Lebron* lawsuit).

That the CIA and military interrogation issues were linked was not only illustrated by the fact that the OLC was advising on both, but also illustrated in the minutes of a meeting which took place at Guantánamo on 2 October 2002. Topics of discussion included the use of sleep deprivation, withholding of food, and isolation. One of those present was the chief legal counsel to the CIA's Counterterrorism Center, the office that was managing the CIA's secret detention programme. He advised that the Department of Justice has "provided much guidance" on the interrogation issue, and there was discussion about sharing an OLC memorandum (see chronology, 1 August 2002). Echoing that memorandum, the CIA lawyer asserted that while torture was prohibited under the UN Convention against Torture, US domestic law implementing the treaty was "written vaguely". In apparent reference to the USA's reservation to Article 16 of UNCAT, he said that the USA "did not sign up to" the prohibition of cruel, inhuman or degrading treatment, thereby giving it "more license to use more controversial techniques". He described waterboarding, and suggested that it was "effective to identify phobias" such as claustrophobia and fear of insects and snakes, and use them against the detainee. Death threats, he said, should be "handled on a case by case basis". At the end of the meeting, the participants discussed "ways to manipulate" the detainee's environment, and suggestions include that "truth serum" has a "placebo effect", and sleep disruption in the form of allowing the detainee to rest "just long enough to fall asleep and wake him up about every thirty minutes and tell him it's time to pray again".[83]

The allegations later made by José Padilla (see below) provide further evidence of the links between what was allegedly done in the military brig in Charleston, South Carolina, where Padilla was being held, and the techniques and conditions being used in Guantánamo.[84]

As Amnesty International, and many others, have pointed out for some years, the use of many of the techniques as those discussed in the 2 October 2002 meeting breach the international legal prohibition on torture and other ill-treatment.[85]

In the case of the military, the techniques approved by Secretary Rumsfeld two months after this meeting were for use against "resistant" detainees at Guantánamo. The DIA Director (a DIA lawyer was one of the participants at the meeting) labelled Padilla as "even more inclined to resist interrogation than most detainees".[86] The DIA assessed Jose Padilla as having "very high" intelligence value.[87] In this "war", being perceived by the US authorities as having "high value" put a detainee at high risk of torture or other ill-treatment.[88]

José Padilla and his mother filed a *Bivens* lawsuit on 9 February 2007, amended in 2008, against Donald Rumsfeld and other former officials they claimed were responsible for his designation as an "enemy combatant" and subsequent ill-treatment.

The defendants named in the Padilla lawsuit moved for its dismissal arguing that there were "special factors counseling hesitation against the federal officers, soldiers, and other officials responsible for his designation, detention, and interrogation". The remedy sought by Padilla must be declined because it "impinges upon the Executive Branch's authority to conduct war, formulate foreign policy, and protect national security from terrorist attack", and for a court to recognize a *Bivens* remedy here would "impermissibly intrude on Presidential and Congressional primacy in matters of war". [89]

US DISTRICT COURT BLOCKS LAWSUIT

On 17 February 2011, Judge Richard Gergel on the US District Court for the District of South Carolina granted the defendants' motion to dismiss the lawsuit. The designation of Padilla as an enemy combatant and his detention incommunicado "were made in light of the most profound and sensitive matters of national security, foreign affairs and military affairs", he wrote. He continued:

> "It is not for this Court, sitting comfortably in a federal courthouse nearly nine years after these events, to assess whether the policy was wise or the intelligence was accurate. The question is whether the Court should recognize a cause of action for money damages that by necessity entangles the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence. This is particularly true where Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances".

Judge Gergel considered the question of whether the former officials in question had qualified immunity under US law. He ruled that they did. He pointed to the litigation history of Padilla's habeas corpus challenge – and the differing decisions by different courts – to illustrate that the lawfulness of indefinite military detention of a US "enemy combatant" was an unsettled question. On the interrogation issue, he pointed to the fact that the Department of Justice had issued "lengthy memoranda, prior to and after Padilla's detention, concluding that various coercive interrogation techniques, including ones allegedly utilized in Padilla's interrogations, were lawful". Even if the latter were controversial, concluded Judge Gergel, "to say the scope and nature of Padilla's legal rights at that time (2002-2006) were unsettled would be an understatement".[90]

Torture and other cruel, inhuman or degrading treatment were clearly, universally, and

absolutely prohibited under international law long before José Padilla was taken into military custody, held for 20 months incommunicado, and allegedly subjected to other interrogation techniques and conditions of detention that violated this prohibition.[91] The invocation of "war", "foreign policy" and "national security" does not give the US government a license to commit torture or other ill-treatment or to escape scrutiny for such acts. For any judge to suggest otherwise is a matter for serious concern and contravenes international law.

FOURTH CIRCUIT AFFIRMS LAWSUIT DISMISSAL

Judge Gergel's decision was appealed to the US Court of Appeals for the Fourth Circuit. A brief for former Secretary of Defense Rumsfeld argued to the court that recognizing a *Bivens* remedy in favour of "detained (even in error) enemy combatants" would impose "an impossible burden on the civilian and military personnel charged with defending the Nation against armed attack".[92]

A brief for the other defendants – former Deputy Secretary of Defense Wolfowitz; former Pentagon General Counsel Haynes; former DIA Director Jacoby; and two former Commanders of the Consolidated Brig in Charleston, Catherine Hanft and Melanie Marr – argued that "it is difficult to imagine a more compelling set of special factors" counselling against allowing a *Bivens* remedy. If successful, the brief noted, the principle advanced by the plaintiffs "would extend damages claims to a range of ongoing counter-terrorism policies, including detention of enemy combatants at Guantánamo, drone strikes directed against US citizens, and the right to detain, as enemy combatants, terrorists whose criminal trials resulted in acquittals."[93] The former officials were warning against setting a precedent on remedy that might impact on policies which to this day continue to raise serious human rights concerns.

The Obama administration also filed a brief asserting its interest in the case, urging the Fourth Circuit to dismiss the Padilla lawsuit: the "judicial creation of a damages remedy is inappropriate because this case implicates national security and war powers where the judicial branch normally stays its hand".[94] The administration argued that: "If Congress wishes to provide a damage remedy in this very sensitive setting, it may do so. In the absence of such congressional action, however, such a remedy should not be created by the court."[95]

The Fourth Circuit Court noted the substantial paper trail of memorandums and other documents generated under the Bush administration "discussing the scope of presidential authority under the AUMF, application of the Geneva Conventions to members of al Qaeda, and permissible forms of interrogation". These, it said, were an indicator of the extensive deliberations on detentions that had taken place within the executive.

On 23 January 2012, the three-judge panel of the Fourth Circuit dismissed the *Lebron* lawsuit. The judges said that this was a case in which the political branches of government – the executive and the legislature – had "formulated policies with profound implications for national security". It said that "being judicial requires that we be judicious", and that under the US Constitution, fidelity to the judiciary's role in such a case meant that the court should "await affirmative action by Congress" on the question of remedy. Congress had taken no such action, the panel pointed out, and until it did, the judiciary should stay its hand: "creating a cause of action here is more appropriately for those who write the laws, rather than for those who interpret them".[96] As an interpreter of laws, the Court should have referred to international law, which is categorical in providing that victims have a remedy for torture and other ill-treatment.

In June 2012, the US Supreme Court announced that it was would not review the Fourth Circuit's ruling in the *Lebron* case.

PADILLA v. YOO

By coming up with offensive rationalizations for torturing detainees, [the Bush administration] dishonestly stirred debate about torture's definition when what it engaged in plainly included torture. The Ninth Circuit was wrong to swallow those deceits and to dwell on whether Mr. Padilla's mistreatment was torture. Even if somehow it did not qualify, its cruel, inhumane and shocking nature badly violated his rights as a citizen — and international law on the treatment of detainees. Even at the time, the issue was beyond debate, and Mr Yoo should have known that

'Beyond debate', Editorial, The New York Times, 3 May 2012

The "enhanced interrogation techniques" used against Abu Zubaydah had been given legal approval in a memorandum written by the defendant on the second of the two lawsuits brought by José Padilla, namely former Deputy Assistant Attorney General, John Yoo. John Yoo was also the primary author of a longer legal memorandum that accompanied the Zubaydah memo – which stated that "under the current circumstances" interrogation techniques that violated the USA's anti-torture statute could be justified. John Yoo had apparently called this the "bad things opinion" in email communications to his assistant at the OLC.[97] In another email, John Yoo had nicknamed Abu Zubaydah, the initial primary target of these "bad things", as "Boo boo".[98] That John Yoo was closely involved on this issue is beyond debate.

Jose Padilla's lawsuit against John Yoo, first filed on 4 January 2008, alleged that when Yoo was Deputy Assistant Attorney General at the OLC, he was closely involved in Padilla's designation as an "enemy combatant" in June 2002 and the use of abusive interrogation techniques and detention conditions subsequently used on him in military detention.[99]

A former head of the OLC during the Bush administration has recalled how John Yoo had been a member of "a secretive five-person group with enormous influence over the administration's antiterrorism policies".[100] Within that group, "Yoo played a vital role", former Assistant Attorney General Jack Goldsmith said.

John Yoo was one of the links between the legal approval given for interrogation techniques used by the CIA and by the military. As already noted, he wrote legal memorandums for the CIA's secret detention programme. He also wrote a similar one, dated 14 March 2003, for the US Department of Defense.

On 8 June 2002, the OLC advised Attorney General John Ashcroft that there were "ample grounds" for Padilla to be taken into military custody as an "enemy combatant" in the context of the "international armed conflict between the United States and the al Qaeda organization", an analysis which Amnesty International has repeatedly demonstrated to be flawed and inconsistent with international law.[101] The OLC emphasised an alleged "bomb" plot in which Padilla was alleged to be involved (which administration officials publicly emphasised at the time but which never became part of his eventual indictment in 2006) that "the nature of Padilla's plan in itself qualifies him as a belligerent", and "the mere fact that Padilla is still apparently in the planning stages for this act and may only have entered the United States now for reconnaissance purposes in no way takes him out of the category of a combatant."[102] Although Assistant Attorney General Jay Bybee signed the memorandum as head of the office, John Yoo has identified himself "as the person who worked on the OLC document".[103]

DISTRICT COURT ALLOWS LAWSUIT TO PROCEED

In June 2009, a US District Court judge in California denied John Yoo's motion to dismiss the lawsuit. Judge Jeffrey White wrote that "this lawsuit poses the question addressed by our

founding fathers about how to strike the proper balance of fighting a war *against* terror, at home and abroad, and fighting a war *using* tactics of terror". He laid out the conditions and techniques allegedly used against José Padilla in military custody:

- extreme and prolonged isolation;
- deprivation of light and exposure to prolonged periods of artificial light, sometimes in excess of 24 hours;
- extreme and deliberate variations in the temperature of his cell;
- sleep adjustment;
- threats to subject him to physical abuse resulting in severe physical pain and suffering, or death, including threats to cut him with a knife and pour alcohol into the wounds;
- threats to kill him immediately;
- threats to transfer him to a location outside of the United States, to a foreign country or Guantánamo, where he was told he would be subjected to far worse treatment, including severe physical and mental pain and suffering;
- administering to him or making believe that he was being administered psychotropic drugs against his will;
- shackling and manacling for hours at a time;
- forcing him into markedly uncomfortable and painful (or "stress") positions;
- requiring him to wear earphones and black-out goggles during movement to, from, and within the brig;
- introduction into his cell of noxious fumes that caused pain to the eyes and nose;
- lying to him about his location and the identity of his interrogators;
- loud noises at all hours of the night, caused by government agents banging on the walls and bars of his cell or opening and shutting the doors to nearby empty cells;
- withholding of a mattress, pillow, sheet or blanket, leaving him with nothing to sleep or rest on except a cold steel slab;
- forced grooming;
- sudden and unexplained suspension of showers;
- sudden and unexplained removal of religious items;
- constant surveillance, including during the use of toilet facilities and showers;
- blackening out of the interior and exterior windows of his cell;
- deprivation of access to any form of information about the outside world, including radio, television, and newspapers from the time of his imprisonment in the military brig until summer 2004, at which time he was allowed very limited access to such materials;
- denial of sufficient exercise and recreation and, when permitted intermittently, only in a concrete cage and often at night;
- denial of any mechanism to tell time in order to ascertain the time for prayer in keeping with the Muslim practice;
- denial of access to the Koran for most of his detention; and
- complete deprivation or inadequate medical care for serious and potentially life-threatening ailments.

Judge White found that Padilla had no alternative remedy but via *Bivens*:

> "There is no claim that Congress has provided an alternative remedy in this context and the Court has found none. The Court finds that Padilla has no other means of redress for the alleged injuries he sustained as a result of his detention and interrogation."

He found that there were no "special factors" that required blocking the lawsuit from proceeding and that John Yoo was not entitled to qualified immunity:

> "the Court finds Padilla has alleged sufficient facts to satisfy the requirement that Yoo

> set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights… Padilla alleges with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla alleges were unlawful…
>
> The Court finds that Padilla alleges a violation of his constitutional rights which were clearly established at the time of the conduct. Further, based on the fact that the allegations involve conduct that would be unconstitutional if directed at any detainee, a reasonable federal officer could have believed the conduct was lawful. Therefore, Yoo is not entitled to qualified immunity."

In District Court, John Yoo had been represented by administration lawyers at the US Department of Justice. For his appeal to the US Court of Appeals to the Ninth Circuit, this would no longer be the case. He has written that "an Obama official even called to ask that I not appeal. In what must be Attorney General Eric Holder's idea of subtlety, the Justice Department then withdrew as my legal counsel."[104]

Nevertheless, the Obama administration did file an *amicus curiae* brief in the case seeking to have the Ninth Circuit dismiss the lawsuit. There were "compelling special factors that strongly counsel against judicial creation of a money-damage remedy, in the absence of congressional action", the administration argued. Where there are "special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage remedy if it so chooses. That course is clearly appropriate here, where the claims directly implicate matters of national security and the President's war powers".

The Obama administration argued that if Congress "were to want to authorize" such actions for redress by people held as "enemy detainees during an armed conflict", or to permit them to "seek money damages against those Executive Branch officials who detain or authorize the military detention, it could do so". Likewise, Congress could provide a "cause of action for money damages against those who provide advice to the President and/or the military".[105] This is the same Obama administration that told the UN Human Rights Council that it had satisfied its obligations to provide a remedy for torture by virtue of the availability of the *Bivens* remedy.

The Obama administration also noted that government lawyers could be subjected to investigation by the Office of Professional Responsibility (OPR) at the US Department of Justice, and that "Yoo's conduct has been subject to investigation by OPR". In fact, five months before the Justice Department filed its *amicus* brief in the Padilla case in the Ninth Circuit, the OPR had finalized – although not released publicly – its report of its four and a half year investigation into the OLC interrogation memorandums. It concluded among other things that former Deputy Assistant Attorney General John Yoo "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice".[106]

A month after the administration's brief was filed in the *Padilla* case, Associate Deputy Attorney General David Margolis at the US Department of Justice issued a memorandum rejecting the OPR's findings of misconduct against John Yoo and stating that he would not authorize the OPR to refer the matter on to the state bar disciplinary authorities in the jurisdiction where Yoo was licenced.[107] John Yoo applauded "David Margolis, one of the Justice Department's most distinguished civil servants" for having "finally put an end to the farce", "the witch-hunt", and the "cooked-up ethics investigation" being "waged" by the OPR, which Yoo asserted has been guilty of "political bias" and "pure incompetence". David Margolis' decision, Yoo concluded, represented a "victory for the people fighting the war on terror".[108]

On 25 January 2012, two days after the Fourth Circuit Court of Appeals blocked the *Lebron*

v. Rumsfeld case from proceeding, the Ninth Circuit ordered the parties in the *Padilla v. Yoo* lawsuit to brief the court on whether Padilla was now prevented from re-litigating issues that had been the subject of the case now dismissed by the Fourth Circuit. After this briefing, the Ninth Circuit issued its ruling on 2 May 2012.

NINTH CIRCUIT BLOCKS THE LAWSUIT

The Ninth Circuit's decision to block remedy was another low point in the USA's human rights record and a ruling that the New York Times, for one, characterized as "misguided and dangerous".[109]

The Ninth Circuit panel pointed to the fact that Judge Gergel in the District of South Carolina had reached a contrary result in the *Lebron v. Rumsfeld* case and that in January 2012 the Fourth Circuit had affirmed his decision to dismiss the lawsuit. While the Fourth Circuit's decision was a "persuasive precedent", the Ninth Circuit also decided that its review of the *Padilla v. Yoo* case was governed by a 2011 US Supreme Court ruling.[110] In that ruling, the Supreme Court had dismissed a *Bivens* lawsuit brought against former Attorney General John Ashcroft (alleging that the administration had abused material witness warrants after the 9/11 attacks to detain individuals it had no intention of calling as witnesses but who it wanted to hold on suspicion of support for terrorism). In doing so, the Supreme Court had said that "qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions". The Court had also stressed that it had "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality" when deciding the qualified immunity question.

The Ninth Circuit said that even a year after John Yoo left the OLC in 2003, US law remained "murky whether an enemy combatant detainee may be subjected to conditions of confinement and methods of interrogation that would be unconstitutional if applied in the ordinary prison and criminal settings". This line alone highlights not only the gap between US and international law – Jose Padilla's treatment violated international law from day one of his military detention – but also the sort of damage done to human rights principles by the USA's "global war" framework.

The Ninth Circuit added that it expressed "no opinion" as to whether the allegations against José Padilla that led to his detention and interrogation as an "enemy combatant" were true, or whether, "even if true, they justified the extreme conditions of confinement to which Padilla says he was subjected". For a court to say that it has no opinion on treatment that clearly violated the international prohibition against torture or other cruel, inhuman or degrading treatment is not only deeply regrettable but fundamentally inconsistent with international law. While the court acknowledged that it was "beyond debate" that "torturing a United States citizen" was unconstitutional by 2001, it said that Yoo was still entitled to qualified immunity because it was "not clearly established in 2001-03 that the treatment to which Padilla says he was subjected amounted to torture".

If Padilla's allegations were to be proven, such a combination of treatment and conditions, imposed for such a prolonged duration and for the purpose of obtaining information, could fall within the definition of torture under international law. In any event, under international law, cruel, inhuman or degrading treatment that does not amount to torture is equally prohibited, and cannot be justified by context.

This absolute prohibition was not an obstacle in the case of foreign nationals held outside the USA, John Yoo advised the Department of Defense. He noted that article 2(2) of UNCAT states that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". Addressing this, John Yoo advised the Department of Defense that a treaty may not eliminate "the United States' right, under international law, to use necessary

measures for its self-defense.... Thus, if interrogation methods were inconsistent with the United States' obligations under CAT, but were justified by necessity or self-defense, we would view those actions still as consistent ultimately with international law".

He added that the Convention does not preclude justification of cruel, inhuman or degrading treatment "by exigent circumstances". Thus, the USA "is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman, or degrading treatment or punishment, so long as their use is justified by defense or necessity". Here John Yoo ignored the fact that under the ICCPR, there can be no derogation, in any circumstances, from Article 7's prohibition of torture or other cruel, inhuman or degrading treatment or punishment. His only reference to the ICCPR in this memorandum was to note that the USA had, as with its ratification of UNCAT, bound itself to the prohibition of cruel, inhuman or degrading treatment only to the extent that that phrase meant what was banned under US constitutional law.

John Yoo's attempt to muddy the waters of the clear and absolute prohibition of torture and other ill-treatment under international law should never have been allowed to block victims' remedies now. Two wrongs do not make a right. Under international law, torture and other cruel, inhuman or degrading treatment are never legal. No lawyer's opinion can render them lawful; no politician, legislator, judge, soldier, police officer, prison guard, or interrogator can override this prohibition. Violations of these human rights must result in investigation, accountability and remedy.

After the US Supreme Court announced that it would not review the Fourth Circuit's ruling in *Lebron v. Rumsfeld*, José Padilla and his mother decided not to seek further review of the Ninth Circuit's ruling in the Yoo case. Instead, on 11 December 2012, Estela Lebron brought a petition against the USA at the Inter-American Commission on Human Rights on her own behalf and on behalf of her son. The petition seeks an investigation, and finding that the USA violated José Padilla's rights under the 1948 American Declaration of the Duties and Rights of Man, including his right to be free from arbitrary detention, and torture and inhumane treatment, and his right to judicial remedy. It also seeks a declaration that the USA violated Estela Lebron's right to family relations and to be free from inhumane treatment. José Padilla was held incommunicado in military detention from 9 June 2002 to 4 March 2004, but, as in many of these cases, he was not the only one impacted. As the UN Committee against Torture has pointed out, victims include "affected immediate family or dependants of the victim".[111] The petition asserts:

> "During this time, Ms Lebron and her family were questioned by government officials and constantly harassed by the public and by members of the media. Journalists often followed and waited outside the homes of Ms Lebron, her elderly parents, and her children. Her grandchildren were bullied and called the 'children of Bin Laden' and the 'Taliban family' to the point that one grandchild's performance in school suffered and another could not go outside without a towel covering his head. Facing considerable scrutiny and stress, Ms Lebron suffered numerous health effects, both physical and psychological. She and her son, Tomas, have suffered from depression, anxiety, nightmares, and insomnia, and both are currently seeing psychiatrists.
>
> In March 2004, Ms Lebron was finally able to speak with her son, and some seven months later, in October 2004, the federal government approved a visit between them. The visit was monitored, and their entire conversation recorded. At one point, she asked her son how the government officials were treating him, but he refused to answer. Ms Lebron had waited for this one-hour conversation for over three years."[112]

CONCLUSION – ENDS AND HUMAN RIGHTS MEANS

We still are involved in a war on terrorism… We have made very clear that we are at war with al-Qaeda… But what will it take to achieve the end of al-Qaeda, or at least the beginning of the end?

US Secretary of Defense Leon Panetta, 20 November 2012[113]

In July 2002, then Secretary of Defense Donald Rumsfeld said that "nine months into the global war on terror, [we are] still closer to the beginning than the end".[114] Two years later, he said the same thing.[115] Another eight and a half years after that, on 30 November 2012, the outgoing General Counsel of the US Department of Defense, Jeh Johnson, said that he could "offer no prediction about when this conflict will end, or whether we are… near the 'beginning of the end'." He pointed out that

> "all three branches of the United States government – including the two political branches elected by the people and the judicial branch appointed for life (and therefore not subject to the whims and political pressures of the voters) – have endorsed the view that our efforts against al Qaeda may properly be viewed as an armed conflict."[116]

The fact that the USA's global war paradigm has gained acceptance across the three branches of its government renders it no less an unacceptably unilateral departure from the very concept of the international rule of law generally, and the limited scope of application of the law of armed conflict in particular. The message sent is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it deems the circumstances warrant it. Under its global war framework, the USA has resorted, among other things, to enforced disappearance, torture, secret detainee transfers, indefinite detention, unfair trials and a policy that permits extrajudicial executions.[117] As the global war theory has gained acceptance across the three branches of government, truth, accountability and remedy have been sacrificed.

And as has become the norm for a US official speaking about the USA's "global war" framework, Jeh Johnson made no explicit reference to human rights. Also familiar was his assertion that the Obama administration had acted "in a manner consistent with our laws and values" in its counter-terrorism efforts, citing the killing of Osama bin Laden as an example. The Bush administration had made the same claims, even as it authorized and carried out a range of human rights violations. As Amnesty International has repeatedly pointed out, while appeals to national values and tradition is a part of political debate in every country, they can feed unhelpful myth-building and self-satisfaction over a country's laws and institutions as much as they can facilitate constructive self-criticism.[118]

Early in his first term, in a landmark speech on national security littered with references to national values and no explicit reference to human rights, President Obama said that he was confident that the USA's "institutions are strong enough to deliver accountability" for the country's abuses in the counter-terrorism context.[119] Four years later the USA remains in clear breach of its international human rights obligations on accountability and remedy. It will take more than blind faith to fill this gap. It will require political will and full recognition of and compliance with the USA's international obligations.

In his speech on 30 November 2012, Department of Defense General Counsel Jeh Johnson suggested that there would come a "tipping point" at some moment in the future when "we must be able to say to ourselves that our efforts should no longer be considered an 'armed conflict' against al Qaeda and its associated forces". At that point, the USA would return to a "law enforcement and intelligence" approach and would have to "face the question of what to do with any members of al Qaeda who still remain in US military detention without a criminal conviction and sentence."

An answer to that question has long been articulated by those who never accepted the global war paradigm developed under the Bush administration and pursued for the past decade by the US authorities. That answer is to apply international human rights principles.

In a speech on 20 November 2012 in which he asked when the "war" against al-Qa'ida will end, US Secretary of Defense Leon Panetta asserted that "since September 11, 2001, our country has worked relentlessly to bring those responsible for the worst terrorist attacks in our history, to justice". Yet those who have long been accused by the US authorities of being responsible for the attacks have still not been brought to trial despite having been in US custody for a decade. Not only that, they are facing unfair trial by military commission, with the Obama administration intending to seek the death penalty against them.

For the first three and a half to four years of their detentions they were subjected to enforced disappearance, and to torture or other cruel, inhuman or degrading treatment. The other question that Jeh Johnson neglected to ask, is when will there be justice for these human rights violations and crimes under international law? In the relentless pursuit of "justice" under the USA's global war framework, no-one has been held accountable for these crimes. This is not justice recognized under the Universal Declaration of Human Rights and the international law and standards that have followed.

Application of human rights principles means to resolve the Guantánamo detentions by releasing those who are not to be charged and brought to fair trial in ordinary civilian courts, abandoning military commissions, and rejecting the death penalty. At the same time a human rights compliant approach means ensuring full accountability for the human rights violations, including crimes under international law, that have occurred since 11 September 2001 at the hands of US personnel, and ensuring genuine access to meaningful remedy to those who have been subjected to them. Moreover, as the European Court of Human Rights highlighted in its judgment in the Khaled El-Masri case on 13 December 2012, both victims and the public have the right to know the truth about the human rights violations that have occurred in the context of counter-terrorism. Realising these rights means not only allowing access to remedy in the cases documented in this report, and other cases including those concerning foreign nationals, but also carrying out thorough full, independent, impartial, thorough and effective investigations in which the perpetrators are brought to justice.

All three branches of government have a role to play in achieving these ends, and between them have the means to do it.

POSTSCRIPT – CHRONICLE OF IMMUNITY FORETOLD

We believe in individual freedom and in the rule of law. For those beliefs, we send men and women of the armed forces abroad to protect that right for our own people and to give others who aren't Americans the hope of a future of freedom. Part of that mission, part of what we believe in, is making sure that when wrongdoings or scandal do occur, that they're not covered up, but they're exposed, they're investigated, and the guilty are brought to justice
US Secretary of Defense Donald Rumsfeld, Senate Hearing, 7 May 2004[120]

In late 2011, Judge Richard Leon of the US District Court in Washington DC dismissed the lawsuit of a Syrian national who was seeking damages against Donald Rumsfeld and others for the torture and other ill-treatment to which he says he was subjected during his seven and a half years in US military custody in Afghanistan and in Guantánamo. Abdul Rahim Abdul Razak al Janko had been released from Guantánamo in 2009 after Judge Leon found that his detention was unlawful.[121] The court was able to consider the habeas corpus petition only after this detainee had already been held for years because the US Supreme Court in 2008 had ruled that the first part of Section 7 of the MCA – stripping the courts of jurisdiction to consider such petitions amounted to an unconstitutional suspension of habeas corpus.[122]

The second part of Section 7, however, apparently remains intact. It states:

> "No 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,… treatment,… 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".

Judge Leon concluded that "For this Court to circumvent such a clear directive from our Legislative Branch would be an utter disregard of the limitations of our judicial power." He dismissed the lawsuit on the grounds that he had no jurisdiction to consider it. This was the outcome the Obama administration had sought, and at the time of writing it was seeking affirmation of Judge Leon's ruling by the Court of Appeals for the DC Circuit.[123] The latter court has already ruled that the second part of the MCA's Section 7 remains intact – in early 2012, the DC Circuit Court of Appeals cited it in dismissing the lawsuit brought by the relatives of two men who died in Guantánamo in 2006.[124]

The case of Abdul al Janko illustrates how US institutions have failed on accountability and remedy, indeed collaborated to block them. The executive allegedly subjects a detainee to torture and other ill-treatment (in addition to unlawful detention). Congress, having already passed an overly broad resolution on executive power (the AUMF, see below), not only fails to bring the executive to account, but strips the courts of jurisdiction to consider such detainee treatment. The judiciary defers to the legislature, and the executive seeks to have that deference maintained and the individual left without remedy. In other cases, the blocking measure is executive invocation of, and judicial deference to, the "state secrets privilege"; in others, it is judicial deference to the political branches by reference to "special factors", and in others it is the doctrine of "qualified immunity".

Under international law, each branch of government is obliged to ensure compliance with the country's human rights obligations, as the UN Human Rights Committee has stated with regard to the ICCPR:

> "All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2 [of the ICCPR], allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."[125]

Below is a selected chronology to illustrate the failure – both by omission and commission – of the three branches of the US government to ensure accountability and remedy for human rights violations committed in the counter-terrorism context since 11 September 2001. Towards its end, the timeline shows lawsuit after lawsuit being blocked by the judiciary, with the absence of any steps being taken by Congress or the executive to fill the remedy void, and the Department of Justice declining to bring any criminal prosecutions in relation to the CIA's secret detention programme. At its beginning, the timeline indicates that officials in the Bush administration sought to build in immunity from the outset, suggesting that they anticipated or intended conduct against detainees which they knew could violate US and international law. The timeline does not claim to be exhaustive, but illustrative only.

AN ILLUSTRATIVE CHRONOLOGY

Key for Timeline

= THE JUDICIARY

= THE LEGISLATURE

= THE EXECUTIVE

■ **11 September 2001** – almost 3,000 people are killed when hijackers crash four airliners into the World Trade Center in New York, the Pentagon in Washington DC, and a field in Pennsylvania. Amnesty International considers the attacks constitute a crime against humanity.

14 September 2001 – With little debate, Congress passes the Authorization for Use of Military Force (AUMF), a broadly-worded resolution authorizing the President to "use all necessary force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001". This remains the underpinning for the USA's "global war" against al-Qa'ida and associated groups to this day.[126]

18 September 2001 – President George W. Bush signs the AUMF into law. In his signing statement, he says: "In signing this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution."[127]

25 September 2001 – In a memorandum signed by Deputy Assistant Attorney General John Yoo, the Office of Legal Counsel (OLC) at the US Department of Justice advises the White House that neither the War Powers Resolution nor the AUMF can "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response".[128] This memorandum has not been withdrawn to date.

■ **7 October 2001 –** the USA leads military action against the Taleban government and members of the *al-Qa'ida* network in Afghanistan

23 October 2001 – the OLC advises the White House that "the President has ample constitutional and statutory authority to deploy the military against international or foreign terrorists operating within the United States" and that the use of military force in this context "need not follow the exact procedures that govern law enforcement operations". As an example, the OLC states that "we do not think that a military commander carrying out a raid on a terrorist cell would be required to demonstrate probably cause or to obtain a warrant".[129]

6 November 2001 – The OLC advises the White House that under the Uniform Code of Military Justice and "his inherent powers as Commander in Chief, the President may establish military commissions to try and punish terrorists apprehended as part of the investigation into, or the military and intelligence operations in response to, the September 11 attacks", and that the death penalty can be pursued in such prosecutions.[130]

13 November 2001 – President Bush signs a Military Order authorizing indefinite detention without charge or trial, or trial by military commission, of foreign nationals in what he calls the "war on terror". The order states that those subject to it "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal".

30 November 2001 – The OLC advises the White House that "neither the federal War Crimes Act, the

Hague Convention IV, nor the Geneva Conventions would apply to the operations of the US Armed Forces against the al Qaeda terrorist organization or the Taliban militia, or to the treatment of members of those groups captured by US Armed Forces in this conflict." The OLC expresses "no view as to whether the President should decide, as a matter of policy, that the US Armed Forces should adhere to the standards of conduct in those treaties in the Afghanistan conflict, particularly with respect to the treatment of prisoners." The OLC also advises that "customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution". The OLC emphasizes that this advice "does not, in any way, compel the conclusion that members of the US Armed Forces who commit acts that might be considered war crimes would be free from military justice." Although the President is not bound by the customary laws of war, the memorandum asserts, "he can still choose to require the US Armed Forces to obey them through the UCMJ [Uniform Code of Military Justice]".[131]

✍ **27 December 2001** – Secretary of Defense Donald Rumsfeld approves, subject to the approval by Deputy Secretary of Defense Paul Wolfowitz (given on 3 January 2002), the use of the Naval Consolidated Brig at Charleston, South Carolina, to hold anyone already in the USA whom the President determines should be transferred to military control from the Department of Justice.[132]

✍ **28 December 2001** – The OLC advises the Pentagon that, although the question cannot be answered definitively, in the OLC's opinion a US District Court would not have habeas corpus jurisdiction in relation to "enemy aliens" detained at Guantánamo Bay Naval Base, Cuba, and therefore could not "properly entertain" an application for a writ of habeas corpus from such a detainee. The Pentagon has asked for advice about "the potential legal exposure if a detainee successfully convinces a federal district court to exercise habeas jurisdiction". Such a result, the OLC responds, would allow a detainee "to challenge the legality of his status and treatment under international treaties, such as the Geneva Conventions and the International Covenant on Civil and Political Rights".[133] (→ 7 February 2003)

2002

■ **11 January 2002** – the first detainees are transferred from Afghanistan to the US Naval Base in Guantánamo Bay, Cuba, in conditions that amount to cruel, inhuman or degrading treatment.

✍ **22 January 2002** – In a memorandum, the OLC advises the White House and the Pentagon that neither the USA's War Crimes Act, nor the Geneva Conventions, applies to the detention conditions of *al-Qa'ida* suspects in US custody. It further advises that customary international law does not bind the President or the Pentagon on decisions concerning such detainees.[134] The memorandum was authored by Deputy Assistant Attorney General John Yoo.[135]

✍ **25 January 2002** – White House Counsel (and future Attorney General) Alberto Gonzales drafts advice to President Bush stating that "the war against terrorism is a new kind of war" which "places a high premium" on obtaining "information from captured terrorists and their sponsors", and that a reason not to apply the Geneva Conventions to such detainees is in order to reduce the threat of domestic prosecution of US interrogators for war crimes.[136] The following day, the OLC suggests changing the language in the Gonzales memo from "Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act", to "Substantially reduces the misapplication of the War Crimes Act."[137]

✍ **1 February 2002** – US Attorney General John Ashcroft writes to President Bush agreeing that a presidential determination against applying Geneva Convention protections to detainees "would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees." Attorney General Ashcroft emphasises that "the War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States".[138]

✍ **7 February 2002** – President Bush signs memorandum that article 3 common to the four Geneva Conventions – banning torture, cruel and inhuman treatment, and "outrages upon personal dignity" –

will not be applied to detainees in US custody in Afghanistan and elsewhere. His memorandum explicitly suggests there are detainees who are "not legally entitled" to humane treatment. (→ 12 June 2008)

✍ **26 February 2002** – The OLC advises the Department of Defense that the constitutional protections against self-incrimination do not apply to military commission trials and so information obtained from detainees held incommunicado can be admitted in such proceedings. It advises that trials by military commission are "not constrained" by the Fifth Amendment's "strictures" because they are not "criminal cases" within the terms of the Amendment, but instead are "entirely creatures of the President's authority as Commander-in-Chief".[139] (→ 29 June 2006)

✍ **13 March 2002** – The OLC advises the Pentagon that "the President has full discretion to transfer al Qaeda and Taliban prisoners captured overseas and detained outside the territorial jurisdiction of the United States to third countries". Neither the Geneva Conventions nor UNCAT, the OLC asserts, poses any obstacle to such transfers. The OLC adds that "to fully shield our personnel from criminal liability, it is important that the United States not enter into an agreement with a foreign country, explicitly or implicitly, to transfer a detainee to that country for the purpose of having the individual tortured… So long as the United States does not intend for a detainee to be tortured post-transfer, however, no criminal liability will attach to a transfer, even if the foreign country receiving the detainee does torture him… Thus, so long as the United States personnel who agree to transfer a detainee do not intend to effectuate the criminal object that is forbidden by the [USA's] criminal torture statute – here, the torturing of the detainee – they cannot be prosecuted under the statute".[140]

■ **11 April 2002** – The 60th ratification to the International Criminal Court (ICC) occurs, meaning that under article 126 of the Rome Statute the treaty will come into force on 1 July 2002. The USA is a signatory, and is therefore bound under international law not to do anything that defeats the object and purpose of the treaty, pending its decision as to whether to ratify it.

✍ **6 May 2002** – The US administration informs the UN Secretary General that the USA will not ratify the Rome Statute of the ICC, and that the US government considers that it therefore has "no legal obligations" arising from the USA's signature to the treaty made on 31 December 2000. Secretary of Defense Donald Rumsfeld issues a statement asserting that the ICC's "flaws… are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction over US service members, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow".[141] In his memoirs, Donald Rumsfeld will recall that what made the ICC so "objectionable was that it would create offices for prosecutors who were effectively unaccountable…who could prosecute Americans without respecting their rights under the US Constitution… I pushed for the US government to 'unsign' the treaty".[142]

🗐 **20 May 2002** – A bill, which will become the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States is introduced in the House of Representatives. As eventually passed in July, the legislation contains the American Service-Members Protection Act (APSA) (→ 2 August 2002). The APSA authorizes the use of military force to free any US citizen or citizen of a US-allied country being held by the court. Among other things the law states: "Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States… No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States."

🗐 **8 June 2002** – In a memorandum signed by Assistant Attorney General Jay Bybee, the OLC advises the Attorney General that the "military has the legal authority" to detain US citizen, José Padilla, as "a prisoner captured during an international armed conflict". Padilla is currently in the custody of the federal civilian authorities.[143] The following day, Padilla is transferred under presidential order to military custody as an "enemy combatant".

✍ **27 June 2002** – In a memorandum signed by John Yoo, the OLC advises the administration that the military detention of US citizens as "enemy belligerents" does not violate US law. The question has arisen in the context of executive briefings to Senate committees in relation to the case of José Padilla, a US citizen transferred from Justice Department to Department of Defense custody by presidential order in early June 2002. The memorandum asserts that "the President's authority to detain enemy combatants, including US citizens, is based on his constitutional authority as Commander in Chief. We conclude that [statutory law] does not, and constitutionally could not, interfere with that authority". It also asserts that by passing the AUMF (← 18 September 2001), Congress has "bolstered" and "endorsed" the President's authority to detain "enemy combatants".[144]

✍ **13 July 2002** – Letter from Deputy Assistant Attorney General Yoo to the Acting General Counsel of the CIA, John Rizzo, responds to the latter's request about "what is necessary to establish the crime of torture" under US law. Yoo advises that the element of "specific intent" to cause severe mental pain or suffering "can be negated by a showing of good faith". Yoo continues: "Thus, if an individual undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture". Yoo reminds Rizzo that a full memorandum on the issue is in the process of being finalized (→ 1 August 2002)

✍ **22 July 2002** – Letter from Deputy Assistant Attorney General Yoo to White House Counsel Gonzales asserts that the declarations the USA made when ratifying UNCAT make clear that the treaty placed no legal obligations under US law on the executive branch, nor created any cause of action in federal court.[145]

31 July 2002 – US District Court for DC rules that it has no jurisdiction to consider habeas corpus petitions from foreign nationals held at Guantánamo (→ 11 March 2003)

✍ **1 August 2002** – In a six-page letter signed by Deputy Assistant Attorney General Yoo, the OLC advises the White House that the USA's "un-signing" of the ICC (← 6 May 2002) means that US interrogators cannot be subject to criminal investigation and prosecution in relation to the "interrogations of al Qaeda operatives".[146]

✍ **1 August 2002** – two OLC memorandums largely authored by Deputy Assistant Attorney General Yoo, are faxed to the CIA.

(1) The first memorandum asserted that even though US law made it a criminal offence for anyone in an official position to commit or attempt to commit torture against a detainee held outside the USA, and even though the USA had ratified international treaties prohibiting torture, the US President's authority as Commander-in-Chief could override those laws. The demands of this presidential power, the OLC asserts, "are especially pronounced in the middle of a war", and in circumstances where "the information gained from interrogations may prevent future attacks by foreign enemies". Even if interrogators were prosecuted for torture, there were defences available to them by which they could seek to escape criminal liability. "Under the current circumstances", the OLC concluded, "necessity or self-defense may justify interrogation methods that might violate [the US anti-torture law]."[147] CIA interrogators and their supervisors, view the opinion as a "golden shield" against prosecution.[148]

(2) In the second memorandum, the OLC gives legal approval to the CIA's use of 10 interrogation techniques against Abu Zubaydah, a detainee then in his fifth month of incommunicado detention at an undisclosed location. The techniques are: "attention grasp", "walling", "facial hold", "facial slap", "cramped confinement", "wall standing", "stress positions", sleep deprivation, exploitation of insect phobia, and "water boarding". The OLC concludes that the interrogation techniques do not amount to torture under US law, whether applied "separately" or "together as a course of conduct".[149]

✍ **2 August 2002** – President Bush signs into law the American Service-Members Protection Act (APSA) (← 20 May 2002).

✍ **August 2002** – Secretary Rumsfeld urges the administration to address "several disturbing trends in international law, including the ICC, [and] universal jurisdiction prosecutions"[150] (→ March 2003).

✍ **2 December 2002** – Secretary Rumsfeld authorizes, "as a matter of policy", a number of "counter-resistance techniques" to "aid in the interrogation of detainees" at Guantánamo. They include stress positions, prolonged isolation, "deprivation of light and auditory stimuli", hooding, 20-hour interrogations, "removal of clothing", "force grooming" and exploitation of individual detainee phobias to "induce stress" (for example, the use of dogs). He does not give blanket approval to water-boarding, "exposure to cold weather or water" and "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family". This is on the recommendation of the Pentagon's General Counsel, William J. Haynes, who nevertheless suggests that these techniques are "legally available" but should not be given "blanket approval" for military interrogators "at this time".

2003

✍ **7 February 2003** – Deputy Assistant Attorney General John Yoo provides the Pentagon with a response to concerns raised by the American Bar Association on the treatment of "enemy combatants". Among other things, he asserts that although the International Covenant on Civil and Political Rights (ICCPR) "is a legally binding agreement under international law, it is a non-self-executing agreement under the express conditions of the Senate and thus had no legal effect in US courts. Moreover, the ICCPR does not apply to the treatment of enemy combatants, because the rights of enemy combatants are governed by a separate body of international law applicable during armed conflicts, namely, the laws of war (← 7 February 2002). In sum, there is plainly nothing in either US or international law which legally entitles enemy combatants to access to counsel to challenge their preventative detention".[151]

11 March 2003 – US Court of Appeals for the DC Circuit upholds the District Court decision (← 31 July 2002) that the court has no jurisdiction to consider habeas corpus petitions from foreign detainees held at Guantánamo (→ 28 June 2004)

✍ **14 March 2003** – In a memorandum, classified Secret and written and signed by Deputy Assistant Attorney General John Yoo, the OLC advises the Pentagon of the "legal standards governing military interrogations of alien unlawful combatants held outside the United States".[152] The memo incorporates most of the analysis of the memo of 1 August 2002 (← 1 August 2002, No. 1). In addition, the Yoo memo concludes among other things that the Fifth Amendment of the US Constitution (due process rights) does not apply to military interrogations outside the USA; the Eighth Amendment (prohibition of cruel and unusual punishments) does not apply to military interrogations; the War Crimes Act does not apply to military interrogations of al-Qa'ida or Taleban detainees; the USA's anti-torture statute does not apply to interrogations conducted at a US military base outside US sovereign territory (e.g. Guantánamo, Bagram, etc); Article 16 of the UN Convention Against Torture does not require criminalization of acts amounting to cruel, inhuman or degrading treatment or punishment, and does not prohibit such acts "so long as their use is justified by self-defense or necessity".

✍ **March 2003** – Jack Goldsmith, Special Counsel to the US Department of Defense[153] (before moving later in the year to the post of Assistant Attorney General at the OLC), produces a proposal for countering the "threat" posed to "USG [US Government] interests" by the ICC and universal jurisdiction over US personnel, an issue made "especially urgent because of the unusual challenges we face in the war on terrorism". The paper proposes, among other things, a re-invigoration of the USA's anti-ICC strategy to "try to de-legitimize ICC", to "aggressively…clarify illegality of ICC jurisdiction over USG officials", and to "enact legislation beyond APSA that severely sanctions any nation that sends a present or former US official to the ICC". The paper proposes US withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations (→ 7 March 2005), that the US government should get "firm assurances from European allies of non-prosecution", adopt a "broad public strategy to make clear that USG has opted out of norms limiting the scope of official immunity", consider legislation "that maintains 'current' official status for political leaders after they

leave office", and "enact legislation cutting off assistance to any nation that pursues charges against USG official for conduct arising out of Iraq war and war on terrorism". [154]

■ **20 March 2003** – US-led Coalition forces attack Iraq.

✍ **9 April 2003** – Secretary of Defense Rumsfeld signs off on the anti-ICC proposal (← March 2003) and it is transmitted with an accompanying memorandum to officials on the National Security Council warning that "universal jurisdiction prosecutions are expanding in Europe and elsewhere. The purported content of international criminal law is growing in various unfavourable ways… It is only a matter of time before there is an attempted prosecution of a US official. There may be a sense that these issues should be shelved during the Iraq matter. On the contrary, the prospect of controversial war should alert us to what all US officials may face… Meanwhile, the ICC proceeds apace… I believe we must quickly develop a campaign to discredit and counter these trends".[155]

✍ **26 June 2003** – President Bush issues a public proclamation against torture in which he states, among other things, that the "United States is committed to the worldwide elimination of torture, and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy."

✍ **11 September 2003** – The Criminal Division at the US Department of Justice declines to prosecute the CIA interrogator who threatened Saudi Arabian national 'Abd al-Nashiri with a handgun and power drill in secret US detention at an undisclosed location in late December 2002 or early January 2003.[156]

2004

28 June 2004 – The US Supreme Court rules in *Rasul v. Bush* that the District Court has jurisdiction to consider habeas corpus petitions filed on behalf of foreign nationals held at Guantánamo (← 11 March 2003)

✍ **26 June 2004** – President Bush issues a public proclamation against torture in which he states, among other things, that "the United States reaffirms its commitment to the worldwide elimination of torture. The nonnegotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality… We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction."

✍ **28 June 2004** – The Bush administration asserts that the Supreme Court has said only that detainees held as "enemy combatants" have "certain procedural" (as opposed to substantive) rights to "contest their detention", and the Department of Justice says that it is reviewing decision "to determine how to modify existing processes to satisfy the Court…".

✍ **7 July 2004** – The Bush administration establishes Combatant Status Review Tribunals (CSRTs), panels of three military officers, to determine whether Guantánamo detainees are "properly detained" as "enemy combatants". The detainee will have no legal representation for this, and the Bush administration will continue to argue that habeas corpus petitions filed in District Court for such detainees should be summarily dismissed.

✍ **22 July 2004** – Attorney General John Ashcroft advises the Acting Director of the CIA, John McLaughlin, that the techniques listed in the ← 1 August 2002 memorandum (2), all apart from water-boarding, "would not violate the United States Constitution or any statute or any treaty obligation of the United States, including Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment" against a detainee held by the CIA in secret detention outside the USA.

✍ **6 August 2004** – the OLC advises the CIA that the use of waterboarding against a detainee held by the CIA in secret custody outside the USA would not violate any US statute, "nor would it violate the United States Constitution or any treaty obligation of the United States".

✍ **26 August 2004** – the OLC advises the CIA that the use of dietary manipulation, nudity, water dousing

and abdominal slaps would be lawful in the "ongoing interrogation" of a detainee held outside the USA in secret detention.

✍ **6 September 2004** – the OLC advises the CIA that the use of "attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary manipulation, nudity, water dousing, and abdominal slap" in the interrogation of an "al Qa'ida operative" held in secret custody outside the USA would "not violate" any US statute, the US Constitution, or "any treaty obligation of the United States".

✍ **20 September 2004** – the OLC repeats its advice to the CIA of 6 September 2004 that the use of the 12 particular interrogation techniques in its secret detention programme would be lawful.

🏛 **8 November 2004** – US District Court for DC rules that military commission trials unlawful (← 13 November 2001; → 15 July 2005)

2005

✍ **18 January 2005** – The Bush administration invokes the "state secrets privilege" against the lawsuit filed by dual Canadian/Syrian national Maher Arar seeking damages for his alleged rendition by the USA to torture in Syria. Ultimately no court will address whether the lawsuit can be dismissed under the state secrets issue, finding that there are other reasons to block it, including "special factors" under *Bivens* (→ 16 February 2006).

🏛 **21 January 2005** – Agreeing with the administration's interpretation of the *Rasul v. Bush* ruling (← 28 June 2004), a judge on the District Court for DC finds that there is "no viable legal theory" under federal, constitutional, or international law by which to issue writs of habeas corpus to Guantánamo detainees (→ 13 December 2006)

✍ **7 March 2005** – The US Bush administration withdraws the USA from the Optional Protocol to the VCCR. The letter to the UN states that "As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."[157]

🏛 **15 July 2005** – US Court of Appeals for the DC Circuit, reversing District Court (← 8 November 2004), finds that Congress, via the AUMF (← 14 September 2001), authorized the military commissions established by presidential order (← 13 November 2001; → 29 June 2006)

🗐 **October-November 2005** – Congress passes the Detainee Treatment Act (DTA). The DTA provides that no person in the custody or effective control of the US Department of Defense (DOD) or held in a DOD facility shall be subject to any interrogation technique that is not authorized by and listed in the US Army Field Manual on Intelligence Interrogation. The bill prohibits persons in US custody or control, regardless of their nationality or physical location, from being subjected to "cruel, inhuman, or degrading treatment or punishment", as defined in US law. Section 1004 of the DTA provides that in any civil or criminal case against any US agent "engaging in specific operational practices, that involved detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted", such an agent can offer as a defence that they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." Further to this, the bill states that "Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful." Section 1005 effectively endorses the executive's use of CSRTs to administratively review detentions at Guantánamo as a substitute for habeas corpus.

✍ **30 December 2005** – President Bush signs the DTA into law, stating that the executive will construe its provisions in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power", shall construe the DTA "not to create a private right of action", that

is, for detainees to pursue remedy or other action against US officials, and shall construe Section 1005 of the DTA "to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus".

2006

6 February 2006 – A US District judge on the DC District Court grants government motion to dismiss a lawsuit brought by four UK nationals, Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed and Jamal al-Harith, who were held without charge or trial in Guantánamo from 2002 to March 2004 after being transferred there from Afghanistan. The four are seeking damages for their alleged prolonged arbitrary detention, as well as torture and other cruel, inhuman or degrading treatment.[158] Judge finds that the AUMF has authorized the military to carry out the detentions, and that torture, though "reprehensible", was a "foreseeable consequence of the military's detention of suspected enemy combatants". He says that there is no evidence to lead him to believe that the alleged torture and other ill-treatment "had any motive divorced from the policy of the United States to quash terrorism around the world". He rules that the individual officials named as defendants in the lawsuit had been acting, "at least in part, to further the interests of their employer, the United States". Under US law, once individual government officials are deemed to have been acting within the scope of their employment, the US government is substituted as the defendant in their place. The judge rules that such a "substitution" in the *Rasul* case has the effect of granting the individual defendants absolute immunity from civil liability in US courts for violations of international law. Because of the "unsettled nature" of the detainees' constitutional rights in US courts at that time, the judge rules, the officials "cannot be said to have been plainly incompetent or to have knowingly violated the law", and therefore "are entitled to qualified immunity" under US law.

16 February 2006 – A US District Court judge in the Eastern District of New York dismisses the lawsuit brought by dual Syrian/Canadian national Maher Arar against former Attorney General John Ashcroft and others. Maher Arar had been arrested at New York airport in 2002 and sent, via Jordan, to Syria, where he was held for a year, including 10 months in a small underground cell, and subjected to torture and other ill-treatment before being released to Canada. The lawsuit alleged that he had been removed to Syria under a policy of "extraordinary rendition" to undergo interrogation under torture and other ill-treatment. The part of the lawsuit that took the form of a *Bivens* claim was dismissed by Judge David Trager who found that "special factors" meant that a judicial remedy was precluded. He said that "governments that do not wish to acknowledge publicly that they are assisting us [in counter-terrorism] would certainly hesitate to do so if our judicial discovery process could compromise them". He said that "the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched – perhaps deliberately – by the Legislative and Executive branches".[159]

8 March 2006 – The Bush administration invokes the "state secrets privilege" in federal court in order to seek dismissal of the lawsuit brought against the CIA and others by Khaled El-Masri, a German national of Lebanese descent seeking redress for his abduction, rendition, arbitrary detention, torture or other ill-treatment by US personnel. The government will argue to the court that allowing the lawsuit to continue would damage national security if the defendants were required to admit or deny El-Masri's allegations (→ 12 May 2006).

13 April 2006 – The OLC produces a secret "memorandum for the files" explaining its conclusions relating to Department of Defense draft documents on the treatment and interrogation of detainees, including Appendix M of the revised Army Field Manual on intelligence collection. At this stage, Appendix M provides guidance for the use of six "restricted interrogation techniques" not otherwise authorized under the manual (believed to include isolation, dietary manipulation, environmental manipulation and sleep adjustment), and the OLC gives its legal approval of all six techniques

(including under the DTA), including on the grounds that they would be restricted to the interrogation of "enemy combatants believed to possess important intelligence that may help safeguard US forces and protect US interests" and not to anyone protected by the Geneva Conventions.[160] (→ 6 September 2006)

12 May 2006 – The US District Court in Virginia rules that the government's invocation of the state secrets privilege in the Khaled El-Masri case is "valid" and the judge grants the government's motion to dismiss the lawsuit. The judge states: "To succeed on his claims, El-Masri would have to prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program…[A]ny answer to the complaint by the defendants risks the disclosure of specific details… These threshold answers alone would reveal considerable detail about the CIA's highly classified overseas programs and operations." He emphasizes that "nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy". The judge says that the only source of the remedy which El Masri appears to deserve "must be the Executive Branch or the Legislative Branch, not the Judicial Branch."[161] (→ 2 March 2007).

29 June 2006 – The US Supreme Court in *Hamdan v. Rumsfeld* (← 15 July 2005) finds that the military commissions under presidential order (← 13 November 2001) are unlawful and that Article 3 common to the four Geneva Conventions is applicable in this context (← 7 February 2002). As pointed out by one of the Justices, US law (the War Crimes Act) defines "war crimes" to include violations of Common Article 3. Officials from the Departments of State, Defense, and Justice subsequently meet with the President and CIA and NSC officials to consider post-*Hamdan* options, including legislation.[162] (→ 17 October 2006)

30 June 2006 – The CIA asks for OLC advice following the *Hamdan* ruling. According to the OLC, the ruling means that Common Article 3 "now applies, as a matter of treaty law, to detainees held by the CIA in the Global War on Terror". CIA is orally told by OLC that the conditions of confinement in the CIA's secret detention facilities "are permitted by common Article 3".[163]

31 August 2006 – The OLC provides the CIA with a memorandum, responding to the CIA's request as to whether particular "standard conditions of detention" at "certain" CIA detention facilities located outside the USA comply with the DTA. The CIA has asked the OLC to consider six standard conditions of confinement – blindfolding, forced shaving, incommunicado detention in solitary confinement, white noise, 24-hour-a-day lighting, and shackling. The OLC advises the CIA that whether applied singly or in combination, the conditions are compatible with the DTA.[164]

31 August 2006 – In a letter to the CIA, OLC "memorializes and elaborates" on its earlier oral advice (← 30 June 2006) that conditions of confinement in the CIA's detention facilities comply with common Article 3 of the Geneva Conventions. Even years of incommunicado detention in solitary confinement, the letter asserts, does not constitute treatment forbidden by common Article 3.[165]

4 September 2006 – 14 detainees transferred from up to four and half years in secret CIA custody to military detention at Guantánamo

6 September 2006 – President Bush responds to the *Hamdan* ruling "In its ruling on military commissions, the Court determined that a provision of the Geneva Conventions known as Common Article Three applies to our war with Al Qaida. This article includes provisions that prohibit ''outrages upon personal dignity'' and ''humiliating and degrading treatment.'' The problem is that these and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act, simply for doing their jobs in a thorough and professional way. This is unacceptable." His administration submits draft legislation, called the Military Commissions Act (MCA) of 2006, to Congress for its consideration.

✍ **6 September 2006** – The US Army releases an updated version of its Army Field Manual on interrogations, implementing the requirements of the DTA (← 13 April 2006). The manual expressly prohibits certain techniques, including water-boarding, electric shocks, sexual humiliation, hooding, use of dogs, mock executions and deprivation of food, water or medical care. Appendix M provides for an interrogation method described as "physical separation" (i.e. solitary confinement), initially for 30 days, but with provisions for unlimited extensions. At the same time, the Manual states that the use of separation must "not preclude the detainee getting four hours of continuous sleep every 24 hours." Again there are no limitations placed on this, apparently meaning that such limited sleep could become a part of the 30-day separation regime, and extendable indefinitely.

🗐 **Late September 2006** – Congress passes the MCA, legislation incompatible with international law in a number of its provisions, including on habeas corpus, remedy and accountability.[166] Section 7.1 of the MCA states that "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". Section 7.2 of the MCA states that "no 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". The MCA amends the War Crimes Act (WCA) so as to decriminalize in US law certain violations of common Article 3 of the Geneva Conventions (specifically "outrages upon personal dignity, in particular humiliating and degrading treatment"). It grants "retroactive immunity to CIA interrogators by providing that it would be effective as of November 26, 1997, the date the War Crimes Act was enacted".[167] The MCA retroactively (back to 11 September 2001) applies Section 1004 of the DTA providing a "good faith" defence for US personnel relying on authorized techniques. The MCA also amends the DTA to require the federal government to provide lawyers and pay any fees in the case of prosecution or civil action against US personnel for authorized detention or interrogation activities. The Act prohibits federal courts from consulting any "foreign or international source of law" in interpreting the prohibitions of Common Article 3 and the WCA.

✍ **17 October 2006** – President Bush signs the MCA into law. Signing the bill, President Bush states that the law will allow the CIA secret detention programme to continue. The OLC will subsequently justify continued use of "enhanced interrogation techniques" by the CIA, in part, by pointing to the fact that the passage of the MCA, legislation incompatible with international law, can be seen as an indicator of "support within contemporary community standards for the CIA interrogation program". Indeed, the OLC will argue, the MCA "was proposed, debated, and enacted in no small part on the assumption that it would allow the CIA program to go forward".[168]

🏛 **13 December 2006** – The DC District Court rules that the MCA has stripped the courts of jurisdiction to consider habeas corpus petitions from Guantánamo detainees (→ 12 June 2008)

2007

✍ **6 February 2007** – the Deputy Chief of Mission (DCM) at the US embassy in Berlin tells the German authorities of the USA's "strong concerns about the possible issuance of international arrest warrants in the al-Masri case" and that issuance of such warrants "would have a negative impact on our bilateral relationship." The diplomatic cable continues: "The DCM pointed out that our intention was not to threaten Germany, but rather to urge that the German Government weigh carefully at every step of the way the implications for relations with the US."[169]

🏛 **2 March 2007** – The US Court of Appeals for the Fourth Circuit affirms the District Court order (←12 May 2006) upholding the Bush administration's invocation of the state secrets doctrine in the Khaled El-Masri rendition and secret detention case and dismissing his lawsuit, adding that "we recognize the gravity of our conclusion that El-Masri must be denied a judicial forum for his Complaint". The Court of Appeals asserts that the federal courts in the USA are assigned a "modest role" under the

Constitution: "we simply decide cases and controversies". The federal courts do not possess "a roving writ to ferret out and strike down executive excess", the Fourth Circuit panel continue, declining "to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line".[170] (→ 9 October 2007)

27 March 2007 – In what he describes as a "lamentable case", the Chief Judge on the District Court for DC dismisses a lawsuit brought against former Secretary Rumsfeld and other high-ranking military officers by nine former detainees – Iraqi nationals Arkan Mohammed Ali, Thahe Mohammed Sabar, Sherzad Kamal Khalid, Ali H., and Najeeb Abbas Ahmed; and Afghan nationals Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman – alleging torture and other abuse while held by the US military in Afghanistan and Iraq, including at Bagram air base in the former country, and Abu Ghraib prison in the latter. The Chief Judge describes the torture allegations as "horrifying", but concludes that "no matter how appealing it might be to infer a *Bivens* remedy to vindicate injuries caused by federal officials committing abuses as severe as those alleged here, which otherwise might not be fully redressed", US constitutional protections did not apply to them because "the Constitution's reach is not so expansive that it encompasses these non-resident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars". There were "special factors" meaning the lawsuit should be dismissed – namely that to allow it to proceed would "place the Court in the position of inquiring into the propriety of specific interrogation techniques and detention practices employed by the military when prosecuting wars". It should be left to Congress, he ruled, to determine "whether a damages remedy should be available under the circumstances presented here". Moreover, "there being no violation of clearly established constitutional rights in this case, the defendants are entitled to qualified immunity". As to claims that their rights under international law, the court holds that the defendants "are entitled to absolute immunity" under US law.[171] (→ 21 June 2011)

20 July 2007 – President Bush issues an executive order authorizing the CIA's detention and interrogation programme to continue.

20 July 2007 – The OLC provides the CIA with legal advice on the application of "enhanced interrogation techniques" against "high value" detainees held in secret custody at undisclosed locations. The CIA has specifically asked whether six such techniques can lawfully be used – dietary manipulation, extended sleep deprivation, "diapering" (forcing the detainee to wear a diaper), "facial hold", "attention grasp", "abdominal slap", and "insult or facial slap"". The CIA has told the OLC that the agency particularly favours the use of sleep deprivation, as it is used to bring the detainee to a "baseline state". The OLC concludes that the CIA's use of the techniques, singly or in combination, does not violate the War Crimes Act (as amended by the MCA of 2006), the DTA 2005, or Common Article 3 of the Geneva Conventions.[172]

9 October 2007 – The US Supreme Court refuses to take the case of Khaled El-Masri, in which the Bush administration has invoked the state secrets privilege, leaving in place the lower courts' (← 2 March 2007) dismissal of his lawsuit against the CIA and others for human rights violations allegedly committed against him in the context of his rendition and secret detention in 2004 (→ 9 April 2008)

19 October 2007 – The Bush administration moves to intervene in a lawsuit filed in US District Court for the Northern District of California by five non-US nationals who claim they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment at the hands of US personnel and agents of other governments as part of the USA's "rendition" programme operated by the CIA. The five are UK resident Binyam Mohamed, Italian national Abou Elkassim Britel, Egyptian national Ahmed Agiza, Yemeni national Muhammad Faraj Ahmed Bashmilah, and Bisher al-Rawi an Iraqi national and UK permanent resident. Between them they allege that they were "rendered" to secret detention in Morocco, Egypt and Afghanistan and subjected to various forms of torture or other ill-treatment. The lawsuit alleges that Jeppesen Dataplan, Inc. (Jeppesen), a subsidiary of the Boeing Company, had provided "direct and substantial services" to the CIA for the rendition programme. In so doing, the lawsuit continued, "Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such

practices are routine". The Bush administration moves to assert "state secrets privilege" on behalf of itself and Jeppesen, and to have the case dismissed on that basis (→ 13 February 2008).

6 November 2007 – A judge on the DC District Court grants motion to summarily dismiss a lawsuit brought against Titan Corporation by Iraqi nationals alleging the involvement in torture or other ill-treatment of interpreters provided to the US military by Titan. The judge denies a motion to summarily dismiss a lawsuit brought by Iraqi nationals against CACI, a contractor that supplied interrogators to the US military in Iraq (→ 11 September 2009)

2008

9 January 2008 – Following revelations that the CIA destroyed tapes of interrogations of detainees in secret US custody, a judge on the US District Court for DC declines to conduct a judicial inquiry into whether the government has complied with his order of June 2005 to preserve evidence of "torture, mistreatment, and abuse" of detainees then at Guantánamo. He notes the government's assurances that the CIA's destroyed tapes did not depict interrogations conducted at Guantánamo and that neither of the two detainees on the tapes (that is, Abu Zubaydah and 'Abd al-Nashiri) had been at Guantánamo by the time the tapes were made in 2002. Judge Kennedy said that he had been "influenced" by the assurances of the Department of Justice that its investigation into the destruction of the tapes would include inquiring into whether the law had been violated, adding that "there is no reason to disregard the Department of Justice's assurances".[173] (→ 9 November 2010)

11 January 2008 – The US Court of Appeals for the DC Circuit upholds the District Court's ruling to dismiss the *Rasul v. Myers* lawsuit brought by former Guantánamo detainees (← 6 February 2006), concluding that "Guantánamo detainees lack constitutional rights because they are aliens without property or presence in the United States". Even if they did have constitutional rights, the panel wrote, this was not clearly established at the time of their detention and the officials were entitled to qualified immunity under US law. (→ 12 March 2009)

13 February 2008 – A judge on the US District Court for the Northern District of California rules that the lawsuit brought by Binyam Mohamed and others seeking redress for alleged human rights violations, including the crimes under international law of torture and enforced disappearance, committed against them in the context of the CIA rendition programme, must be dismissed at the outset (← 19 October 2007). The CIA Director has filed a declaration with the Court that "this lawsuit puts at issue whether or not Jeppesen assisted the CIA with any of the alleged detention and interrogation . . . . Disclosure of information that would tend to confirm or deny whether or not Jeppesen provided such assistance… would cause exponentially grave damage to the national security by disclosing whether or not the CIA utilizes particular sources and methods and, thus, revealing to foreign adversaries information about the CIA's intelligence capabilities or lack thereof…Second, this lawsuit puts at issues whether or not the CIA cooperated with particular foreign governments in the conduct of alleged clandestine intelligence activities. Adducing evidence that would tend to confirm or deny such allegations would result in extremely grave damage to the foreign relations and foreign activities of the United States." District Court Judge James Ware upholds the Bush administration's assertion that the very subject matter of the case is a state secret and grants the government's motion to dismiss the lawsuit.[174] (→ 28 April 2009)

9 April 2008 – A petition is filed before the Inter-American Commission on Human Rights in the case of Khaled el-Masri seeking investigation and remedy for human rights violations (← 9 October 2007)

12 June 2008 – In *Boumediene v. Bush*, the US Supreme Court rules that the Guantánamo detainees have the constitutional right to a "prompt hearing" to challenge the lawfulness of their detention in federal court.

30 June 2008 – A three-judge panel of the US Court of Appeals for the Second Circuit affirms the District Court's dismissal of Maher Arar's lawsuit *in Arar v. Ashcroft* (→ 16 February 2006). On the question of a *Bivens* remedy, the Second Circuit concludes that "special factors" counsel against "the

judicial creation of a damages remedy for claims arising from Arar's removal to Syria" (→ 30 June 2008)

29 October 2008 – The Chief Judge on the US District Court in DC rules in a summary judgment that the CIA has provided adequate explanation for withholding details of the CSRT transcripts in the cases of the 14 detainees transferred from secret CIA custody to Guantánamo in September 2006. In the versions made publicly available by the Pentagon to date, descriptions by the detainees of how they were treated in CIA custody has been blacked out. The CIA summarizes what the redacted text describes and maintains that it is properly withheld. For example, in the cases of Abu Zubaydah and 'Abd al-Nashiri, the CIA has redacted "detailed information" regarding each man's detention and "the conditions of his confinement, as well as the interrogation methods that he claims to have experienced". In the case of Majid Khan, in addition to statements made by him at the CSRT hearing, the CIA has redacted "substantial portions of two exhibits" – his written "Statement of Torture" and an oral "Statement of Torture". The information redacted by the CIA includes "the conditions and locations of his detention" and "interrogation methods he claims to have experienced". In Khalid Sheikh Mohammed's case, the redacted material includes the detainee's two-page "written statement regarding alleged abuse" incorporating details of his "locations and conditions of detention" in CIA custody.[175] The judge rules that "The Court, giving deference to the agency's detailed, good-faith declaration, is disinclined to second-guess the agency in its area of expertise through *in camera* review."[176] (→

20 November 2008 – The US Senate Committee on Armed Services releases the report of its "Inquiry into the Treatment of Detainees in US custody". It concludes that "the abuse of detainees in US custody cannot simply be attributed to the actions of 'a few bad apples' acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees".

2009

22 January 2009 – On his second full day in office, President Barack Obama issues executive orders committing his administration to close the Guantánamo detention facility by 22 January 2010 at the latest, and ending the CIA's use of long-term secret detention and any US government agent's reliance on OLC interrogation memorandums issued between 11 September 2001 and 20 January 2009. The order relating to the CIA's use of secret detention does not cover facilities "used only to hold people on a short-term, transitory basis". By its wording, the order also does not appear to prevent the CIA from using foreign-controlled secret detention facilities to conduct detentions or interrogations of individuals held there.[177] The CIA is limited to using interrogation techniques authorized in the Army Field Manual, including Appendix M (← 6 September 2006)

5 March 2009 – US Senators Dianne Feinstein and Kit Bond, Chair and Vice Chair of the US Senate Select Committee on Intelligence, announce that the Committee "will review the CIA's detention and interrogation program". The review will include "how the CIA created, operated, and maintained its detention and interrogation program" and "whether the CIA implemented the program in compliance with official guidance, including covert action findings, Office of Legal Counsel opinions, and CIA policy". The review is expected to take about a year.[178] The Committee voted by 14 votes to one to initiate the review (→ 1 December 2011)

12 March 2009 – the Obama administration files its brief in the *Rasul v. Myers* case in the DC Circuit Court of Appeals. Following the Supreme Court's *Boumediene v. Bush* ruling in June 2008 finding that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in US court (reversing the DC Circuit Court of Appeals on this question), the Supreme Court remanded the *Rasul* lawsuit to the Court of Appeals to consider the effect of the *Boumediene* decision on it. The new administration argues that the Court of Appeals had been right to rule that Guantánamo detainees lack due process rights under the US Constitution. It also asserted that it would be "unfair" to subject government employees to financial damages when the constitutional rights being

asserted, "which are still not established today, were not clearly established at the time of the alleged acts in question here".

✍ **16 March 2009** – CIA Director Leon Panetta announces that the Chair and Vice Chair of the Senate Select Committee on Intelligence have assured him that the goal of their review of the secret detention programme (← 5 March 2009) is not accountability for the past but to inform "future policy decisions", rather than "to punish those who followed guidance from the Department of Justice."[179] (→ 1 December 2011)

🏛 **18 March 2009** – The US District Court for the Eastern District of Virginia denies defendants' motion to dismiss on all grounds a lawsuit brought against CACI International and its subsidiary CACI Premier Technology, US companies which provided contractor interrogators to the US military in Iraq. The lawsuit has been brought by four Iraqi nationals alleging that CACI interrogators tortured them in Abu Ghraib prison in 2003 and 2004. The abuses alleged include electric shocks, beatings, deprivation of food, sleep deprivation, intimidation by dogs, sensory deprivation, subjection to extreme temperatures, forced nudity, death threats, forced shaving, stress positions, sexual humiliation, electro-shocks by taser, hanging, mock execution, being hidden from the ICRC, hooding, and prolonged solitary confinement. The judge dismisses the claims brought against CACI under the Alien Tort Statute but concludes that common-law tort claims can proceed because "civil tort claims against private actors for damages do not interfere with the separation of powers"[180] (→ 21 September 2011)

✍ **15 April 2009** – Pursuant to President Obama's executive order of 22 January 2009, the OLC withdraws four OLC legal memorandums on interrogations dated 2002 and 2005.[181]

✍ **16 April 2009** – the administration releases the four withdrawn OLC memos, largely unredacted. In the second memo, the identities of three officials with whom the CIA had consulted were withheld. The CIA argues that disclosure of their identities would "discourage such individuals, and others approached by the CIA in the future, from voluntarily assisting the CIA in clandestine intelligence activities" and "could subject them to harassment, loss of business, and detention, arrest, or prosecution in foreign countries in some circumstances".[182]

🏛 **24 April 2009** – the Court of Appeals for the DC Circuit rules that the Supreme Court's *Boumediene* decision does not change the outcome of its own earlier decision in the *Rasul v. Myers* lawsuit (← 11 January 2008). The claims raised by the former detainees are not based on rights that were "clearly established" at the time they were held and "the doctrine of qualified immunity shields government officials from civil liability" under such circumstances, it rules (→

🏛 **28 April 2009** – A three-judge panel of the US Court of Appeals for the Ninth Circuit overturns the District Court ruling on the *Jeppesen* rendition lawsuit (← 13 February 2008). The subject matter of the lawsuit "is not a state secret", they write, "and the case should not have been dismissed at the outset". It took issue with the US administration's position, saying that if accepted it would "effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." (→ 12 June 2009)

🏛 **19 May 2009** – DC Circuit Court of Appeals remands to the District Court the question of whether CIA can withhold information in CSRT transcripts of 14 former CIA secret detainees now held at Guantánamo in light of the Obama administration's release of OLC memos in April (← 29 October 2008; → 16 October 2009)

✍ **8 June 2009** – CIA Director Panetta signs a declaration for filing in federal court to oppose disclosure of documents relating to the CIA detention programme. In relation to a sample 65 documents relating to the destroyed videotapes of CIA interrogations conducted in 2002 (← 7 May 2009), he declares that the documents must be withheld from public disclosure in their entirety, on the grounds that to release them would cause exceptionally grave damage to national security. He states that "the majority of documents at issue are TOP SECRET communications to CIA Headquarters from a covert overseas CIA facility where interrogations were being conducted. These TOP SECRET communications

consist primarily of sensitive intelligence and operational information concerning interrogations of Abu Zubaydah." Director Panetta asserts that the documents include "information that would disclose the locations of covert CIA facilities overseas and the identities of foreign countries that have assisted the CIA…" Sixty-two of the 65 documents, he says, contain names or identifying information of CIA personnel or employees and disclosure of such "would constitute a clearly unwarranted invasion of personal privacy". He also states that the documents contain descriptions of "enhanced interrogation techniques" being "applied during specific overseas interrogations". Even though the administration has released Department of Justice memorandums on such techniques (← 16 April 2009), Director Panetta states that the information on "EITs ['enhanced interrogation techniques'] *as applied* in actual operations… are of a qualitatively different nature than the EIT descriptions *in the abstract* contained in the OLC memoranda" and this information should therefore remain secret. He asserts that even if the techniques are not used by the CIA again, disclosure of the information in the documents would provide "future terrorists with a guidebook on how to evade such questioning" and "al-Qa'ida with propaganda it could use to recruit and raise funds".[183]

✍ **11 June 2009** – Pursuant to President Obama's executive order of 22 January 2009, the OLC withdraws its opinion issued on 20 July 2007 relating to interrogations.[184]

✍ **12 June 2009 –** The Obama administration files its petition for a rehearing *en banc* in the *Jeppesen* case (← 28 April 2009): "Director Hayden noted that plaintiffs' claims were based on allegations that Jeppesen assisted the CIA in conducting clandestine intelligence activities abroad, which the CIA could neither confirm nor deny. Director Hayden explained that confirmation of these allegations would reveal the intelligence sources and methods by which the CIA conducts clandestine intelligence activities, while denial would tend to confirm similar allegations in other cases in which the CIA could not deny such allegations. Director Hayden also made clear that, in order to prevail on their suit, plaintiffs would have to prove that the conduct they alleged was carried out on behalf of, and with the assistance of, the US Government and various foreign governments. As Director Hayden noted, foreign governments cooperating with the CIA in clandestine intelligence activities do so under assurances that the fact of their cooperation will remain secret, and violating such assurances would damage the relations with foreign governments and severely impact the CIA's foreign activities by making other governments unwilling to cooperate with the United States in the future."[185] The court agrees to rehear the case en banc (→ 2 November 2009)

12 June 2009 – A US District Court judge in California denies former Justice Department lawyer John Yoo's motion to dismiss a lawsuit against him brought by Jose Padilla. The lawsuit alleged that John Yoo, then a Deputy Assistant Attorney General, was involved in Padilla's designation as an "enemy combatant" in June 2002 and the use of abusive interrogation techniques and detention conditions against him – including denial of access to counsel and the courts, extreme and prolonged isolation, death threats, threats of transfer to torture, cruel use of shackles, stress positions, and deprivation of natural light. Denying Yoo's motion to dismiss the case, Judge Jeffrey White wrote that "this lawsuit poses the question addressed by our founding fathers about how to strike the proper balance of fighting a war against terror, at home and abroad, and fighting a war using tactics of terror".[186]

✍ **26 June 2009** – President Obama issues a public proclamation against torture in which he states that torture violates US and international law, but makes no reference to accountability for torture committed under his predecessor. He states that his administration is committed to addressing the "needs of its victims", but makes no reference to the right to remedy.

✍ **29 July 2009** – The US Department of Justice Office of Professional Responsibility issues the report, although not yet publicly, of its four and a half year investigation into the OLC interrogation memorandums. It concludes that former Deputy Assistant Attorney General John Yoo "committed international professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice". It also finds that former Assistant Attorney General Jay Bybee "committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice". It finds that no "no other Department officials involved in this matter committed professional

misconduct in this matter". It also recommends that the Justice Department review certain decisions not to pursue prosecutions in relation to "incidents of detainee abuse" referred to the Department by the CIA's Office of Inspector General.[187] (→ 5 January 2010)

✍ **24 August 2009** – US Attorney General Eric Holder expands the mandate of US Attorney John Durham, who is investigating the CIA's destruction of interrogation videotapes, to include a "preliminary review" into whether federal laws were violated in connection with the interrogation of certain detainees at overseas locations." In a statement, Attorney General Holder emphasizes that "neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, mean that charges will necessarily follow". He emphasizes that "the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals. I share the President's conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these."[188]

🏛 **11 September 2009** – The US Court of Appeals for the DC Circuit affirms by 2-1 the District Court's summary dismissal of the lawsuit against Titan Corporation alleging the involvement in abuses of the interpreters they supplied to the US military in Iraq, and reverses the District Court's denial of summary dismissal of lawsuit against CACI International alleging abuse by the interrogators supplied to the US military in Iraq by this company (← 6 November 2007). The dissenting judge writes: "The plaintiffs in these cases allege that they were beaten, electrocuted, raped, subject to attacks by dogs, and otherwise abused by private contractors working as interpreters and interrogators at Abu Ghraib prison… No act of Congress and no judicial precedent bars the plaintiffs from suing the private contractors – who were neither soldiers nor civilian government employees". Judge Garland argues that the claims should be allowed to proceed against both companies.[189]

✍ **21 September 2009** – CIA Director Panetta signs a declaration in support of the agency's withholding from public disclosure of information relating to the secret detention programme, including "details about the conditions of confinement" and the "locations of detention facilities". Disclosure of such information would damage national security, he asserted. He added that "operational details regarding the CIA's former interrogation program – that is, information regarding how the program was actually implemented – also remains classified, as to descriptions of the implementation or application of interrogation techniques, including details of specific interrogations where Enhanced Interrogation Techniques (EITs) were used (excepting such general information that bas been released to date on these topics)".[190]

🏛 **16 October 2009** – The Chief Judge of the DC District Court again rules against ordering disclosure of the details of the CSRT hearings of the 14 detainees that describes where they were held and how they were treated in secret CIA custody (←19 May 2009). Among other things, he rules that "the fact that the President outlawed the use of EITs and the CIA's operation of detention centers does not warrant full disclosure of the records at issue in this case" and that "this Court is in no position to second-guess defendants' determination that disclosure of detainees' statements would result in damage to national security."[191] (→ 18 January 2011)

✍ **28 October 2009** – President Obama signs the Military Commissions Act of 2009 into law. While this replaces the MCA of 2006 in so far as it revises procedures for military commission trials, it does not amend Section 7.2 of the MCA of 2006 ("no 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".) The Obama administration will continue to cite this jurisdiction-stripping provision of the MCA 2006 in seeking judicial dismissal of lawsuits brought by former detainees or their relatives (→ 22 December 2011; 21 February 2012)

2 November 2009 – The full US Court of Appeals for the Second Circuit affirms the dismissal of the *Arar v. Ashcroft* lawsuit (← 12 June 2009) brought by Maher Arar alleging, among other things, his US rendition to torture in Syria. The Court does not reach the issues of "qualified immunity" or "state secrets privilege", but instead addresses whether Arar's claims of unlawful detention and torture can be asserted under *Bivens*. It decides that "special factors" means that they cannot: "it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us as judges – to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation." Four judges dissent. Among other things, they point to "the miscarriage of justice that leaves Arar without a remedy in our courts. The majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security… Where appropriate, deference to the coordinate branches is an essential element of our work. But there is…an enormous difference between being deferential and being supine in the face of governmental misconduct."[192] (→14 June 2010)

3 December 2009 – The US Department of Justice files an *amicus curiae* brief in the Court of Appeals for the Ninth Circuit urging the Court to reverse the District Court's ruling in the *Padilla v. Yoo* case (← 18 June 2009) allowing a lawsuit against former OLC attorney John Yoo to proceed. The Obama administration argues that the District Court's ruling, if upheld, "could deter frank and full discussions within the Executive Branch" concerning such issues as "war power and national security". The administration's brief says that "this is not to say that the actions of a Department of Justice attorney providing advice should go unchecked. Department of Justice attorneys, it they abuse their authority, are subject to possible state and federal bar sanctions, investigation by both the Office of Professional Responsibility [OPR] and the Office of the Inspector General, as well as criminal investigation and prosecution, where appropriate". Furthermore, it asserts, "if Congress believes that additional avenues are necessary in cases where Department of Justice attorneys provide legal advice regarding matters relating to war powers and national security, it could enact appropriate legislation". The Department of Justice specifically points out to the Court that "indeed, Yoo's conduct has been subject to investigation by OPR", adding that the OPR report and recommendations had not yet been published.[193] (→5 January 2010)

14 December 2009 – the US Supreme Court announces that it will not take the *Rasul v. Myers* case, thereby allowing the Court of Appeals ruling (← 24 April 2009) to stand and leaving the former detainees without access to judicial remedy in the USA.

2010

5 January 2010 – Associate Deputy Attorney General David Margolis at the US Department of Justice issues a memorandum rejecting the OPR's findings of misconduct against John Yoo and stating that he will "not authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licenced".[194]

16 February 2010 – US District Judge on the DC District Court grants the Obama administration's (having moved successfully to substitute for Donald Rumsfeld and the other named Bush officials) motion to dismiss a lawsuit brought by relatives of two detainees – Saudi Arabian national Yasser Al-Zahrani and Yemeni national Salah Ali Abdullah Ahmed Al-Salami – who died in Guantánamo in 2006. The lawsuit alleged acts and treatment perpetrated on the detainees that led to their physical and mental deterioration, and claim compensation and punitive damages for physical, psychological, and emotional injuries; loss of earnings and earning capacity; loss of interfamilial relations; and medical expenses.[195]

5 March 2010 – The US District Court for the Northern District of Illinois rules that the *Bivens* lawsuit brought by US citizens Donald Vance and Nathan Ertel against former Secretary of Defense Donald Rumsfeld can proceed (→ 8 August 2011)

✍ **26 March 2010** – The Obama administration urges the DC Circuit Court of Appeals to uphold the District Court's ruling that the CIA can withhold from disclosure allegations made by the 14 detainees transferred to Guantánamo in September 2006 about their treatment and where they were held by the CIA and how they were treated. These detainees, the administration argues, "are in a position to provide accurate and detailed information about some aspects of the CIA's former detention and interrogation program, which remains classified".[196]

🏛 **1 April 2010** – US District Court dismisses as moot 105 habeas corpus petitions of former Guantánamo detainees, ruling that the petitioners "no longer present a live case or controversy since a federal court cannot remedy the alleged collateral consequences of their prior detention at Guantánamo".[197]

🏛 **14 June 2010** – the US Supreme Court announces that it is refusing to consider the Arar case, leaving the lower court's ruling intact and Maher Arar without judicial remedy in the USA (← 2 November 2009).

🏛 **29 July 2010** – The US District Court for the District of Maryland denies defendants' motion to dismiss a lawsuit brought in 2008 against L-3 Services, a Delaware company headquartered in Virginia which provided civilian Arabic translators for the US military in Iraq. The lawsuit has been brought by 72 Iraqi nationals who allege, among other things, that they were subjected to war crimes and to torture and other ill-treatment by L-3 employees while in US custody in Abu Ghraib and other facilities between 2003 and 2008. The alleged abuses included beatings, hangings, electric shocks, mock executions, threats of death and rape, intimidation by dogs, sleep deprivation, forced nudity, dousing with cold water, stress positions, sexual assault, confinement in small spaces, sensory deprivation, and to being held as "ghost" detainees (that is, not registered). Among other things, the judge rejects the defendants' argument that cruel, inhuman and degrading treatment is "not a recognized violation of the law of nations" and therefore not subject to claims under the Alien Tort Statute. The judge notes that the allegations made by the former detainees describe acts that "may justify a finding of torture", and "may also justify a claim which falls into the broader category of wrongful behaviour classified as cruel, inhuman, and degrading treatment".[198] (→ 11 May 2012)

🏛 **8 September 2010** – US Court of Appeals for the Ninth Circuit issues its *en banc* ruling in the *Jeppesen* rendition case. By six votes to five, the court upholds the Obama administration's invocation of the "state secrets privilege" and agrees to dismiss the lawsuit. The five dissenting judges, noting that "abuse of the Nation's information classification system is not unheard of", warned that the state secrets doctrine "is so dangerous as a means of hiding governmental misbehaviour under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets". They accused the six judges in the majority of "gratuitously attaching 'allegedly' to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations."[199] The dissenting judges published an appendix summarizing some 1,800 pages of public materials submitted in support of the plaintiffs' claims.[200] (→ 16 May 2011)

✍ **9 November 2010** – The US Department of Justice announces, without further elaboration, that no one will be prosecuted for the "destruction by CIA personnel of videotapes of detainee interrogations".[201] In December 2007, to pre-empt a report that was about to be published in the media, General Michael Hayden, then Director of the CIA, confirmed that videotapes of interrogations during 2002 had been destroyed by the CIA in 2005. In the course of litigation in federal court in 2009, the CIA revealed that 92 videotapes of interrogations of Abu Zubaydah (90) and 'Abd al-Nashiri (2) recorded between April and December 2002 had been destroyed. Twelve of the tapes depicted use of "enhanced interrogation techniques", including "water-boarding". In fact, it was the CIA's Office of Inspector General's review of the tapes in 2003 that revealed Abu Zubaydah being subjected to "eighty-three applications of the waterboard", a detail not made public until 2009.[202] (→ 5 October 2011)

2011

14 January 2011 – At a hearing in US District Court in New York, on a motion to find the CIA in contempt of court for the destruction of videotapes of interrogations of detainees held in secret CIA custody, despite a court order to identify and preserve such material, Judge Alvin Hellerstein notes that his "judicial order has been flouted, and just as I feel a great hesitancy in chastising the Executive, so the Executive should feel a great hesitancy in not accepting and obeying a court order". He notes that the individuals in the CIA responsible for the destruction of the tapes "did something that was really wrong".[203] (→ 15 October 2011)

18 January 2011 – The US Court of Appeals for the DC Circuit upholds the District Court's affirmation of the CIA's refusal to disclose allegations by the 14 detainees transferred to Guantánamo from CIA custody about where they were held and how they were treated in CIA custody (← 16 October 2009) – that is, evidence of torture or other ill-treatment and of enforced disappearance.[204]

17 February 2011 – A judge on the US District Court for the District of South Carolina blocks José Padilla's lawsuit brought against Donald Rumsfeld and others for alleged ill-treatment and unlawful detention when held as an "enemy combatant" in military custody on the US mainland from 2002 to 2005. The Supreme Court, he rules, had over the past 30 years, with "increasingly strong and direct language…refused to extend the *Bivens* claim to other contexts, generally finding present 'special factors counseling hesitation'". In this case, "the designation of Padilla as an enemy combatant and his detention incommunicado were made in light of the most profound and sensitive matters of national security, foreign affairs and military affairs." The judge continued: "It is not for this Court, sitting comfortably in a federal courthouse nearly nine years after these events, to assess whether the policy was wise or the intelligence was accurate. The question is whether the Court should recognize a cause of action for money damages that by necessity entangles the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence. This is particularly true where Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances". The judge expressed concern about what the consequences would be were the lawsuit allowed to go forward, including "numerous complicated state secret issues" and the possibility of "an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges". He concluded that "special factors" were present in the case counselling against allowing a *Bivens* claim to go forward in the absence of express Congressional authorization, and dismissed the lawsuit (→ 23 January 2012).

16 May 2011 – The US Supreme Court, without comment, dismisses the *Mohamed v. Jeppesen* CIA rendition case, leaving in place the divided decision of the Court of Appeals upholding the US administration's invocation of the "state secrets privilege" as justification for dismissing the lawsuit without any review of its merits, and leaving the plaintiffs without judicial remedy (← 8 September 2010).

31 May 2011 – The US Supreme Court dismisses US citizen Abdullah al-Kidd's *Bivens* lawsuit against former Attorney General John Ashcroft on the grounds that Ashcroft was entitled to qualified immunity because he did not violate clearly established law. The lawsuit alleged that Ashcroft had authorized federal officials to use material-witness warrants after the 9/11 attacks to detain people the administration had no intention of using as witnesses, but whom it suspected of supporting terrorism, but against whom they had insufficient evidence to charge with a crime. The ruling overturned decisions by the District Court and the Court of Appeals for the Ninth Circuit that the lawsuit could proceed (→ 2 May 2012)

21 June 2011 – In *Ali v. Rumsfeld*, the US Court of Appeals for the DC Circuit affirms the District Court decision dismissing the *Bivens* claim brought by nine Iraqi and Afghan nationals alleging torture and other abuse in US military custody in Iraq and Afghanistan (← 27 March 2007). The abuse alleged variously includes beatings, stabbing, stripping, hooding, confinement in a box, prolonged sleep deprivation, deprivation of adequate food and water, mock execution, death threats, sexual assault, sexual humiliation, threat of rape, exposure to extreme temperatures, denial of necessary medical care,

intention exposure to infection, threats of transfer to Guantánamo, cruel use of restraints, racial abuse, stress positions, intimidation with dogs, threats to family members, sensory deprivation, humiliation through being photographed while naked, solitary confinement, and dousing with cold water. The Court of Appeals states that its decision on the *Bivens* aspect of this claim is governed by its ruling in the Guantánamo case, *Rasul v. Myers* (← 24 April 2009), and "even if the defendants were not shielded by qualified immunity and the plaintiffs could claim the protections of the Fifth and Eighth Amendments [to the US Constitution], we would declined to sanction a *Bivens* cause because special factors counsel against doing so". As in the *Rasul* case, the Court of Appeals also upheld dismissal of the plaintiff's claims that their rights under international law were violated on the grounds that the defendants were "acting within the scope of their employment – "the detention and interrogation of enemy combatants", and therefore once the USA was substituted as the defendant, the individual defendants had absolute immunity under US law. One of the three judges dissents: "Under the majority's approach, despite the fact that torture has long been illegal under United States law, a *United States official* who tortures a foreign national in a foreign country is not subject to a suit in an action brought under [the Alien Tort Statute (ATS)], whereas a foreign official who tortures a foreign national in a foreign country may be sued under [the ATS]. This is a bizarre result."

✍ **30 June 2011** – US Attorney General Eric Holder announces that the preliminary review being conducted by Assistant US Attorney John Durham into interrogations in the CIA programme is at an end (← 24 August 2009). Attorney General Holder has accepted Durham's recommendation for "a full criminal investigation regarding the death in custody of two individuals. Those investigations are ongoing." However, "the Department [of Justice] has determined that an expanded criminal investigation of the remaining matters is not warranted." Attorney General Holder noted the limited scope of the preliminary review: "I made clear at that time [24 August 2009] that the Department would not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. Accordingly, Mr. Durham's review examined primarily whether any unauthorized interrogation techniques were used by CIA interrogators, and if so, whether such techniques could constitute violations of the torture statute or any other applicable statute. In carrying out his mandate, Mr Durham examined any possible CIA involvement with the interrogation of 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001, a number of whom were determined by Mr. Durham to have never been in CIA custody."[205] CIA Director (and future Secretary of Defense) Leon Panetta announces that "The Attorney General has informed me that, with limited exceptions, the Department of Justice inquiries concerning the Agency's former rendition, detention, and interrogation program have been completed and are now closed...As Director, I have always believed that our primary responsibility is not to the past, but to the present and future threats to the nation. We will continue to fulfill our vital mission of protecting America."[206]

🏛 **2 August 2011** – The DC District Court rules that the *Bivens* lawsuit brought by "John Doe" against former Secretary of Defense Donald Rumsfeld can proceed (→ 15 June 2012).

🏛 **8 August 2011** – A three-judge panel of the Seventh Circuit rules that the Vance/Ertel lawsuit can proceed, upholding the District Court decision (← 5 March 2010). The Court says that the case raises "fundamental questions about the relationship between the citizens of our country and their government". The Seventh Circuit panel agrees with the District Court that the plaintiffs have alleged in sufficient detail "supporting Secretary Rumsfeld's personal responsibility for the alleged torture", and that Rumsfeld is "not entitled to qualified immunity". The court also agrees that there are no "special factors" precluding a *Bivens* remedy, and that it would be "startling and unprecedented to conclude that the United States would not provide such a remedy to its own citizens"(→ 7 November 2012)

🏛 **21 September 2011** – In two separate decisions (both 2-1), the US Court of Appeals for the Fourth Circuit reverses the District Court decisions allowing a lawsuit brought by four Iraqi nationals against CACI International for alleged torture at Abu Ghraib (← 18 March 2009) and another brought against L-3 Services by 72 Iraqi nationals alleging torture at Abu Ghraib and elsewhere in Iraq (← 29 July

2010). In its decision in the CACI case, the Fourth Circuit panel concludes that "The nation rightly reacted with moral indignation to the pictures circulated from Abu Ghraib prison. And if these four Iraqi citizens did in fact suffer in a similar manner from the unauthorized conduct of military and civilian guards and interrogators, the nation, including its judges, would react similarly. Nothing we say in this opinion is intended to condone the torture, abuse, and cover-up alleged in the complaint". However, the Court states that "what we hold is that conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation. The Commander in Chief [the President] and the military under him have adopted policies, regulations, and manuals and have issued orders and directives for military conduct, and they have established facilities and procedures for addressing violations and disobedience. On this structural ground alone, and not on any judgment about the conduct itself, we are requiring that the claims of these four Iraqi detainees alleging abuse in a military prison in Iraq be dismissed by the District Court"[207] (→ 11 May 2012)

5 October 2011 – A judge on the US District Court for the Southern District of New York rules that he will not hold the CIA in civil contempt for destroying 92 videotapes, 12 of which depicted the use of "enhanced interrogation techniques" against two detainees, Abu Zubaydah and 'abd al Nashiri, held in secret custody by the CIA, reportedly in Thailand. To hold the CIA in contempt for violating a court order, the judge says, would "serve no beneficial purpose". He says that the CIA's failure to produce the tapes in response to the court's "repeated order" and the subsequent destruction of the tapes, "has been remedied" by the information about what was on them and who destroyed them having been produced and by the CIA's assurances that new protocols against repetition of such an event having been put in place. At the hearing on 1 August 2011 that preceded the written ruling, the judge had said "I think these things can happen in any large organization… There are misguided officials, misguided in their belief that everything they do is correct, or that they are motivated to do the correct thing when, in fact, it is not the correct thing. I decline to hold an entire agency in contempt for the mistakes of some of its officials".

1 December 2011 – During a debate in the Senate, Senator Feinstein says, "As chairman of the Select Committee on Intelligence, I can say that we are nearing the completion of a comprehensive review of the CIA's former interrogation and detention programme (← 5 March 2009), and I can assure the Senate and the Nation that coercive and abusive treatment of detainees in US custody went beyond a few isolated incidents at Abu Ghraib. Moreover, the abuse stemmed not from the isolated acts of a few bad apples but from fact that the line was blurred between what is permissible and impermissible conduct, putting US personnel in an untenable position with their superiors and the law."[208] (→ 13 December 2012)

22 December 2011 – A judge on the DC District Court grants the Obama administration's motion to dismiss action brought by a former Guantánamo detainee seeking damages for physical and psychological injuries allegedly suffered as a result of abuse in US custody. In claims brought under the Federal Tort Claims Act, the Alien Tort Statute and the US Constitution, Abdul Rahim Abdul Razak al Janko, a Syrian national, alleged among other things that when in US custody in Afghanistan he was subjected to "abusive interrogation techniques", including "striking his forehead; threatening to remove his fingernails; sleep deprivation; exposure to very cold temperatures; humiliation; and rough treatment" and in Guantánamo that he was tied, shackled, force-fed, had his Koran desecrated, was subjected to "extreme sleep deprivation" in solitary confinement, and to "severe beatings and threats against himself and his family". He alleged that as a result of the abuse, he attempted suicide 17 times. The District Court granted the government's motion to dismiss, citing section 7 of the MCA, which he said stripped jurisdiction of the court to consider such claims.[209]

2012

23 January 2012 – US Court of Appeals for the Fourth Circuit affirms the District Court's dismissal of the *Lebron v. Rumsfeld* lawsuit (← 17 February 2011), finding that "special factors" mean that the judiciary should not create a cause of remedy in such a case involving "national security". That should be for Congress to do, the Court said (→ 11 June 2012).

21 February 2012 – The US Court of Appeals for the DC Circuit rules that the federal courts have no jurisdiction to consider a lawsuit for damages brought by relatives of two detainees who died in Guantánamo in June 2006 (← 16 February 2010). The Court finds that jurisdiction had been removed under the second part of Section 7 of the Military Commissions Act (← late September 2006), and decided that the US Supreme Court's *Boumediene* ruling (← 12 June 2008) had only found the first part of MCA § 7 on habeas corpus unconstitutional, saying "We…presume that the Supreme Court used a scalpel and not a bludgeon in dissecting §7 of the MCA, and we uphold the continuing applicability of the bar to our jurisdiction over 'treatment' case". [210]

2 May 2012 – The US Court of Appeals for the Ninth Circuit blocks José Padilla's lawsuit against former Deputy Assistant Attorney General John Yoo (← 12 June 2009). It states that under a 2011 decision of the US Supreme Court (*Ashcroft v. al-Kidd*, ← 31 May 2011), "we are compelled to conclude that, regardless of the legality of Padilla's detention and the wisdom of Yoo's judgments, at the time [Yoo] acted the law was not sufficiently clear that every reasonable official would have understood that what he was doing violated the plaintiffs' rights". Therefore it found that "Yoo must be granted qualified immunity" and the lawsuit against him dismissed (→ 11 June 2012).

11 May 2012 – The full US Court of Appeals for the Fourth Circuit issues its decision in the consolidated case involving lawsuits brought against private contractors by four Iraqi nationals allegedly tortured in Abu Ghraib and another 72 Iraqi nationals allegedly tortured in Abu Ghraib and other facilities in Iraq (← 21 September 2011). By 11 to 3, the Court holds that it lacks jurisdiction at this stage to consider the appeals against the District Court rulings allowing the lawsuits to proceed (→ 21 June 2012)

11 June 2012 – The US Supreme Court refuses to review the decision of the US Court of Appeals for the Fourth Circuit to dismiss José Padilla's *Lebron v. Rumsfeld* lawsuit (← 23 January 2012) In light of this decision, the plaintiffs will decide not to seek further review of the *Padilla v. Yoo* lawsuit in the US courts (→ 11 December 2012).

15 June 2012 – The US Court of Appeals for the DC Circuit overturns the District Court ruling in *Doe v. Rumsfeld* (← 2 August 2011), ruling that "special factors" mean that "John Doe" may not bring a *Bivens* claim against Donald Rumsfeld. The US Supreme Court, the DC Circuit says, "has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence". The allegations against Rumsfeld, the Court noted, raised questions about his "personal control over the treatment and release of specific detainees". Allowing the Doe lawsuit to proceed would "detract focus, resources, and personnel from the mission in Iraq". Given the evidence of "congressional inaction" – namely that Congress did not legislate to create a remedy for detainees when it passed the Detainee Treatment Act – it would be "inappropriate for this Court to presume to supplant Congress's judgement in a field so decidedly entrusted to its purview".

21 June 2012 – US Court of Appeals for the Fourth Circuit refuses to stay its ruling in the consolidated CACI and L-3 Services case (← 11 May 2012) pending the defendants appeal to the US Supreme Court (→ 5 October 2012)

30 August 2012 – US Attorney General Eric Holder announces there will be no criminal charges relating to two deaths in custody relating to the CIA secret detention programme (← 30 June 2011). This ends all announced investigations into the programme, with no charges against anyone for the crimes under international law that were committed in the programme.[211]

5 October 2012 – With the case against it remanded to the District Court by the Fourth Circuit (← 21 June 2012), Engility Holdings (previously called L-3 Services) and more than 70 Iraqi plaintiffs in the case agree to a settlement of US$5.28 million. The lawsuit is then voluntarily dismissed.[212]

7 November 2012 – The full US Court of Appeals for the Seventh Circuit dismisses the *Vance v. Rumsfeld* lawsuit (← 8 August 2011), deciding that the federal judiciary should "not create a right of action for damages against soldiers (and others in the chain of command) who abusively interrogate or mistreat military prisoners, or fail to prevent improper detention and interrogation". The Seventh

Circuit notes that both the DC Circuit and the Fourth Circuit have so ruled, and also points to the Second Circuit's ruling in 2009 in *Arar v. Ashcroft*. "We agree with those decisions", states the Seventh Circuit majority.

6 December 2012 – The military judge overseeing the forthcoming capital trial by military commission of five Guantánamo detainees accused of involvement in the attacks of 11 September 2001 issues a protective order to protect classified information. This order aims to prevent public disclosure of which "foreign countries" the five detainees were held in for years by the CIA prior to their transfer to Guantánamo (← 4 September 2006); which "enhanced interrogation techniques" were used against them, including "descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations"; the "names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation" of the detainees; and descriptions of the "conditions of confinement." This applies, "without limitation" to the "observations and experiences" of the detainees themselves – subjected in secret US detention to crimes under international law, and facing trial proceedings that do not comply with international fair trial standards, and a government seeking to obtain death sentences against them. To prevent disclosure of such information at any trial proceedings, there will be a 40-second delay in broadcast from the courtroom to the public gallery.[213]

11 December 2012 – Estela Lebron files a petition against the USA in the Inter-American Commission on Human Rights seeking an investigation and findings that the USA violated her and her son José Padilla's rights during his military detention as an "enemy combatant".

13 December 2012 – European Court of Human Rights issues a landmark ruling on the case of Khaled El-Masri. It finds Macedonia responsible for complicity in the torture and enforced disappearance to which Khaled El-Masri was subjected in US custody. The Court notes that his lawsuit had been blocked in the US courts (← 9 October 2007) after the US administration had asserted the "state secrets privilege". The European Court adds that "the concept of 'State secrets' has often been invoked to obstruct the search for truth".[214]

13 December 2012 – The US Senate Select Committee on Intelligence voted 9-6 to approve the report of its review into the CIA's secret detention and interrogation programme (← 1 December 2011). The Chairperson of the Committee, Senator Dianne Feinstein says that the report is more than 6,000 pages long, with 35,000 footnotes, and that it "uncovers startling details" of the CIA programme – and is "a comprehensive review of the CIA's detention program that includes details of each detainee in CIA custody, the conditions under which they were detained, how they were interrogated, the intelligence they actually provided and the accuracy—or inaccuracy—of CIA descriptions about the program to the White House, Department of Justice, Congress and others." Senator Feinstein says she believes the report to be "one of the most significant oversight efforts in the history of the United States Senate, and by far the most important oversight activity ever conducted by this committee." She notes that the report will be provide to the President and members of his administration "for their review and comment". She notes that the report will remain classified "and is not being released in whole or in part at this time." She states that a majority of the Committee agrees that "the creation of long-term, clandestine 'black sites' and the use of so-called 'enhanced-interrogation techniques' were terrible mistakes."[215]

2013

2 January 2013 – The US District Court for the Southern District of New York rules that the administration has not violated the Freedom of Information Act (FOIA) by refusing to disclose documents relating to its policy of "targeted killing" in the counter-terrorism context.[216] The judge writes: "The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men. The Administration has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions. More fulsome disclosure of the legal

reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable 'hot' field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise in which we have been engaged for well over a decade… However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules – a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusions a secret."[217]

- **11 January 2013** – The Guantánamo detentions enter their 12th year, with 166 detainees held there, the vast majority of them without charge or trial, and with six facing possible death sentences after unfair trials by military commission.[218] These six were among those subjected by the USA, among other things, to enforced disappearance before being brought to the US naval base in Cuba in 2006. No one has been brought to justice for these and other crimes under international law committed by US personnel against these and other detainees held in the CIA's secret detention programme.

ENDNOTES

[1] *Vance v. Rumsfeld*, US Court of Appeals for the Seventh Circuit, 7 November 2012, Judge Hamilton dissenting.

[2] Article 2(3) of the 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, ratified by the USA on 8 June 1992; Articles 13, 14 and 16 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), 1465 UNTS 85, ratified by the USA on 21 October 1994;

[3] BakerHostetler obtains major win protecting US national security officials and soldiers against 'lawfare', Press release, 9 November 2012, http://www.bakerlaw.com/news/bakerhostetler-obtains-major-win-protecting-us-national-security-officials-and-soldiers-against-lawfare-11-9-2012/

[4] Litigating for terrorists. John Yoo, Wall Street Journal, 4 May 2012.

[5] 'Beyond debate'. Editorial, New York Times, 3 May 2012.

[6] Litigating for terrorists. John Yoo, Wall Street Journal, 4 May 2012.

[7] In its May 2012 ruling blocking the Padilla lawsuit against Yoo, the US Court of Appeals for the Ninth Circuit listed the memorandums which John Yoo had either authored or promulgated, according to the Padilla complaint: "An October 23, 2001 memorandum from Yoo to Gonzales and Department of Defense General Counsel William J. Haynes regarding *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, which concluded that "the Fourth Amendment had no application to domestic military operations," and that "restrictions outlined in the Fifth Amendment simply do not address actions the Executive takes in conducting a military campaign against the nation's enemies." A December 21, 2001 memorandum from Yoo to Haynes regarding *Possible Criminal Charges Against American Citizen Who Was a Member of the Al Qaeda Terrorist Organization or the Taliban Militia*. A January 9, 2002 draft memorandum from Yoo to Haynes on the *Application of Treaties and*

Laws to al Qaeda and Taliban Detainees. A January 22, 2002 memorandum to Gonzales signed by then-Assistant Attorney General Jay Bybee but allegedly drafted by Yoo on the *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. A February 26, 2002 memorandum to Haynes signed by Bybee but allegedly created by Yoo on *Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan*. A May 2002 OLC memorandum regarding access to counsel and legal mail by detainees held at the naval brigs at Norfolk and Charleston. A June 27, 2002 memorandum from Yoo to Assistant Attorney General Daniel J. Bryant of the Office of Legislative Affairs regarding *The Applicability of 18 U.S.C. Sec. 4001(a) to Military Detention of United States Citizens*. An August 1, 2002 memorandum to Gonzales, again signed by Bybee but allegedly created by Yoo, on *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, concluding that an interrogation technique must cause damage that rises "to the level of death, organ failure, or the permanent impairment of a significant body function" in order to be considered torture. A second memorandum produced during August 2002 addressing the legality of particular interrogation techniques that the CIA wished to employ. A November 27, 2002 memorandum from Haynes that Yoo allegedly reviewed and approved, recommending that Secretary of Defense Donald Rumsfeld approve for use by the military a range of aggressive interrogation techniques not permitted by the military field manual. A March 14, 2003 opinion from Yoo to Haynes on *Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, extending authority to use harsh interrogation techniques against high-level prisoners held at Guantanamo Bay and other facilities under Department of Defense control, and approving the use of mind-altering drugs during interrogations."

[8] See, for example, USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, http://www.amnesty.org/en/library/info/AMR51/120/2009/en

[9] See, for example, USA: Human Rights Betrayed – 20 Years After US Ratification of ICCPR, Human Rights Principles Sidelined by 'Global War' Theory', 7 June 2012, http://www.amnesty.org/fr/library/info/AMR51/041/2012/en

[10] Remarks by the President on National Security at the National Archives, Washington, DC, USA, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[11] See for example, White House website at http://www.whitehouse.gov/our-government, "To ensure that no person or group would amass too much power, the founders established a government in which the powers to create, implement, and adjudicate laws were separated. Each branch of government is balanced by powers in the other two coequal branches".

[12] On 2 January 2008, then US Attorney General Michael Mukasey appointed a federal prosecutor to supervise a criminal investigation into the CIA's destruction of videotapes made in 2002 of interrogations conducted against two detainees held in the CIA's secret program. On 9 November 2010, the Justice Department announced that no criminal charges would be pursued in relation to the destruction of the tapes. However, the federal prosecutor's mandate had been expanded in August 2009 by Attorney General Eric Holder to include a "preliminary review" into some aspects of some interrogations of some detainees held in the secret detention program. On 30 June 2011, Attorney General Holder announced that the Department of Justice was closing investigations into all cases relating to the CIA program since 2001, except into the deaths of two detainees in CIA custody. On 30 August 2012, he announced the closure of the investigations into the two deaths and that no criminal charges would be filed.

[13] Section 1004 of the DTA provides that in any civil or criminal case against any US agent "engaging in specific operational practices, that involved detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted", such an agent can offer as a defence that they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."

[14] See *Al Janko v. Gates et al*, note 209, *infra*.

[15] See USA: Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, 30 November 2011, http://www.amnesty.org/en/library/info/AMR51/097/2011/en; See also, for example, UK arrest highlights Nepal's failure to address torture, 4 January 2013, http://www.amnesty.org/en/news/uk-arrest-highlights-nepal-s-failure-address-torture-2013-01-04

[16] USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en

[17] *Webster Bivens v. Six unknown named agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[18] *Wilkie v. Robbins*, 551 U.S. 537, 25 June 2007.

[19] *Harlow v. Fitzgerald*, US Supreme Court (1982) ("Government officials whose special functions or constitutional status requires complete protection from suits for damages - including certain officials of the Executive Branch, such as prosecutors and similar officials, and the President - are entitled to the defense of absolute immunity. However, executive officials in general are usually entitled to only qualified or good-faith immunity. The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority. Federal officials seeking absolute immunity from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope").

[20] *Al-Kidd v. Ashcroft* (2011), citing *Anderson* v. *Creighton* (1987).

[21] *Pearson v. Callahan*, 21 January 2009.

[22] For example, under the ICCPR, "Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights." General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc.: CCPR/C/21/Rev.1/Add. 13, para 15.

[23] UN Human Rights Committee, General Comment 29 (States of Emergency), 31 August 2001, UN Doc.: CCPR/C/21/Rev.1/Add.11. para 14.

[24] Principle 11, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[25] See, among others, Principles 18 – 23, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005; Human Rights Committee, General Comment no. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc.: CCPR/C/21/Rev.1/Add. 13, paras 16 and 18).

[26] UNCAT, article 14(1). While article 14 refers to torture in particular, the right to remedy and reparation applies also to other cruel, inhuman or degrading treatment or punishment: see for instance, UN Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States parties, 19 November 2012, UN Doc. CAT/C/GC/3, para. 1; UN Committee against Torture, General Comment No. 2 on Implementation of Article 2 by States parties, 24 January 2008, UN Doc. CAT/C/GC/2, paras. 3 and 6; UN Committee against Torture, *Hajrizi Dzemajl et al. v Yugoslavia*, UN Doc

CAT/C/29/D/161/2000 (2 December 2002), para 9.6; UN Human Rights Committee, General Comment no. 20 on prohibition of torture and cruel treatment or punishment, 3 October 1992, UN Doc. HRI/GEN/1/Rev.6 at 151 (2003), para 14; UN Human Rights Committee, General Comment no. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para 16.

[27] UN Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States parties, 19 November 2012, UN Doc. CAT/C/GC/3, para. 42.

[28] *Ibid.*

[29] *Vance v. Rumsfeld*, US Court of Appeals for the Seventh Circuit, 7 November 2012, Judge Hamilton dissenting.

[30] See http://2001-2009.state.gov/documents/organization/100296.pdf, paragraph 274

[31] See question 5 at http://www.state.gov/j/drl/rls/68554.htm

[32] *Ibid.*

[33] In a few cases, US Courts have shown willingness to allow suits against foreign nationals accused of torture. See, for example, *Ahmed v Magan,* Civil Action 2:10-cv-342. (S.D. Ohio).

[34] General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, UN Doc.: CCPR/C/21/Rev.1/Add. 13. .

[35] UN Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States parties, 19 November 2012, UN Doc. CAT/C/GC/3, paras. 16-17.

[36] "The State Department relied on the availability of *Bivens* actions when it filed its answers to a number of questions posed by the United Nations committee with oversight responsibility over the Convention Against Torture (CAT)... I do not know whether the State Department will feel compelled to inform the [UN Human Rights] Committee that it was in error with respect to its Bivens/Davis representation in light of the majority's opinion, but there is no ambiguity in what it said". *Vance v. Rumsfeld*, Judge Wood concurring in judgment.

[37] See http://www.state.gov/documents/organization/133836.pdf , paragraph 98.

[38] See http://www.state.gov/j/drl/rls/55504.htm, paragraph 35.

[39] See http://www.state.gov/j/drl/rls/179781.htm, paragraph 113.

[40] UN Doc.: A/HRC/16/11/Add.1, Report of the Working Group on the Universal Periodic Review: United States of America. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 8 March 2011.

[41] USA: Remedy blocked again: Injustice continues as Supreme Court dismisses rendition case, 25 May 2011, http://www.amnesty.org/en/library/info/AMR51/044/2011/en

[42] *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December 2012.

[43] Article 4, CAT; Enforced disappearance has been recognized as a crime under international law since the judgment of the Nuremberg Tribunal in 1946: Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 30 September and 1 October 1946 (Nuremberg Judgment), Cmd.6964, Misc. No.12 (London: H.M.S.O. 1946), p. 88. See also other international instruments, including, International Law Commission 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18 (i).

[44] *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December

2012, para 191.

[45] *USA v Khalid Sheikh Mohammad et al*, AE 013P, Protective Order #1. See also, USA: Truth, Justice and the American Way? Details of Crimes under International Law Still Classified Top Secret, 19 December 2012, http://www.amnesty.org/en/library/info/AMR51/099/2012/en .

[46] UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008, para. 1 and preamble; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005 and UN Human Rights Council, Res. 21/7, 'Right to the truth', UN Doc. A/HRC/21/L.16, 24 September 2012, para. 1 and preamble.

[47] See *Vance v. Rumsfeld*, United States' statement of interest and response to plaintiff's motion for leave to serve expedited third party discovery. In the US District Court for the Northern District of Illinois, 11 January 2007.

[48] Each was informed that the unclassified "factual basis" to be considered by the Board in making this determination was the following: "On or about April 15, 2006 you were detained by members of the Coalition Forces for being a suspect in supplying weapons and explosives to insurgent/criminal groups through your affiliation with the Shield Group Security Company (SGS) operating in Iraq. Credible evidence suggests that certain members of SGS are supplying weapons to insurgent groups in Iraq. Further, you are suspected of illegal receipt of stolen weapons and arms in Iraq from Coalition Forces".

[49] The definition of which was: "An individual detained because there exists reasonable grounds to believe you pose a threat to security or stability in Iraq. Reasonable grounds consist of sufficient indicators to lead a reasonable person to believe that detention is necessary for imperative reasons of security, e.g. that you pose a threat to MNF-I or Iraqi security forces, or to the safety of civilians in Iraq, or otherwise pose a threat to security and stability in Iraq".

[50] *Rochin v. California* 342 U.S. 165 (1952) and *Sacramento v. Lewis*, 523 U.S. 833 (1998).

[51] Article 2, CAT.

[52] Common Article 3, Geneva Conventions of 12 August 1949, ratified by USA on 2 August 1955.

[53] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees,* 30 May 2005.

[54] See also Donald Rumsfeld's handwritten comment on his 2 December 2002 approval of "counter-resistance" techniques for use at Guantánamo. The comment relates to the proposed limit on stress positions (for example forced standing) of four hours. Secretary Rumsfeld commented: "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"

[55] See USA: Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, 22 June 2006, http://www.amnesty.org/en/library/info/AMR51/093/2006/en.

[56] Action memo, Counter-resistance techniques. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002. See also Memorandum for Commander, Joint Task Force 170, Legal brief on proposed counter-resistance strategies, 11 October 2002.

[57] See, for example, USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en

[58] See, for example, interview with Janis Karpinski at http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html#3

[59] Page 37, Final Report of the Independent Panel to Review DoD Detention Operations. August 2004,

[Schlesinger report], http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf

[60] Page 25, AR 15-6 Investigation of Intelligence Activities at Abu Ghraib. Conducted by Major General George R. Fay and Lieutenant General Anthony R. Jones. http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf

[61] Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services of the United States Senate, 20 November 2008.

[62] See, for example, Iraq: Beyond Abu Ghraib: Detention and torture in Iraq, 6 March 2006, http://www.amnesty.org/en/library/info/MDE14/001/2006/en

[63] Report to the UN Economic and Social Council regarding the situation of detainees at Guantánamo Bay of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, 27 February 2006, UN Doc. E/CN.4/2006/120, paras 49-52.

[64] Torture Victims Protection Act of 1991.

[65] Written statement of James Schlesinger to the Senate Armed Services Committee, 9 September 2004.

[66] "To take the highest level, take the level of the Secretary of Defense, I don't think that you can punish somebody, demand resignation, on the basis of some action, an individual action, by somebody far down the chain. I think at that level, the decision has to be made on the basis of broad performance. And indeed at the very highest level, it's made at election time… The Secretary of Defense has to decide whether he's lost confidence in his under-secretaries or his assistant secretaries on the basis of their performance. And the electorate has to decide on the basis of its confidence at election time". Oral testimony to the Senate Armed Services Committee, 9 September 2004.

[67] Press conference with members of the Schlesinger Panel, *op. cit.*

[68] In May 2008, Susan Crawford, then convening authority for the military commissions at Guantánamo, dismissed charges against Mohamed al-Qahtani, then facing a death penalty trial by military commission. In January 2009, she explained: "We tortured Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case". (Detainee tortured, says US official. Bob Woodward, Washington Post, 14 January 2009. See also, A case to answer: the torture of Mohamed al-Qahtani, in Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, Amnesty International, June 2006, http://www.amnesty.org/en/library/info/AMR51/093/2006/en). Since leaving office, Donald Rumsfeld has confirmed his involvement in approving interrogation techniques for use against Mohamed al-Qahtani after being advised that this detainee "had information that could save American lives". Donald Rumsfeld claimed that he had "understood that the techniques I authorized were intended for use with only one key individual", that is Mohamed al-Qahtani, although in the same memoirs he notes that the Guantánamo military authorities under him were seeking the additional "counter-resistance techniques" because "some detainees" (plural) had "resisted our current interrogation methods". Donald Rumsfeld. Known and unknown: a memoir, Sentinel Books (2011), page 580. Today, Mohamed al-Qahtani remains in detention at Guantánamo without charge or criminal trial, 11 years after he was first taken into custody.

[69] See, for example, requirement to maintain a register under Article 10(1) of the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by UN General Assembly resolution 47/133 of 18 December 1992. See also page 12 of USA: Bringing George W. Bush to justice:

International obligations of states to which former US President George W. Bush may travel, 30 November 2011, http://www.amnesty.org/en/library/info/AMR51/097/2011/en

[70] *Vance v. Rumsfeld*, Petition for rehearing and suggestion for rehearing en banc, In the US Court of Appeals for the Seventh Circuit, 22 September 2011.

[71] Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008.

[72] "The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders…When I proposed this legislation, I explained that I would have one test for the bill Congress introduced: Will it allow the CIA program to continue? This bill meets that test." Remarks on signing the Military Commissions Act of 2006, President George W. Bush, 17 October 2006. See also USA: Law and executive disorder: President gives green light to secret detention program, 17 August 2007, http://www.amnesty.org/en/library/info/AMR51/135/2007/en

[73] See USA: Deadly formula: An international perspective on the 40th anniversary of *Furman v. Georgia*, 28 June 2012, http://www.amnesty.org/en/library/info/AMR51/050/2012/en

[74] Human Rights Committee, Concluding Observations: United States of America, 6 April 1995, UN Doc. CCPR/C/79/Add.50, A/50/40, para 279. Under article 19 of the Vienna Convention on the Law of Treaties, a state may not make a reservation to a treaty if that reservation is prohibited in the treaty itself or if the reservation is incompatible with the object and purpose of the treaty. The USA signed the VCLT in April 1970, but by December 2012 had still not ratified it. However, the USA considers many of the VCLT's provisions "to constitute customary international law on the law of treaties". See US Department of State, at http://www.state.gov/s/l/treaty/faqs/70139.htm

[75] Under the Torture Victims Protection Act of 1991.

[76] The case was originally filed in the District Court for the Northern District of Illinois in 2008, but was dismissed for lack of jurisdiction on grounds that it was the wrong venue

[77] See, for example, USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, 3 February 2011, http://www.amnesty.org/en/library/info/AMR51/005/2011/en, and USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, http://www.amnesty.org/en/library/info/AMR51/151/2008/en

[78] José Padilla was indicted in 2006 in the US District Court for the Southern District of Florida on charges of involvement in a broad terrorism-related conspiracy. A pre-trial motion filed by José Padilla's lawyers sought dismissal of the indictment on the grounds of the government's "outrageous conduct" before bringing him to trial. In denying the motion, the trial judge noted that José Padilla was "free to institute a *Bivens* action, an action for monetary damages or any other form of redress that he is legally entitled to pursue". Padilla was convicted in 2007, and in January 2008, José Padilla was sentenced to 17 years and four months in prison. On appeal, the government (which had argued for a life sentence at the trial) argued that the sentence was too low under federal sentencing guidelines and in 2011 the US Court of Appeals for the 11th Circuit agreed, also ruling that the 152-month reduction in sentence that the trial judge had given Padilla because of the length of his pre-trial confinement and the harsh conditions to which he was subjected was unjustifiably "extensive". José Padilla's sentence was vacated and the case sent back to the District Court for re-sentencing. At the time of writing, the new sentencing was scheduled to take place on 29 January 2013.

[79] See USA: 'Congress has made no such decision': Three branches of government, zero remedy for counter-terrorism abuses: Court dismisses Padilla lawsuit, 6 February 2012, http://www.amnesty.org/en/library/info/AMR51/008/2012/en

[80] Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, 9

January 2003 (Jacoby Declaration)

[81] Human Rights Committee, A v. Australia, Communication No 560/1993, paras 9.3 and 9.4; *C v. Australia*. Communication No 900/1999, para 9.2. The UN Committee against Torture has echoed these concerns in the counter-terrorism context, see Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN Doc. CAT/C/CR/33/3, paras 4(e) and 5(h); UN Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment, Principles 15, 16, 17, 18, adopted by UN General Assembly resolution 43/173 of 9 December 1988.

[82] After taking Abu Zubaydah into custody in late March 2002, according to George Tenet, the CIA Director of the time, the CIA "got into holding and interrogating high-value detainees – 'HVDs', as we called them – in a serious way". George Tenet, At the Center of the Storm, Harper 2007, page 365. Also see Transcript of Remarks by CIA Director Gen. Michael V. Hayden at the Council on Foreign Relations, 7 September 2007 ("CIA's detention and interrogation program…began with the capture of Abu Zubaydah in the spring of 2002").

[83] Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

[84] A government email dated 2 July 2006 refers to "the 'lash-up' between GTMO and Charleston" in relation to policies for "enemy combatants". (Re: FW: EC mail transmitted to GTMO. Date: Sunday, July 02, 2006 1:39 pm). Secretary Rumsfeld's approval of the Charleston facility for such use followed a recommendation to do so by William J. Haynes, General Counsel to the US Department of Defense. In a memo dated 27 December 2001 to Secretary Rumsfeld, Haynes wrote "in the event the President determines that an individual already in the United States should be transferred to your control from the Department of Justice, you will need to detain him somewhere…. I recommend the Charleston facility". A little under a year later, it was William Haynes' memorandum on interrogation techniques for use at Guantánamo which Secretary Rumsfeld signed on 2 December 2002. William Haynes was one of the five lawyers, including John Yoo, who formed a so-called "War Council", see note 100, *infra*.

[85] See, for example, USA: Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, 22 June 2006, http://www.amnesty.org/en/library/info/AMR51/093/2006/en; Report to the UN Economic and Social Council regarding the situation of detainees at Guantánamo Bay of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, 27 February 2006, UN Doc. E/CN.4/2006/120, President Obama himself acknowledged that the use of 'waterboarding' constituted torture in 2009, which he has reaffirmed since; see, for example, Jennifer Parker, *Obama on Cheney: Waterboarding is Torture,* 11 January 2009, available at: http://abcnews.go.com/blogs/politics/2009/01/obama-on-cheney/ .

[86] Jacoby Declaration, *op. cit.*

[87] Jacoby Declaration, *op. cit.*

[88] See, for example, Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation, February 2004. And Special Review. Counterterrorism detention and interrogation activities (September 2001 – October 2003), CIA Office of Inspector General, 7 May 2004, and ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007.

[89] *Padilla v. Rumsfeld et al*, Individual federal defendants' motion to dismiss plaintiffs' third amended complaint. In the US District Court for the District of South Carolina, 25 August 2008.

[90] *Lebron et al v. Rumsfeld et al*, Order, US District Court for the District of South Carolina, 17 February 2011.

[91] The UN Human Rights Committee has found prolonged incommunicado detention, in and of itself, to violate the prohibition of torture and other ill-treatment: see, e.g., *Polay Campos v Peru* (6 November 1997) UN Doc CCPR/C/61/D/577/1994 para 8.6 [one year in duration]; *Aber v Algeria* (13 July 2007) UN Doc CCPR/C/90/D/1439/2005, para 7.3 [one period of twenty-one months, another of five months]; *Kulov v Kyrgyzstan* (26 July 2010) UN Doc CCPR/C/99/D/1369/2005 para 8.2 [one period of four and a half months, another of three months].

[92] *Lebron et al v. Rumsfeld et al*, Brief for Defendant-Appellee Donald H. Rumsfeld, US Court of Appeals for the Fourth Circuit, 11 July 2011.

[93] *Lebron et al. v. Rumsfeld et al*. Brief for defendants-appellees Hanft, Haynes, Jacoby, Marr, and Wolfowitz, US Court of Appeals for the Fourth Circuit, 11 July 2011.

[94] *Lebron et al. v. Padilla et al*, Brief of the United States as amicus curiae. In the US Court of Appeals for the Fourth Circuit, 18 July 2011.

[95] *Lebron et al. v. Rumsfeld et al*, Brief of the United States as amicus curiae. In the US Court of Appeals for the Fourth Circuit, 18 July 2011.

[96] *Lebron; Padilla v. Rumsfeld et al*, US Court of Appeals for the Fourth Circuit, 23 January 2012.

[97] Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, pages 44-45.

[98] *Ibid*. page 57.

[99] See, e.g., Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, signed by John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003. Also: Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[100] "The 'War Council', as the group called itself, included the White House Counsel, Alberto Gonzales; the Vice President's Counsel, David Addington; [William] Haynes [General Counsel, Department of Defense]; Gonzales's first deputy (and former OLC head under George H.W. Bush), Tim Flanigan; and Yoo. The War Council met every few weeks, either in Gonzales's White House office or behind closed doors in Haynes's Defense Department office. It would plot legal strategy in the war on terrorism, sometimes as a prelude to dealing with lawyers from the State Department, the National Security Council, and the Joint Chiefs of Staff who would ordinarily be involved in war-related interagency legal decisions, and sometimes to the exclusion of he interagency process altogether". Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton (2007), page 20.

[101] See, for example, USA: Human Rights Betrayed – 20 Years After US Ratification of ICCPR, Human Rights Principles Sidelined by 'Global War' Theory', 7 June 2012, http://www.amnesty.org/fr/library/info/AMR51/041/2012/en

[102] Memorandum to the Attorney General through the Deputy Attorney General: Determination of enemy belligerency and military detention. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 8 June 2002.

[103] John Yoo. War by other means: An insider's account of the war on terror, Atlantic Monthly Press (2006), page 140.

[104] Litigating for terrorists. John Yoo, Wall Street Journal, 4 May 2012.

[105] *Lebron et al. v. Rumsfeld et al.*, Brief of the United States as *Amicus Curiae*, In the US Court of Appeals for the Fourth Circuit, 18 July 2011.

[106] Investigation into the Office of Legal Counsel's memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, page 11.

[107] Memorandum of decision regarding the objections to the findings of professional misconduct in the Office of Professional Responsibility's report of investigation into the Office of Legal Counsel's memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. David Margolis, Associate Deputy Attorney General, Office of the Deputy Attorney General, US Department of Justice, 5 January 2010.

[108] John Yoo: Finally, an end to Justice Dept. investigation. Philadelphia Inquirer, 28 February 2010, available at http://www.aei.org/article/101726. See also John Yoo, My gift to the Obama Presidency, The Wall Street Journal, 24 February 2010.

[109] 'Beyond debate'. Editorial, New York Times, 3 May 2012.

[110] *Ashcroft v. Al-Kidd*, 31 May 2011.

[111] UN Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States parties, 19 November 2012, UN Doc. CAT/C/GC/3, para. 3.

[112] The petition is available at https://www.aclu.org/files/assets/iachr_padilla_petition.pdf

[113] 'The fight against al Qaeda: Today and tomorrow.' Speech at the Center for a New American Security, US Secretary of Defense Leon E. Panetta, 20 November 2012, http://www.defense.gov/speeches/speech.aspx?speechid=1737

[114] US Department of Defense news briefing, 22 July 2002, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3598

[115] Remarks at the International Institute for Strategic Studies, 5 June 2004, http://www.defense.gov/speeches/speech.aspx?speechid=128 ("the reality is that we remain closer to the beginning of this struggle than to its end.")

[116] 'The Conflict Against Al Qaeda and its Affiliates: How Will It End?', Jeh Charles Johnson, General Counsel of the US Department of Defense at the Oxford Union, Oxford University, 30 November 2012, http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/

[117] On latter, for example, see USA: 'Targeted killing' policies violate the right to life, 15 June 2012, http://www.amnesty.org/en/library/info/AMR51/047/2012/en

[118] See, for example, USA: Guantánamo: A decade of damage to human rights and 10 anti-human rights messages Guantánamo still sends, 16 December 2001, http://www.amnesty.org/en/library/info/AMR51/103/2011/en, USA: Trials in error: Third go at misconceived military commission experiment, 16 July 2009, http://www.amnesty.org/en/library/info/AMR51/083/2009/en

[119] Remarks by the President on National Security, National Archives, Washington, DC, USA, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[120] Testimony before Senate Armed Services Committee, 7 May 2004.

[121] USA: Judge orders Guantánamo detainee released after seven and a half years in detention without charge, 24 June 2009, http://www.amnesty.org/en/library/info/AMR51/080/2009/en

[122] *Boumediene v. Bush*.

[123] In June 2012, the Obama administration filed a motion in the US Court of Appeals for the DC Circuit urging the Court to issue a summary affirmance of Judge Leon's ruling. In October 2012, the Court of Appeals denied that motion and at the time of writing, briefs were due to be filed with the court by the parties in the first two months of 2013.

[124] *Al-Zahrani v. Rodriguez*, US Court of Appeals for the DC Circuit, 21 February 2012. ("We therefore presume that the Supreme Court used a scalpel and not a bludgeon in dissecting § 7 of the MCA, and we uphold the continuing applicability of the bar to our jurisdiction over 'treatment' cases.")

[125] UN Doc.: CCPR/C/21/Rev.1/Add. 13. General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004.

[126] USA: Doctrine of pervasive 'war' continues to undermine human rights, 15 September 2010, http://www.amnesty.org/en/library/info/AMR51/085/2010/en

[127] Overriding President Richard Nixon's veto, Congress passed the War Powers Resolution in 1973 in an attempt to limit presidential war power. Every US President since then has taken the position that aspects of the WPR constitute an unconstitutional foray into presidential commander-in-chief powers and the WPR has arguably been all but ineffective. See, for example, Richard F. Grimmett, RL32267 – The War Powers Resolution: After Thirty Years, CRS Report for Congress, 11 March 2004. And: War Power, Chapter 5 of The Democratic Constitution, Neal Devins and Louis Fisher, Oxford University Press (2004). See also, Authority to use Force in Libya. Memorandum for the Attorney General, Office of Legal Counsel, US Department of Justice, 1 April 2011 ("*The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest. Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.")*

[128] The President's constitutional authority to conduct military operations against terrorists and nations supporting them. Memorandum opinion for Timothy Flanigan, the Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001, http://www.justice.gov/olc/warpowers925.htm

[129] Memorandum for Alberto R. Gonzales, Counsel to the President, for William J. Haynes II, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General and Special Counsel Robert J. Delahunty. Re: Authority for use of Military Force to Combat Terrorist Activities within the United States, 23 October 2001.

[130] Memorandum opinion for the Counsel to the President, Legality of the use of military commissions to try terrorists, Deputy Assistant Attorney General Patrick Philbin, Office of Legal Counsel, US Department of Justice, 6 November 2001.

[131] Re: Treaties and Laws Applicable to the Conflict in Afghanistan And to the Treatment of Persons Captured by US Armed Forces In that Conflict. Memorandum for Alberto R. Gonzales, Counsel to the President, from Deputy Assistant Attorney General John C. Yoo and Special Counsel Robert J. Delahunty, Office of Legal Counsel, US Department of Justice, 30 November 2001.

[132] Detention facilities in the continental United States. Action Memo from William J. Haynes, General Counsel, to Secretary of Defense, 27 December 2001.

[133] Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General, and John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of

Justice, 28 December 2001.

[134] Application of treaties adnd laws to al Qaeda and Taliban detainees. Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002.

[135] Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, page 26.

[136] Memorandum for the President. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Alberto R. Gonzales, 25 January 2002. The Geneva Conventions and their Additional Protocols form a core part of international humanitarian law, the body of international law that regulates the conduct of armed conflict.

[137] Memorandum for Larry D. Thompson, Deputy Attorney General, from Jay S. Bybee, Assistant Attorney General, re: Memorandum from Alberto Gonzales to the President on Application of the Geneva Convention to Al Qaeda and the Taliban, 26 January 2002.

[138] Letter from John Ashcroft, Attorney General, to President George W. Bush, 1 February 2002.

[139] Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 26 February 2002.

[140] The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 March 2002.

[141] Secretary Rumsfeld statement on the ICC Treaty. US Department of Defense news release, 6 May 2002, http://www.defense.gov/releases/release.aspx?releaseid=3337

[142] Donald Rumsfeld. Known and unknown: a memoir, page 598.

[143] Determination of enemy belligerency and military detention. Memorandum from Jay Bybee, Assistant Attorney General, Office of Legal Counsel, to the Attorney General, 8 June 2002.

[144] Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens, From John Yoo, Office of the Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 27 June 2002.

[145] Letter from Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, 22 July 2002. Cited in Memorandum for William J. Haynes II, General Counsel of the Department of Defense, Re: Military interrogation of alien unlawful combatants held outside the United States. From John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003, page 47 and note 62.

[146] The OLC advice added that it could not account for the actions of "rogue prosecutors" or "predict the political actions of international institutions". Letter to Alberto Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[147] Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of

Legal Counsel, US Department of Justice, 1 August 2002. In the OLC's Abu Zubaydah memorandum of the same date, this memorandum was cited as "Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency".

[148] See Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton (2007), page 144.

[149] Interrogation of al Qaeda operative. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002 (hereinafter Bybee interrogation memo 2, 1 August 2002).

[150] Judicialization of International Politics. Memorandum for The Vice President, Secretary of State, The Attorney General, Assistant to the President and Chief of Staff, National Security Advisor, Counsel to the President. From Donald Rumsfeld, Secretary of Defense, 9 April 2003.

[151] Letter to William J. Haynes, General Counsel Department of Defense, attaching "Response to the Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants".

[152] Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

[153] "[I]n the spring of 2002, the Pentagon's top lawyer, Jim Haynes, convinced me…to work for him in the Department of Defense. Haynes heard about me from (among others) John Yoo… Yoo and I were part of a group of conservative intellectuals… who were sceptical about the creeping influence of international law on American law… My scholarship argued against the judicial activism that gave birth to international human rights lawsuits in US courts. It decried developments in 'customary international law' that purported to bind the United States to international rules to which the nation's political leaders had not consented. And it defended, on grounds of democratic legitimacy and national self-interest, the United States' refusal to enter into treaties like the Rome Statute establishing the International Criminal Court…" Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton (2007), page 20-21.

[154] Potential Responses to the Judicialization of International Politics. Attached to Judicialization of International Politics, Memorandum for The Vice President et al, From Donald Rumsfeld, Secretary of Defense, 9 April 2003, *op . cit.*

[155] Jack Goldsmith has said that "several years of NSC meetings among lawyers and deputies followed. But a concrete plan never emerged". He writes that in March 2005, "Rumsfeld acted alone, setting down a marker in the National Defense Strategy that he, at least, understood the threat posed to the United States by "the weak using international for a, judicial processes, and terrorism". Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton (2007), page 63-64.

[156] Special Review. Counterterrorism detention and interrogation activities (September 2001 – October 2003), CIA Office of Inspector General, 7 May 2004, para. 93.

[157] Letter to Kofi Annan, Secretary-General of the United Nations, from Condoleezza Rice, US Secretary of State, available at http://www.state.gov/documents/organization/87288.pdf

[158] Their allegations of torture and other ill-treatment include: repeated beatings; prolonged solitary confinement; threats of attacks by dogs; forced nudity; repeated body cavity searches; denial of food and water; sleep deprivation and disruption; and shackling in painful stress positions for extended periods.

[159] *Arar v. Ashcroft et al*, Memorandum and order, US District Court for the Eastern District of New York, 16 February 2006.

[160] Memorandum for the Files. Re: Legal review of Department of Defense draft documents regarding

treatment and interrogation of detainees. From Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 April 2006.

[161] *El Masri v. Tenet, et al.* Order. US District Court for the Eastern District of Virginia, 12 May 2006.

[162] Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, page 153.

[163] Letter from Acting Assistant Attorney General Steven G. Bradbury, to John Rizzo, Acting General Counsel, Central Intelligence Agency, 31 August 2006.

[164] Re: Application of the Detainee Treatment Act to conditions of confinement at Central Intelligence Agency detention facilities. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Acting Assistant Attorney General Steven G. Bradbury, Office of Legal Counsel, US Department of Justice, 31 August 2006. Also Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

[165] Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

[166] See USA: Military Commission Act of 2006 – Turning bad policy into law, 29 September 2006, http://www.amnesty.org/en/library/info/AMR51/154/2006/en

[167] Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, page 154.

[168] Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007, page 34. See also pages 153-154 of Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009.

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[208] S8130, Congressional Record – Senate, 1 December 2011.

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[211] Statement of Attorney General Eric Holder on closure of investigation into the interrogation of certain detainees, US Department of Justice, Office of Public Affairs, 30 August 2012, http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html

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