

Black letter abuse: the US legal response to torture since 9/11

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Abstract

The use of torture by the US armed forces and the CIA was not limited to “a few bad apples” at Abu Ghraib but encompassed a broader range of practices, including rendition to third countries and secret “black sites”, that the US administration deemed permissible under US and international law. This article explores the various legal avenues pursued by the administration to justify and maintain its coercive interrogation programme, and the response by Congress and the courts. Much of the public debate concerned defining and redefining torture and cruel, inhuman and degrading treatment. While US laws defining torture have moved closer to international standards, they have also effectively shut out those seeking redress for mistreatment from bringing their cases before the courts and protect those responsible from prosecution.

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I. Introduction: revelations of torture

Allegations of torture by US personnel in the “global war on terror” only gained notoriety after photographs from Abu Ghraib prison in Iraq were broadcast on US television in April 2004. Prior to the mass dissemination of these disturbing images, reports in the media and in the publications of human rights organizations of torture and other mistreatment generated little public attention and evidently rang few alarm bells in the Pentagon (Department of Defense). Words did not

* Thanks to Nicolette Boehland of Human Rights Watch for her assistance in preparing this article.

carry the reality of the pictures. And the pictures – of US soldiers giving the “thumbs up” behind a stack of naked Iraqi men or a battered corpse, of military dogs snarling at a naked, helpless prisoner, and the iconic photo of the man in the hood on the box, arms outstretched, wires dangling in the air – could not have fully captured the reality of Abu Ghraib.

And it was not just at Abu Ghraib, as the misleading phrase “Abu Ghraib scandal” would suggest. And it was not just a few “bad apples”. US military and Central Intelligence Agency (CIA) personnel committed torture and other forms of coercive interrogation at the detention centres at Bagram air base in Afghanistan, various detention facilities and forward operating bases in Iraq, and at Guantánamo Bay in Cuba. Prisoners were subjected to long-term sleep deprivation, extremes of heat and cold, painful stress positions, beatings, forced nakedness and other degrading treatment, indefinite solitary confinement, and other abusive interrogation methods. Jose Padilla, a US citizen, was held for 43 months in severe isolation in a naval brig in Charleston, South Carolina, so that he would confess all he knew about al Qaeda.¹

And those were just the methods used at the known detention centres. Only the barest information has emerged about torture by the CIA in secret prisons – so-called “black sites” – outside the United States.² And then there is the torture inflicted on individuals unlawfully rendered by the United States to other countries, such as Syria or Egypt.

The Abu Ghraib photos were powerful enough to generate a public furore, an official reaction from the previously unforthcoming administration of President George W. Bush and a series of military investigations. New revelations in the media and from Freedom of Information Act requests kept the matter in the headlines. Internal government memorandums setting out legal justifications for torture were made public. Retired military personnel emerged publicly to decry practices unbecoming of the armed forces.

More than three years since the revelations of Abu Ghraib, the concerns of detainee mistreatment have been subsumed in larger questions about Guantánamo Bay and what should be done about the prisoners there. According to the US government, torture has been prohibited and mistreatment has stopped. The low-level personnel caught in the photos at Abu Ghraib have been tried and punished. The Department of Justice legal memos on torture have been repudiated. Persons held in secret facilities by the CIA have been sent to Guantánamo, where the International Committee of the Red Cross is able to meet with them. And the

1 According to the *Christian Science Monitor*, “Although the issue of Padilla’s treatment in the brig arose briefly in the Miami case, no judge has ruled on its legality. According to defense motions on file in the case, Padilla’s cell measured nine feet by seven feet. The windows were covered over. There was a toilet and sink. The steel bunk was missing its mattress. He had no pillow. No sheet. No clock. No calendar. No radio. No television. No telephone calls. No visitors. Even Padilla’s lawyer was prevented from seeing him for nearly two years.” Warren Richey, “US gov’t broke Padilla through intense isolation, say experts”, *Christian Science Monitor*, 14 August 2007.

2 See Human Rights Watch, “Off the record: US responsibility for enforced disappearances in the ‘war on terror’”, June 2007.

military field manual on interrogations and the interrogation rules for the CIA have been revised and deemed compliant with US legal obligations.

But that is only part of the story. The US military's record of prosecuting personnel implicated in prisoner abuse has been poor, albeit with some exceptions. Convicted were a number of low-ranking soldiers and officers, but no senior officers. And investigations into other more serious cases of detainee abuse – including the death of several detainees during interrogations in Afghanistan and Iraq – made little headway or resulted in disciplinary action or short sentences. Except for the demotion of the brigadier-general in charge of coalition detention facilities in Iraq – a reservist – no serious action has been taken against senior military personnel for their role in establishing a system of coercive interrogation of prisoners.

The United States continues to hold several hundred men at Guantánamo Bay without regard to international human rights or humanitarian law. Thousands more are held in questionable circumstances and doubtful conditions in Afghanistan and Iraq. The various military investigations into the allegations of torture did not find anything terribly wrong – at least not criminally – at the senior levels, and Congress never conducted its own investigations: not a single member of the administration lost his or her job because detainees were tortured. Even if the United States has indeed ended torture and other mistreatment at these detention centres, those held still endure the psychological abuse of indefinite, long-term isolation.

Whereas the administration sought to deflect any role in the mistreatment of detainees at Abu Ghraib, CIA coercive interrogation techniques – some of which by any standard amount to torture – against “high-value” detainees have received official praise.³ While more than a dozen of the “disappeared” – the detainees held in secret CIA prisons – have since late 2006 been transferred to Guantánamo, nearly forty or so persons whose identities human rights organizations made public, remain unaccounted for. Many likely were sent home to an unknown fate. In short, the administration decried photographed abuses at Abu Ghraib while simultaneously conducting a programme of organized coercive interrogation in offshore CIA detention facilities.

This article will examine US legal issues concerning the torture and other mistreatment of prisoners held by the United States in the “global war on terror” and from the armed conflicts in Afghanistan and Iraq. It will examine the initial response of the executive branch to allegations of mistreatment, efforts by the legislative branch to address these concerns, and the role of the courts. What occurred can be likened to a three-sided ping-pong match, where issues of prisoner mistreatment bounced between the administration, the Congress and the Supreme Court.

This legal ping-pong match is far from over, but certain trends have developed over the ensuing years since the Abu Ghraib revelations. Efforts by the

3 See The White House, “The Military Commissions Act of 2006”, fact sheet, 17 October 2006; see generally Jane Mayer, “The black sites”, *New Yorker*, 13 August 2007.

administration to make the definition of torture so narrow as to preclude even the most terrible treatment from being considered torture were unsuccessful. Congress, through legislation, has pressed for definitions of torture and other mistreatment that approach, if they do not fully meet, the standards set out in international law. At the same time, administration initiatives in Congress have increasingly made it difficult for so-called “enemy combatants” in US custody – who may have been mistreated in detention – to bring their claims for redress before the courts. In other words, in the three years since Abu Ghraib, the substantive protections against torture have been strengthened against presidential tampering, but the real means to enforce them have been substantially weakened. Until the lights are turned on with regard to the US practice of torture, we shall never be sure what has occurred in the dark.

Failure of accountability mechanisms

The US government’s response to the allegations of torture and other mistreatment at Abu Ghraib prison, Guantánamo and Afghanistan was twofold: the creation of more than a dozen primarily military inquiries to investigate the allegations and possible policy failings, and the prosecutions or disciplinary action of individuals directly involved in the abuse. Ultimately, the inquiries and prosecutions attributed the abuses to policy lapses within the military structure and to criminal conduct by enlisted personnel and low-ranking officers. Protected from official condemnation, disciplinary action and prosecution were senior military and civilian officials. One effect was to shift the legal issues surrounding mistreatment from the executive branch of government to Congress and the courts – and away from the accountability of the administration.

Official inquiries

The dozen or so inquiries established by the Pentagon to investigate various aspects of detainee abuse were of uneven quality. The first investigation, by Major General Antonio M. Taguba, began in January 2004 in response to the as-yet-unpublished photographs of abuse at Abu Ghraib and was limited to investigating allegations of abuse by the 800th Military Police Brigade, which provided security at the prison. Filed in March 2004, the Taguba report proved to be the most forthright and critical analysis of US military detainee practices. Taguba found that

Between October and December 2003, at the Abu Ghraib Confinement Facility, numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force ... The allegations of abuse were substantiated by detailed

witness statements and the discovery of extremely graphic photographic evidence.⁴

Congressional hearings following the publication of the Abu Ghraib photographs addressed the allegations in the Taguba report. However, there was no serious follow-up to the Taguba report by Congress, only additional Pentagon investigations.

The ensuing investigations appeared to be little more than self-serving exercises on behalf of the senior military leadership. In August 2004, the highest-level report, the Final Report of the Independent Panel to Review DoD Detention Operations, headed by former Defense Secretary James R. Schlesinger, found “institutional and personal responsibility at higher levels”, but absolved Defense Secretary Donald Rumsfeld of any direct responsibility.⁵ Although email messages sent to the Pentagon in January 2004 from senior officials in Iraq reported the abuses and the existence of the photographs, the Schlesinger report upheld Rumsfeld’s contention that “the reluctance to move bad news up the chain of command” was the main reason why the Defense Department failed to respond to the ill-treatment at Abu Ghraib until after the story became public in April 2004.⁶ Other Defense Department inquiries provided important and useful information about the abuse of prisoners in US detention facilities, especially when examined together. However, none reached persuasive conclusions on the role of senior military and civilian officials in the perpetration of the mistreatment.

The inquiries suffered from three crucial flaws. First, most of the reports contained extensive classified sections. While classifying certain information relating to individuals or source information will be necessary in documents of this nature, the reported length of the classified sections of many of the reports suggest that they were being used to bury information to which the public should have had access. Indeed, it would likely be necessary to reassess upward the value of some of these reports were the classified information made public. But the failure to bring all possible information to public attention meant that the government and military could avoid responding in full to all the issues raised.

Second, the large number of investigations had the effect of diluting the findings of abuses and deterring a more comprehensive and independent investigation. Whereas the 9/11 Commission authorized by Congress and completed around that time painted a broad and compelling portrait of

4 US Department of Defense, “Article 15–6 Investigation of the 800th Military Police Brigade” (Taguba report), March 2004, reprinted in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers*, Cambridge University Press, Cambridge, 2005, p. 405.

5 US Department of Defense, “Final Report of the Independent Panel to Review DoD Detention Operations” (Schlesinger report), August 2004, reprinted in Greenberg and Dratel, above note 4, p. 908. At a media conference releasing the report, Schlesinger rejected calls for Rumsfeld’s resignation, saying that it “would be a boon to all of America’s enemies and, consequently, I think that it would be a misfortune if it were to take place”. Bradley Graham and Josh White, “Top Pentagon leaders faulted in prison abuse”, *Washington Post*, 25 August 2004.

6 Seymour Hersh, “The general’s report”, *New Yorker*, 25 June 2007, pp. 65–6.

government failings prior to the attacks of 11 September 2001, none of the individual commission reports investigating mistreatment by US personnel had or could have had the same impact.

Third, and most importantly, the commission investigations were not of sufficiently high level to permit a bottom-to-top investigation of abuse. Military personnel can only conduct investigations of soldiers of equal or lower rank. That meant that none of the investigations could genuinely examine the role that senior military and civilian officials played in the abuse. Major General Taguba acknowledged that he was only permitted to investigate the military police at Abu Ghraib, not those above him in the military chain of command. Although he learned that somebody was giving “guidance” to the military police at Abu Ghraib, he told a journalist several years later, “I was legally prevented from further investigation into higher authority. I was limited to a box”.⁷

As a result, the numerous commissions of inquiry unearthed important information about detainee abuse but fell far short of providing any kind of governmental accountability. The piecemeal approach meant that the focus remained on enlisted personnel and a handful of officers. It meant that no single report was able to “connect the dots” between abuse in one location and abuse in another. And it meant that the most senior officials, most notably Defense Secretary Rumsfeld and his top officials and officers, were not investigated, even though documents before and since point to their role in the promulgation and support of policies that resulted in the torture and other abuse of detainees in Iraq, Afghanistan and at Guantánamo.⁸

Criminal prosecutions

Two years after Abu Ghraib, Human Rights Watch and several other non-governmental human rights organizations reported that more than 600 US military and civilian personnel were implicated in prisoner abuse involving more than 460 detainees.⁹ Few of those investigated for prisoner abuse were officers, and no officers were held accountable as a matter of command responsibility.¹⁰ The groups found more than 330 cases in which US military and civilian personnel were credibly alleged to have abused, tortured or, in about 30 cases, killed prisoners. Only half of the cases appear to have been adequately investigated.

7 Ibid., p. 61.

8 See generally Human Rights Watch, “Getting away with torture? – command responsibility for the US abuse of detainees”, April 2005, available at www.hrw.org/reports/2005/us0405/ (last visited 10 August 2007).

9 See generally Human Rights Watch et al., “By the numbers: findings of the detainee abuse and accountability project”, April 2006, available at <http://hrw.org/reports/2006/ct0406/> (last visited 10 August 2007).

10 Under the doctrine of command responsibility, commanders and other superiors may be found criminally responsible for the criminal acts of their subordinates when they knew or should have known of such crimes and did not take all necessary and reasonable measures in their power to prevent the crime or to punish those responsible. See, e.g., *Yamashita v. Styer*, 317 US 1; 66 S. 340, 4 February 1946.

The investigations conducted often ended abruptly or stalled without any resolution.¹¹

In those cases where military investigators found significant evidence of abuses and identified perpetrators, military commanders frequently used weak, non-judicial disciplinary measures as punishment, instead of pursuing a criminal case through courts-martial. When courts-martial did occur, most resulted in either prison sentences of less than one year or punishments that did not involve incarceration (such as discharge or rank-reduction). Only 40 of the more than 600 US personnel implicated in these cases were sentenced to prison time. As of April 2006, only ten US personnel had been sentenced to a year or more in prison. Only three officers were convicted by a court-martial for prisoner abuse.¹² On 28 August 2007 a court-martial acquitted Lieutenant Colonel Steven L. Jordan on charges that he failed properly to supervise soldiers at Abu Ghraib responsible for detainee mistreatment. He was the only officer to stand trial for abuses at Abu Ghraib, and his acquittal meant that not a single officer was found criminally liable for what happened there.¹³

One of the cases highlighting the failure of government accountability mechanisms to address official involvement in mistreatment concerned the alleged torture of Mohammad al-Qahtani, a Saudi citizen accused of being the so-called “twentieth hijacker” on 9/11. An unredacted copy of al-Qahtani’s interrogation log, which detailed interrogations during a six-week period from November 2002 to January 2003 at Guantánamo Bay, indicates that US personnel subjected al-Qahtani to a programme of physical and mental abuse including sleep deprivation, painful stress positions, forced standing, and sexual and other humiliation. A December 2005 army investigation contains a sworn statement describing then Defense Secretary Rumsfeld as being “personally involved” in al-Qahtani’s interrogation, with Rumsfeld “talking weekly” with General Geoffrey Miller, then senior commander at Guantánamo, about al-Qahtani’s interrogation. The head of US Southern Command, General Bantz J. Craddock, rejected the report’s findings, saying that the al-Qahtani interrogation did not violate military law or policy.¹⁴ No investigations or criminal action were taken against Rumsfeld or Gen. Miller.

Congressional inaction

Until the passage of the Detainee Treatment Act (DTA) in December 2005, the US Congress took a decidedly hands-off approach to the entire issue of detainee treatment, despite constitutional authority for a congressional role. There was no congressional authorization for the administration’s establishment of military commissions to try foreign terrorism suspects, the “opting out” of the Geneva Conventions in the “war on terror” or the creation of a detention facility at

11 Human Rights Watch et al., above note 9, pp. 2–3.

12 Ibid.

13 Paul von Zielbauer, “Colonel is acquitted in Abu Ghraib abuse case”, *New York Times*, 29 August 2007.

14 See Human Rights Watch, “US: Rumsfeld potentially liable for torture”, 14 April 2006.

Guantánamo Bay. Congress let the administration draft the rules and orders on the treatment of detainees instead of putting forth its own legislation. This was the case even though the Republican-controlled Congress would undoubtedly have supported the administration by enacting legislation that would have given clear legal authority for the administration's various actions.

The administration evidently determined that it had neither the need nor the obligation for congressional involvement. The vision of a unitary executive branch, promoted by influential administration lawyers such as David Addington and John Yoo – in which the president as commander-in-chief has unconstrained wartime powers¹⁵ – required neither legislation nor congressional approval. This vision was reflected in the so-called Bybee memorandum (discussed below) and executive branch statements suggesting that the president was restrained by no laws – including prohibitions on torture – during a time of war. And Congress itself showed little or no inclination to get involved in the issue of detainee treatment, despite Article 1, Section 8, Paragraph 11 of the Constitution, which empowers Congress to “make rules concerning captures on land and water”. The Republicans seemed content to leave the matter with the administration and the minority Democrats had little ability or will to push through such politically explosive legislation.

Defining and redefining torture

The chain of events that led to the use of coercive interrogation methods, including torture at Abu Ghraib and elsewhere in Iraq, Afghanistan and Guantánamo, is still not fully understood. A series of public policy statements and internal legal memorandums, some still unpublished, demonstrate that senior officials in the administration at a minimum created the conditions under which US military and civilian personnel could commit abusive interrogations with little fear of being subjected to disciplinary action or criminal prosecution.

On the basis of the documentation currently available, it would be unsurprising if the release of further government documents relating to the “torture scandal” and personal accounts by participants revealed that government responsibility for the coercive interrogations of detainees was crucial, direct and intentional. Continuing official support for coercive methods that are claimed to fall short of torture – the continuing administration refusal to denounce mock drowning (“waterboarding”¹⁶) for instance – is strong evidence of this.

15 See generally Jane Mayer, “The hidden power”, *New Yorker*, 3 July 2006.

16 “Waterboarding” was used during the Spanish Inquisition when it was called the *tormenta de toca*. In some versions of waterboarding, prisoners are strapped to a board, their faces covered with cloth or cellophane, and water is poured over their mouths and nose so they believe they are drowning.

Torture and other mistreatment under international and US law

The prohibition against torture and other mistreatment of persons in custody is long-standing under both international and US law. The torture prohibition is *jus cogens*, meaning that it pre-empts other international law norms.¹⁷ It is enshrined in many international treaties, most notably the International Covenant on Civil and Political Rights (ICCPR)¹⁸ and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture).¹⁹

The Convention against Torture defines torture as intentional acts by public officials or their agents inflicting on a person severe pain or suffering, whether physical or mental, to gain information or a confession, as punishment, to intimidate or coerce, or for any reason based on discrimination. The Convention against Torture also prohibits cruel, inhuman or degrading treatment or punishment. Cruel and inhuman treatment includes suffering that lacks one of the elements of torture or does not reach the intensity of torture.²⁰ Degrading treatment includes acts that involve the humiliation of the victim or that are disproportionate to the circumstances of the case.²¹

The prohibition against torture during wartime is codified under international humanitarian law (the laws of war) dating back at least to the US Lieber Code in 1863²² and more recently to the Geneva Conventions of 1949,²³ as well as their additional protocols.²⁴ It is prohibited at all times and in all places, in both international and non-international armed conflicts, always without exception. Torture is a grave breach of the Geneva Conventions and thus a war crime. It is a war crime under the ad hoc International Criminal Tribunals for the

17 See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, N.P. Engel, Kehl, 1993, pp. 157–8.

18 International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, Article 7.

19 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987, Article 1.

20 Nowak, above note 17, p. 131.

21 *Ibid.*, p. 133.

22 General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 16.

23 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I), 75 UNTS 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II), 75 UNTS 85, entered into force October 21, 1950; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III), 75 UNTS 135, entered into force 21 October 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), 75 UNTS 287, entered into force 21 October 1950.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) of 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II) of 8 June 1977, 1125 UNTS 609, entered into force 7 December 1978.

former Yugoslavia and for Rwanda and under the Rome Statute of the International Criminal Court.

Torture and other forms of mistreatment are banned under US state and federal law. As the US government in 2006 reported to the UN Committee against Torture, the international body that monitors compliance with the Convention against Torture,

Every act of torture within the meaning of the Convention [against Torture] is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.²⁵

Members of the armed forces are prohibited from engaging in coercive interrogation under various provisions of the Uniform Code of Military Justice, which applies to all US service members, whether present in the United States or abroad.²⁶

Two federal laws also prohibit torture and other forms of coercive interrogation. Prior to its revision by the Military Commissions Act of 2006, the War Crimes Act of 1996 made it a criminal offence for US military personnel and US nationals to commit grave breaches of the 1949 Geneva Conventions as well as violations of Article 3 common to the Geneva Conventions (Common Article 3), which prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... outrages upon personal dignity, in particular humiliating and degrading treatment”.²⁷

The US anti-torture statute, enacted in 1994, permits the prosecution of a US national or anyone present in the United States who, while outside the United States, commits or attempts to commit torture. Torture is defined as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”.²⁸

25 US Department of State, “List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America”, 2006, available at www.state.gov/documents/organization/68662.pdf (last visited 10 August 2007), p. 25.

26 See Department of Defense, Uniform Code of Military Justice, Title 10, Subtitle A, Part II, Chapter 47 of the United States Code, Articles 77–134.

27 18 USC §2441 (2000). Amendments to the War Crimes Act are discussed below.

28 18 USC §2340A (1998). A person found guilty under the anti-torture statute can be incarcerated for up to 20 years or receive the death penalty if the torture results in the victim’s death. Additionally, military contractors working for the Department of Defense might also be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106–778), known as MEJA. MEJA permits the prosecution in federal court of US civilians who, while employed by or accompanying US forces abroad, commit any federal criminal offence punishable by imprisonment for more than one year. MEJA was amended in 2005 to define the phrase “employed by the Armed Forces outside the United States” to include civilian employees, contractors or employees of contractors, not only of the Defense Department, but also of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas”.

Torture redefined after 9/11

Following the 11 September 2001 attacks on the World Trade Center and the Pentagon, and the ensuing armed conflict in Afghanistan, the administration sought to loosen the definition of torture and other mistreatment under US law. After a public disagreement between the State and Justice Departments on the applicability of the Geneva Conventions to the Afghan conflict, President George W. Bush on 7 February 2002 issued a directive entitled “Humane Treatment of al Qaeda and Taliban Detainees”.

While accepting that the Geneva Conventions were applicable to the hostilities in Afghanistan, the directive concluded that captured Taliban members were not entitled to prisoner-of-war status because they were “unlawful combatants”, and captured al Qaeda members – because al Qaeda is “not a High Contracting Party to Geneva” – were not entitled anywhere in the world to treatment under the Geneva Conventions. Crucially, the directive stated that “the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, *in a manner consistent with the principles of Geneva*”.²⁹

This was the first public articulation of a policy in which those held by the United States in the “global war on terror” would not formally be entitled to legal protections – but only protected as a matter of policy. And the directive purposely excluded mention of the CIA.³⁰ The administration was opening the door to redefining the reach of US and international law to permit abusive practices.

As a result of this apparent relaxation of existing rules on interrogation and increasing demands for “actionable intelligence”, the CIA asked the Department of Justice for guidance on permissible interrogation methods. According to John Yoo, then Deputy Assistant Attorney General,

The CIA wanted – needed – a definitive answer to the question: how far can we go? They had specifically requested a legal opinion. They had captured senior al-Qaeda operatives who were not responding to being asked questions politely. CIA officers needed to know what, legally, they were entitled to do to them to get them to talk. They knew these guys had information on what al-Qaeda was planning. If the CIA could get that information, they could save lives. But they also wanted to be sure they would not end up going to prison for doing so.³¹

29 The White House, “Humane treatment of al Qaeda and Taliban detainees”, 7 February 2002, reprinted in Greenberg and Dratel, above note 4, p. 134 (emphasis added).

30 In written answers to the Senate Judiciary Committee, White House Counsel Alberto Gonzales confirmed that the policy was designed “to provide guidance” to the US armed services. When questioned whether the directive applied to CIA and other non-military personnel, Gonzales said that it did not. See US Senate, Committee on the Judiciary, “Confirmation hearing on the nomination of Alberto R. Gonzales to be Attorney General of the United States”, 6 January 2005, serial no. J-109-1, p. 331.

31 Alasdair Palmer, “‘Professor Torture’ stands by his famous memo”, *The Spectator*, 17 March 2007.

The Justice Department's Office of Legal Counsel drafted a response to the CIA request, which had been routed through then White House counsel Alberto Gonzales. It was reportedly drafted by Yoo and signed by Assistant Attorney General Jay Bybee, who soon thereafter was appointed to a federal judgeship. Completed in August 2002, the "Bybee memo" interpreted the statutory term of art "torture" as defined in the anti-torture statute.³² In 2007, Yoo described the memo as examining "what methods of inflicting pain and suffering constitute torture, and whether the U.S. president can order torture if he thinks it necessary".³³ More than that, the memo – commonly referred to as the "torture memo" when it became public – was a broad justification for methods of interrogation that were patently unlawful under US and international law.

The Bybee memo states that within the meaning of the Convention against Torture as ratified by Congress, "acts must be of an extreme nature to rise to the level of torture". The mere infliction of pain or suffering "is insufficient to amount to torture". Rather, the "[p]ain or suffering must be severe". That is, to amount to torture, "an act must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or even death".³⁴ In short, the memo defined torture so narrowly as to exclude many practices commonly recognized as torture.³⁵

At the time, the administration was seeking authority for a wider range of interrogation methods for the military than had been permitted under existing doctrine. The standard US military doctrine on interrogation methods was the Army Field Manual on Intelligence Interrogation, FM 34–52, last revised in 1987.³⁶ While some of the approved interrogation methods in the field manual, such as "fear up" and "false flag", lend themselves to abusive treatment,³⁷ in general both the prescribed practices and overall tone of the field manual were consistent with the requirements of the Geneva Conventions. As FM 34–52 states in Chapter 1,

32 Office of Legal Counsel, Department of Justice, Memorandum for Alberto R. Gonzales Counsel to the President, "Standards of conduct for interrogation under 18 USC secs. 2340–2340A" (Bybee memo), 1 August 2002, reprinted in Greenberg and Dratel, above note 4, p. 172.

33 Palmer, above note 31.

34 Bybee memo, above note 32, pp. 172, 176.

35 Beyond the definitions of torture, the memo sought to set out legal grounds that would serve to protect any official who might ever be charged with committing unlawful acts. It indicated that the president as military commander-in-chief could authorize torture and suggested that interrogators have such authorization. It also set out legal defences, notably the "necessity" defence, as a justification for an official charged – no doubt by a later administration – for breaking the law. *Ibid.*, pp. 207–13. Although the Bush administration later declared the Bybee memo to be inoperative, the superseding Office of Legal Counsel opinion of 30 December 2004 noted that "[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum". Office of Legal Counsel, Department of Justice, "Legal standards applicable under 18 USC sections 2340–2340A", 30 December 2004, available at www.usdoj.gov/olc/18usc23402340a2.htm (visited 10 August 2007).

36 US Department of the Army, *Field Manual 34–52: Intelligence Interrogation*, September 1992.

37 Professor Martin Lederman suggests that US military interrogators could have come to believe that the abusive interrogation methods used in Iraq were actually in compliance with FM 34–52 and thus in compliance with the Geneva Conventions on which the field manual was based. See <http://balkin.blogspot.com/2005/08/mowhoush-murder-geneva-scorpions-and.html>.

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.³⁸

The perceived intelligence demands at Guantánamo, and later in Iraq, led the administration to seek to substantially rewrite the provisions of FM 34–52 on coercive interrogation. In November 2002, Defense Department General Counsel William Haynes, after discussions with Deputy Secretary of Defense Paul Wolfowitz, Chairman of the Joint Chiefs of Staff General Richard Myers, and Undersecretary of Defense Douglas Feith, notified Defense Secretary Rumsfeld that it was lawful to subject detainees at Guantánamo to two categories of interrogation methods, including the use of stress positions for up to four hours,³⁹ isolation for up to 30 days, forced nakedness and using fear of dogs to induce stress. Even more serious “category III” methods, such as exposure to cold and heat and waterboarding were proposed without specific approval. In December 2002, Secretary Rumsfeld approved all of these interrogation methods for use at Guantánamo.⁴⁰ A month later, after protests from the military Judge Advocates General, the use of the category III methods was withdrawn.⁴¹

Additional legal concerns about what constituted torture and other mistreatment raised by the military led to the creation of the Defense Department Working Group under Navy General Counsel Alberto Mora. While the Working Group’s final, classified report on 3 April 2003 noted that the Uniform Code of Military Justice prohibited assault, cruelty and maltreatment of detainees, it recommended that Secretary Rumsfeld approve various seemingly unlawful methods, such as the use of guard dogs and forced nudity.⁴² It was later uncovered that the military officials participating in the Working Group, including Mora,

38 *Field Manual 34–52*, above note 36, pp. 1–8.

39 The listing of this method prompted Secretary Rumsfeld’s handwritten comment: “I stand for 8–10 hours a day. Why is standing limited to 4 hours?”, US Department of Defense, “Memorandum from the Secretary of Defense: counter-resistance techniques”, 27 November 2002, reprinted in Greenberg and Dratel, above note 4, p. 236.

40 US Department of Defense, “Memorandum for Commander, Joint Task Force 179: legal brief on proposed counter-resistance strategies”, 11 October 2002, reprinted in Greenberg and Dratel, above note 4, p. 229.

41 “Counter-resistance techniques”, above note 39, p. 236.

42 The Working Group final report stated that “legal doctrines could render specific conduct, otherwise criminal, *not* unlawful”. It cites its earlier discussion of commander-in-chief authority: “In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 USC 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress lacks authority under Article I [of the Constitution] to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.” According to Prof. Martin Lederman, this analysis came directly from a 14 March 2003 memo written by John Yoo for Defense Department General Counsel Haynes, and was presented to the

never signed off on the Working Group's final report. This version of the report was used to brief Major General Geoffrey Miller prior to his being transferred from Guantánamo to Iraq. And it is these abusive methods that appeared again and again in the Abu Ghraib photographs.⁴³

Torture, renditions and extraterritoriality

As a fundamental element of its efforts to narrow the definition of torture and maintain that its methods were legal, the administration has made use of international borders – transferring detainees to states that routinely use torture, or simply applying coercive interrogation methods outside the United States. It sought to do so through its interpretation of its international legal obligations: it tried to evade the Convention against Torture prohibition not to return individuals to places where they were likely to be tortured by receiving so-called diplomatic assurances from receiving states. And it rejected any extraterritorial application of the International Covenant on Civil and Political Rights, effectively permitting abroad that which would have been unlawful if committed in the United States.

Unlawful renditions

One method by which the administration made use of torture and other ill-treatment to obtain information from detainees in the “war on terror” was to render (or transfer) them to other states, including the person's home country, for interrogation. Unlike extradition, which is normally a treaty-based process that may entail provisions to ensure the protection of the rights of the person being transferred for criminal prosecution, rendition is typically “off the books”. The term “extraordinary rendition” had been used in the context of the *Álvarez Machain* case from the 1990s with respect to the controversial practice of abducting persons abroad to prosecute them at home – so-called renditions to justice.⁴⁴ Post-9/11, the term came to be applied to cases of renditions *from* justice,

Working Group as “controlling authority” because it came from the Justice Department's Office of Legal Counsel, presumably the “Bybee memo”. See Martin Lederman, “Silver linings (or, the strange but true fate of the *second* (or was it the third?) OLC torture memo)”, Balkinization Blog, 21 September 2005, available at <http://64.233.169.104/search?q=cache:Dt5WwNn1JuEJ:balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html+Lederman+%22controlling+authority%22+March+13&hl=en&ct=clnk&cd=1&gl=us> (last visited 10 August 2007). In other words, the Justice Department was compelling the military to adopt abusive interrogation methods that were later used in Iraq.

43 See Jane Mayer, “The memo”, *New Yorker*, 27 February 2006.

44 In 1990, agents hired by the US Drug Enforcement Administration (DEA) abducted from Mexico Dr. Humberto Álvarez Machain because of his alleged role in the 1985 kidnapping, torture and murder of DEA agent Enrique Camarena Salazar, and brought him to the United States for trial. *United States v. Alvarez-Machain*, 504 US 655 (1992). See Alan J. Kreczko, Deputy Legal Adviser, US Department of State, “The Alvarez-Machain decision: US jurisdiction over foreign criminal Humberto Alvarez Machain, statement before the subcommittee on civil and constitutional rights of the House Judiciary Committee (24 July 1992)”, in 3 *US Dep't St. Dispatch* 616, 3 August 1992 (“These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter-agency coordination and that they be considered at the highest levels of the government”).

where persons would be sent without legal safeguards to another country that had no intention of fairly prosecuting them.

The very nature of these US renditions is such that their number is not – and probably cannot be – known. Several cases of alleged rendition to torture have been widely reported, most notably those of Maher Arar, a Syrian-Canadian national who was picked up by US authorities while in transit in 2002 and sent to Syria, where he was brutally treated for nearly a year, and Khaled el-Masri, a German citizen of Lebanese descent, who alleged being picked up in Macedonia in 2003 and sent to a CIA detention facility in Afghanistan, where he was mistreated. Efforts by these individuals to seek redress for their alleged mistreatment via the courts are discussed below.

Article 3 of the Convention against Torture provides that no state “shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.⁴⁵ Article 3 adds that for the purpose of making this determination, “the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.⁴⁶

Despite cases of evident abuse, the administration continues to assert that it may lawfully send terrorism suspects to states that regularly engage in torture so long as it has obtained “diplomatic assurances” – promises from the receiving state that it will treat the detainee humanely. These promises cannot be enforced and neither state has an incentive in uncovering abuse, so there is little likelihood that diplomatic assurances provide protection to the individual so transferred.⁴⁷

Extraterritorial application of human rights law

The administration long asserted that international human rights treaties, notably the ICCPR and the Convention against Torture, do not prohibit US officials abroad from using coercive interrogation techniques short of torture against non-US citizens.

During the confirmation process for attorney general in January 2005, Alberto Gonzales responded to queries by Senate committee members on the treatment of foreign detainees abroad by claiming that US officials were not bound by the prohibition against cruel, inhuman or degrading treatment.⁴⁸ While asserting in written responses that torture by all US officials was unlawful, Gonzales indicated that no law would prohibit the CIA from engaging in cruel,

45 Convention against Torture, Article 3(1).

46 Ibid., Article 3(2).

47 See, e.g., Human Rights Watch, “Still at risk: diplomatic assurances no safeguard against torture”, April 2005.

48 See “Senate Judiciary Committee Confirmation Hearing” on the nomination of Alberto R. Gonzales to be attorney general, 6 January 2005, available at www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?ei=5070&en=31a4f50c78ff7e20&ex=1186977600&adxnlnl=1&adxnlnlx=1186844794-hxi4ru4f/rDg6r7qSpVagA&pagewanted=all&position= (last visited 10 August 2007).

inhuman or degrading treatment when interrogating non-citizens outside the United States. Gonzales argued that when the US Senate gave its advice and consent to ratify the Convention against Torture in 1994, it made a reservation by which the United States defined the prohibited “cruel, inhuman or degrading treatment” as meaning the ill-treatment prohibited by the Fifth, Eighth or Fourteenth Amendments to the US Constitution.⁴⁹

The administration was claiming that because the Constitution does not apply to non-US citizens outside the United States,⁵⁰ neither does the Convention against Torture’s prohibition against ill-treatment. Under this interpretation, US officials interrogating or detaining non-US nationals abroad would be free to engage in cruel and inhuman treatment short of torture without violating the Convention against Torture.

Abraham Sofaer, legal advisor at the State Department during the Reagan administration, disagreed publicly with Gonzales’s analysis of the reservation’s meaning. In a letter to the Judiciary Committee, Sofaer stated,

[T]he purpose of the reservation [to the Convention] was to prevent any tribunal or state from claiming that the US would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. The words of the reservation support this understanding, in that they related to the meaning of the terms involved, *not to their geographic application*.⁵¹

The administration reiterated its position in the 5 May 2006 statement to the Committee Against Torture by State Department legal advisor John Bellinger III. Bellinger said that the Convention against Torture did not apply to detainees in the “war on terror” held abroad because “[i]t is the view of the United States that these detention operations [in Afghanistan, Guantánamo and Iraq] are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.”⁵²

Such an interpretation undermines the very aim of the Convention against Torture, which calls on governments to eliminate torture and ill-treatment to the fullest extent of their authority.⁵³ It would also give the green light to the

49 United States of America Reservation I (1) to the Convention against Torture, available at www.ohchr.org/english/countries/ratification/9.htm#reservations (last visited 10 August 2007).

50 See *Reid v. Covert*, 354 US 1 (1957) (US constitutional rights apply abroad only to US citizens).

51 Letter from Abraham Sofaer, Hoover Institution, to Senator Patrick Leahy, Judiciary Committee, 21 January 2005 (emphasis added). Sofaer’s letter emphasizes the words of the reservation: “the United States considers itself bound by the obligation under article 16 ... *only insofar as the term* cruel, inhuman or degrading treatment or punishment *means* the cruel, unusual and inhumane treatment under the Eighth Amendment” (emphasis in original).

52 Department of State, US Meeting with UN Committee Against Torture, Opening Remarks of John B. Bellinger, III, Geneva, 5 May 2006, available at www.us-mission.ch/Press2006/0505BellingerOpenCAT.html (last visited 10 August 2007).

53 As the UN Human Rights Committee states in its General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10: States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. ... This

CIA to commit abuses in its secret detention facilities abroad. Thus while claiming it was rejecting torture, the administration was effectively seeking a loophole in international law that would allow US intelligence operatives abroad leeway to conduct abusive interrogations.

Congress responds

Throughout this period – and indeed to the present – the administration has maintained that it has not authorized the use of torture and has acted consistently with international law. For instance, in a June 2003 response to a letter from Senator Patrick Leahy about allegations of mistreatment by US forces in Afghanistan, Defense Department General Counsel Haynes wrote that “*It is the policy of the United States to comply with all its legal obligations in its treatment of detainees*” (emphasis added). He added that it is US policy to treat all detainees and conduct all interrogations, “wherever they may occur”, in a manner consistent with US obligations under the Convention against Torture. But with respect to allegations of specific practices, he said that “[i]t would not be appropriate to catalogue the interrogation techniques used by US personnel ... thus we cannot comment on specific cases or practices”.⁵⁴ As such statements indicate, the administration did not accept that international legal provisions were binding on the United States, but rather the United States would treat detainees humanely only as a matter of policy – policies which of course were subject to change.

In an apparent refutation of the Bybee memo, the Justice Department in December 2004 declared torture to be “abhorrent”. Yet, as the *New York Times* reported in October 2007, incoming Attorney General Alberto Gonzales in February 2005 approved a secret Justice Department legal opinion on “combined effects” providing the CIA with “explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures”.⁵⁵

The administration strongly objected to the inclusion of the “McCain amendment” to the proposed Detainee Treatment Act (DTA), which included language specifically to prohibit US military personnel abroad from using coercive methods that fell short of torture. In July 2005 Vice President Cheney met with senior Republican leaders to oppose such language, and the White House issued a statement to Congress that President Bush’s advisers would urge him to veto the pending \$442 billion defence bill “if legislation is presented that would restrict the

principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

54 Letter of Department of Defense General Counsel William J. Haynes II to Senator Patrick Leahy, June 25, 2003, *reprinted in* Congressional Record: February 10, 2004 (Senate), pp. S781–S785.

55 See Scott Shane, David Johnston and James Risen, “Secret US endorsement of severe interrogations,” *New York Times*, 4 October 2007. The administration did not deny the existence of the legal opinion, but to date it has not been made public.

President's authority to protect Americans effectively from terrorist attack and bring terrorists to justice⁵⁶ – a clear reference to the McCain amendment.

McCain and congressional supporters persisted, and on 5 October 2005, his amendment to the bill passed the Senate by a veto-proof 90 to 9 vote. As enacted and signed into law in December 2005, the DTA prohibits the use of cruel, inhuman or degrading treatment by any US official or employee operating anywhere in the world and prohibits US military interrogators from using interrogation techniques not listed in the Army Field Manual on Intelligence Interrogation.

One substantive provision of the DTA is problematic. It requires that detainee status tribunals set up at Guantánamo Bay assess whether any detainee statements were obtained through coercion and then assess the “probative value of the statement”.⁵⁷ The implication is that statements obtained through torture or cruel, inhuman or degrading treatment could be entered as evidence if they have sufficient probative value. There are also no prohibitions on the use of statements by other witnesses in detainee review proceedings obtained through torture or other coercion. A misuse of such evidence seems to have occurred, according to Defense Department documents, when Guantánamo detainee Mohammed al-Qahtani accused 30 other prisoners there of being Osama bin Laden's bodyguards – after Qahtani reportedly endured weeks of sleep deprivation, isolation and sexual humiliation.⁵⁸

Even after the DTA was enacted, the administration sought to weaken its substantive provisions. President Bush's “signing statement”, issued when the DTA was signed into law, stated that the president's powers as military commander-in-chief superseded any restrictions on the use of torture and cruel, inhuman and degrading treatment imposed by the McCain amendment.⁵⁹ This view was reflected in administration pronouncements on “waterboarding”, an

56 See Josh White and R. Jeffrey Smith, “White House aims to block legislation on detainees”, *Washington Post*, 23 July 2005.

57 Detainee Treatment Act, Federal Judiciary Emergency Special Sessions Act of 2005, Pub.L.No. 109–163, §100(3)(b.Stat.1993,119 (2005).

58 Adam Zagorin, “One life inside Gitmo”, *Time Magazine*, 13 March 2006. Nor have the federal courts always provided better protection against the use of evidence allegedly obtained through abusive treatment by third parties. During the trial in 2005 of Ahmed Omar Abu Ali, a US citizen, on charges of providing material support for the al Qaeda terrorist network, the government relied extensively on a confession made by Ali while he was detained in Saudi Arabia. He asserted that he gave a confession only after authorities in Saudi Arabia tortured, whipped and eventually coerced him into confessing. The federal court convicted Ali on terrorism conspiracy charges and subsequently sentenced him to 30 years in prison. The federal court rejected the request of Ali's defence counsel to present evidence of scars on his back from Saudi Arabia as evidence of his being tortured. The court also denied the defence request to admit information concerning Saudi Arabia's poor human rights record on torture, ignoring US Department of State country reports of widespread abuse of prisoners by Saudi authorities. The court instead accepted official Saudi statements denying that torture occurred in Saudi Arabia. See Jerry Markon, “Judge allows statement by al Qaeda suspect”, *Washington Post*, 24 October 2005; Amnesty International, “The trial of Ahmed Abu Ali - findings of Amnesty International's trial observation”, 14 December 2005.

59 George W. Bush, President's Statement on Signing of HR 2863 (30 December 2005), available at www.whitehouse.gov/news/releases/2005/12/20051230-8.html (last visited 10 August 2007).

interrogation method that is invariably torture. Prior to the passage of the DTA, the administration refused to declare waterboarding to be unlawful.⁶⁰ Nearly a year after the law was enacted, State Department legal adviser Bellinger in October 2006 declined to answer specific questions on waterboarding, saying the matter was up to Congress.⁶¹ And Vice President Cheney agreed with a radio interviewer that subjecting prisoners to “a dunk in water” was not torture; if it could save lives, he said, “It’s a no-brainer for me”. The vice president said that such methods had been a “very important tool” in the interrogation of alleged high-level al Qaeda detainees, such as Khalid Sheikh Mohammed, and that they did not, in his view, constitute torture.⁶² And in October 2007 it came to light that after the enactment of the DTA, the Justice Department had approved a secret legal memorandum, which remains classified, that none of the CIA interrogation methods were cruel, inhuman or degrading.⁶³

Blocking redress for torture

While Congress slowly, if not wholly successfully, placed limits on the administration’s interrogation practices, it simultaneously took measures that undermined detainees’ rights to be protected from mistreatment. This became evident in the congressional response to the three Supreme Court decisions to date concerning the detainees at Guantánamo – *Hamdi v. Rumsfeld*⁶⁴ and *Rasul v. Bush*⁶⁵ in 2004, and *Hamdan v. Rumsfeld* in 2006.⁶⁶

These cases addressed the issue of whether those incarcerated had the legal right to challenge their detention in US federal courts and the jurisdiction of the courts to hear their claims. So while not directly concerned with torture and other abuse, the cases had important implications for detainee treatment. Prohibitions on mistreatment mean little if there is no effective remedy, with the courts being an independent and impartial source of such a remedy.

A judicial hearing has also been important in other cases relating to the “global war on terror”. Those subjected to rendition and torture have sought out the courts for a remedy – or at least an official apology. And while some detainees have achieved courtroom victories, in none of the cases has the complainant obtained genuine relief. So while the definition of torture and other mistreatment

60 CIA Director Porter Goss while appearing on ABC News on 29 November 2005 refused to condemn waterboarding as an impermissible interrogation method.

61 Demetri Sevastopulo, “Cheney endorses simulated drowning”, *Financial Times*, 26 October 2006.

62 The White House, “Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House”, October 24, 2006, available at www.whitehouse.gov/news/releases/2006/10/20061024-7.html (last visited 10 August 2007).

63 See Shane, Johnston and Risen, above note 55.

64 *Hamdi v. Rumsfeld*, 542 US 507 (2004). In September 2004, the US government released Hamdi to Saudi Arabia on the condition that he give up his US citizenship.

65 *Rasul v. Bush*, 542 US 466 (2004). The claimant in the case, Shafiq Rasul, a British national, was repatriated to the United Kingdom and released three months before the decision was handed down.

66 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

under US law has gone beyond the “equivalent to organ failure” standard endorsed in the August 2002 “torture memo” to approach international standards, it is largely because of congressional action. However, congressional action has largely been the reason why judicial remedies available to those who have claimed abuse have appreciably narrowed in the same time span.

The intervention of the Supreme Court

The two Supreme Court cases decided on 29 June 2004 were a defeat for the administration’s claim that detainees at Guantánamo Bay were outside the purview of the federal courts. Creating a “legal black hole”, in the words of Lord Steyn,⁶⁷ was the rationale for establishing a detention centre at Guantánamo in the first place. It seemed to allow US officials to employ interrogation methods that would otherwise be unlawful within the United States, while those detained could not challenge their detention or treatment before US courts. Although the cases did not address the first half of that equation, *Rasul* and *Hamdi* taken together rejected the second half.

In *Rasul*, the court by a six to three margin held that the federal courts had the authority to decide whether foreign nationals held at Guantánamo Bay were lawfully imprisoned, reversing a lower court decision. While long established case law supports the proposition that US citizens are protected under the Constitution whether they are inside the United States or abroad, non-nationals have constitutional protections only within the United States.⁶⁸ Thus the question for the *Rasul* court was whether Guantánamo was inside or outside the United States. The court held for *Rasul* and the other petitioners, finding that the Guantánamo detainees were being imprisoned “within ‘the territorial jurisdiction’ of the United States” in a place “over which the United States exercises exclusive jurisdiction and control”.⁶⁹ Non-nationals at Guantánamo, said the court, “no less than American citizens”, had the right to challenge the lawfulness of their detention through the writ of habeas corpus, and the courts had jurisdiction to review.⁷⁰ While this was a favourable ruling for the Guantánamo detainees, it seemed unlikely to apply to detainees held by the United States in other locations, such as in Afghanistan or Iraq.

67 Johan Steyn, “Guantanamo Bay: the legal black hole”, Twenty-Seventh F. A. Mann Lecture, British Institute of International and Comparative Law, 25 November 2003.

68 See *Reid v. Covert*, 354 US 1 (1957).

69 *Rasul*, above note 65, at 476, 480.

70 *Ibid.*, 481. The court found that the petitioners were entitled to the writ of habeas corpus under the federal habeas corpus statute, but indicated that application of the writ to the detainees was “consistent with the historical reach of the writ of habeas corpus” at common law. The Court noted that the writ of habeas corpus existed prior to the federal statute and that at common law the writ extended to persons detained not only “within sovereign territory of the realm”, but persons in “all other dominions under the sovereign’s control”. *Ibid.*, at 481–2. This issue would be returned to in the case of *Boumediene v. Bush* and *Al Odah v. Bush*, which considered whether Guantánamo detainees did in fact have a habeas corpus right that existed outside the federal habeas corpus statute, since under the Military Commissions Act they were no longer covered by the federal habeas corpus statute.

In *Hamdi*, the court reversed the dismissal of a habeas corpus petition brought on behalf of Yaser Esam Hamdi, a US citizen detained indefinitely as an “illegal enemy combatant”. The court recognized the government’s authority to detain enemy combatants but said that the executive branch does not have the power to detain indefinitely a US citizen without basic due process rights, such as notice of the charges and an opportunity to contest them.

The *Rasul* and *Hamdi* decisions established that neither the location of the detention facility (at least at Guantánamo and perhaps in other foreign locations) nor the legal status of the detainees (as enemy combatants) precluded their right to judicial review of their cases. The cases were a defeat for the administration and threatened to burst the law-free zone created at Guantánamo. The administration’s ability to hold detainees at will was being challenged along with its ability to conduct coercive interrogations.

The aspect of the *Hamdi* decision that had the greatest immediate impact was the plurality’s holding that a detained US citizen had the right “to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator”.⁷¹ The reference to an “impartial adjudicator” left open the possibility that the military could create a tribunal that would serve this function, and still avoid bringing the matter before the courts.

The administration reacted quickly. Nine days after the announcement of the *Hamdi* and *Rasul* decisions, Deputy Secretary of Defense Paul Wolfowitz announced – as a matter of internal department “management” – the creation at Guantánamo of Combatant Status Review Tribunals (CSRTs). According to the Pentagon, the purpose of this entirely new process was not to make *de novo* determinations of the legal status of the detainees to determine whether they were properly detained. Rather, the CSRT process would allow for a review of determinations that had already been made “through multiple levels of review by officers of the Department of Defense” that those held were “enemy combatants”.⁷²

Under the CSRT regulations applied since 2004, Guantánamo detainees are not allowed counsel. They are not allowed to see or have the opportunity to rebut any accusations against them that the government considers classified. They are given no meaningful opportunity to present exculpatory evidence or present witnesses on their behalf. Basically, the process imposes upon Guantánamo detainees the burden of proving themselves innocent of being “enemy combatants” without allowing them access to the information on which the government was basing its decision to hold them.

Unsurprisingly, in over 90 per cent of the CSRT rulings, in several hundred cases, the tribunals confirmed the original decision that a detainee was an “enemy combatant”. In 2007, in an affidavit appended to a legal challenge to the CSRTs, Lt. Col. Stephen Abraham, an Army reservist and lawyer who spent six

71 *Hamdi*, above note 64, p. 535.

72 See US Department of Defense, “Factsheet on Combatant Status Review Tribunals”, July 2006, available at www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf (last visited 10 August 2007).

months in 2004–5 as a panelist on the CSRTs at Guantánamo, sharply criticized the CSRTs, claiming that determinations of enemy combatant status were based on outdated, generic intelligence that was rarely case-specific.⁷³

Denying the right to a remedy

A fundamental precept of international human rights law is the right to an effective remedy for the violation of one's rights. Article 2 of the ICCPR provides that each state party to the convention shall "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" for abuses by persons acting in an official capacity and that anyone claiming such a remedy shall have this right determined by competent governmental authorities, and that such remedies when granted shall be enforced.⁷⁴

The difficulties of redress for those alleging torture while in US custody have been evident in cases brought by individuals who claim that they were unlawfully rendered by the US government to other countries and mistreated in detention.

Maher Arar, a Canadian citizen of Syrian ancestry, was detained incommunicado by US immigration authorities for two weeks in September 2002, during which time he was unable to challenge either his detention or imminent transfer to a country where he was likely to be tortured. Relying on diplomatic assurances from Syria that he would not be tortured, the United States flew Arar to Jordan, where he was driven across the border to Syria. He was detained in Syria for ten months, during which time he alleges that Syrian authorities tortured him repeatedly, often with cables and electrical cords.⁷⁵

Arar brought a lawsuit in US federal court against US officials involved in his rendition and detention for compensation for the physical and psychological harm suffered in Syria. The US government claimed a national security privilege and sought to dismiss the case. The district court agreed, concluding that it could not second-guess the government's claims that the need for secrecy was

73 *Al Odah v. US*, Supreme Court, Reply to Opposition to Petition for Rehearing, available at www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf (last visited 10 August 2007).

74 The UN Human Rights Committee in its General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 10, states with respect to states' jurisdiction for human rights violations, "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." See also 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 ("Reparations Principles"), adopted 16 December 2005, GA Res. 60/147, UN Doc. A/RES/60/147 (2005), principle 11.

75 United States Senate, "Hearing of the Personnel Subcommittee of the Senate Armed Services Committee, military justice and detention policy in the global war on terrorism", 109th Cong., 1st sess., 14 July 2005.

paramount and that discovery could have a negative impact on US foreign relations and national security.

In a ruling on 16 February 2006 that makes the very mistreatment of the individual the grounds for denying judicial relief, a US district court judge dismissed Arar's lawsuit because the government raised "compelling" foreign policy and national security issues that were a matter for the executive and legislative branches, not the courts. The judge also stressed that "the need for secrecy can hardly be doubted". According to the court ruling, "One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria". The concern, then, was not Arar's treatment, but the embarrassment that would be felt by Canadian officials were it to become known in a US courtroom that they had secretly participated in Arar's unlawful rendition to Syria. As a *New York Times* columnist wrote at the time, the ruling "basically gave the green light to government barbarism".⁷⁶

In *Arar v. Ashcroft*, the administration had initially invoked the "state secrets" doctrine, which permits the government the privilege, not reviewable by the courts, of shielding state secrets from trial. The government argued that because every fact in the case is a US state secret, Arar could not prove his case and it should be dismissed. But the federal court judge did not accept the state secret doctrine as presented and instead took it a step further. He said that merely invoking the doctrine could prove embarrassing to the government because "it could be construed as the equivalent of a public admission that the alleged conduct had occurred in the manner claimed".⁷⁷ Thus the government does not even have to claim that torture is a "state secret" to prevent allegations of it from being heard in court. Arar has appealed.

In a second highly publicized case, Khaled el-Masri, a German citizen of Lebanese descent, claimed that he was seized in Macedonia in December 2003 and eventually transferred to a CIA-run detention facility in Afghanistan where he was beaten and held incommunicado for several months. It is believed that el-Masri was mistaken for Khaled al-Masri, a suspected al Qaeda member alleged to have been involved in the planning of the 9/11 attacks on the United States. In May 2004, el-Masri was flown to Albania and left on an empty road; he eventually found his way back to Germany. He said that one of the detaining officials conceded that his arrest and detention had been in error. El-Masri filed a lawsuit in US federal court against US officials and other individuals and companies allegedly involved in his detention and rendition. He alleged violations of his due process rights and the international prohibitions against arbitrary detention and cruel, inhuman and degrading treatment. The US government invoked the state

76 Bob Herbert, "The torturers win", *New York Times*, 20 February 2006.

77 *Arar v. Ashcroft*, 16 February 2006; see David Luban, "An Embarrassment of Riches", Balkinization Blog, 4 March 2006, available at <http://balkin.blogspot.com/2006/03/embarrassment-of-riches.html> (last visited 10 August 2007).

secrets doctrine. The court agreed with the US government's argument and on 18 May 2006 dismissed the case.⁷⁸ In October 2007, the Supreme Court without comment rejected el-Masri's appeal against the appellate court decision.⁷⁹

Hamdan and the Military Commissions Act

The Abu Ghraib scandal and its revelations and several years of litigation by Guantánamo detainees culminated in a historic Supreme Court decision and new legislation from Congress. Instead of largely resolving the issues of coercive interrogation and redress for abuse, they ensured that the United States would not put the issue behind it in the near future.

Redefining mistreatment

The Military Commissions Act (MCA), enacted by Congress on 28 September 2006 and signed into law by President Bush on 17 October 2006, was not just about re-establishing the military tribunals at Guantánamo Bay that were struck down by the Supreme Court in *Hamdan v. Rumsfeld*. In *Hamdan*, the Supreme Court held that the Guantánamo military commissions were unlawfully established under US law and also violated the fair trial provision of Common Article 3 to the 1949 Geneva Conventions. It said that the lower court had erred in finding the conflict with al Qaeda to be international in scope instead of a non-international armed conflict. During non-international armed conflicts, states (and non-state actors) are bound to abide by Common Article 3.⁸⁰

The *Hamdan* case has important implications for the use of coercive interrogation methods against suspected al Qaeda members. In addition to requiring that sentences only be carried out by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”,⁸¹ Common Article 3 also sets out minimum standards for the humane treatment of all persons no longer actively participating in hostilities.⁸² On 7 July 2006 the Pentagon quickly issued a memo implementing the court's decision with respect to the applicability of Common Article 3 to the US armed forces.⁸³

In the meantime the administration made no clear enunciation of the requirements of humane treatment as required by Common Article 3. This was

78 *El-Masri v. George Tenet*, 2006 WL 1391390 at 7 (E.D.Va., 2006); Reuters, “Judge dismisses Masri torture case”, 18 May 2006.

79 Linda Greenhouse, “Supreme Court refuses to hear torture appeal,” *New York Times*, 9 October 2007.

80 *Hamdan*, above note 66.

81 Article 3 (1)(d) common to the Geneva Conventions of 1949.

82 *Ibid.*, Article 3(1)(a) and (c).

83 See US Department of Defense, “Application of Common Article 3 of the Geneva Conventions to the treatment of detainees in the Department of Defense”, 7 July 2006, accessed at <http://balkin.blogspot.com/CA3.DOD.memo.pdf> (last visited 10 August 2007).

crucial to the US interrogation regime because it opened up the liability of US officials involved in interrogation to prosecution under the War Crimes Act. The War Crimes Act makes grave breaches of the 1949 Geneva Conventions felonies under federal law when committed against or by US citizens. The intention of the act was to allow for the prosecution in US courts of persons responsible for war crimes against US military personnel. In 1997 the law was amended to include violations of Common Article 3 of the Geneva Conventions, thus expanding coverage to abuses committed in non-international armed conflicts as well as international armed conflicts. Legislative proponents of the amendment specifically had in mind members of armed groups in internal conflicts in Somalia, Bosnia or El Salvador who might mistreat US soldiers in their custody.⁸⁴

The US government's inclusion of Common Article 3 in the list of prosecutable offences under the War Crimes Act along with grave breaches of the four Geneva Conventions⁸⁵ goes beyond what the Geneva Conventions themselves require. The "Penal Sanctions" provisions of the Geneva Conventions only mandate that high contracting parties undertake to enact legislation necessary to provide effective penal sanctions for persons committing or ordering "any of the grave breaches" of the Conventions.⁸⁶ Because it was assumed that violations committed during non-international armed conflicts would be prosecuted by the state in which they occurred, Common Article 3 was not included among the "grave breaches" of the 1949 Geneva Conventions.⁸⁷

The *Hamdan* decision no doubt raised concerns within the administration that the Common Article 3 component of the War Crimes Act could be used to prosecute officials who used cruel or inhuman interrogation methods – or that it could at least hamper ongoing and future interrogations of al Qaeda suspects. So while *Hamdan* created the need for congressionally mandated military commissions to replace the unlawful commissions set up by executive order, it also encouraged the administration to seek to amend the War Crimes Act. As a result, the Military Commissions Act not only provided a legal basis for military commissions, but addressed substantive US law defining torture and other ill-treatment of "enemy combatants" as found in the War Crimes Act.⁸⁸

While the MCA prohibits the introduction of evidence at military commissions that the accused cannot see to rebut, the act relaxes the rule on

84 See R. Jeffrey Smith, "Detainee abuse charges feared", *Washington Post*, 28 July 2006.

85 18 USC §2441(c) (2006). "(c) Definition.--As used in this section the term "war crime" means any conduct ... (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict."

86 See GC I, Article 49; GC II, Article 50; GC III, Article 129; and GC IV, Article 146.

87 The ad hoc tribunals for the former Yugoslavia and Rwanda determined that serious violations of Common Article 3 committed during non-international armed conflicts could be prosecuted as war crimes. The Rome Statute of the International Criminal Court specifically added criminal offences found in Common Article 3 to its list of war crimes. Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 1, 2002, Article 8(c).

88 Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (17 October 2006) (codified at 10 USC §§948a-950w and other sections of titles 10, 18, 28, and 42).

hearsay – permitting evidence deemed “reliable” and sufficiently “probative”⁸⁹ – which opens the door for the use of evidence obtained through the mistreatment of detainees. International human rights law does not prohibit the use of hearsay evidence – indeed, continental legal systems rely on judges rather than on hearsay rules to disallow evidence that is of doubtful probative value. But the military commissions under the MCA lack the broader array of protections found in continental law courts – particularly fully independent and professional judges. Under the MCA, the burden is on the accused to prove that the evidence is unreliable; given the very limited opportunity to obtain evidence through discovery, this will be a particularly difficult hurdle to overcome. Individuals could be convicted on the basis of summaries of second and third-hand testimonies of persons who were mistreated in detention, without the accused having any meaningful chance to confront their accusers or meaningfully challenge their statements.

The MCA also contains limited discovery compared with what is available to defendants in federal court or before US courts-martial. Specifically, the rules allow the prosecution to withhold classified sources and methods of interrogation from both the accused and the legal counsel of the accused.⁹⁰ This could render meaningless the prohibition on torture, since the defence will have a very difficult time showing that evidence used before the commission was obtained through coercive interrogation methods.

The MCA neither authorizes torture nor eliminates Common Article 3 from the War Crimes Act. However, it does narrow the scope of unlawful treatment considered to be a criminal offence. The MCA lists nine offences that it defines as “grave breaches” of Common Article 3 that can be prosecuted as war crimes. Torture and inhuman treatment are listed as “grave breaches”, but degrading and humiliating treatment are not. The MCA defines “serious physical pain or suffering” as occurring only if there is “extreme” pain or other extreme injuries: substantial risk of death, burn or serious physical disfigurement, or significant impairment of a body part, organ or mental faculty.⁹¹ In other words, the threshold for “serious” pain has effectively been raised to an “extreme” pain threshold.

Crucially with respect to possible future prosecutions of US personnel for engaging in abusive interrogations, the MCA sets out two distinct definitions of cruel and inhuman treatment. One definition applies to mistreatment that occurred prior to the enactment of the MCA and a second, more stringent definition, applies to conduct since then. Any non-fleeting mental pain or suffering is defined as cruel and inhuman treatment if committed after the passage

89 Ibid., 10 USC §949a(b)(2).

90 Ibid., 10 USC §949d(f)(2)(B). The act states, “The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable.”

91 Ibid. 10 USC §950v(b)(12).

of the MCA. Prior to the MCA's passage, the pain inflicted had to be "prolonged" to qualify as cruel and inhuman treatment.⁹²

This latter definition of "cruel and inhuman treatment" effectively accepts the administration's contention that "enhanced interrogation techniques" used by the CIA against suspected Al Qaeda members, such as exposure to heat and cold, stress positions, and even waterboarding, were never prohibited. That is, they were not cruel and inhuman because they did not cause "prolonged suffering". Two of the primary sponsors of the MCA, Senators John McCain and John Warner, argued that the MCA was intended to ensure that these and similar practices were prohibited by law. The result is that officials previously authorized to use or who had carried out abusive interrogation methods that caused relatively brief but severe mental anguish – such as waterboarding and extended sleep deprivation – would effectively be immune from prosecution.

The MCA provides the president with the authority to interpret the "meaning and application" of the Geneva Conventions. This could be considered merely a restatement of the president's existing powers under the constitution – necessary for instance to interpret treaties – with no more weight than other executive branch regulations, which are subject to judicial review. But administration lawyers, while concluding that the law did not require that an executive order on CIA interrogation practices be drafted, were under pressure from the CIA, as well as Congress, to do so. As CIA Director Michael V. Hayden wrote in a note to CIA employees, "At the end of the day, the director — any director — of CIA must be confident that what he has asked an agency officer to do under this program is lawful. That's the story here".⁹³

It was not until 20 July 2007 that President Bush issued an executive order construing the meaning of Common Article 3 with respect to the CIA's detention and interrogation programme.⁹⁴ While reiterating the ban on torture and cruel and inhuman treatment as provided under US law, the executive order essentially permits the CIA to restart its interrogation of persons held in secret, incommunicado detention. Specific directives on permissible interrogation methods remain classified. Thus the determination of whether certain techniques such as waterboarding are allowed cannot be determined from the executive order, and so long as there is no independent oversight of persons held at so-called "black sites", there can be no real way to judge how the CIA is defining torture and mistreatment.

92 The MCA provisions on offences state in 10 USC §950v (b)(12), "The term serious mental pain or suffering has the meaning given the term severe mental pain or suffering in [the War Crimes Act] except that—

(I) the term serious shall replace the term severe where it appears; and

(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term serious and non-transitory mental harm (which need not be prolonged) shall replace the term prolonged mental harm where it appears."

93 See Mark Mazzetti, "C.I.A. awaits rules on terrorism interrogations", *New York Times*, 25 March 2007.

94 Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 20 July 2007.

Perhaps the answer can be found in the statement President Bush made when he signed the MCA into law in October 2006. Calling the CIA detention programme “one of the most successful intelligence efforts in American history”, he said that the new authority provided to the CIA to detain intelligence suspects would “ensure that we can continue using this vital tool to protect the American people for years to come”.⁹⁵

Court stripping under the MCA

Legal victories for detainees in the Supreme Court on judicial oversight, along with pressure from the US Congress to bring legal definitions of torture and other coercive treatment in line with the requirements of the Geneva Conventions and human rights treaties, threatened to shut down administration interrogation practices and subject those involved to legal scrutiny. The administration fought back by obtaining legal provisions in legislation that made it hard, if not impossible, for detainees to bring their case before a court. Should the administration succeed, this would effectively reverse the major Supreme Court decisions on Guantánamo and judicial review and keep actual interrogation practices out of public scrutiny – regardless of how legislation defined torture and other mistreatment.

The genuine substantive gains of the Detainee Treatment Act were undermined by the inclusion of important procedural restrictions on the rights of Guantánamo detainees. For instance, the DTA includes no mechanism for detainees who are mistreated in detention to bring civil actions seeking redress for violations of the DTA. This left enforcement of the act with the administration, which never indicated what measures if any the Department of Defense and the CIA would take to ensure compliance with the McCain amendment.

The “Graham-Levin amendment” to the DTA precluded Guantánamo detainees from bringing any future challenge to their ongoing detention or conditions of confinement before the courts. The administration took the position that the Graham-Levin amendment precluded *all* Guantánamo detainees from challenging in federal court the use of torture and cruel, inhuman or degrading treatment. The June 2006 *Hamdan* decision declaring the military commissions at Guantánamo illegal found that the “court-stripping” provisions of the DTA only applied retroactively – that is, it did not prevent those who had already filed suits from having their habeas petitions heard.

The Military Commissions Act addressed the illegal military commissions but also the habeas corpus stripping provisions, and effectively reversed the administration’s Supreme Court defeat in *Hamdan*.⁹⁶ The bill was rushed through Congress – doubtless to take advantage of the Republican majority in the House

⁹⁵ The White House, “President Bush signs Military Commissions Act of 2006”, 17 October 2006.

⁹⁶ MCA, above note 88.

and Senate before the November 2006 elections, which brought about Democratic majorities in both houses.⁹⁷

As discussed above, the MCA strengthens some elements of the 2005 Detainee Treatment Act and somewhat weakens the War Crimes Act with respect to US officials implicated in the mistreatment of detainees. Most importantly, however, the act sharply reduces the legal avenues open to “enemy combatants” to challenge their mistreatment in detention.

The MCA includes a paragraph stripping the federal courts of jurisdiction in cases of “application[s] for a writ of habeas corpus” and other actions that relate “to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of aliens determined by the US government. This provision basically undoes the *Hamdan* decision by making its habeas-stripping provisions retroactive and applicable to non-citizens held by the United States anywhere in the world. The constitutional issues addressed by the provision will not only have important implications for the rights of Guantánamo detainees, but have profound consequences for the right to habeas corpus under US law.

The court-stripping provisions of the MCA were challenged in *Boumedienne v. Bush*, brought by Guantánamo detainees petitioning for habeas corpus against their continuing detention. In April 2007 the Supreme Court rejected a late term request for review. On 29 June, in apparent response to US intelligence officer Lt. Col. Abraham’s affidavit criticizing the CSRTs in which he had participated, the Supreme Court took the highly unusual step of reversing its earlier ruling and decided to hear arguments in the *Boumedienne* appeal during the 2007–8 term.⁹⁸ The question in this case will be whether the status determination process used by the CSRTs at Guantánamo is sufficient to meet the common law requirements of habeas corpus under the US Constitution.

The MCA not only seeks to strip the courts of their ability to review habeas corpus petitions, but *all* legal actions seeking relief, including redress for mistreatment.⁹⁹ As a result, violations of the prohibition on torture will be difficult for Guantánamo detainees to litigate, and thus ultimately difficult to prevent, when those responsible for mistreatment cannot be taken to court by their victims. This provision also sends a message to those contemplating the use of coercive interrogation methods banned by the legislation that they are unlikely to face prosecution should they violate the laws.

97 President Bush stated publicly, “I urge the Senate to act quickly to get a bill to my desk before Congress adjourns.” White House, “President Bush appreciates House passage of Military Commissions Act of 2006”, 27 September 2006.

98 The court gave no reason for its reversal. The last time the Supreme Court granted such a request after an initial denial was in 1968. See James Vicini, “Court to hear Guantanamo prisoners appeals”, Reuters, 30 June 2007.

99 The MCA states, “[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant, or is awaiting such determination”, above note 88, §950j(b).

Further provisions of the MCA preclude any individual from invoking the Geneva Conventions as a source of rights in a legal action against any US official.¹⁰⁰ This will also make it very difficult for those mistreated in detention to challenge presidential interpretations of the Geneva Conventions. Had this provision been in effect previously, it would have prevented Salim Ahmed Hamdan from making his claim that he was being denied a fair trial under Common Article 3. But it will also affect future detainees who believe that they were protected by Geneva Convention prohibitions on torture and other ill-treatment, and who seek to have those claims adjudicated in US courts.¹⁰¹

Conclusion

Since 9/11, the use of torture and other coercive interrogation methods by the US government has played out at two levels. The first is the actual terrible practice – the stress positions, the exposure to freezing temperatures, the sleep deprivation, the mock drowning. Few have been prosecuted for their actions, none at the highest levels. Since Abu Ghraib much information has come out about these unlawful practices and, just as certainly, much remains unknown. Some or all have been discontinued in Afghanistan, Iraq and Guantánamo and at CIA “black sites” – or they have not. The lack of accountability makes it hard to know.

The second level is how these interrogation techniques – what is torture, what is not – have played out through the law. An issue that the Bush administration sought to keep wholly within its own purview has reached the courts and the Congress. At times the question is the definition of mistreatment; at other times it has been about the right of those mistreated to be heard. Congress and the courts have established prohibitions on torture and other mistreatment that approach international standards. But the administration, with the help of Congress, has successfully to date ensured that those who might suffer mistreatment will not be able to bring their claims before a court of law.

This three-way ping-pong match between the branches of the US government shows no signs of ending. Remedies for those abused in Guantánamo or Afghanistan or rendered to torture abroad seem no closer. As long as the debate about torture continues in the federal courtrooms and halls of Congress and from the president’s desk, one cannot be confident that the practice of torture by the US government does not continue as well. Torture should not be debated.

100 MCA, above note 88, §5.

101 The question of whether the Geneva Conventions are self-executing has never been fully answered by US courts. See, for example, *United States v. Noriega*, case No. 88-79-CR, US District Court for the Southern District of Florida, 8 December 1992 (“this Court believes Geneva III is self-executing and provides General Noriega with a right of action in a US court for violation of its provisions”).