9-1-2013

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THE ABU GHRAIB CONVICTIONS: A MISCARRIAGE OF JUSTICE

ROBERT BEJESKY[†]

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I. INTRODUCTION

The depravity that transpired at Abu Ghraib prison in Iraq propagated in the global media and left an indelible impression after CBS 60 Minutes first displayed images of U.S. military police abusing nude Iraqi prisoners. In April 2013, a nonpartisan panel produced a six hundred page report that drew conclusions on the abuse occurring during detentions and interrogation of alleged terrorists and combatants in Afghanistan, Iraq, Guantánamo Bay, and at other foreign sites.¹ The report recognizes the significance of the Abu Ghraib atrocities, but merges unassociated accounts² and ultimately concludes that the depictions in the notorious Abu Ghraib photographs “were a function of undisciplined sadistic soldiers, not policy.”³ Agreeing with scholars who have eschewed the superficial “bad apples” explanation,⁴ this article maintains that the panel’s interpretation does not scrupulously contextualize the Abu Ghraib convictions and nurtures lingering agitation from the episode.

Referencing the misconduct at Abu Ghraib in testimony before Congress, Donald Rumsfeld, secretary of defense during the George W. Bush Administration, affirmed that individuals who committed the abuses and those who “recommended the kind of behavior” should “be brought to justice.”⁵ The statement escapes coherence because human rights groups, academics, and politicians have emphasized that culpability should have been firmly affixed on Rumsfeld and other top Bush Administration officials because they issued orders that were akin to, or could have reasonably been

¹ THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT, *passim* (2013).

² *Id.* at 7, 85-118 (stating that “the disclosure of atrocities at Abu Ghraib in 2004 and the ensuing condemnation both at home and abroad” altered the “aggressiveness of the detention policies”).

³ *Id.* at 106.

⁴ See *infra* Part IV(D)(3).

⁵ *Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST, May 7, 2004, available at http://www.washingtonpost.com/wp-dyn/articles/A8575-2004May7_2.html.

expected to lead to the injustices portrayed in photographs and video.⁶ Yet the only perpetrators brought to justice were low-level soldiers; Army Reserve Spc. Charles Graner was sentenced to ten years in prison, Staff Sergeant Ivan L. Frederick to eight years, Army Pfc. Lynndie England to three years, and nine other military personnel received non-penal sanctions for their involvement.⁷

Human Rights Watch highlighted that offenses, including death, trauma, and various other human rights violations, routinely occurred at Abu Ghraib and dozens of other facilities worldwide, but the “only wrongdoers being brought to justice are those at the bottom of the chain of command.”⁸ In July 2011, Human Rights Watch contended that a real investigation should be conducted into the role of those top officials “who authorized, ordered, and oversaw torture and other serious violations of international law, as well as those implicated as a matter of command responsibility, should be investigated and prosecuted if evidence warrants.”⁹ In August 2012, Amnesty International vehemently argued that it “is simply not good enough” that President Obama came to office affirming that he would “turn the page” on abuses perpetrated under the Bush Administration.¹⁰ Amnesty International declared: “The U.S. government is required by international law to respect and ensure human rights ... and to bring perpetrators to justice, no matter their level of office.”¹¹

⁶ Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 823-29 (2012) [hereinafter Bejesky, *Pruning*]. See *infra* Parts II(D)(2)(3)(4).

⁷ Samuel Brenner, “*I am a Bit Sickened*”: *Examining Archetypes of Congressional War Crimes Oversight After My Lai and Abu Ghraib*, 205 MIL. L. REV. 1, 68 (2010).

⁸ PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 403-04 (2007).

⁹ HUMAN RIGHTS WATCH, *GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES* 3 (July 12, 2011), http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf.

¹⁰ *Demand Accountability for Torture and Abuse*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/torture/accountability-for-torture>; HUMAN RIGHTS WATCH, *supra* note 1 (itemizing abuses, identifying several responsible Bush Administration officials, and demanding accountability).

¹¹ *Demand Accountability*, *supra* note 10.

Pentagon reports cited dereliction of leadership as a cause of systematic and rampant injustices committed in U.S. detention facilities in Iraq,¹² but no investigation judiciously examined command responsibility of top officials.¹³ Stanford Psychology Professor Philip Zimbardo, a foremost authority on evaluating how hierarchical acculturation can goad subordinates to transgress appropriate behavior and engage in immoral and criminal acts, served as an expert witness for the defense during the Abu Ghraib criminal trials and maintained that criminal indictments should have been brought against senior military officers and officials in the Bush White House.¹⁴ Zimbardo underscored that the Bush Administration commanded the interrogation system, ordered the policies down the chain of command, and “isolate[d] the problem in order to deflect attention and blame away from those at the top.”¹⁵ Concurring, Professor Ian Buruma wrote that “Lyndie England’s character ... is irrelevant” because it was the appointed legal advisers and the Bush Administration that sought “ways to circumvent the Geneva Conventions” and made torture permissible, which made England’s deeds possible.¹⁶

The Abu Ghraib detention scandal is one piece of an encompassing pattern of interrogation crimes. This article does not assert that no punishment of low-level troops was warranted, but maintains that without investigating top officials in the Bush White House, CIA, and the Office of the Secretary of Defense and at least

¹² Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, Torture*, 81 IND. L.J. 1255, 1271 (2005) (citing language from Fay Report, Schlesinger Report, and Church Report).

¹³ Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 46 (2005).

¹⁴ ZIMBARDO, *supra* note 8, at x-xiii.

¹⁵ *Id.* at 10.

¹⁶ Ian Buruma, *Just Following Orders*, FIN. TIMES WEEKEND MAG., July 3, 2004, at 24. *See also* Diane Marie Amann, *Abu Ghraib*, 153 U. PENN. L. REV. 2085, 2134-35 (2005) (remarking that the MPs were part of a “group mentality that had divided all into either ‘good guys’ or ‘the enemy,’” which was even philosophically a reflection of the same policy set by the President as a war campaign of all countries either lining up with “us” or “the terrorists.”).

including them as witnesses, the convictions and disciplinary punishment imposed on low-level actors at Abu Ghraib could have logically been expected to eventuate in a miscarriage of justice. Part II addresses the abuse at Abu Ghraib, Part III considers the basis for criminal liability of top officials, and Part IV assesses the unreasonable result of solely convicting low-level soldiers.

II. IRAQI DETENTIONS

A. Dragnet Detentions During the Invasion and Occupation of Iraq

After marketing peril for over six months,¹⁷ on March 19, 2003, President Bush ordered an attack on Iraq for supposedly possessing weapons of mass destruction (WMDs), having associations with al-Qaeda, and posing a security threat to Americans.¹⁸ The invasion proceeded against the will of the international community and without Security Council assent,¹⁹ there were no WMDs or relations with al-Qaeda,²⁰ and the alleged basis for threats was an October 2002 National Intelligence Estimate that was a product of deductive reasoning and White House agenda-setting.²¹ It was later

¹⁷ See Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348-49 (2012); Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reported*, 40 CAP. U. L. REV. 967-1052 (2012) [hereinafter Bejesky, *Public Diplomacy*]. See also Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L.J. 1, 5-6 (2012) [hereinafter Bejesky, CFP].

¹⁸ Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 350-56 (2011) [hereinafter Bejesky, *Weapon Inspections*].

¹⁹ Bejesky, *Weapon Inspections*, *supra* note 18, at 345-50.

²⁰ Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 817, 842-43, 877 (2011) [hereinafter Bejesky, *Intelligence Information*].

²¹ See generally Robert Bejesky, *The SSCI Investigation of the Iraq War: Part II: Politicization of Intelligence*, 40 S.U. L. REV. 243 (2013) (explaining flaws and missing evidence in the SSCI's investigation); Robert Bejesky, *SSCI Investigation of the Iraq War: Part I: A Split Decision*, 40 S.U. L. REV. 1 (2012) (summarizing the SSCI's analysis).

learned that the Bush Administration held National Security Council meetings as early as February 2001 on the topic of displacing the Iraqi government²² and tasked military commanders with developing war plans starting in November 2001 while publicly denying that there was any such war plan.²³

Shortly after the invasion, the U.S. military seized the Abu Ghraib prison, a massive incarceration facility.²⁴ Detaining combatants and suspected foes became a hallmark of the occupation. Two months after the invasion, an estimated 12,000 Iraqis had been arrested and were often confined for many months.²⁵ Approximately 43,000 had been arrested and detained during the first year²⁶ and over 100,000 over the seven-year occupation.²⁷ The number of detainees fluctuated from 14,000 in 2005,²⁸ 15,000 in 2006,²⁹ 18,000 in 2007,³⁰ 21,000 in early August 2008,³¹ 25,000 in October

²² Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 63-65 (2011) [hereinafter Bejesky, *Politico*].

²³ See BOB WOODWARD, PLAN OF ATTACK 3-4, 30-31, 34-37, 40, 42, 55-59, 75-79, 96-103, 120-25, 129-30, 137, 157-59, 188 (2004).

²⁴ ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 23 (2006).

²⁵ See HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 24 (2005), available at <http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib>. IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 96-97 (Jeremy Brecher, Jill Cutler, Brendan Smith, eds., 2005).

²⁶ Rajiv Chandrasekaran & Scott Wilson, *Mistreatment of Detainees Went Beyond Guards' Abuse; Ex-Prisoners, Red Cross Cite Flawed Arrests, Denial of Rights*, WASH. POST, May 11, 2004, at A1; Isabel Hilton, *The 800lb Gorilla in American Foreign Policy: Alleged Terror Suspects are Held Incommunicado All Over the World*, GUARDIAN, July 27, 2004, available at <http://www.guardian.co.uk/print/0,3858,4980261-103390,00.html> (estimating that 12,000 prisoners were being held in Iraq).

²⁷ Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 553 (2011).

²⁸ See ALFRED W. MCCOY, A QUESTION OF TORTURE 124 (2006); IN THE NAME OF DEMOCRACY, *supra* note 25, at 96.

²⁹ Alexander G. Higgins, *UN Exec. Decries Illegal Iraq Detainees*, ASSOC. PRESS, Apr. 21, 2006, available at <http://www.globalpolicy.org/component/content/article/168/37481.html>.

³⁰ Walter Pincus, *U.S. Holds 18,000 Detainees in Iraq*, WASH. POST, Apr. 15, 2007, at A24.

2008,³² and 15,000 in December 2008.³³ Detainees were reportedly criminal suspects, terrorists, combatants, and “security detainees” and many underwent interrogation procedures.³⁴

While tens of thousands of Iraqis were detained over a several year period, after Iraqis captured several U.S. soldiers during the invasion, Congress passed a resolution admonishing that “Iraqis who are holding United States and British troops as prisoners could potentially be eligible for prosecution under the War Crimes Act of 1996.”³⁵ The War Crimes Act criminalizes war crimes³⁶ perpetrated by foreigners or any U.S. national in any location and can impose fines, imprisonment, or the death penalty.³⁷ Despite the War Crimes Act’s applicability to foreigners and U.S. nationals and announcement to provide equitable treatment,³⁸ it does not appear that there was commensurate protection or punishment.³⁹

³¹ John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Human Rights and Humanitarian Law: United States Holds Large Numbers of Detainees in Iraq, Afghanistan*, 102 AM. J. INT’L L. 879, 879 (2008) (also holding 630 prisoners at Bagram air base in Afghanistan).

³² Catherine Powell, *Essay: Scholars’ Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 COLUM. J. TRANSNAT’L L. 339, 346 (2009); Alissa J. Rubin, *A Puzzle over Prisoners as Iraqis Takes Control*, N.Y. TIMES, Oct. 25, 2008, at A1.

³³ Captain Matthew Greig, *Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition*, 2009 ARMY LAW 25, 29.

³⁴ MCCOY, *supra* note 28, at 124.

³⁵ IN THE NAME OF DEMOCRACY, *supra* note 25, at 317.

³⁶ A war crime is defined as a “grave breach” in applicable treaties, particularly the Geneva Conventions, of which the U.S. is a member. 18 U.S.C. § 2441(c)(1) (2006).

³⁷ 18 U.S.C. § 2441(1) (2006).

³⁸ *War Crimes Act of 1995*: Hearing on H.R. 2587 Before S. Comm. On Immigration & Claims of the H. Comm. On the Judiciary, 104th Cong. 12 (1996) (statement of Michael J. Matheson, Principal Deputy Legal Advisor, Department of State) (“We are certainly interested in bringing to justice those who commit war crimes against our nationals and our armed forces personnel, but we also have an interest in having the authority, if necessary, to prosecute any U.S. national or armed forces members who commits such acts.”) available at http://www.justice.gov/jmd/ls/legislative_histories/pl104-192/hear-81-1996.pdf.

³⁹ Douglas Jehl & Neil A. Lewis, *The Reach of War: The Prisoners; U.S. Military Disputed Protected Status of Prisoners Held in Iraq*, N.Y. TIMES, May 23, 2004,

Evidence of human rights suffering emerged, but the Bush Administration defended by maintaining that inconveniences were legal and necessary because interrogation techniques were vital to acquiring intelligence.⁴⁰ As for the feverish predilection to confine, in February 2004, US military intelligence officers announced that “between 70 percent and 90 percent of person deprived of their liberty in Iraq had been arrested by mistake”⁴¹ and were held without legal redress.⁴² The Pentagon’s Fay Report estimated that

<http://www.nytimes.com/2004/05/23/world/reach-war-prisoners-us-military-disputed-protected-status-prisoners-held-iraq.html?pagewanted=all&src=pm> (noting that the Red Cross presented the U.S. military with a list of human rights abuses at Abu Ghraib and the U.S. military stated “that many Iraqi prisoners were not entitled to the full protections of the Geneva Conventions.”). One military detention supervisor remarked that “if you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.” Dana Priest & Barton Gellman, *US Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html>. Professor Marcy Strauss was curious whether this sentiment was equivalent to a manager advising a CEO at a top multinational corporation with a comment such as, “[i]f we’re not discriminating against employees on the basis of race, we’re not doing our job.” Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1282 (2005). Brigadier General Janis L. Karpinski, the Military Police (MP) commander, was purportedly told by her superior, Major General Walter Wodjakowski, “I don’t care if we’re holding 15,000 innocent people. We’re winning the war.” MCCOY, *supra* note 28, at 142. It is unclear how detainees could be of intelligence value or be guilty of wrongdoing related to the rationales for war when all reasons persistently alleged for attacking Iraq were spurious and ultimately false, the Security Council did not sanction the invasion, and a notable percentage of scholars and countries called the war illegal. Bejesky, CFP, *supra* note 17, at 2; Bejesky, *Weapon Inspections*, *supra* note 18, at 350-51; Phillippe Sands, *The Green Light*, VANITY FAIR, May 2008 (remarking that interrogation “techniques are [only] legal if the motivation is pure.”), <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805.print>.

⁴⁰ ARNOVE, *supra* note 24, at 21-24; Priest & Gellman, *supra* note 39.

⁴¹ REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004) [hereinafter ICRC, TREATMENT BY THE COALITION FORCES], available at <http://cryptome.org/icrc-report.htm>.

⁴² Ash U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 468-69 (2005).

between 85 to 90 percent of those detained at Abu Ghraib “were of no intelligence value.”⁴³ Women and teenagers were detained.⁴⁴ The ICRC explained that those interned were arrested without cause and “without knowing what they were accused of.”⁴⁵ A former CIA intelligence officer objected to interrogation operations in Iraq and stated: “No way. We signed up for the core program in Afghanistan—pre-approved for operations against high-value targets—and now you want to use it on cabdrivers, brothers-in-law, and people pulled off the streets.”⁴⁶

B. Legal Authority to Detain

1. During War and Official Occupation

Under international law, the legal authority to detain adversaries varies between a war period and an occupation phase. The invasion of Iraq was an inter-state conflict, which means the Third Geneva Convention Relative to the Treatment of Prisoners of War permitted detaining POWs.⁴⁷ Combatants, or those who take up

⁴³ MASTER GENERAL GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 37, Aug., 23, 2004, *available at* <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter Fay Report].

⁴⁴ Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

⁴⁵ ICRC, TREATMENT BY THE COALITION FORCES, *supra* note 41; Richard Norton-Taylor, *US Sweep of Arrests After Iraq Invasion Leads to Few Convictions*, GUARDIAN, Nov. 14, 2005, <http://www.guardian.co.uk/world/2005/nov/15/iraq.usa> (noting that from US Central Command numbers, from the invasion in March 2003, 35,000 Iraqis had been detained, 1,300 had been charged with crimes, and half of those charged had been found guilty).

⁴⁶ MCCOY, *supra* note 28, at 133; MATTHEW GUTMANAN & CATHERINE LUTZ, BREAKING RANKS: IRAQ VETERANS SPEAK OUT AGAINST THE WAR 112-13 (2010) (noting how veterans were dismayed about how interrogation was being conducted on people who were in the wrong place and the wrong time).

⁴⁷ Chesney, *supra* note 27, at 559-60. *See* Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 4, 42, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva I] (permitting deprivation of civilian liberties if “the security of the Detaining Power makes it absolutely necessary.”).

arms, can be detained until hostilities cease, and a civilian may only be held for as long as the individual detention is absolutely necessary to ensure security for the situation giving rise to the detention.⁴⁸ Anyone other than a “combatant” is by default a civilian.⁴⁹

On May 1, 2003, Bush provided a “Mission Accomplished” speech on the *USS Abraham Lincoln*, which military officials later observed was calculated to convert the status of Iraqis from being held as POWs during war to civilians or insurgents during occupation,⁵⁰ which ostensibly also imparts a heightened legitimacy with a victor-occupier right to control. Consequently, the Fourth Article of the Geneva Convention explicitly countenances extended detentions for individuals posing a threat to governing authorities.⁵¹ Article 42 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War permits detaining individuals “for imperative reasons of security.”⁵² A “protected person” includes enemy nationals and the entire population of the occupied

⁴⁸ Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 404-05 (2009); Alec Walen & Ingo Venzke, *Detention in the “War on Terror”: Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT’L & COMP. L. 45, 65-66 (2007).

⁴⁹ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 50(1), (June 8, 1977), 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; INTL. COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 1977 TO THE GENEVA CONVENTION OF 1949, at 611 P 1917 (Yves Sandoz et al. eds., Martinus Nijhoff Publishers 1987)

⁵⁰ R. Jeffrey Smith, *Memo Gave Intelligence Bigger Role*, WASH. POST, May 21, 2004, at A17; Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343, 345 (2010) (noting that “[m]any important human rights protections may be relaxed or derogated from in the exigencies of armed conflict” and that this “shift from the law that prevails during peace occurs only when armed conflict begins.”).

⁵¹ See Geneva I, *supra* note 47, at art. 4.

⁵² Chesney, *supra* note 27, at 559-60. See Geneva I, *supra* note 47, at arts. 3, 4, 42 (permitting deprivation of civilian liberties if “the security of the Detaining Power makes it absolutely necessary.”).

territories.⁵³ While these agreements prevail as *lex specialis*, human rights treaties might also apply.⁵⁴

Human rights laws forbid individuals from being confined for capricious, illegal, unjust or inappropriate reasons,⁵⁵ and the United Nations Secretary-General's Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies recently affirmed that situations of preventive administrative detention must not be arbitrary, must adhere to legal procedures, and must designate reasons for incarceration.⁵⁶ Consistent with conceptions of robust human rights guarantees, the Coalition Provisional Authority purportedly went so far as to afford Miranda-like warnings, including the right to remain silent, avoid self-incriminations, and assure that violations of those rights could not be introduced into criminal proceedings.⁵⁷ These rights should have reduced the number of innocent people who were detained and precluded the use of interrogations, but tergiversation presumably bided over the applicability of criminal law and occupation-based detention.

⁵³ Oscar M. Uhler et al., COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PRISONERS OF WAR 46 (Jean S. Pictet ed., Intl. Comm. Red Cross 1958).

⁵⁴ Jochen Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 ISR. Y.B. HUM. RTS. 1, 16 (1998) (noting that "international humanitarian law takes precedence over human rights treaties as *lex specialis* in so far as it may constitute a special justification in armed conflict for interference with rights protected under human rights treaties.").

⁵⁵ International Covenant on Civil and Political Rights art. 9(1), Dec. 19, 1966, 999 U.N.T.S. 171; UN Human Rights Comm., Views: Communication No. 1085/2002, para. 8.3, U.N. Doc. CCPR/C/86/D/1085/2002 (2006).

⁵⁶ The Secretary-General, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 234 (May 27, 2008), available at <http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f?OpenDocument>.

⁵⁷ John C. Williamson, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT'L & COMP. L. 229, 239-40 (2004). See L. Paul Bremer, Administrator, Coalition Provisional Authority Memorandum No. 3, Criminal Procedures (June 18, 2003), at §§ 4, 6 (purportedly granting Iraqis an absolute right to remain silent from time that they were arrested).

2. Occupation Authority After Iraqi Governance

While the “war” had figuratively ended, a hybrid reality straddled war and occupation and eventually engendered dubiety over whether Iraqis or occupation security forces were principally responsible for legally detaining insurgents and miscreants. Shortly after Bush’s “Mission Accomplished” speech declared that the war was over, Lieutenant General David McKiernan, the general of US ground forces, announced to reporters that the “war has not ended” and that violence was attributable to insurgencies against US forces and not criminal acts.⁵⁸ From Supreme Court precedent that affirms a war can officially end by events, such as a Congressional act, consummation of a treaty, or another political act,⁵⁹ the President arguably provided an informal and equivocal assertion about the war’s end.⁶⁰

Insurgent attacks on American troops intensified and occurred with more regularity as time passed.⁶¹ With intensified internal conflict, the occupation-appointed Iraqi government

⁵⁸ MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND SELLING OF THE IRAQ WAR 226 (2006).

⁵⁹ *Lee v. Madigan*, 358 U.S. 228, 230 (1959); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Wood v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947).

⁶⁰ Moreover, the use of detention status derived from a period of “war” had not entirely been relegated because former President Saddam Hussein was captured in December 2003, and the U.S. afforded Hussein with POW status. Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 656 (2005); Douglas Jehl, *The Struggle for Iraq: Captive; Hussein Given P.O.W. Status; Access Sought*, N.Y. TIMES, Jan. 10, 2004, <http://www.nytimes.com/2004/01/10/world/the-struggle-for-iraq-captive-hussein-given-pow-status-access-sought.html> (Pentagon spokesman noting that Hussein “is an enemy prisoner of war, and he’ll continue to be an enemy prisoner of war unless and until his status is determined to be otherwise.”).

⁶¹ ISIKOFF & CORN, *supra* note 58, at 213, 226; Noah Feldman, *Better Sixty Years of Tyranny Than One Night of Anarchy*, 31 LOY. L.A. INT’L & COMP. L. REV. 143, 145 (2009) (noting the distinction between the formal matter under international law of not being the occupier and the reality of remaining as an occupier).

requested the U.S. military to remain as an occupier-intervener⁶² even though the formalities were questionable because the Iraqi officials were not elected, had minimal control over Iraqi territory, and were dependent on or perhaps even beholden to the occupying military.⁶³

In short, war, occupation, and an occupation-subordinate role applied to U.S. forces as the occupation progressed, which derivatively governed detainee treatment. If Geneva Convention POW status applies to combatants, Article 17 prohibits POWs from being interrogated.⁶⁴ If occupation law applies or the Iraqi government is responsible for detention and enforcing punishment on detainees, the US military and the Iraqi government are both mandated to respect human rights law and humanitarian law for territory under their control, despite stages or labels of conflict.⁶⁵ The period of the Abu Ghraib atrocities was after the President stated that the war was over; after Security Council Resolutions called the U.S. and U.K. “occupiers,” who were required to apply international humanitarian law in that status; after the U.S.-led Coalition Provision Authority was installed; and after an initial Iraqi

⁶² S.C. Res. 1546, annex, U.N. Doc. S/RES/1546 (June 5, 2004).

⁶³ Bejesky, *Public Diplomacy*, *supra* note 17, at 1037-41 (explaining the dominance of occupational authorities in the media to support continued occupation); Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L.J. 337, 341 (2011).

⁶⁴ Geneva I, *supra* note 47, art. 17.

⁶⁵ Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 345 (2007) (“Whether they constitute ‘torture’ or ‘violence to life and person,’ it is quite clear that the tactics portrayed in photos from Abu Ghraib Prison, namely the stripping naked and hooding of persons for interrogation purposes and the use of dogs for interrogation and terroristic purposes, are patently illegal interrogation tactics. Such treatment violates the explicit rights of detainees of any status covered by various treaty based and customary international legal prohibitions of cruel, inhuman, degrading, and humiliating treatment, physical coercion, threats of violence, measures of intimidation, and terrorism during any armed conflict and regardless of purpose or feigned excuses on the basis of reciprocity, reprisals, or alleged necessity.”).

Governing Council was appointed.⁶⁶ The remainder of the article explains why, despite the possible combinations of governing law, the U.S. soldiers convicted of abuse at the Abu Ghraib prison should likely not have been the most criminally culpable.

C. The Abuse at Abu Ghraib

1. The Event

Earlier leaks of detainee abuse in Iraq did not quell the bombshell impact of the imagery of injustices that 60 Minutes initiated on April 28, 2004.⁶⁷ Photographs displayed naked prisoners being paraded around with their heads' covered with sandbags bearing small holes that could dangerously inhibit breathing.⁶⁸ Soldiers laughed and exhibited "thumbs up" gestures as they hovered over detainees⁶⁹ layered in a pyramid to be "smoked," which was the commonly-used term for subjecting prisoners to muscle fatigue so that they would pass out.⁷⁰ Hayder Sabber Abd stated that "he and six other inmates were beaten, stripped naked" and "forced to pile on top of one another, to straddle one another's

⁶⁶ S.C. Res. 1500, U.N. Doc. S/RES/1500 (Aug. 14, 2003); S.C. Res. 1483, Preface, P5, U.N. Doc. S/RES/1483 (May 22, 2003) (calling the U.S. and Britain the occupying authority and requiring all parties to comply with the Geneva Conventions of 1949 and the Hague Regulations of 1907).

⁶⁷ MCCOY, *supra* note 28, at 144.

⁶⁸ *Id.* at 59; David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1431 (2005) ("As anyone who has ever come close to drowning or suffocating knows, the oxygen-starved brain sends panic signals that overwhelm everything else.").

⁶⁹ PETER IRONS, WAR POWERS 252 (2005).

⁷⁰ SEYMOUR M. HERSH, CHAIN OF COMMAND 13 (2004) (accounting how prisoners were hooded and the military soldiers would "drive them around the camp in a Humvee, making turns so they didn't know where they were I wasn't trying to get information I was just having a little fun"); Eric Schmitt, *3 in 82nd Airborne Say Beating Iraqi Prisoners Was Routine*, N.Y. TIMES, Sept. 24, 2005, at A1 (service members further noting that "soldiers in their battalion in Iraq routinely beat and abused prisoners in 2003 and 2004 to help gather intelligence on the insurgency and to amuse themselves.").

backs naked, to simulate oral sex.”⁷¹ Other photographs depicted a female soldier gaily leading a hooded and naked detainee with a dog chain around his neck, and inmates covered in human feces.⁷² A hooded prisoner stood on a box with wires attached to his “fingers, toes, and penis” because he was informed that he would be electrocuted if he stepped off of the box.⁷³

The Department of Defense commissioned U.S. Army Major General Antonio M. Taguba, the acting director of the army staff during the Iraq War under General Eric K. Shinseki, to investigate the crimes depicted in the Abu Ghraib prison photographs.⁷⁴ The investigation documented that the “systemic,” “intentionally perpetrated,” “sadistic, blatant, and wanton criminal abuses” were perpetrated between October and December 2003.⁷⁵ Soldiers threatened detainees with guns and military dogs (that even bit detainees), beat prisoners, “broke chemical lights and poured the phosphoric liquid on detainees,” “sodomized [a prisoner] with a broomstick and chemical light, poured freezing water on naked detainees, [and] videotaped and photographed detainees” while they were forced into “sexually explicit positions.”⁷⁶ Prisoners were exposed to extreme

⁷¹ Ian Fisher, *Iraqi Recounts Hours of Abuse by US Troops*, N.Y. TIMES, May 5, 2004, at A1 (quoting Mr. Abd) (“[W]e did not think we would survive. All of us believed we would be killed and not get out alive.”).

⁷² WILLIAM A. SHERDEN, BEST LAID PLANS: THE TYRANNY OF UNINTENDED CONSEQUENCES AND HOW TO AVOID THEM 135 (2011); Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, May 6, 2004, http://www.cbsnews.com/2100-500164_162-614063.html; David Stout, *More Abu Ghraib Pictures Broadcast on Australian TV*, N.Y. TIMES, Feb. 16, 2006, <http://travel.nytimes.com/2006/02/16/international/middleeast/16abuse.html>.

⁷³ MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 17 (May 4, 2004), http://www.npr.org/iraq/2004/prison_abuse_report.pdf [hereinafter Taguba Report]; Amann, *supra* note 16, at 2091; Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 762 (2005) (noting Darius Rejali, an expert on torture, notes that the methods are “standard torture [in democracies]”).

⁷⁴ Taguba Report, *supra* note 73.

⁷⁵ *Id.* at 16.

⁷⁶ *Id.* at 16-17; LIEUTENANT GENERAL ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE

heat and cold, subjected to “believed-drowning situations,” deprived of sleep for many days, kept naked for several days at a time,⁷⁷ and subjected to mock executions, burning, and electric shock.⁷⁸ Professor of Medicine Steven Miles surveyed the potentially devastating psychological impact. Miles cited sworn statements and interviews describing “beatings, burns, shocks, bodily suspensions, asphyxia, threats against detainees and their relatives, sexual humiliation, isolation, prolonged hooding and shackling, and exposure to heat, cold and loud noise.”⁷⁹

The Military Police (MPs) did not hide the perversions. Graphic photos were used as computer screen savers in the interrogation room, and soldiers cognizant of the tactics remained silent⁸⁰ and others considered the practices a routine recreational game.⁸¹ Republican Senator James Inhofe placed attention on the detainees and noted: “These prisoners, you know they’re not there for traffic violations. If they’re in Cellblock 1-A or 1-B, these

9-10 (Aug. 25, 2004), available at http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf [hereinafter Jones Report].

⁷⁷ IN THE NAME OF DEMOCRACY, *supra* note 25, at 74-76, 85; Fay Report, *supra* note 43, at 57, 63-64, 68.

⁷⁸ IN THE NAME OF DEMOCRACY, *supra* note 25, at 110; ZIMBARDO, *supra* note 8, at 357; Laura A. Dickinson, Filartiga’s Legacy in an Era of Military Privatization, 37 RUTGERS L.J. 703, 705 (2006) (citing several official Pentagon investigations that listed methods that might be torture).

⁷⁹ *US Army Medics Accused in Abuse*, BBC, Aug. 20, 2004, <http://news.bbc.co.uk/2/hi/health/3579792.stm>.

⁸⁰ IN THE NAME OF DEMOCRACY, *supra* note 25, at 98-99; Kate Zernike, *Only a Few Spoke Up on Abuse as Many Soldiers Stayed Silent*, N.Y. TIMES, May 22, 2004, <http://www.nytimes.com/2004/05/22/world/reach-war-witnesses-only-few-spoke-up-abuse-many-soldiers-stayed-silent.html>.

⁸¹ PHILIP GOUREVITCH & ERROL MORRIS, STANDARD OPERATING PROCEDURE 165 (2008) (calling abuses just standard procedure). Private Lynndie England, who can be seen enthusiastically participating in the photos, explained that it was “just fun and games.” ZIMBARDO, *supra* note 8, at 329. Other soldiers abused prisoners as a way to “work out your frustrations.” *Id.* at 368-69. Karpinski stated that the soldiers were “thoroughly enjoying all of this sport...” Major General Antonio M. Taguba, Article 15-6 Investigation Interview of Brigadier General Janis L. Karpinski, Feb. 15, 2004, available at <http://www.scvhhistory.com/scvhhistory/signal/iraq/reports/TAG45-karpinski.pdf>.

prisoners, they're murderers, they're terrorists, they're insurgents."⁸² It was later revealed that there were specific orders related to the abuse, but that was not the impression characterized by top government officials.

D. Chain of Command at Abu Ghraib

1. A Warned But Still "Shocked" Administration

After the notorious CBS 60 Minutes story broke, top officials in the Bush administration and the Pentagon relegated culpability for human rights violations to the lowest levels of the military hierarchy. Policymakers asserted that misguided reservists committed isolated indiscretions, and they also concomitantly justified that intense interrogation pressure methods were needed to acquire intelligence information⁸³ while abstaining from allusions that the vivid misconduct could have been associated with interrogations. Secretary of Defense Rumsfeld announced that he was "visibly perturbed" by the soldiers⁸⁴ and their sadistic and inhumane photographs.⁸⁵ President Bush pledged to raze Abu

⁸² ZIMBARDO, *supra* note 8, at 328; Sean D. Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L L. 820, 820 (2004) (government noting that harsher interrogations were authorized for detainees who had "migrated" to Iraq).

⁸³ ARNOVE, *supra* note 24, at 23; MCCOY, *supra* note 28, at 152; IN THE NAME OF DEMOCRACY, *supra* note 25, at 2, 8, 84; David Paul Kuhn, *Damage Control on Abu Ghraib*, CBS NEWS, May 5, 2004, <http://www.cbsnews.com/stories/2004/05/05/politics/main615811.shtml>. Senator Lindsey Graham stated that this was not about humiliation but about "rape and murder." *Rumsfeld Warns of Worse to Come*, ASSOCIATED PRESS, May 8, 2004, available at <http://www.foxnews.com/story/0,2933,119374,00.html>.

⁸⁴ Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1187 (2007).

⁸⁵ *Rumsfeld: Unreleased images 'cruel and inhuman'*, CNN, (May 8, 2004, 8:47 AM), <http://www.cnn.com/2004/WORLD/meast/05/07/iraq.abuse.main/index.html>; MCCOY, *supra* note 28, at 133 ("[S]enior CIA officials were recoiled from abuses at Abu Ghraib").

Ghraib and erect a “modern maximum security prison” because Abu Ghraib was a “symbol of disgraceful conduct by a few American troops who dishonored our country and dishonored our values.”⁸⁶

It is true that the Bush Administration did not endorse most of these acts or the deviant intent underlying the crimes, but incredulity was peculiar because there were plentiful warnings of analogous offenses and top officials not only sanctioned but even directed interrogation methods that included humiliating detainees, hooding and stripping prisoners naked, and using stress positions and sensory deprivation.⁸⁷ Similar to Afghanistan, where detainees were excluded from Geneva Convention protections by way of several legal arguments that labeled them “unlawful combatants,”⁸⁸ top officials also maintained that many Iraqis were not entitled to protections under the Geneva Conventions⁸⁹ even though every Iraqi detained should be a “protected person” covered by the Geneva Conventions.⁹⁰ Moreover, interrogation immoralities became a

⁸⁶ MCCOY, *supra* note 28, at 146. Demolishing the prison might mean that US private contractors could build a new facility at the expense of US taxpayers and/or would be another item that would put Iraqis into deeper debt. Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT’L L. 91, 101-03 (2012). The prison was not demolished because an Army judge held that the prison had to be preserved as a “crime scene.” MCCOY, *supra* note 28, at 146.

⁸⁷ Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 843-44 (2005).

⁸⁸ Robert Bejesky, *How the Commander in Chief’s “Call for Papers” Veils a Path Dependent Result of Torture*, 40 SYRACUSE J. INT’L L. & COM. (forthcoming Fall 2013) [hereinafter *Call for Papers*].

⁸⁹ Douglas Jehl & Neil A. Lewis, *The Reach of War: The Prisoners; U.S. Disputed Protection Status of Iraq Inmates*, N.Y. TIMES, May 23, 2004. The Geneva Conventions and POW protections distinctly applied in Iraq Victor Hansen, *A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 650-52 (2009) (noting that John Yoo and others had suggested that laws of war changed after 9/11, but an alternative position is that there is no difference between the war in Iraq, the Vietnam War, or conflict envisioned by the Geneva Conventions, and the string of cases handed down by the Supreme Court that overturned Yoo’s advice, simply affirms that).

⁹⁰ David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT’L L. 61, 82-83 (2005).

standard practice across detention facilities and still continued after the scandal, frequently with the approval of superior officers,⁹¹ but the Abu Ghraib offenses became vividly familiar because soldiers filmed them.

Notice of this breed of harm was available before the publicized events at Abu Ghraib occurred. There were general warnings in that abusive actions had been occurring in other foreign incarceration facilities outside of Iraq for nearly two years before the Abu Ghraib photos were revealed,⁹² but admonitions were more specific.

⁹¹ ARNOVE, *supra* note 24, at 22, 27. Human Rights Watch, *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the US Army's 82nd Airborne Division*, 16-18, vol. 17(3)(G), Sept. 2005, <http://www.hrw.org/reports/2005/us0905/us0905.pdf> (noting that superior officers did not provide a meaningful response regarding applying restrictions of the Geneva Conventions to the interrogation programs). This was not the spirit of publicized laws. On March 8, before the photos were released, the Coalition Provision Authority adopted an interim Administrative Law which stated: "Torture in all its forms, physical or mental, shall be prohibited under all circumstances, as shall be cruel, inhuman, or degrading treatment. No confession made under compulsion, torture, or threat thereof shall be relied upon or admitted into evidence for any reason in any proceeding, whether criminal or otherwise." *Iraq's Transitional Administrative Law*, WASH. POST, MARCH 8, 2004, http://www.washingtonpost.com/wp-dyn/articles/A39825-2004Mar8_2.html.

⁹² David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 59 (2006). Reports revealed that as early as January 2002, detainees at Bagram Prison in Afghanistan were held naked with bags covering their heads, that they were photographed while surrounded by approximately a dozen MPs wielding bats and guns, and that they were forced to squat and remain in uncomfortable positions for extended durations. David Rose, *They Tied Me Up Like a Beast and Began Kicking Me*, GUARDIAN, May 16, 2004, <http://www.guardian.co.uk/world/2004/may/16/terrorism.guantanamo>; HUMAN RIGHTS WATCH, ENDURING FREEDOM: ABUSES BY US FORCES IN AFGHANISTAN 24-25 (2004), <http://www.hrw.org/sites/default/files/reports/afghanistan0304.pdf> (reporting that prisoners were stripped naked at Bagram prison as early as May 2002); Suzanne Goldenberg & James Meek, *Papers Reveal Bagram Abuse*, GUARDIAN, Feb. 18, 2005, <http://www.guardian.co.uk/world/2005/feb/18/usa.iraq> (stating that "[n]ew evidence has emerged that US forces in Afghanistan engaged in widespread Abu Ghraib-style abuse, taking 'trophy photographs' of detainees and carrying out rape and sexual humiliation."); Carlotta Gall & David Rohde, *New Charges Raise Questions on Abuse at Afghan Prisons*, N.Y. TIMES, Sept. 17, 2004, http://www.nytimes.com/2004/09/17/international/asia/17afghan.html?_r=0 (stating that mili-

Starting shortly after the invasion and throughout 2003, the International Committee of the Red Cross (ICRC) periodically informed the Bush Administration and U.S. military command of arrests without cause, the use of excessive force, and physical and emotional coercion during interrogations.⁹³ In July 2003, Amnesty International produced a memorandum for the U.S. government that documented reports on arrests without cause, allegations of torture and ill treatment of prisoners in Iraq, and even deaths of detainees.⁹⁴ Specific to the issues in question, in October 2003, the ICRC expressed outrage to coalition authorities when it visited Abu Ghraib and found prisoners “completely naked in totally empty concrete cells and in total darkness” for several days.⁹⁵ The ICRC concluded that top Bush Administration officials had knowledge of analogous violations sometime between March and November

tary investigations confirmed that “Interrogation techniques intended only for Guantánamo came to be used in Afghanistan and Iraq ... [T]echniques included removal of clothing”); Kathy Gannon, *Prisoners Released From Bagram Say Forced to Strip Naked, Deprived of Sleep, Ordered to Stand for Hours*, ASSOC. PRESS, March 14, 2003.

⁹³ ICRC, TREATMENT BY THE COALITION FORCES, *supra* note 41; *Abuse Scandal Focus Shifts to Bush Legal Memo*, ASSOC. PRESS, May 16, 2004, <http://www.foxnews.com/story/0,2933,120072,00.html> (stating that “Secretary of State Powell says there were high-level discussions within the Bush administration last fall about information from the International Committee of the Red Cross alleging inmate abuse at the U.S.-run Abu Ghraib prison in Iraq.”).

⁹⁴ AMNESTY INTERNATIONAL, IRAQ: MEMORANDUM ON CONCERNS RELATING TO LAW AND ORDER 6, 11, 13 (JULY 2003), <http://www.amnesty.org/en/library/asset/MDE14/157/2003/en/968002d6-d6b1-11dd-ab95-a13b602c0642/mde141572003en.pdf>.

⁹⁵ Neil A. Lewis, *The Struggle for Iraq: Inspectors; Red Cross Found Abuses at Abu Ghraib Last Year*, N.Y. TIMES, May 11, 2004, <http://www.nytimes.com/2004/05/11/world/the-struggle-for-iraq-inspectors-red-cross-found-abuses-at-abu-ghraib-last-year.html> (further noting that there were “acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women’s underwear over the heads for prolonged periods” and that military intelligence officers confirmed that “methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information.”).

2003.⁹⁶ Secretary of State Powell certified that “we kept the president informed of the concerns that were raised by the ICRC and other international organizations as part of my regular briefings of the president.”⁹⁷

2. General Orders for Interrogation

Following the 60 Minutes broadcast, the media gradually leaked secret memos indicating that orders to engage in disturbing interrogation techniques, such as those used at Abu Ghraib, came from the highest levels of government.⁹⁸ In October 2002, which was more than one year before the crimes at Abu Ghraib occurred, Joint Task Force 170 imparted the Joint Chiefs of Staff and SOUTHCOM with proposals to use three categories of progressively intensive interrogation tactics. Category I commissioned interrogators to impose an uncomfortable environment, including by yelling and employing deception to inflict stressful conditions on detainees.⁹⁹ Category II permitted interrogators to employ stress

⁹⁶ Monica Hakimi, *The Media as Participants in the International Legal Process*, 16 DUKE J. COMP. & INT’L L. 1, 5 (2006).

⁹⁷ Mark Matthews, *Powell says Bush was ‘informed’ of Red Cross concerns*, BALT. SUN, May 12, 2004, <http://www.baltimoresun.com/news/bal-te.powell12may12,0,2608695.story>; AMNESTY INTERNATIONAL, IRAQ: ONE YEAR ON THE HUMAN RIGHTS SITUATION REMAINS DIRE 3, 10-11, Mar. 18, 2004, <http://www.amnesty.org/en/library/asset/MDE14/006/2004/en/abb12f40-d601-11dd-bb24-1fb85fe8fa05/mde140062004en.pdf> (reporting that Coalition Forces “have shot Iraqis dead during demonstrations” and “tortured and ill-treated prisoners and detainees,” and that there were reports of Iraqis being tortured starting in April 2003.).

⁹⁸ MCCOY, *supra* note 28, at 144. Larry Wilkerson, chief of staff to Secretary of State Powell, explained that the secretary of defense and the vice president initially authorized interrogation procedures for the armed forces that “were not in accordance with the spirit of the Geneva Conventions and the laws of war.” Paust, *supra* note 65, at 350.

⁹⁹ William J. Haynes II, General Counsel, Department of Defense, For: Secretary of Defense, Subject: Counter-Resistance Techniques, Nov. 27, 2002, *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/additional_detainee_documents/07-F-2406%20doc%201.pdf; Task Force 170, Dep’t of Def., Request for Approval of Counter-Resistance Strategies 1, Oct. 11, 2002, <http://www.dod>.

positions, mislead detainees with falsified documents, quarantine captives in solitary confinement for up to thirty days, constrict breathing, induce sensory deprivation, and invoke phobias.¹⁰⁰ Category III authorized interrogators to threaten to kill members of a captive's family, expose inmates to harshly cold temperatures and water, engage in daylong interrogations, and induce perceptions of drowning and suffocation.¹⁰¹ In December 2002, Defense Secretary Rumsfeld approved Category I and II, and some methods in Category III.¹⁰²

After some officials contended that detainees frequently resisted approved interrogation methods, a Defense Working Group was established in early-March 2003, and Rumsfeld authorized another dozen interrogation methods, which included implementing "environmental manipulation" methods, altering sleep rhythms from night to day, leaving detainees isolated and naked in the dark for up to thirty days, applying harsh heat and cold, withholding food, hooding for several days straight, and forcing detainees into "stress positions" to "subject detainees to rising levels of pain."¹⁰³ These methods did not spontaneously emerge, but, instead, were authorized by top officials, progressed down the chain of command, and were substantially consistent with the CIA's interrogation tactics that were set forth in the *Kubark Interrogation Manual* (1963).¹⁰⁴

mil/pubs/foi/operation_and_plans/Detainee/additional_detainee_documents/07-F-2406%20doc%201.pdf.

¹⁰⁰ Task Force 170, *supra* note 99, at 1-2.

¹⁰¹ *Id.* at 2-3.

¹⁰² Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT'L. 541, 583, 593-94 (2005); Paust, *supra* note 87, at 840. The Bush Administration approved the use of sensory deprivation, stress positions, phobias and dogs, psychological trickery, and threat scenarios against the detainee and/or his family. Haynes, *supra* note 99.

¹⁰³ Alfred W. McCoy, *The Outcast of Camp Echo: The Punishment of David Hicks*, THE MONTHLY, June 2006, <http://www.themonthly.com.au/punishment-david-hicks-outcast-camp-echo-alfred-w-mccoy-229>.

¹⁰⁴ Wallach, *supra* note 102, at 581. For example, the CIA's *Kubark Interrogation manual* states that "whereas pain inflicted on a person from outside himself may actually focus or intensify the will to resist, his resistance is likelier to be sapped

At Senate Armed Service Committee hearings, Senator Levin itemized interrogation methods approved by the Secretary of Defense for “unlawful combatants,” which included “nudity, exploiting detainees’ fears ... and stress positions” in December 2002; additional interrogation methods authorized on April 16, 2003; General Miller’s involvement when visiting Iraq; a document for Iraq “titled ‘Policy No. 1—Battlefield Interrogation Team and Facility (BIT/F) Policy’ dated 15 July 2003;” and queried General Fay who admitted that these authorizations “contribute[d] to the use at Abu Ghraib of aggressive interrogation techniques.”¹⁰⁵ Without these extraordinary orders, the military would have followed Field Manual 34-52 and provided an exceptionally higher standard of treatment for detainees.¹⁰⁶

by pain which he seems to inflict on himself.” MCCOY, *supra* note 28, at 51-52, 91 (citing CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION 88, 90, 94) (the “immediate source of pain is not the interrogator but the victim himself.”); CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL—1983, <http://www.scribd.com/doc/80161998/Human-Resource-Exploitation-Training-Manual-1983>) (stating that “[i]ntense pain is quite likely to produce false confessions, fabricated to avoid punishment,” which results in a time-consuming delay while an investigation is conducted and the admissions are proven untrue.”). However, forcing detainees to remain in “stress positions” for prolonged durations can make the victim feel responsible because the detainee’s muscles are creating the pain. MCCOY, *supra* note 28, at 55; European Court of Human Rights, Ireland v. The United Kingdom, No. 5310/17, January 18, 1978, ¶ 96-97, *available at* <http://www.worldlii.org/eu/cases/ECHR/1978/1.html> (holding psychological interrogation methods illegal).

¹⁰⁵ Committee on Armed Services, United States Congress, Review of Department of Defense Detention and Interrogation Operations, S Hrg. 108-868, Sept. 9, 2004, *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg96600/html/CHRG-108shrg96600.htm>; John Barry, Michael Hirsch, & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 23, 2004, *available at* <http://www.thedailybeast.com/newsweek/2004/05/23/the-roots-of-torture.html> (stating that a “NEWSWEEK investigation shows that, as a means of pre-empting a repeat of 9/11, Bush, along with Defense Secretary Rumsfeld and Attorney General John Ashcroft, signed off on a secret system of detention and interrogation that opened the door to such [brutal methods as were seen in the Abu Ghraib photos]”).

¹⁰⁶ GOUREVITCH & MORRIS, *supra* note 81, at 39. The Department of Defense remarked about interrogation procedures: “[O]ur Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.” Memorandum from William J. Haynes II, General Counsel, Dep’t of Def, to Donald Rumsfeld, Sec’y

In *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (2007), ACLU attorneys Jameel Jaffer and Singh, asserted: “The fact that the Abu Ghraib photographs depicted abuse at a single prison allowed senior administration officials to claim, as they did repeatedly, that the abuse was confined to that facility. This claim is completely false.”¹⁰⁷ FBI reports, human rights groups, and witnesses confirmed that Abu Ghraib-like atrocities were being committed at Guantánamo Bay as early as November 2002,¹⁰⁸ which was shortly after top officials sanctioned oppressive interrogation approaches.

Lt. Gen. Randall Schmidt investigated abuses at Guantánamo Bay and stated: “For lack of a camera, you could have seen in Guantánamo what was seen at Abu Ghraib.”¹⁰⁹ The Pentagon’s Fay

of Def. (Nov. 27, 2002); Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from Historical Perspective* 58 WAYNE L. REV. 327, 386-90, 401-02 (2012) [hereinafter Bejesky, *Utilitarian Rational Choice*] (pointing out abuse with Operation Phoenix during the Vietnam War, training of Latin American security forces at the School of the Americas, and other potential Pentagon involvement in Latin America).

¹⁰⁷ ACLU, *ACLU Announces Publication of Administration of Torture, a Groundbreaking Account of Prisoner Abuse in US Custody Abroad*, BLOG OF RIGHTS (Oct. 22, 2007), available at <https://www.aclu.org/organization-news-and-highlights/aclu-announces-publication-iadministration-torturei-groundbreaking->. The denials of abuse were “completely false, and senior officials almost certainly knew it to be so.” *Id.*

¹⁰⁸ Edward Alden, *FBI Saw Abu Graib-style tactics in Guantanamo Bay jail*, FIN. TIMES, (Dec. 7, 2004, 12:36 AM) available at <http://www.ft.com/cms/s/0/03c795c2-47e7-11d9-a0fd-00000e2511c8.html#axzz2MQXJVAaV>; FBI, *Detainee Interviews: Abusive Interrogation Issues*, May 6, 2004, available at http://www.aclu.org/files/torturefoia/released/FBI_4194.pdf (stating that “[i]n late 2002 and continuing into mid-2003, the Behavioral Analysis Unit raised concerns over interrogation tactics being employed by the U.S. military,” and affirming that the FBI objected to the these methods, which were approved by the military and government); Suzanne Goldenberg, Tania Branigan & Vikram Dodd, *Guantanamo abuse same as Abu Ghraib, say Britons*, THE GUARDIAN, (May 14, 2004, 10:04 PM), available at <http://www.guardian.co.uk/world/2004/may/14/iraq.guantanamo>.

¹⁰⁹ Seymour M. Hersh, *The General’s Report*, THE NEW YORKER, (June 25, 2007), available at http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?currentPage=all.

Report itemized instances that demonstrate keeping prisoners naked in their cells and abusing them while they were naked was a standard practice.¹¹⁰ Sexual humiliation for psychological effect may have been systematically incorporated into interrogation tactics at Guantánamo Bay and Afghanistan.¹¹¹ In November 2002, Rumsfeld approved of the use of attack dogs to intimidate prisoners in generate phobias, and this was implemented at Guantánamo Bay, Afghanistan, and Abu Ghraib.¹¹²

The Bush Administration approved of outrageous interrogation methods and detainees were subjected to human rights abuses even though Article 17 of the Geneva Convention explicitly states that “every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this,

¹¹⁰ Fay Report, *supra* note 43, at 88 (noting that military intelligence employed removal of clothing as an “‘ego down’ technique” and by MPs “as a ‘control’ mechanism”); ICRC, TREATMENT BY THE COALITION FORCES, *supra* note 41 (stating that “methods of ill-treatment most frequently alleged ... included [b]eing stripped naked for several days while held in solitary confinement...”); ACLU, *supra* note 107 (reporting of the numerous homicides of detainees in U.S. detention facilities and that there were numerous reports of prisoners being stripped naked); Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, (May 21, 2004), available at <http://www.washingtonpost.com/wp-dyn/content/article/2004/05/21/AR2005040207076.html>; Scott Higham & Joe Stephens, *Punishment and Amusement*, WASH. POST, May 22, 2004, at A01.

¹¹¹ Seymour M. Hersh, *The Gray Zone: How a secret Pentagon program came to Abu Ghraib*, THE NEW YORKER, (May 24, 2004), available at http://www.newyorker.com/archive/2004/05/24/040524fa_fact (noting that the use of sexual humiliation as an interrogation strategy apparently came from a book by Raphael Patai, *The Arab Mind*, in which he asserts that cultural values and rules about sexual behavior are much more conservative and strict in the Arab world); MCCOY, *supra* note 28, at 126-27 (stating that after Rumsfeld appointed Miller, he created a Behavioral Science Consultation Team (BSCT) with psychologists and psychiatrists to “engineer the camp experiences of ‘priority’ detainees to make interrogation more productive.”).

¹¹² Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 340 (2006); Pearlstein, *supra* note 12, at 1259, 1263-65 (citing Lt. GEN. MARK SCHMIDT & BRIG. GEN. JOHN FURLOW, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AS GUANTANAMO BAY, CUBA DETENTION FACILITY 14 (2005)).

equivalent information.”¹¹³ Professor Mary Ellen O’Connell explained: “[T]he President of the United States may no more authorize the use of coercion and cruelty against detainees than he may authorize torture.”¹¹⁴ In its Model Manual on the Law of Armed Conflict, the ICRC explicates: “Although a prisoner of war is not bound to give information (except his identity), he may be willing to provide other information and there is no reason why the capturing power should not ask questions ... [N]o coercion may be used.”¹¹⁵

Hypothetically, interrogators might “talk” to detainees and prisoners might willingly volunteer information, but it is patently illegal to strip naked, threaten, place in stress positions, suffocate, or punish detainees so that interrogators might attain information. Distinctions between “torture” and “cruel and inhumane punishment” are red herrings because both standards are prohibited.¹¹⁶ Professor

¹¹³ Geneva I, *supra* note 47, at 98; Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1235 (2005) (affirming that “IHL expressly prohibits not just torture, but any form of coercion of detainees during interrogation.”).

¹¹⁴ O’Connell, *supra* note 113, at 1237.

¹¹⁵ ICRC, FIGHT IT RIGHT: MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES § 1405.2, available at http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence170510/bmi08148.pdf. ICRC, THE LAW OF ARMED CONFLICT 14-7, (2002), available at http://www.icrc.org/eng/assets/files/other/law7_final.pdf (“it is unlawful to give particularly cooperative prisoners of war more favorable treatment, such as better accommodations, rations or pay, since all POWs are to be treated alike.”); The Committee on International Human Rights and the Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the United States’ Interrogation of Detainees*, 59 THE RECORD 183, 220 (2004).

¹¹⁶ Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 42-43 (2008); Jordan J. Paust, *Prosecuting Military Commanders and Civilian Ministers for Violations of the Laws of War: The Importance of Customary International Law During Armed Conflict*, 12 ILSA J. INT’L & COMP. L. 601, 603 (2006) (hooding and stripping detainees naked for interrogation and using dogs to strike fear are each forms of torture, a jus cogens violation, and a “patently illegal tactic that was authorized and ordered in memos by Secretary Rumsfeld and others as part of a common plan for use in Guantanamo and even in Iraq.”); O’Connell, *supra* note 113, at 1239 (noting that the allegation “that some individuals have no right not to be tortured or abused while in detention is simply wrong.”).

Jordan Paust stated: “I know of no other instance in our history when a Secretary of Defense, top U.S. Generals, or a DOD Working Group approved such denials of protection or the use of interrogation tactics that were either patently violative of the laws of war or could clearly constitute violations in various circumstances.”¹¹⁷ The same psychological abuse approaches have been condemned for several decades.¹¹⁸ One might surmise that top officials in the Bush Administration were cognizant of the history.

3. Specific Orders for Abu Ghraib

After dismissing other generals who apparently were not comfortable imposing extreme interrogation methods on detainees at Guantánamo Bay, such as stress positions, deprivation of food, and intimidation with dogs,¹¹⁹ Major General Geoffrey D. Miller did implement orders at Guantánamo Bay and Rumsfeld instructed Miller to use those same methods on Iraqi prisoners who should have been afforded POW protection under the Geneva Conventions.¹²⁰ Miller traveled to Iraq and directed Janis Karpinski,¹²¹ the US Army Reserve officer who managed Abu Ghraib, to “Gitmoize” Abu Ghraib by extending interrogation tactics used at Guantánamo Bay.¹²² Karpinski explained that Miller visited Abu Ghraib in early

¹¹⁷ Paust, *supra* note 87, at 863. A more mild interpretation is that “the Bush Administration’s failure to implement a clear Convention III policy in Iraq ignited a chain of events that led to the abuse of numerous detainees.” Alison Croessmann, Note, *Congress’ Preliminary Response to the Abu Ghraib Prison Abuses Room for Reform?*, 71 BROOKLYN L. REV. 945, 978 (2005).

¹¹⁸ Bejesky, *Utilitarian Rational Choice*, *supra* note 106, at 405-07.

¹¹⁹ Paust, *supra* note 65, at 348; Robert Bejesky, *Closing Gitmo Due to the Epiphany Approach to Habeas Corpus During the Military Commissions Circus*, 50 WILLAMETTE L. REV. 43, 62-65 (2013) (listing abuses and referencing investigations by the FBI and human rights groups that condemned the abuses).

¹²⁰ MCCOY, *supra* note 28, at 133-34 (citing Taguba Report, *supra* note 73, at 7-8, 15); Murphy, *supra* note 82, at 828-29.

¹²¹ MCCOY, *supra* note 28, at 134.

¹²² Frontline, *Interview with Janis Karpinski, Gulf War Veteran and Army Reservist*, PBS (Aug. 5, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html>. Scholars readily recognized this connection between orders to “Gitmoize” Abu Ghraib and wrongdoing. See Manfred

September 2003 and instructed: “[W]e’re going to train the MPs to work with the interrogators ... We’re going to select the MPs who can do this, and they’re going to work specifically with the interrogation team.”¹²³ The Taguba investigation concluded that Miller considered it essential for MPs to “be actively engaged in setting the conditions for successful exploitation of the internees.”¹²⁴

The orders were affirmed by Lt. Gen. Ricardo Sanchez, the military commander in Iraq. In October 2003, Sanchez wrote in a classified memo that interrogators at Abu Ghraib would work with MPs to “manipulate an internee’s emotions and weaknesses” and augment the effectiveness of interrogations.¹²⁵ Interrogators implemented the orders because in February 2004, the ICRC reported that military intelligence in Iraq was using “physical and psychological coercion” in a “systematic way to gain confessions and extract information.”¹²⁶ Tactics included positioning detainees in “painful stress positions” for prolonged durations, hooding prisoners to disorient and restrict breathing, placing them in pitch-black cells for several days at a time, and parading them around naked.¹²⁷ Soldiers seen in the photos later explained that military intelligence officers

Nowak, Moritz Birk & Tiphane Crittin, *The Obama Administration and Obligations Under the Convention Against Torture*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 33, 40 (2011). See also Joseph Pugliese, *Abu Ghraib and its Shadow Archives*, 19 CARDOZO STUD. L. & LIT. 247, 257 (2007); Sadat, *supra* note 112, at 312.

¹²³ MCCOY, *supra* note 28, at 134; Wilde, *supra* note 73, at 758-59 (noting the approach of MPs softening up detainees); Strauss, *supra* note 39, at 1275 (“they were responding to orders from higher-ups to ‘soften up’ the detainees for interrogation”). See also Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT’L L. 1353, 1376 (2004).

¹²⁴ Taguba Report, *supra* note 73, at 8-9; JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 10 (2004), available at <http://www.defense.gov/news/aug2004/d20040824finalreport.pdf> [hereinafter Schlesinger Report] (stating that “MG Miller called for the military police and military intelligence soldiers to work cooperatively, with the military police ‘setting the conditions’ for interrogations”).

¹²⁵ Smith, *supra* note 50, at A17.

¹²⁶ HUMAN RIGHTS WATCH, *supra* note 25.

¹²⁷ *Id.*; Pearlstein, *supra* note 12, at 1269.

instructed them to subject prisoners to these methods because it was an effective means of attaining information.¹²⁸ Investigations exposed that the interrogation methods were approved by top officials, but that those committing wrongdoing somehow misunderstood their obligations.¹²⁹

The reported justification for implementing interrogation operations in Iraq was that General Sanchez was confronted with a swelling insurgency and commanders believed that interrogation could reveal vital information,¹³⁰ but in implementing the interrogation operations, commanders also recognized distinctions with Afghanistan and Abu Ghraib by admitting that the Geneva Convention was fully applicable in Iraq.¹³¹ Not only is “cheating” by coercing and forcing information from detainees specifically what the Geneva Convention prohibitions were devised to prevent, but causal inferences about the insurgency might be reversed. Perhaps if combatants believe that they will be treated with respect, they may surrender, but if they perceive that they will be tortured, they may be

¹²⁸ Joel Roberts, *Female GI in Abuse Photos Talks*, CBS NEWS, May 12, 2004, http://www.cbsnews.com/2100-500257_162-616921.html.

¹²⁹ Fay Report, *supra* note 43, at 10, 15-16, 25-26, 29 (acknowledging that “[i]nterrogating detainees was a massive undertaking,” that it was intended to “gather initial battlefield intelligence,” and that orders were issued for interrogation but contending that soldiers somehow misunderstood the policies); Josh White, *Abuse Report Widens Scope of Culpability*, WASH. POST, Aug. 26, 2004, at A01 (“The generals also describe confusing and contradictory interrogation policies that led some military intelligence personnel to abuse detainees because they thought they were following accepted practices.”).

¹³⁰ Schlesinger Report, *supra* note 124, at 10-11.

¹³¹ *General Ricardo Sanchez Testimony Before Senate Committee on Armed Services*, May, 19, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19.html> (Sanchez testifying: “In September [2003], a team headed by General Geoffrey Miller assessed our intelligence interrogation activities and human detention operations. We reviewed recommendations with the expressed understanding, reinforced in conversations between General Miller and me, that they might have to be modified for use in Iraq where the Geneva Convention was fully applicable.”); Wallach, *supra* note 102, at 624.

less likely to surrender¹³² and more prone to organize an insurgency.¹³³

Internal memos verified that Miller explained to Karpinski, during his early-September 2003 visit to Iraq, that “teams, comprised of operational behavioral psychologists and psychiatrists, are essential in developing integrated interrogation strategies and assessing interrogation intelligence.”¹³⁴ Former military interrogators disclosed that psychologists and psychiatrists used prisoner medical files to advise interrogators on the effective means of provoking “detainees’ fears and longings to increase duress.”¹³⁵ In a sworn statement, Pappas explained that the MP guards were

¹³² David A. Wallace, *Torture v. the Basic Principles of the U.S. Military*, ICJ 6 2 (309), May 2008.

¹³³ See generally PHILIP BOBBIT, *TERROR AND CONSENT* 183 (2008) (believing that reactions to state violence can inflame and that accurate indicia are required to “determine when a state ... threatens to become a state of terror”); P.W. Singer, *Can’t Win with “Em, Can’t Go to War without Em”: Private Military Contractors and Counterinsurgency*, BROOKINGS INSTITUTION, Sept. 2007, available at <http://www.brookings.edu/research/papers/2007/09/27militarycontractors> (an Iraqi government official stating that private contractors are “part of the reason for all the hatred that is directed at Americans”). Chris Mackey, an Army interrogator in Afghanistan, believed that “images of depravity will inflame anti-American sentiment in the Muslim world for a generation, driving who knows how many would-be jihadists into the ranks of Al Qaeda and other terrorist organizations.” MCCOY, *supra* note 28, at 200 (citing CHRIS MACKEY & GREG MILLER, *THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA* 472 (2004)); Scott Horton, *A Nuremberg Lesson: Torture Scandal Began Far Above “Rotten Apples*, L.A. TIMES, Jan. 20, 2005, available at <http://articles.latimes.com/2005/jan/20/opinion/oe-horton20> (stating that “stories of [torture in detention centers] ... were spread everywhere among the people, and later by the prisoners who were freed.”). Likewise, if other innocent detainees were similarly defiled with interrogation practices, released, and communicated injustices to other Iraqis, the fear of or desire to avenge torturous treatment might have sparked insurgencies.

¹³⁴ DEP’T OF DEF., *ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ* 5 (2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB140/a20.pdf>. The Behavioral Science Consultation Team was granted access to detainee records to assist in developing tailored interrogation plans. MCCOY, *supra* note 28, at 127 (citing M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantánamo Bay*, 353(1) N.E. J. MED. (July 7, 2005)).

¹³⁵ MCCOY, *supra* note 28, at 182; Graham, *supra* note 90, at 81.

typically given “a copy of the interrogation plan and a written note as to how to execute [it],” and [t]he doctor and psychiatrist also look at the files to see what the interrogation plan recommends.”¹³⁶ Having medical and health professionals assist in stimulating or moderating a degree of mental pain to attain “intelligence information” is a controversial application of the doctors’ Hippocratic Oath¹³⁷ and further demonstrates a systemization of interrogation that was fully incorporated into the chain of command.

4. A Quagmire of Confusion

Even with acknowledgements that interrogators were authorized to use extraordinary methods to acquire intelligence (which was in violation of the Geneva Convention), the highest levels of the U.S. government approved a list of interrogation techniques, and that there were specific interrogation directives for Iraq and would involve MPs, an alternative chronology superseded these facts; MPs should not have been participating in interrogation operations or at least should not have perpetrated the specific harms for which they were accused. After Miller apprised Karpinski of the intention to enlist MPs to make detainees more biddable, the chain of command became obscure.¹³⁸ Apparently, shortly after Miller’s visit, cell blocks 1-A and 1-B, the locations of misconduct depicted on 60 Minutes, were informally removed from Karpinski’s command and situated within the authority of Colonel Thomas M. Pappas and Lieutenant Colonel Steve Jordan, two intelligence officers who reported directly to General Sanchez in Baghdad.¹³⁹ On November

¹³⁶ Thomas M. Pappas, Sworn Statement for ODCSOPS 3, (2004), *available at* <http://www.usnews.com/usnews/news/articles/040709/Pappas.pdf>.

¹³⁷ Bejesky, *Utilitarian Rational Choice*, *supra* note 106, at 392-94; Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 552 (2008) (noting that participating physicians, nurses and technicians apparently did not object).

¹³⁸ Brenner, *supra* note 7, at 41.

¹³⁹ MCCOY, *supra* note 28, at 137 (citing Taguba Report, *supra* note 73, at 7-8, 15); Adam Zagorin, *New Charges in Abu Ghraib?*, TIME, Apr. 26, 2006, *available at* <http://www.time.com/time/world/article/0,8599,1187871,00.html> (stating that “Jordan ... helped direct day-to-day activities in the Abu Ghraib cell block where

19, 2003, Sanchez officially removed all of Abu Ghraib prison from Karpinski's command and assigned it to Pappas's 205th Military Intelligence Brigade.¹⁴⁰ On January 13, 2004, less than two months after this operational control shifted within Abu Ghraib, the lewd pictures circulated to U.S. government authorities.¹⁴¹

After the photos were publicized, Karpinski was appalled by the sexual humiliation and Sanchez maintained that Karpinski's "poor leadership" over the MPs produced these "incidents over the preceding six months."¹⁴² It is difficult to imagine how Karpinski could have easily managed the situation; the Pentagon chain of command empowered Karpinski with overall authority for hundreds of soldiers operating at sixteen prison facilities in Iraq¹⁴³ when she had been a member of the Army Reserve with no experience managing a prison facility prior to being activated in June 2003.¹⁴⁴ It

most the abuses occurred" and others who potentially have knowledge of orders included Maj. Gen. Barbara Fast, Lt. Gen. Ricardo Sanchez, Col Pappas, and Gen. Geoffrey Miller).

¹⁴⁰ MCCOY, *supra* note 28, at 137 (citing Taguba Report, *supra* note 73, at 38); Philip Shenon, *The Struggle for Iraq: Detainees; Officer Suggests Iraqi Jail Abuse was Encouraged*, N.Y. TIMES, May 2, 2004, available at <http://www.nytimes.com/2004/05/02/world/the-struggle-for-iraq-detainees-officer-suggests-iraqi-jail-abuse-was-encouraged.html?ref=janiskarpinski> (Karpinski stating that "the prison cellblock where the abuse occurred was under the tight control of Army military intelligence officers who may have encouraged the abuse.").

¹⁴¹ MCCOY, *supra* note 28, at 142.

¹⁴² *Id.* (Karpinski expressing: "I was shocked. I felt sick to my stomach.... And not that they were torturing these people, but this was absolute humiliation of a sexual nature, and [the MPs'] faces seemed to reveal that they were enjoying it.... Do you know what this does in an Arab culture? Do you know what you are doing? This is the equivalent of castrating them in public."). Brigadier General Mark Kimmitt spoke for Sanchez and blamed "leadership, supervision" of Brigadier General Janis Karpinski because she was the military police commander for Iraq. *Id.* at 144.

¹⁴³ Scott Higham, Josh White & Christian Davenport, *A Prison on the Brink*, WASH. POST, May 9, 2004, available at http://www.washingtonpost.com/wp-dyn/articles/A11413-2004May8_4.html.

¹⁴⁴ Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493, 496 (2006).

is the Pentagon's poor judgment to impose such encompassing responsibility on one individual.

The Taguba report concurred that commanders did not adequately supervise MPs or take corrective action, but also blamed failures on "lack of knowledge, implementation, and emphasis of basic legal, regulatory, doctrinal, and command requirements."¹⁴⁵ Karpinski retorted that Sanchez and Miller instilled the milieu by instructing that detainees should be harshly treated.¹⁴⁶ Ostensibly agreeing with Karpinski, Lt. Randall Schmidt noted: "[Major Gen. Miller] was responsible for the conduct of interrogations that I found to be abusive and degrading ... He was responsible."¹⁴⁷ The Taguba report also criticizes higher-level officers—Pappas, Phillabaum, Jordan, DiNenna, and Reese—and low-level officers—Raeder, Emerson, Lipinski, and Snider.¹⁴⁸

Army investigators documented an inappropriate separation of authority between commanders and prison management over intelligence directives, which created an "ambiguous command relationship" that was not "doctrinally sound."¹⁴⁹ Moreover,

¹⁴⁵ Taguba Report, *supra* note 73, at 11, 13, 19-20, 37-44; ZIMBARDO, *supra* note 8, at 388-89.

¹⁴⁶ ZIMBARDO, *supra* note 8, at 337; Pugliese, *supra* note 122, at 258 (noting that Karpinski explained that Miller told her, "[L]ook, the first thing you have to do is treat these prisoners like dogs. If they ever get the idea that they're anything more than dogs, you've lost control of your interrogation."). See also GOUREVITCH & MORRIS, *supra* note 81, at 48; JANIS KARPINSKI WITH STEVEN STRASSER, ONE WOMAN'S ARMY 197 (2006). Some military personnel allegedly referred to Arab prisoners and other racially derogatory terms. Pugliese, *supra* note 122, at 269.

¹⁴⁷ Hersh, *supra* note 109.

¹⁴⁸ ZIMBARDO, *supra* note 8, at 389; Taguba Report, *supra* note 73, at 45-46, 91, 64-67, 120 explaining that Pappas did not inhibit subordinates from departing from sanctioned U.S. interrogation methods and the Geneva Conventions and did not prevent misconduct after ICRC warnings, and Lieutenant Colonel Jordan inadequately supervised soldiers under his command and did not verse soldiers in the Geneva Convention rules).

¹⁴⁹ Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, THE NEW YORKER, May 17, 2004, available at http://www.newyorker.com/archive/2004/05/17/040517fa_fact2?currentPage=all; Taguba Report, *supra* note 73, at 29, 38 (noting the "unclear lanes of responsibility, and ambiguous relationship between the MI and MP assets" and an "ambiguous command relationship").

changing interrogation directives confused personnel,¹⁵⁰ troops and interrogators were ill-trained,¹⁵¹ and procedures to report abuses were lacking.¹⁵² Explanations of neglect are not altogether reconcilable with the Taguba report conclusion which stated that anonymous intelligence operatives were obligating and training MPs to “break down prisoners” before interrogation.¹⁵³

The predicament with asserting that soldiers, interrogators, and mid-level officials somehow all misunderstood obligations under the Geneva Conventions is that the military follows orders and the Bush Administration issued both general and specific orders to conduct abusive interrogations in Iraq when any form of interrogation is wholesale prohibited under the Geneva Convention.¹⁵⁴ When Miller, Sanchez, Pappas, Karpinski, and others evidently permitted abuse at Abu Ghraib,¹⁵⁵ they were ostensibly following orders from Rumsfeld and other White House officials. Trying to pinpoint culpable acts between directives from top directives and perpetration resulted in a resplendent wheel of accusation-casting.

Article 92 of the Uniform Code of Military Justice states that a “general order or regulation is lawful unless it is contrary to the Constitution ... or for some other reason is beyond the authority of

¹⁵⁰ Fay Report, *supra* note 43, at 8 (“[B]y October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved.”).

¹⁵¹ Jones Report, *supra* note 76, at 19-22 (stating that Military Intelligence and Military Police did not receive adequate training on interrogation techniques and did not understand the Geneva Conventions); Pearlstein, *supra* note 12, at 1271-72 (2005).

¹⁵² Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 A.J.I.L. 1, 16 (2010) (drawing comparisons to the My Lai massacre).

¹⁵³ Taguba Report, *supra* note 73, at 19 (describing how interrogators complimented MPs for breaking down the prisoners); Fay Report, *supra* note 43, at 69 (stating that “MI interrogators started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees.”).

¹⁵⁴ See *supra* Part II(D)(3).

¹⁵⁵ ZIMBARDO, *supra* note 8, at 337.

the official issuing it.”¹⁵⁶ The Manual for Courts Martial states that “[i]t is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”¹⁵⁷ A soldier who chooses to disobey a potentially illegal order can face insubordination, courts-martial, and negligent or willful dereliction of duty charges, which can impose incarceration.¹⁵⁸ After Spc. Charles Graner was sentenced to ten years for participating in the Abu Ghraib atrocities, his mother highlighted the legal and moral dilemma: “He got 10 years in prison for something he was told to do ... [H]e committed a crime for obeying orders, and he would have committed a crime if he didn’t obey orders.”¹⁵⁹

Part III explains why the level of culpability should be reversed—those at the top of the command chain should be most culpable because they issued illegal orders, those in the middle should be less culpable than superiors because they possess a heightened opportunity to evaluate directives more fully than subordinates, and the MPs should be viewed as least culpable. Rules, expectations, and military culture are elements that inherently undermine the free choice of soldiers, making it more unreasonable to impose the foremost level of culpability on low-level troops for adhering to chain of command directives.

¹⁵⁶ MANUAL FOR COURTS-MARTIAL: UNITED STATES pt. IV, ¶ 16(C)(1)(C) (2012) [hereinafter MCM], available at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

¹⁵⁷ *Id.* at 916(d).

¹⁵⁸ Unif. Code of Military Justice §§ 893 art. 93; 897 art. 97; 916 art. 116; 918 art. 118; 919 art. 120; 924 (2008); MCM, *supra* note 156, at A2-26, A2-29, A2-31, A2-32.

¹⁵⁹ Susan Candiotti & Jim Polk, *Graner sentenced to 10 years for abuses*, CNN, (Jan. 15, 2005), <http://www.cnn.com/2005/LAW/01/15/graner.court.martial/>. While the wrongs were much more egregious than those committed at Abu Ghraib, studies found that soldiers complied with directives during the Vietnam War not because they thought that attacks massacring women and children were morally right, but because they were “just following orders” of superiors. Tom R. Tyler, *TRUST AND DEMOCRATIC GOVERNANCE*, 277 (Braithwaite, Valerie, & Levi, eds. 1998).

III. BASIS FOR CRIMINAL CULPABILITY

A. Chain of Command

The legal doctrine of command responsibility affirms that senior officials may not only be held responsible for the acts of subordinates, but could be deemed more accountable than subordinates for violating domestic or international law.¹⁶⁰ In 1949, the High Command Case confirmed that officers cannot docilely ignore subordinates who implement illicit directives of superiors and remain immune from criminal responsibility, but also that culpability does not perfunctorily apply equally across the chain of command.¹⁶¹ Addressing obligations of superior officials, the tribunal stated that “[t]here must be a personal dereliction that ... is directly traceable to him or where his failure to supervise his subordinates constitutes criminal negligence on his part.”¹⁶²

The U.S. Supreme Court also affirmed the doctrine of command responsibility when it held that superior officers can be liable if they (1) held effective control over subordinates who violated the law of nations, (2) knew or should have been aware of the subordinates’ illegal conduct, and (3) with knowledge, the superior official did not undertake reasonable steps to thwart the subordinates’ illegal conduct.¹⁶³ If the test is met, a soldier or officer who

¹⁶⁰ Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996) (noting that command responsibility is incorporated into international and domestic law); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005) (“Accountability ... implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”).

¹⁶¹ *U.S. v. von Leeb: The High Command Case in XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS* 512 (United States Government Printing Office, 1953).

¹⁶² *Id.* at 543.

¹⁶³ Pearlstein, *supra* note 12, at 1268 (referencing doctrine from *In re Yamashita*, 327 U.S. 1 (1946); U.S. DEP’T OF ARMY, FM 27-10: THE LAW OF LAND WARFARE 501; JUDGE ADVOCATE GENERAL’S SCHOOL, LAW OF WAR DESKBOOK, 202-04

exercises command authority can be held accountable for what is carried out within the chain of command.¹⁶⁴ Consequently, international law and U.S. court precedent both confirm that commanding military officers cannot remain willfully ignorant of the war crimes of subordinates, but are obliged to investigate wrongdoing and must react and emend the conduct, or liability can attach to the commanding officer¹⁶⁵ based on a negligence standard.¹⁶⁶

(Chr. Brian J. Bill ed., 2000); The Committee on International Human Rights, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* 60 THE RECORD 13, 126 (2005) (referencing that international criminal tribunals follow an analogous test).

¹⁶⁴ U.S. DEP'T OF ARMY, AR 600-20, ARMY COMMAND POLICY, § 2-1(b) (June 2006).

¹⁶⁵ Geneva Protocol I, *supra* note 49, arts. 86-87. This is also consistent with the ICC Statute, which states that a "military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution." Rome Statute of the International Criminal Court, art. 28(a)(ii), July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>; Prosecutor v. Mucic et al., Case No. IT-96-21-T, Judgment, P 383 (Nov. 16, 1998), available at http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (holding that a leader is culpable when

“(1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes [prohibited by binding international law] ... or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offenses by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.”);

4 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34-35 (William S. Hein & Co. 1997) (1948); 8 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 70-71 (William S. Hein & Co. 1997) (1949); 12 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 70-77, 92-95 (William S. Hein & Co. 1997) (1948); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 266 (2009) (ICTY citing a report by the Commission of Experts, which stated that superiors are “individually responsible for a war crime or crime against humanity committed by a subordinate.”).

¹⁶⁶ Rome Statute, *supra* note 165, art. 28 (requiring leaders and commanders to react when the commander should have known that subordinates were committing proscribed misconduct and did not reasonably endeavor to impede the crimes).

Even though the U.S. has resolutely accepted the doctrine of command responsibility, the U.S. government and courts have only imposed command responsibility on foreign military hierarchies, and have never subjected U.S. military commanders to criminal charges on a conspicuous command responsibility approach.¹⁶⁷ In the interrogation misconduct cases, the Bush Administration did adduce the import of abiding by international and domestic law and intrinsically endorsed command responsibility by stating that those responsible would be brought to justice, but the omission was that they were not participants in the criminal cases. The substantive offense for torturous interrogation tactics is binding and prohibited under US law¹⁶⁸ and complicity is punishable, but several systemic and informal influences and institutional mechanisms evince how subordinates can be impelled to execute nefarious and potentially illegal directives and why there is an apparent expanse between civilian expectations for command responsibility and how law relating to command responsibility is actually enforced.

B. Systemic Influences

Rules and culture within organizations encourage conformity, foster obedience to authority,¹⁶⁹ marginalize dissent, and

Not that there was much to praise in the statute, but in 2006, the Military Commissions Act incorporated a negligence standard for superiors by making them responsible when they knew “or should have known” that a subordinate would commit a crime and failed to prevent it; Military Commissions Act of 2006, 10 § U.S.C. § 950q(3) (2011).

¹⁶⁷ Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25, 25 (2010).

¹⁶⁸ Unif. Code of Military Justice §§ 893 art. 93, 897 art. 97; 916 art. 116; 918 art. 118; 919 art. 119; 920 art. 120; 924 at pt. IV, P 16.c.(3)(a), at IV-24 (2008) (stating that a commander’s authority and obligations can derive from a “treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service”). Torture and war crimes are punishable under the War Crimes Act of 1996, the Uniform Code of Military Justice, and the Anti-Torture Act of 1996. ZIMBARDO, *supra* note 8, at 406.

¹⁶⁹ Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM AND MARY L. REV. 135, 208-09 (2005).

bolster consonance among employees and superiors within organizations due to the prospect of punishment, demotions, incentives for promotion, merger of world views, and the compulsion to cultivate favorable impressions and achieve acceptance.¹⁷⁰ With his research, Stanford Psychology Professor Philip Zimbardo has demonstrated that system power within an institutional structure can endow higher authority with prerogatives to act in ways that “would ordinarily be constrained by pre-existing laws, norms, morals, and ethics.”¹⁷¹ In comparison to civilian bureaucracies, military bureaucracies ensure an elevated conformity and discipline throughout the chain of command because of the stringent hierarchical culture of loyalty and obedience, apprehension of internal punishment,¹⁷² and the military’s need to encourage fulfillment of the military mission and maintain order.¹⁷³

The puissant forces that compel conformity to the chain of command within a national bureaucracy that normally holds *realist* visions of the world,¹⁷⁴ interacted with hawkish neoconservative government discourse¹⁷⁵ that invoked imperatives and dread to

¹⁷⁰ Bejesky, *Politico*, *supra* note 22, at 74-75; Tom R. Tyler, Patrick E. Callahan & Jeffrey Frost, *Armed, and Dangerous (?) : Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC’Y REV. 457, 458 (2007) (noting that studies on law enforcement confirm that abuse of power can manifest in a wide variety of contexts).

¹⁷¹ ZIMBARDO, *supra* note 8, at 226-27

¹⁷² Dickinson, *supra* note 169, at 208-09. Commanders can subject soldiers to non-judicial penalties. 10 U.S.C. § 815 (2006); JOHN M. LINDLEY, “A SOLDIER IS ALSO A CITIZEN”: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920, at 165-66 (1990); Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defense*, 52 MCGILL L.J. 1, 15 (2007) (explaining that “[l]oyalty, hopes for promotion, fears of retaliation, and solidarity with those in authority” are puissant compulsions “even though the doctrine of command responsibility obviates the difficulties in establishing orders of actual knowledge in advance of the violations.”).

¹⁷³ Tyler et al., *supra* note 170, at 459.

¹⁷⁴ See generally, SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957) (generally perceiving the military as *realists* and civilians as *liberalists*).

¹⁷⁵ Bejesky, *Politico*, *supra* note 22, at 39-44, 71-78.

generate trans-societal conformity,¹⁷⁶ abridging the perceived blameworthiness of the officials. For example, Professor Benjamin Davis construed that high-level civilians and generals “may have caused the criminality” at U.S. military prisons but masked their actions at most as misfeasance, rather than malfeasance.¹⁷⁷ Indicating that bureaucratic culture can encourage compliance with directives that exceed misfeasance of superiors, Professor Richard Seamon explained: “Official torture ... is made possible by laws empowering government lawfully to detain people, [and] employing officials (guards, etc.) whose conduct toward detainees would be unlawful if it occurred outside that setting.”¹⁷⁸ Professor Leila Sadat elevated the level of blameworthiness by emphasizing that the Bush Administration issued the documents and “the propaganda supporting them have led to the systematic use of torture,” while “U.S. investigators, U.S. courts, and U.S. lawyers ... carried out the government’s plan.”¹⁷⁹ An even stronger critique is offered by Professor Joseph Pugliese, who remarked: “... I view the regime of torture that was deployed at Abu Ghraib by the U.S. military as enabled by

¹⁷⁶ ZIMBARDO, *supra* note 8, at 226-27 (noting that “[t]hose in authority present the [policy or] program as good and virtuous, as a highly valuable moral imperative;” which, in the case of the Bush Administration, consisted of “frighten[ing] citizens into willingly sacrificing their basic civil rights,” “justifying a pre-emptive war of aggression against Iraq,” and constituting governance over the system of military prison management); Clarke, *supra* note 116, at 20 (stating that “[t]he teachings of modern psychology, sociology, and history suggest that when faced with systemic, widespread torture and cruel treatment, one should not look at a ‘few bad apples’ but rather at failures of command and control.”).

¹⁷⁷ Benjamin G. Davis, *Refluat Stercus: A Citizen’s View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN’S J. LEGAL COMMENT. 503, 559-60 (2008).

¹⁷⁸ Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 756 (2006); Luban, *supra* note 68, at 1427 (instilling such norms in institutions and society a “torture culture.”).

¹⁷⁹ Leila Nadya Sadat, *The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT’L L. & POL’Y 539, 541 (2009).

a violent neofascist politics indissociably tied to a codified imperial-fascist aesthetics.”¹⁸⁰

C. Reduced Rights of Military Personnel and Obedience to Authority

The highest echelon of the military can even be restrained when confronted by adverse White House policies. Chris Matthews, MSNBC talk show host, queried: “How come every time a general retires he starts trashing the president’s war policy, but doesn’t say a word until he retires?”¹⁸¹ Assuming that commanders abide by the most lucid military rules governing whistle-blowing and dissent, remaining taciturn while in the service may be rational. Article 88 of the Uniform Code of Military Justice enumerates that members of the military cannot express “contempt toward officials,”¹⁸² which has been construed as prohibiting both on- and off-duty speech that criticizes the president and other political officials.¹⁸³ Other provisions are somewhat akin to crime by analogy or are substantially open to interpretation. Article 134 is a general rule that authorizes prosecuting military personnel for unreasonable conduct and expressions or behavior that places the military service in disrepute.¹⁸⁴ Similarly, Article 133 affirms that members of the military cannot

¹⁸⁰ Pugliese, *supra* note 122, at 248, 252 (assessing responsibility on the guards is brought to fore by the cinematographic allure of “bring[ing] into focus the voyeuristic intrusion of the camera within the relations of torturer and tortured.”). Thus, it is the charm of the fetish and the “ocular apex originally occupied by the photographer.” *Id.* at 252.

¹⁸¹ *Hardball with Chris Matthews*, MSNBC, (Sept. 27, 2006), available at <http://www.msnbc.msn.com/id/15045586>.

¹⁸² 10 U.S.C. § 888 (2006).

¹⁸³ Richard W. Aldrich, Comment, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1199-1208 (1986) (Article 88 is apt to be unconstitutional if the language were applied to civilians); John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968).

¹⁸⁴ 10 U.S.C.A. § 934 (2012).

engage in “[c]onduct unbecoming of an officer and a gentleman,”¹⁸⁵ which is applicable to officers and might refer to almost any criminal offense.¹⁸⁶

The military hierarchy can also restrict constitutional rights of its members,¹⁸⁷ including the right to free speech and to assemble against government policy,¹⁸⁸ and those restrictions are heightened during a time of war.¹⁸⁹ For example, nine months before the Iraq

¹⁸⁵ 10 U.S.C.A. § 933 (2012).

¹⁸⁶ Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and “Conduct Unbecoming,”* 26 LAW AND INEQ. 1, 2-3, 5 (2008).

¹⁸⁷ *Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *United States v. Priest*, 45 C.M.R. 338, 343-44 (1972); Barney F. Bilello, Note, *Judicial Review and Soldiers’ Rights: Is the Principle of Deference a Standard of Review*, 17 HOFSTRA L. REV. 465, 467-68 (1989); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U.L. REV. 855 (1987). While a Circuit Court of Appeals judge, Justice Kennedy wrote: “One does not surrender his or her constitutional rights upon entering the military, but the Supreme Court has repeatedly held that constitutional rights must be viewed in light of special circumstances and needs of the armed forces.” *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980).

¹⁸⁸ *Parker v. Levy*, 417 at 759 (quoting *Priest*, 21 C.M.A. at 570) (Justice Rehnquist reasoning that “[t]he armed forces depend on a command structure that ... ultimately involve the security of the Nation itself. Speech that is protected in the civil population may ... undermine the effectiveness of response to command.”). While the rights to express dissent and to assemble are protected under the First Amendment, military troops are prohibited from attending a rally to protest military actions or from advocating an opinion against incumbent administrations. U.S. Dep’t of Defense, Directive 1344.10, Political Activities by the Armed Forces on Active Duty, para. E3.2, E3.3 (2004).

¹⁸⁹ U.S. Dep’t of Defense, *supra* note 188, para. E3.2, E3.3; *Parker v. Levy*, 417 U.S. at 738 (upholding the criminal conviction of Howard Levy, an Army doctor, who made statements in opposition to the Vietnam War and violated Article 134, which prohibits making statements “with design to promote disloyalty and disaffection among the troops.”); *United States v. Daniels* 42 C.M.R. 131, 137 (C.M.A. 1970) (In opposing the Vietnam War and urging others not to go to Vietnam, the court convicted Daniels because his statements caused “an impairment of the loyalty and obedience”); *United States v. Priest*, 45 C.M.R. 338, 345 (1972) (serviceman Roger Priest distributed 800 copies of a newsletter that urged readers to not go to the Vietnam War and was convicted, with the military court holding that “the Government is entitled to protect itself in advance against a calculated call for revolution.”); *United States v. Wilcox*, 66 M.J. 442, 444 (C.A.A.F. 2008) (servicemember convicted because “conduct was to the prejudice

War, the news reported intra-Pentagon discord over whether Iraq was really a threat or possessed WMDs, but after the president ordered the invasion, the military chain of command conformed and the American media exhibited near-amnesia over the terms of the congressional authorization for the use of force and the original reason for war.¹⁹⁰ As a result of the false pretenses that led to war,¹⁹¹ Lieutenant Ehren Watada called the Iraq War “manifestly illegal” and rejected deployment orders because he believed he would be committing war crimes,¹⁹² and the military attempted to prosecute Watada.¹⁹³ Quite affected is that criticism about the Pentagon or the government’s military or war policy is frequently risky because of the retort slogan to “support the troops,”¹⁹⁴ but if troops are mandated to refrain from expressing dissenting opinions and are

of good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces” when he made antigovernment and racist comments online); *United States v. Howe*, 17 C.M.A. 165, 168 (1967) (holding that the military could restrict Lieutenant Howe’s right to free speech under UMC Article 88 when Howe attended a protest and held a sign that read “Let’s Have More Than a Choice Between Petty Ignorant Facists in 1968” and “End Johnson’s Facist Aggression in Vietnam.”).

¹⁹⁰ Bejesky, *Politico*, *supra* note 22, at 72-74; Bejesky, *Public Diplomacy*, *supra* note 17, at 971-74.

¹⁹¹ Walter Pincus, *Records Could Shed Light on Iraq Group*, WASH. POST, June 9, 2008, at A15 (quoting SSCI Chairman John D. Rockefeller: “In making the case for war, the [Bush] administration repeatedly presented intelligence as fact when it was unsubstantiated, contradicted or even nonexistent ... Sadly, the Bush Administration led the nation to war under false pretenses.”); Bejesky, *Intelligence Information*, *supra* note 20, at 811-12.

¹⁹² Sarah N. Rosen, Comment, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations*, 12 U. PA. J. CONST. L. 875, 886 (2010).

¹⁹³ *Id.* at 886-87. More recently, Marine Sargeant Gary Stein was facing dishonorable discharge for criticizing President Obama. *Marine Sgt. Gary Stein should go for criticizing Obama on Facebook, Board says*, CBS NEWS, Apr. 6, 2012, available at http://www.cbsnews.com/8301-201_162-57410342/marine-sgt-gary-stein-should-go-for-criticizing-obama-on-facebook-board-says/.

¹⁹⁴ Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 49-52 (2012) [hereinafter Bejesky, *Political Penumbra*] (citing how politicians used the “support the troops” slogan during both the Vietnam War and Iraq War).

dictated what to believe and how to think, it seems unconscionable to permit a high-level political agenda, based upon unsubstantiated premises, to exploit enlistees making sacrifices.¹⁹⁵

Military justice further ensures obedience at the lower levels of the chain of command,¹⁹⁶ and cases involving disciplinary structure and control are normally unchallengeable by military and federal courts.¹⁹⁷ Low-level soldiers are much more apt to be subject to court-martial and punishment¹⁹⁸ than higher-level military officials, who may, at most, be subject to demotion, reprimand, and other non-judicial penalties.¹⁹⁹ As Major General Enoch H. Crowder emphasized, that “the real purpose of the court-martial is to enable commanders to insure discipline in their forces.”²⁰⁰ If policymaker and high-level impunity is widely perceived throughout the chain of command, officers may not believe that they will be subject to

¹⁹⁵ The mission became indeterminate. The Bush Administration ordered an invasion due to Iraq’s supposedly existing WMDs. Military personnel were involved in an invasion based upon the premise that they were protecting American security, and were later required to fulfill directives for an occupation with large-scale detention operations that were unrelated to the originally-intended mission. Yet troops must still follow orders, which may not be consistent with the perceived mission for which they enlisted. *See generally* Bejesky, *Political Penumbra*, *supra* note 194, at 48-52 (members of Congress expressing resentment that the Bush Administration exploited the “support the troops” slogan and noting that they would not have approved of the Iraq War and placed troops in harm’s way had they known the truth about the false allegations about security threats).

¹⁹⁶ Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 423 (2008).

¹⁹⁷ *United States v. Wilson*, 33 M.J. 797, 799 (A.C.M.R. 1991); *Dynes v. Hoover*, 61 U.S. 65 (1857) (Court refraining from reviewing a challenge to a court-martial decision); Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and “Civil Rights and Supervision” over the Armed Forces*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989* 405 (Richard H. Kohn ed., 1991).

¹⁹⁸ Davis, *supra* note 177, at 550, 564.

¹⁹⁹ *Id.* at 549.

²⁰⁰ Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Great First Amendment Protection for America’s Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 318-19 (2007).

punishment for violations of the laws of war when they are following orders of superiors, while lower-level soldiers may fear being disciplined for reporting controversial matters up the chain of command²⁰¹ or for rejecting to execute questionable or illegal directives.

With this history, it is understandable that military personnel may be reluctant to even dissent to the orders of superiors or act as whistle-blowers. In the Abu Ghraib abuse, anecdotal evidence adumbrates that Pentagon officials would have favored that soldier-witnesses report the abuses, but evidence also suggests that soldiers believed that they would have been ignored or disciplined for reporting the abuse. For example, Sergeant Samuel Provance furnished evidence of torture at Abu Ghraib, and he was stripped of his military intelligence clearance, demoted, and transferred, but purportedly not because he *reported* abuses, but because he did not report the abuses *sooner*.²⁰² Provance held a different impression and reported that he did inform superiors, but “was told that the honor of my unit and the Army depended on either withholding the truth or outright lies.”²⁰³ Provance further believed that everything he “observed at Abu Ghraib and in Iraq convinced” him that he would be ignored, that the abuse “would be covered up,” and that he “would be considered a troublemaker and ostracized.”²⁰⁴ Similarly, Defense Intelligence Agency (DIA) officers admitted witnessing

²⁰¹ Dickinson, *supra* note 152, at 369.

²⁰² IN THE NAME OF DEMOCRACY, *supra* note 25, at 211 (further noting that in June 2003, Sergeant Richard Ford complained about torture by members of his unit in Samarra, Iraq, but he was threatened by the soldiers, called delusional, and eventually “strapped to a gurney and medevaced to Germany as a psychiatric patient.”); ZIMBARDO, *supra* note 8, at 331 (stating that troops are reluctant to report wrongdoing). Being a whistleblower could be dangerous. For example, Sergeant Joseph Darby came forward with photos documenting the Abu Ghraib atrocities after Corporal Charles Graner gave Darby the CD, but he became the target of death threats. Sam Richie, *Honoring Courage Seven Years After Abu Ghraib*, ACLU, Apr. 28, 2011, available at <http://www.aclu.org/blog/content/honoring-courage-seven-years-after-abu-ghraib>.

²⁰³ Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 28 PENN. ST. INT’L L. REV. 1, 22 (2009).

²⁰⁴ *Id.*

prisoner atrocities and explained that they were threatened and ordered to remain silent.²⁰⁵

Restraints, due to military chain of command rules, culture, and secrecy ostensibly permit policymakers and high-level officers to issue orders that troops would be expected to execute even when directives are suspect. In addition to the military chain of command orders, the relationship between the MPs and interrogators would seem to further reduce the interpretation that MP obligations were discretionary, but would instead persuade MPs to execute directives.²⁰⁶

D. Interrogator Directives

Associated with the chain of command that involved top officials issuing directives for interrogation, subordinate officers implementing orders, and MPs being instructed to be involved in the interrogation process, three categories of official interrogators directed MPs—CIA agents, military intelligence interrogators, and

²⁰⁵ Neil A. Lewis, *Iraqi Prisoner Abuse Reported after Abu Ghraib Disclosures*, N.Y. TIMES, Dec. 8, 2004, available at http://www.nytimes.com/2004/12/08/politics/08abuse.html?_r=0. DIA officers stated that they observed prisoners being severely being beaten by members of a secret special operations group called Task Force 6-26, but when the DIA officers protested, they were intimidated by the group and their pictures of the atrocities were confiscated. IN THE NAME OF DEMOCRACY, *supra* note 25, at 110. It was later revealed that Task Force 6-26 was managing an off-the-books prison with “disappeared” detainees, some of whom were killed and others extensively beaten, and the prison continued to operate even after admonitions were purportedly issued. *Id.* at 196.

²⁰⁶ For example, in April 2005, the US Army Criminal Investigation Division was ignored after it sent a memo to the CIA explaining that it was “unable to thoroughly investigate” prisoner abuses because identities of suspects in the Special Access Program and witnesses were protected under national security laws. Hersh, *supra* note 109 (noting that “fake names were used.”); ZIMBARDO, *supra* note 8, at 219 (“[W]hen people feel anonymous in a situation, as if no one is aware of their true identity (and thus that no one probably cares), they can more easily be induced to behave in antisocial ways. This is especially so if the setting grants permission.”); Clarke, *supra* note 116, at 15; Luban, *supra* note 68, at 1427 (describing the scenarios of simulated abuse in the Stanford psychology experiment).

private contractors.²⁰⁷ What is most salient is that there were intermediaries who were officially tasked by superior government officials to execute harsh interrogations, which is a violation of the Geneva Convention, and one or more actors directed MPs to be involved with the interrogation process. Major General Taguba's investigation ascertained that "interrogators actively requested that MP guards set physical and mental conditions for favorable ... military intelligence interrogations" and to have detainees adequately "broken down" before interrogations.²⁰⁸

CIA interrogators also conducted interrogations at Abu Ghraib.²⁰⁹ The *New York Times* reported that the MPs learned interrogation routines by "watching Central Intelligence Agency operatives interrogating prisoners."²¹⁰ One aspect of the interrogation directives involved Rumsfeld authorizing a Top Secret Special Project Team, code named "Copper Green," which included CIA agents.²¹¹ Karpinski, soldiers, and investigations explained that in late-2003 and around the time that Miller informed Karpinski that MPs would participate with interrogators, mysterious operative-

²⁰⁷ M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 411 (2006); Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 449, 453 (2006); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1682 (2005) (noting that intelligence officials also directed conditions for abuse).

²⁰⁸ Taguba Report, *supra* note 73, at 18-20 (stating that MPs believed that the orders from military intelligence interrogators "insinuate[d] to the guards to abuse the inmates."); Fay Report, *supra* note 43, at 69. According to SPC Ambuhl, had it not been for military intelligence interrogators, the Abu Ghraib scandal would not have occurred because "the detainees would have been in their cells, and we would have been in the office watching a movie or drinking coffee." GOUREVITCH & MORRIS, *supra* note 81, at 157; MCCOY, *supra* note 28, at 176-77 (noting that a document dated in January 2004 indicated that there was an Army investigation of the 311th Military Intelligence Battalion at Mosul, Iraq, that stated Military Intelligence "personnel and/or translators engaged in physical torture of detainees.").

²⁰⁹ Douglas Jehl, *C.I.A. Cites Order on Supervised Interrogations*, N.Y. TIMES, Sept. 11, 2004, at A7.

²¹⁰ MCCOY, *supra* note 28, at 136.

²¹¹ *Id.* at 132-33.

interrogators with aliases began visiting Abu Ghraib in civilian dress, and Karpinski explained that these were the individuals who began taking pictures of nude detainees.²¹²

The Taguba report also stated that private military contractors (PMCs) were directing the MPs on how to execute interrogations.²¹³ Plaintiffs-detainees alleged in federal court that PMCs beat prisoners, played loud music to deprive them of sleep, kept them naked and exposed to cold temperatures, used electric shocks, forced them to perform sex acts, threatened them with attack dogs, and broke legs and poked out eyes.²¹⁴ The Fay Report estimated that one-third of the human rights violations at Abu Ghraib prison involved contractors.²¹⁵ Contractors and the Army sprung into accusation-casting mode over principal responsibility.²¹⁶ A court

²¹² *Id.*; ZIMBARDO, *supra* note 8, at 349-50.

²¹³ Taguba Report, *supra* note 73, at 18-20.

²¹⁴ Jenny S. Lam, Comment, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1477 (2009).

²¹⁵ Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 555 (2005); U.S. DEPARTMENT OF DEFENSE., ACCOMPANYING SLIDES TO SPECIAL DEFENSE DEPARTMENT BRIEFING ON RESULTS OF INVESTIGATION OF MILITARY INTELLIGENCE ACTIVITIES AT ABU GHRAIB PRISON FACILITY 7 (2005), available at <http://www.defenselink.mil/news/Aug2004/d20040826slides.pdf> (estimating that was that four private contractors and twenty-three military intelligence officers were responsible for torture); Leland H. Kynes, Note, *Letting the CAT Out of the Bag: Providing a Civil Right of Action for Torture Committed by U.S. Officials Abroad, an Obligation of the Convention Against Torture?*, 34 GA. J. INT'L & COMP. L. 187, 188 (2005); P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3. (stating that at Abu Ghraib, sixteen out of forty-four cases of abuse were perpetrated by private contractors outside the purview of a U.S. government actor).

²¹⁶ Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1; Joel Brinkley, *U.S. Civilian Working at Abu Ghraib Disputes Army's Version of His Role in Abuses*, N.Y. TIMES, May 24, 2004, at A5; Joshua Chaffin, *Contract Interrogators Hired to Avoid Supervision*, FIN. TIMES, May 21, 2004, at 9. Private contractor interrogators also worked for the military, but the military was either unaware that they were civilians or that the civilians would not take orders from the military. Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 329 (2006).

case quoted Karpinski stating that private contractors “ordered these things [abuses] to be done.”²¹⁷ Independent contractors apparently also worked for the CIA.²¹⁸

According to a recently published book, only six people had comprehensive knowledge of the misconduct at Abu Ghraib, and authors Christopher Graveline and Michael Clemens were purportedly two of the six.²¹⁹ Graveline and Clemens contend that the truth is perched somewhere between the two extremes of a “few bad apples” MPs and of orders being issued by top government leaders.²²⁰ The “few bad apples” explanation is wholly erroneous²²¹ because interactions among Miller, Sanchez, and Karpinski evince that command directives were issued by the White House and Secretary of Defense when no interrogation was legally permitted,²²² official interrogators were tasked with executing the top-level orders, and interrogators directed MPs to participate with some level of specificity.

The contention herein is not that the MP’s vividly documented debauchery should not be punished, but to emphasize that military orders within the chain of command mandate adherence. A superior officer can be held criminally liable for not correcting actions of subordinates under dereliction of duty,²²³ but subordinate officers are in dereliction of duty for not obeying “a violation of a lawful general order or as an act which constitutes dereliction of

²¹⁷ CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 288 (4th Cir. 2008).

²¹⁸ Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18; D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1031 (2004) (noting that private contractors have been running private interrogation centers with some affiliation with the CIA was apparently the standard approach in Afghanistan).

²¹⁹ Major Eric J. Lawless, *The Secrets of Abu Ghraib Revealed: American Soldiers on Trial*, 2011 Army Law 58 (2011) (book review).

²²⁰ *Id.* at 58.

²²¹ Anderson, *supra* note 92, at 59-61.

²²² *See supra* Part II(D).

²²³ William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 90 (1973).

duty.”²²⁴ If individuals are instructed to execute illegal mandates, one can contest that the subordinate should have disregarded orders, but is it reasonable to expect that MPs, in a combat zone, should be placed in such a precarious situation by high-level zealots issuing orders in violation of the Geneva Conventions and human rights law? Frankly, even if soldiers acted discretionarily or perpetrated conduct that was not per se approved, those actions might still be the foreseeable consequences of top-level orders for interrogation that contained sufficiently specific acts that violated the Geneva Convention. How can any MPs be punished without all of the evidence of directives and an assessment of the culpability of all of those top officials who issued orders? Nonetheless, this is specifically what happened.

IV. RESULT OF ABU GHRAIB

A. Criminal Punishment

Twenty-seven military and intelligence officials were implicated in the abuse.²²⁵ Eleven soldiers were punished, with the most serious penalties imposed on Charles Graner, who was sentenced to ten years in prison; Staff Sergeant Frederick, who was sentenced to eight years; Lynndie England, who was sentenced to three years; and nine other low-level individuals were court-martialed or received short prison sentences.²²⁶ The troops who were punished with court-martial or conviction were enlistees,²²⁷ while superiors such as Brigadier General Janis Karpinski, Colonel Thomas Pappas, and Captain Donald Reese received non-criminal penalties.²²⁸ The

²²⁴ *Id.* at 98.

²²⁵ Fay Report, *supra* note 43, at 109.

²²⁶ Brenner, *supra* note 7, at 68; Adam Zagorin, *The Abu Ghraib Cases; Not Yet Over*, TIME, (Aug. 29, 2007), available at <http://www.time.com/time/politics/article/0,8599,1656906,00.html>.

²²⁷ Hillman, *supra* note 186, at 3.

²²⁸ James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 723-24 (2006). Karpinski was censured, suspended from duty, and demoted to colonel,

Bush Administration asserted that justice was served because the perpetrators acted without orders.²²⁹

While the defense was rebuffed by the court, Graner contended that he was acting on orders from superiors to “soften up” detainees, that he complied with “a general command climate of humiliating detainees in the belief that humiliation would make them more likely to reveal information of intelligence value,”²³⁰ adhered to directives of PMCs and military intelligence operatives,²³¹ and asserted that he believed the actions were approved because a JAG officer witnessed the actions and did not voice opposition.²³² Because the Bush Administration issued interrogation orders in violation of the Geneva Convention and there were specific directives from Rumsfeld and Miller for Abu Ghraib, and interrogators were carrying out the Bush Administration’s illegal orders and involving MPs,²³³ Graner’s argument is not illogical.

and she retired from the service. ZIMBARDO, *supra* note 8, at 336; John Hagan, Gabrielle Ferrales & Guillermina Jasso, *Collaboration and Resistance in the Punishment of Torture in Iraq: A Judicial Sentencing Experiment*, 28 WIS. INT’L L.J. 1, 14 (2010).

²²⁹ IN THE NAME OF DEMOCRACY, *supra* note 25, at 104. WALDEN BELLO, DILEMMAS OF DOMINATION 64 (2005); *Full Text: Rice Defends US Policy*, BBC, Dec. 5, 2005, <http://news.bbc.co.uk/2/hi/americas/4500630.stm> (noting that National Security Advisor Rice maintained that “the United States has vigorously investigated, and where appropriate, prosecuted and punished those responsible.”).

²³⁰ U.S. v. Graner, U.S. Ct. of Apps for the Armed Forces, No. 09-0432, at 4 (June 25, 2010), *available at* <http://www.armfor.uscourts.gov/newcaaf/opinions/2009SepTerm/09-0432.pdf> (court denying the request to reconsider evidence of purported orders).

²³¹ Candiotti & Polk, *supra* note 159.

²³² GOUREVITCH & MORRIS, *supra* note 81, at 167.

²³³ ACLU lawyer Amrit Singh accentuated that government documents and investigations indicated that “torture and abuse of detainees was routine and was considered acceptable practice by US soldiers.” MCCOY, *supra* note 28, at 176-77. *See also* Van Bergen & Valentine, *supra* note 207, at 453; *Karpinski: Conspiracy Behind Iraq Prison Abuse*, ASSOC. PRESS, (Aug. 3, 2004), *available at* <http://www.foxnews.com/story/0,2933,127873,00.html> (stating that Karpinski disclosed that officials had been planning and discussing interrogation procedures, excluding her from meetings, and trying to “ensure that [she] would not have access to those facilities” and would remain uninformed; and that those officials

Professor Davis called the lack of punishment for higher level officials the “‘different spansks for different ranks’ problem.”²³⁴ High-level military officers are very unlikely to be subject to judicial punishments, but could be reprimanded or demoted, whereas those who actually execute orders have a higher likelihood of receiving more severe punishment.²³⁵ Professor Bacevich, a veteran of the Vietnam War and 1991 Gulf War, explained that “a Pentagon file clerk who misplaces a classified document faces stiffer penalties than a defense secretary whose arrogant recklessness consumes thousands of lives.”²³⁶ Professor Elizabeth Hillman emphasized soldiers believe “that officers are insulated against prosecution for wrongdoing by the political experience of pushing blame to the lowest possible level, where it does not reflect as poorly on the judgment of military and civilian leaders.”²³⁷ Perhaps, in the case of Abu Ghraib, soldiers were punished for getting caught or for causing the Bush White House to look bad. Or, ironically enough, the offensive scandal may have actually made the Bush Administration look better than it would have ultimately appeared, “but for” the episode.

knew what was happening and were embroiled in a conspiracy that probably reached up to the White and Pentagon). *See generally supra* Parts II(D), III(A)(D).

²³⁴ Davis, *supra* note 177, at 516; Edward T. Pound, *Unequal Justice*, U.S. NEWS & WORLD REPORT, (Dec. 16, 2002), *available at* <http://www.usnews.com/usnews/news/articles/021216/16justice.htm>.

²³⁵ Davis, *supra* note 177, at 549-50, 560 (“lower-level persons find themselves in a terribly difficult situation where they fear being ‘thrown under the bus’ if a public outcry occurs.”); Brenner, *supra* note 7, at 36 (drawing parallels with the My Lai massacre during the Vietnam War, in which top officials in the White House and Pentagon used Lt. William Calley as a scapegoat to prevent scrutiny of the war).

²³⁶ ANDREW J. BACEVICH, *THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM* 88 (2008).

²³⁷ Hillman, *supra* note 186, at 2-3 (further noting that “[o]thers attribute the low number of officer court-martials to the generally good behavior of officers or to the legal and political barriers to punishing individuals for acts that they did not themselves commit, notwithstanding the doctrine of command responsibility.”).

B. Propaganda Effect

It is true that the Bush White House attempted to conceal and prevent the Abu Ghraib scandal and the depth of wrongdoing from being publicized,²³⁸ denied that detail was known,²³⁹ delayed the public release of reports on the atrocities,²⁴⁰ and selectively held secret the more egregious images,²⁴¹ but one can even contend that

²³⁸ ARNOVE, *supra* note 24, at 24; IN THE NAME OF DEMOCRACY, *supra* note 25, at 9, 68.

²³⁹ Members of Congress were openly skeptical when Rumsfeld testified before Congress on May 7, 2004, and alleged that he knew nothing about the depraved activities and that “no one in the Pentagon had seen [the photos] [S]omebody just sent a secret report to the press, and there they are.” Hersh, *supra* note 109. Skeptical Congresspersons were correct; there was previous knowledge because it was subsequently divulged that the whistleblower, Sergeant Joseph Darby, delivered a CD containing thousands of sexually explicit photographs of prisoners to the Army’s Criminal Investigation Division on January 13, 2004. Wallach, *supra* note 102, at 546; Hersh, *supra* note 109. Joint Chiefs of Staff (JCS) General Richard Myers testified that a few days after the photos were handed over to Army investigators, the information was given “to me and the Secretary up through the chain of command And the general nature of the photos, about nudity, some mock sexual acts and other abuse, was described.” Hersh, *supra* note 109.

²⁴⁰ The Pentagon possessed the images in mid-January, four months prior to the 60 Minutes telecast, and the ICRC prepared an official report for the White House in February 2004, making at least partial publication of the atrocities inevitable. ARNOVE, *supra* note 24, at 23; Hersh, *supra* note 111; Hersh, *supra* note 109. JCS Myers reportedly urged CBS to delay the telecast for an additional two weeks. Gary Younge and Julian Borger, *CBS Delayed Report on Iraqi Prison Abuse After Military Chiefs Plea*, THE GUARDIAN, (May 4, 2004), available at <http://www.guardian.co.uk/media/2004/may/04/Iraqandthedia.broadcasting>.

²⁴¹ Hersh, *supra* note 109 (noting that the Taguba Report discussed more unreleased video and photographic files that were even more offensive than those revealed by 60 Minutes). Some of those additional photos, which were released in 2006, involved images of a man with a slit throat, prisoners with burns, men forced to masturbate in front of guards, and other heinous acts, but the U.S. media virtually slighted the new photos. M. Angela Buenaventura, *Presidential Power: Article and Poetry: Torture in the Living Room*, 6 SEATTLE J. SOC. JUST. 103, 121-22 (2007). The Bush Administration sought to prevent public disclosure of Darby’s disc under FOIA Exemptions 6 and 7(C), contending that doing so would result in an “unwarranted invasion of personal privacy” of the victims, but Judge Hellerstein discarded the argument. *ACLU v. Dep’t of Def.*, 543 F.3d 59, 64 (2d.

having so much attention fixed on Abu Ghraib distracted scrutiny from more egregious crimes,²⁴² such as ordering what many called an illegal war of aggression.²⁴³ Had the striking images of naked Iraqis at Abu Ghraib not surfaced, perhaps more public attention would have been placed on the question of an illegal war.²⁴⁴ Without a legal justification for invasion, it is unclear how any exonerating explanation can exist for detaining, interrogating, or abusing anyone.²⁴⁵

With the infamy at Abu Ghraib, academics, the media, and politicians began deliberating the proper standards for occupation and for conducting interrogations that would not be torture, even

Cir. 2008); Kreimer, *supra* note 84, at 1206-07; ACLU v. Dept. of Def., 389 F. Supp. 2d 547, 572 (S.D.N.Y. 2005). Court battles lingered over the release of additional photos into the new administration, and President Obama remarked: "Releasing these photos would inflame anti-American opinion and allow our enemies to paint U.S. Troops with a broad, damning, and inaccurate brush, thereby endangering them in theaters of war." *Remarks by the President on National Security*, WHITE HOUSE, May 21, 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

²⁴² The sequence of Senate Select Committee on Intelligence reports, the CIA's Iraqi Survey Group investigation during the occupation and other investigations concluded that Iraq had no connection to 9/11 or al Qaeda, and did not possess WMDs. Robert Bejesky, *Intelligence Information*, *supra* note 20, at 875-82. The first installment of those reports was released several weeks after the Abu Ghraib story aired. SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301 (July 7, 2004). The Bush Administration had tasked officials with operations intended to displace the Iraqi regime from its first days in office, which was revealed several months before Abu Ghraib broke, and made hundreds of false statements about WMDs. Bejesky, *Politico*, *supra* note 22, at 33-34, 62-65.

²⁴³ Bejesky, *Weapon Inspections*, *supra* note 18, at 348-50.

²⁴⁴ Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 431-34 (2012) [hereinafter Bejesky, *Flow*] (noting that media processes and cognitive processes can displace older scandalous events with new as time passes).

²⁴⁵ *Debate: "Will Hussein Get a Fair Trial,"* 37 CASE W. RES. J. INT'L L. 21, 23-24 (2006/2007) (recognizing that the barbarity at Abu Ghraib was merely an outcome of an invasion that killed troops and civilians, demolished cities, and wasted American taxpayer funds, and that troops executing questionable operations during an illegal and oppressive occupation, must all be observed within the context of an invasion that undeniably violated international law).

though any form of interrogation that is coercive is *prima facie* illegal under Article 17 of the Geneva Conventions²⁴⁶ and the acts of interrogation that the Bush Administration approved ostensibly violated U.S. statutes.²⁴⁷ The discourse was a bait-and-switch and akin to stating, “Watch the abuse of the nude Iraqi over here and ignore the illegal war, Geneva Convention rules that prohibit interrogation without exception, injustices that were purportedly *not quite* torture, and the fact that MPs were committing crimes akin to what the Bush Administration approved for interrogators.” There was likely cognitive dissonance in that supermajorities of Americans believe that it is illegal to use abusive interrogations,²⁴⁸ but that exceptions might be warranted if it could prevent a terrorist attack.²⁴⁹ The Bush Administration adamantly rejected the turpitude

²⁴⁶ Geneva I, *supra* note 47, art. 17. The foreign media was much more condemnatory of the abuse at Abu Ghraib than the American media. Strauss, *supra* note 39, at 1274 (noting that the American media frequently presented the accounts as “abusive” while foreign media usually utilized the word “torture”).

²⁴⁷ See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (“torture [is] any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering ... whether physical or mental, is intentionally inflicted on that individual”). The Torture Victim Protection Act of 1991 states that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual.” *Id.*

²⁴⁸ WorldPublicOpinion.org, *World Public Rejects Torture*, June 24, 2008, available at http://www.worldpublicopinion.org/pipa/pdf/jun08/WPO_Torture_Jun08_pr.pdf (noting that 53% of Americans believed that torture should be banned under all circumstances); Jonathan Marcus, *Heated Debate Over Use of Torture*, BBC, (Oct. 19, 2006, 6:16 GMT), <http://news.bbc.co.uk/2/hi/europe/6063800.stm> (finding that 59% of people throughout the world oppose torture); Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism,”* 1 J. NAT’L SECURITY L. & POL’Y 285, 287 (2005) (“Legal experts, foreign leaders, and journalists rose in chorus to condemn the apparent approval of torture”). For specific techniques that were approved or regularly practiced but are ostensibly more extreme or vivid, 79% of Americans thought chaining prisoners down and forcing them to be naked was wrong, 69% believe threats with dogs was wrong, and 82% said waterboarding was wrong. Scheppele, *supra*, at 292 n.17.

²⁴⁹ Evan Thomas & Michael Hirsh, *The Debate Over Torture*, NEWSWEEK, Nov. 21, 2005, at 26 (noting that 58% of Americans believed that torture was justified to prevent a terrorist attack); Strauss, *supra* note 39, at 1284 (many Americans, Congress, and top Administration officials ignored the stories of abuse). In a

committed by a few “bad apple” MPs at Abu Ghraib as anathema to American values, but approved of similar interrogation techniques and kept maintaining that interrogation was necessary to prevent terrorism.²⁵⁰ Terrorism, by definition, targets civilians,²⁵¹ and American civilians were not being threatened by prisoners in Iraq.

Ultimately, despite the public revulsion resulting from the Abu Ghraib scandal, there were no serious ramifications for the Bush Administration; officials supported the conviction and punishment of individual soldiers for acts at Abu Ghraib while continuing to use the “support the troops” slogan to garner positive views about operations in Iraq²⁵² and apparently continued the orders for interrogation,²⁵³ which is particularly surprising given other events in Iraq that were related to interrogation and occurred at about the same time that the Abu Ghraib scandal broke.

November 2001 poll, 32% of Americans agreed that it would be lawful to use interrogation methods that could be torture. *See* Luban, *supra* note 68, at 1425-26. The percentage that felt torture was acceptable in some situations rose to 35% two months after the release of the Abu Ghraib pictures. MCCOY, *supra* note 28, at 151. Others would allow torture if a judge or jury would assess that it was absolutely necessary. John T. Perry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 766 (2002).

²⁵⁰ Similarly, the television portrayal may dilute realistic perceptions of alleged threats. Scholars, the Supreme Court, the Intelligence Science Board, and the dean of West Point expressed that television shows, such as *24* and their tactics of using torture to gain information from detainees was negatively influencing societal perceptions and inexperienced interrogators with depraved lessons. John Ip, *Two Narratives of Torture*, 7 NW. U.J. INT’L HUM. RTS. 35, 75 (2009). Such hypothetical portrayals can inveigle society to permit torture when they would otherwise entirely reject it. Luban, *supra* note 68, at 1440-41; Buenaventura, *supra* note 241, at 103 (“[F]ictional portrayals of torture on television mislead the American public as to the true nature of torture, thereby obscuring the public debate and diminishing the public pressure to hold those guilty of torture accountable.”).

²⁵¹ Bejesky, CFP, *supra* note 17, at 15.

²⁵² *See* Bejesky, *Political Penumbra*, *supra* note 194, at 48-52.

²⁵³ MCCOY, *supra* note 28, at 166 (noting that in December 2004, the Senate voted 96 to 2 to ban all U.S. intelligence agencies from engaging in torturous acts, but White House pressure and Republican Senators blocked attempts to outlaw CIA interrogation methods and extraordinary rendition). *See generally* Bejesky, *Call for Papers*, *supra* note 88, at 65-70; Bejesky, *Pruning*, *supra* note 6, at 823-28.

C. More Egregious Accounts

The Abu Ghraib photographs principally exposed psychological abuse that was considerably similar to the enumerated approaches that the Bush Administration approved for interrogators.²⁵⁴ However, because some of these acts at Abu Ghraib ostensibly exceeded authorized interrogation methods and because even more flagrant offenses were reported, one might opine that personnel conducting interrogations and holding detainees were disposed to overstepping authorized directives. Once illegalities are recognized as frequently occurring and deemed *ultra vires*, perhaps top officials in Washington should comprehend that they have heightened obligations to implement measures to impede future misdeeds in US facilities. Moreover, canvassing cases in which troops, intelligence officials, or interrogators undoubtedly exceeded authority, make the arguably lesser outrages depicted on 60 Minutes appear all the more foreseeable. Consider some examples.

On November 28, 2003, the Pentagon announced that Iraqi Major General Abed Hamed Mowhoush died from “natural causes,”²⁵⁵ but the *Denver Post* investigated and obtained a court order to open previously classified documents and discovered that Mowhoush had been stuffed alive into a sealed bag and beaten to death.²⁵⁶ A military autopsy was released and revealed that

²⁵⁴ See *supra* Parts II.D.2 and II.D.3 (noting general categories of interrogation that were authorized for Guantanamo Bay and Afghanistan, including using isolation, stress position, phobias, harsh and day-long interrogations, perceptions of drowning and suffocation, environmental manipulation, dietary restrictions, and nudity; and the general orders to have interrogators at Abu Ghraib work with MPs).

²⁵⁵ Michael Howard, *Ex-Iraqi General Dies in US Custody*, THE GUARDIAN (Nov. 28, 2003, 8:21 PM), available at <http://www.theguardian.com/world/2003/nov/28/iraq.michaelhoward>; Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty*, 34 J.L. MED. & ETHICS 570, 573 (2006) (surgeon stating that he died of natural causes).

²⁵⁶ MCCOY, *supra* note 28, at 144-45. Other death certificates in Afghanistan were falsified. Clark, *supra* note 255, at 573. It was not just US authorities who were involved in egregious abuses. British troops detained the father of Mr. Baha

Mowhoush died of suffocation and “blunt force trauma” during CIA and Special Forces interrogations.²⁵⁷ Mowhoush was apparently unresponsive to U.S. interrogations, and some combination of CIA, Special Forces, and Army personnel apparently employed this smothering technique to intensify pressure.²⁵⁸ The former commander, Colonel David A. Teeple, testified that this “claustrophobic technique” was an “approved and effective” interrogation method used before and after Mowhoush’s death.²⁵⁹

One month after the Abu Ghraib scandal broke, media revealed that Delta Force was operating a facility for “Iraqi insurgents and suspected terrorists,” which was the “scene of the most egregious violations of the Geneva Convention.”²⁶⁰ Manadel al-Jamadi was discovered dead in a shower stall, hanging suspended from a rope, with hands cuffed behind his back, broken ribs, and a brutally beaten face.²⁶¹ An interrogator explained that al-Jamadi

Mousa and he was “brutally beaten by British troops” and killed. *Al-Skeini v. Sec’y State Def.*, [2007] UKHL 26, [6].

²⁵⁷ MCCOY, *supra* note 28, at 144; Clark, *supra* note 253, at 573 (stating that “Mowhoush’s head was pushed into a sleeping bag while interrogators sat on his chest”).

²⁵⁸ Christopher A. Britt, *The Commissioning Oath and the Ethical Obligation of Military Officers To Prevent Subordinates from Committing Acts of Torture*, 19 GEO. J. LEGAL ETHICS 551, 551-52, 561 (2006).

²⁵⁹ MCCOY, *supra* note 28, at 145; Britt, *supra* note 258, at 552.

²⁶⁰ Campbell Brown, *New front in Iraq Detainee Abuse Scandal?*, NBC NEWS, (May 20, 2004, 8:10 PM), available at <http://www.nbcnews.com/id/5024068/>; *U.S. Admits to Secret Interrogation Site in Baghdad*, CNN, (May 21, 2004, 6:37 PM), available at <http://www.cnn.com/2004/WORLD/meast/05/21/iraq.main/index.html> (acknowledging the secret interrogation site, contending that it was being run consistent with the Geneva Conventions, and noting “[t]hat’s not to say somebody didn’t get their head dunked.”).

²⁶¹ IN THE NAME OF DEMOCRACY, *supra* note 25, at 82-83. Guards explained that blood gushed from his mouth like a “faucet had been turned on.” Seth Hettena, *Iraqi Died While Hanging by His Wrists*, ASSOC. PRESS, Feb. 18, 2005, available at <http://www.heraldtribune.com/article/20050218/NEWS/502180362>. A photograph surfaced of one of al-Jamadi, a “ghost detainee,” who was surrounded by US soldiers grinning and brandishing a “thumbs up” gesture. IN THE NAME OF DEMOCRACY, *supra* note 25, at 82; ZIMBARDO, *supra* note 8, at 411; Hettena, *supra*.

“was not cooperating,”²⁶² and he evidently died from asphyxiation during interrogation.²⁶³ The Pentagon and CIA asserted that al-Jamadi was already in poor health when received by interrogators and died while being interrogated by a CIA officer in November 2003.²⁶⁴

There are other accounts. In November 2003, 39-year-old Huda Alazawi, and her two brothers, Mu’taz and Ayad, were captured and interrogated in a US detention facility. Guards threw Ayad’s dead body into Huda’s cell, and the US military issued a death certificate claiming the death was caused by “cardiac arrest of unknown etiology,” while later-released photographs of the body exhibited extensive bruising and a severe head wound.²⁶⁵ Major John M. Hackel reiterates the accounts of detainees that emerged at about the same time that the infamy at Abu Ghraib was spotlighted, but was virtually ignored: “Soldiers took two bound detainees, cut their restraints, handed them inoperable assault rifles, and killed

²⁶² IN THE NAME OF DEMOCRACY, *supra* note 25, at 82-83; Hettena, *supra* note 261.

²⁶³ Buenaventura, *supra* note 241, at 129-30.

²⁶⁴ DEPT. OF THE ARMY, U.S. ARMY CRIM. INVESTIGATION COMMAND, CID REPORT OF INVESTIGATION 240, (Oct. 16, 2004), *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DODDOACID009482.pdf>; Andrea Mitchell, *Delta Force, Navy SEALs involved in abuse?* NBC NEWS, (May 6, 2004, 6:15 PM), *available at* <http://www.nbcnews.com/id/4917567/> (CIA interrogator stating that al Jamadi was “injured before he was turned over to the CIA”); Hersh, *supra* note 44 (noting that CIA and military intelligence officials fought over who should “dispose of the body,” and they attempted to remove the corpse from the prison on a stretcher with a fake IV attached to his arm so that al-Jamadi did not appear in the prison’s files). The news headlines suggested that Delta Force and Navy SEALs could have been involved, and former CIA officer Robert Baer speculated that there could have been a more intricate connection to the atrocities for which MPs were being blamed: “I can’t believe that those MPs knew enough about Arab culture to systematically do this Somebody prompted them.” Mitchell, *supra*.

²⁶⁵ Luke Harding, *After Abu Ghraib*, GUARDIAN Sept. 20, 2004, *available at* <http://www.guardian.co.uk/world/2004/sep/20/usa.iraq>. As General Miller was escorting journalists through Abu Ghraib prison, Huda Alazawi shouted: “You are the killers. This is our country. You have invaded it.” *Id.* Shortly after the Abu Ghraib scandals emerged and investigations of U.S. prison facilities were being conducted, Huda was unexpectedly released after eight months of detainment. *Id.*

them, claiming that the detainees had attempted to flee.”²⁶⁶ Amjed Isail Waleed was another prisoner at Abu Ghraib who had been tortured, humiliated, and subject to sexual abuses.²⁶⁷ An Iraqi going by the name “Saleh” was detained at Abu Ghraib and was beaten, subjected to electric shocks, and forced to engage in sexual acts, but he was not even a loyalist of the former regime.²⁶⁸

The Bush Administration did not authorize interrogation techniques that should have resulted in detainee deaths, although advice from legal advisors seemed to discombobulate the connection among the government’s interrogation orders, definitions of torture, and culpability for perpetrating torture.²⁶⁹ These more atrocious examples demonstrate that it should be expected that detention and interrogation practices can intensify and that there were an assortment of criminal acts that transpired during interrogations that should impose a much higher level of culpability on interrogators than on those who issued orders. Yet most of the depictions on 60 Minutes represent the reverse circumstance—those who committed acts that were tantamount to the variety of interrogation methods that were explicitly authorized by the White House and secretary of defense should not be held as culpable as those who issued interrogation directives in violation of international law. Despite the virtually unanimous condemnation and demands for responsibility across the US government, from Congress, within the human rights

²⁶⁶ Major John Hackel, *Planning for the “Strategic Case”: A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 255 (2009).

²⁶⁷ Carney, *supra* note 216, at 319. *See also* Fay Report, *supra* note 43, at 66 (highlighting an ICRC report of an abuse detainee who was held “in a totally darkened cell, measuring about 2 meters long, and less than a meter across, devoid of any window, latrine or water tap, or bedding,” and noting that a sign was attached that called the prisoner “Gollum” and included an image of the character from the Lord of the Rings movie).

²⁶⁸ Roger Doyle, Comment, *Contract Torture: Will Boyle Allow Private Military Contractors to Profit from the Abuse of Prisoners?*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 467, 468 (2007).

²⁶⁹ Bejesky, *Call for Papers*, *supra* note 88, at 48-70.

community, and from the international community,²⁷⁰ investigations did not reflect a consistent theory of culpability, which makes the assessment of liability on MPs glaringly deficient.

D. Multiple Investigations

1. Calls for Responsibility

The Bush Administration avowed that wrongdoing would be investigated,²⁷¹ but instead frustrated investigations, relied on amenable Congresspersons to terminate inquiries,²⁷² and later insisted that

²⁷⁰ MCCOY, *supra* note 28, at 146 (noting that on May 10, 2004, by a vote of 92-0, the U.S. Senate called for “a full accounting for the cruel and disgraceful abuse of Iraqi detainees,” but a full accounting was never forthcoming); Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 826 (2007) (citing *Programme Management Note*, African Hum. Rts. And Access to Just. Programme (Int’l Comm’n of Jurists), May 2004, at 1) (citing members of the international human rights community, the International Commission of Jurists expressed deep concern over the reports of systematic human rights abuses at Abu Ghraib, and designated them “sadistic, wanton and criminal abuses” and “obscene” and “shocking” torture). See generally Neil MacFarquhar, *Arab Meeting Expected to Produce Mostly Criticism of U.S.*, N.Y. TIMES, May 22, 2004, at A3; Alan Cowell, *Powell, on Trip to Mideast, Vows Justice on Iraq Abuse*, N.Y. TIMES, May 16, 2004, at A18; Thomas L. Friedman, Editorial, *Restoring Our Honor*, N.Y. TIMES, May 6, 2004, at A35 (contending that Bush should have apologized for what happened at Abu Ghraib at a meeting of world leaders). Then-Senate Majority Leader Bill Frist explained that “[w]hat we saw is appalling.” Charles Babington, *Lawmakers Are Stunned By New Images of Abuse*, WASH. POST, May 13, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A22464-2004May12.html>. Representative Jane Harman contended: “I saw cruel, sadistic torture.” Babington, *supra* at A01. Senator Saxby Chambliss stated: “My stomach gave out.” Kathy Kiely & William M. Welch, *Abu Ghraib Photos Cause Gasps in Congress*, USA TODAY, May 13, 2004, available at http://usatoday30.usatoday.com/news/world/iraq/2004-05-12-congress-abuse_x.htm.

²⁷¹ IN THE NAME OF DEMOCRACY, *supra* note 25, at 110.

²⁷² Eric Schmitt, *Congress’s Inquiry into Abuse of Iraqi Prisoners Bogs Down*, N.Y. TIMES, July 16, 2004, available at <http://www.nytimes.com/2004/07/16/world/reach-war-capitol-hill-congress-s-inquiry-into-abuse-iraqi-prisoners-bogs-down.html>; *Abu Ghraib, Stonewalled*, N.Y. TIMES, June 30, 2004, available at <http://www.nytimes.com/2004/06/30/opinion/abu-ghraib-stonewalled.html> (noting

the media's fixation on accounts of human rights abuses, were motivated by "political animus and misinformation."²⁷³ In Senate confirmation hearings in January 2005, Gonzales remarked that he regretted and condemned the abuses at Abu Ghraib and informed that assessing accountability was the reason for court-martials and administrative penalties.²⁷⁴ Gonzales himself was not held responsible, despite that he was approving of the illegal tactics, and instead the Republican Congress approved of him as the chief prosecutor in the country.²⁷⁵

Government reports, human rights investigations, court documents, journalist accounts, media articles, and victim statements substantiated a long list of torture crimes,²⁷⁶ and numerous investigations did result in disciplinary or criminal proceedings.²⁷⁷

that the White House "obstructed investigations," the Pentagon removed 2,000 of the 6,000 pages relating to interrogation techniques in Iraq, and Rumsfeld claimed that providing information to Congress violated "Red Cross confidentiality policies" to turn over IRC reports even when the IRC officially stated many times that the reports should be given to Congress). As with eagerly authorizing the use of force against Iraq when there was no security threat and the rejection of bringing troops home when Americans opposed the war, the Republican-controlled Congress did very little to end interrogation abuses. Bejesky, *Pruning*, *supra* note 6, at 887-90; Bejesky, *Political Penumbras*, *supra* note 194, at 14, 45-46.

²⁷³ Kreimer, *supra* note 84, at 1194.

²⁷⁴ *Id.* at 163 (citing Senate Judiciary Committee Confirmation Hearing Transcript 5, 12, 19, January 6, 2005).

²⁷⁵ Bejesky, *Call for Papers*, *supra* note 88, at 4-5, 64-66.

²⁷⁶ IN THE NAME OF DEMOCRACY, *supra* note 25, at 68, 84; HUMAN RIGHTS WATCH, *supra* note 25. Starting in October 2003, the ACLU, along with Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace, began filing FOIA requests and by early-2005 and attained 1,200 pages of documents relating to prisoner abuse. ACLU, *supra* note 107; Charlie Savage, *Files Suggest US Troops Tried to Hide Abuses*, BOSTON GLOBE, Feb. 18, 2005, available at http://www.boston.com/news/nation/washington/articles/2005/02/18/files_suggest_us_troops_tried_to_hide_abuses/.

²⁷⁷ John R. Crook, *U.S. Military Justice Proceedings Involving Alleged Offenses Against Protected Persons*, 99 A.J.I.L. 713, 713 (2005) (noting that an Army report stated that 125 personnel had been administratively sanctioned or court-martialed). The Pentagon investigated over five hundred cases of alleged detainee abuse in Iraq and Afghanistan and 251 disciplinary or criminal proceedings had been brought against military personnel. Eric Schmitt, *Army Interrogator Is Convicted of Negligent Homicide in 2003 Death of Iraqi General*, N.Y. TIMES Jan.

By 2009, the Department of Defense adopted fourteen different investigative reports of detainee abuse, and Abu Ghraib became one of the most investigated government abuse scandals since Watergate.²⁷⁸

2. Pentagon Investigations

The Ryder Report was the first official report produced on prisoner abuse in U.S. detention facilities.²⁷⁹ Major General Ryder, the Army Provost Marshall, reviewed detainment facilities in Iraq during October and November 2003 and explained that “[g]enerally, conditions in existing prisons, detention facilities and jails meet minimum standards of health, sanitation, security, and human rights established by the Geneva Conventions.”²⁸⁰ Perhaps the worst abuses did not surface prior to this investigation. Consequently, four heavily publicized investigations followed—the Taguba, Fay/Jones, Mikolashek, and Schlesinger reports.²⁸¹ The Taguba and the Fay/Jones reports concentrated on the Abu Ghraib atrocities, while the Schlesinger and Mikolashek investigations involved broader inquiries.²⁸² The Mikolashek and Fay/Jones reports provided only minimal sourcing for assertions, while the Schlesinger report provided almost no sourcing for its conclusions.²⁸³

The Taguba investigation concluded that “several US Army Soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq.”²⁸⁴

23, 2006, at A17; Josh White, *Former Abu Ghraib Guard Calls Top Brass Culpable for Abuse*, WASH. POST, JAN. 23, 2006, at A3.

²⁷⁸ Rohman, *supra* note 203, at 97, 101.

²⁷⁹ ZIMBARDO, *supra* note 8, at 383.

²⁸⁰ MAJOR GENERAL DONALD RYDER, U.S. DEPARTMENT OF THE ARMY OFFICE OF THE PROVOST MARSHAL GENERAL, REPORT ON DETENTION AND CORRECTIONS OPERATIONS IN IRAQ 7 (November 2003), *available at* <http://www.dodig.mil/Foia/ERR/06-INTEL-10-part%202.pdf>.

²⁸¹ Rohman, *supra* note 203, at 102.

²⁸² *Id.* at 104-05.

²⁸³ *Id.* at 121 (stating that the Taguba Report was more thorough in substantiating findings).

²⁸⁴ Taguba Report, *supra* note 73, at 50.

The Fay/Jones inquiry also countenanced the “few bad apples explanation” by attributing culpability to a “small group of morally corrupt soldiers and civilians” who lacked discipline.²⁸⁵ The MPs possessed “criminal propensities” and lacked a solid understanding of MP responsibilities for interrogation operations, which were shortcomings abetted by leadership failures, multiple-agency overlap of operations at Abu Ghraib, and languid management of contractors²⁸⁶ and Army failure to prevent the CIA interrogators’ violation of rules applicable to US military detention facilities.²⁸⁷ The Fay and Jones reports determined that the highest levels of government assumed that detainees could be forcefully treated,²⁸⁸ but refrained from assessing affirmative responsibility on the highest levels²⁸⁹ and discerned that a massive diffusion of responsibility among fifty people contributed to misconduct at Abu Ghraib.²⁹⁰

Another interpretation is that if fifty people were involved, there were fifty opportunities to prevent the wrongs. It seems unlikely that dozens of individuals could all concomitantly founder

²⁸⁵ MAJOR GENERAL GEORGE R. FAY & LIEUTENANT GENERAL ANTHONY R. JONES, U.S. DEPARTMENT OF THE ARMY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE, at Executive Summary 2-3 (2004), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf [hereinafter Jones/Fay Report].

²⁸⁶ ZIMBARDO, *supra* note 8, at 393; Jones/Fay Report, *supra* note 285, at 4-6; Jones Report, *supra* note 76, at 18 (“the primary cause of the most egregious violent and sexual abuses was the individual criminal propensities of the particular perpetrators.”). *see* Schooner, *supra* note 215, at 557.

²⁸⁷ The Army allowed CIA interrogators to move freely about the facility and to “house ‘ghost detainees’ who were unidentified and unaccounted for in Abu Ghraib,” which was a corrupting mystique that “eroded the necessity [of the MPs] ... to follow Army rules.” MCCOY, *supra* note 28, at 154-56; Fay Report, *supra* note 43, at 7-9, 29, 42, 44, 45, 53, 55, 118; Scheppele, *supra* note 248, at 318 (“[S]oldiers who witnessed what the CIA was allowed to do in the middle of the same ‘war on terrorism’ may have been tempted to believe that they could do the same.”).

²⁸⁸ Jones Report, *supra* note 76, at 8-9.

²⁸⁹ *Id.* at 15-16 (affirming “These incidents of physical or sexual abuse are serious enough that no soldier or contractor believed the conduct was based on official policy or guidance ... No policy, directive, or doctrine caused the violent or sexual abuse incidents.”)

²⁹⁰ Fay Report, *supra* note 43, at 7-8.

on their obligations to engender the particular result unless some superior authority impelled the wrongdoing into motion. Top officials *did* issue outrageous directives for interrogation when the Article 17 of the Geneva Conventions states that *no interrogations* of detainees may be conducted.²⁹¹ Moreover, if the misconduct at Abu Ghraib was principally attributable to poor judgments at the lowest level, it is bewildering that more serious harms became common across multiple detention facilities and that wrongs continued long after the Abu Ghraib investigations.

In addition to the already discussed instances of more egregious abuse that occurred due to interrogation and at about the same time that the Abu Ghraib scandal occurred,²⁹² by May 2004, at least 37 prisoner deaths in U.S. detention facilities had been investigated.²⁹³ In many cases, Army investigators lost records, evidence was contaminated, and autopsies were not taken.²⁹⁴ Army inspector General Paul T. Mikolashek's 321-page report itemized 94 cases of abuse, 39 deaths, and 20 murders.²⁹⁵ Mikolashek's First Finding states: "All interviewed and observed commanders, leaders, and soldiers treated detainees humanely," and that there was no systemic or institutional causes for abuse.²⁹⁶ The methodical explanation was that wrongdoers were soldiers who disregarded "Army Values."²⁹⁷

²⁹¹ Cf. Geneva I, *supra* note 47, art. 17. See *supra* Part II(D)(2),(3) (issuing abusive interrogations).

²⁹² See *supra* Part IV(C).

²⁹³ IN THE NAME OF DEMOCRACY, *supra* note 25, at 82-83.

²⁹⁴ *Id.* at 110.

²⁹⁵ John Hendren & Mark Mazzetti, *Army Implicates 28 US Troops in Deaths of 2 Afghan Detainees*, L.A. TIMES, (Oct. 15, 2004), available at <http://articles.latimes.com/2004/oct/15/world/fg-defense15>.

²⁹⁶ U.S. DEP'T OF THE ARMY INSPECTOR GEN, INSPECTION REPORT ON DETAINEE OPERATIONS ii, 17 (2004), available at <http://www1.umn.edu/humanrts/OathBetrayed/Mikolashek%20Report.pdf> (stating that "[t]he DAIG did not identify a systemic cause for the abuse incidents").

²⁹⁷ *Id.* at forward, ii-iv, 13, 15-16, 22, 31, 38, 90, E-8; *id.* at iii, 13 (further rationalizing that the enemy did not obey the Geneva Conventions, which placed soldiers in demanding and stressful conditions and required intelligence from interrogations, and soldiers were frequently "attacked by detainees," "taunted or spat upon," at risk of being infected by detainee diseases, and required to dodge the "urine or feces" being thrown by detainees).

The Milolashek Report assessed very limited responsibility, and Professor Zimbardo explained that “[t]his top-level ‘whitewash’ should be packaged with the Ryder Report as a Tweedledee-Tweedledum boxed set.”²⁹⁸

The Schlesinger report did implicate the Bush Administration in wrongdoing for affirmatively rejecting being bound by the Geneva Convention,²⁹⁹ and also stated that there were “confusing and inconsistent interrogation technique policies,” which “contributed to the belief that additional interrogation techniques were condoned.”³⁰⁰ In April 2005, Lieutenant General Stanley E. Green, the Army’s inspector general, exonerated four out of the five top Army officers who were criticized in previous reports.³⁰¹ None of the officials who authorized abusive practices for interrogations were implicated.³⁰²

3. Reflections

Consider remarks by the Bush Administration shortly after the Abu Ghraib stories broke. President Bush stated that the actions in the “prison are abhorrent and they don’t represent America,” but only “represent the actions of a few people.”³⁰³ Three weeks later,

²⁹⁸ ZIMBARDO, *supra* note 8, at 383, 391 (noting that the *New Yorker* labeled the Ryder Report “at best a failure and at worst a cover up”).

²⁹⁹ IRONS, *supra* note 69, at 252; Benforado & Hanson, *supra* note 137, at 547.

³⁰⁰ Benforado & Hanson, *supra* note 137, at 548 (citing Schlesinger Report, *supra* note 124, at 10). See Eric Schmitt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1 (Schlesinger postulating that it was “‘Animal House’ on the night shift.”). Tillie Fowler, a member of the committee that produced the report and a former member of the House of Representatives, determined that there were “fundamental failures throughout all levels of command ... from the soldiers on the ground to Central Command [in Iraq] and to the Pentagon. These failures of leadership helped to set the conditions which allowed the abusive practices to take place.” IRONS, *supra* note 69, at 252-53.

³⁰¹ Eric Schmitt, *Four Top Officers Cleared by Army of Prison Abuse*, N.Y. TIMES, Apr. 23, 2005, available at http://www.nytimes.com/2005/04/23/politics/23abuse.html?pagewanted=1&_r=0.

³⁰² MCCOY, *supra* note 28, at 169.

³⁰³ *Bush Vows Abusers Will Face Justice*, CNN, (May 6, 2004), available at <http://edition.cnn.com/2004/ALLPOLITICS/05/05/bush.abuse/index.html>.

Bush contended that it was “disgraceful conduct by a few American troops, who dishonored our country and disregarded our values.”³⁰⁴ Secretary of Defense Donald Rumsfeld affirmed that they were “seeking a way to provide appropriate compensation to those detained who suffered grievous and brutal abuse and cruelty at the hands of a few members of the U.S. military.”³⁰⁵ Official accounts denied that human rights violations were systematic, but instead assumed that abusive acts were anomalies and aberrations.³⁰⁶ Those issues were never resolved and apparently most Americans did not accept the explanation.³⁰⁷

Investigations conducted by high-ranking generals and former top officials were not comprehensive, but were confined and controlled³⁰⁸ and incorporated an innate conflict with military personnel adverse to implicating their superiors and the White House³⁰⁹ and did not interview victims or engage in queries up the

³⁰⁴ *Transcript From Bush Speech on American Strategy in Iraq*, N.Y. TIMES, (May 24, 2004), <http://www.nytimes.com/2004/05/24/politics/25PTEX-FULL.html?pagewanted=all>.

³⁰⁵ Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees (May 7, 2004), *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=118>.

³⁰⁶ Jesselyn Radack, *Discussing a Taboo—A Review of Torture: A Collection*, 14 TEMP. POL. & CIV. RTS. L. REV. 609, 625 (2005).

³⁰⁷ Jill Taylor, *Poll: Most Want Inquiry into Anti-terror Tactics*, USA TODAY, Feb. 12, 2009, at 1A, *available at* http://www.usatoday.com/news/washington/2009-02-11-investigation-poll_N.htm (citing that even after President Obama entered office and after all of the military reports, nearly two-thirds of Americans still wanted an investigation into the Bush Administration’s involvement in the purported torture programs).

³⁰⁸ Rohman, *supra* note 203, at 44.

³⁰⁹ *See Id.* at 106; General David M. Brahms, et. al., Letter to President George W. Bush, Sept. 7, 2004, *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090108-ETN-sept7-mil-ldrs-ltr.pdf> (group of military officials affirming the limitations in such an investigation when they stated: “Investigations that are purely internal to the military, however competent, cannot examine the whole picture.”). General Taguba later recalled that after he completed the report, he was told that “you and your report will be investigated.” Hersch, *supra* note 109. He remarked: “I’d been in the Army thirty-two years by then, and it was the first time that I thought I was in the Mafia.” *Id.* After retiring in 2007, Taguba felt that he had been “ostracized” for being “overzealous and disloyal.” *Id.*

chain of command.³¹⁰ Members of Congress sparred over interpretations of the same reports in allocating blame.³¹¹ The informal and ambiguous chain of command and the multiple investigations, theories, and individuals responsible, evidently contained culpability such that together, everyone is responsible, but separately, there is diffusion of responsibility.³¹²

Despite that the “few bad apples” theory remained the Bush Administration’s official response,³¹³ scholars also did not believe

³¹⁰ Rohman, *supra* note 203, at 18, 22-23 (stating that the Department of Defense investigations relied on interviews with soldiers and officers, who were sometimes summoned in groups and had their responses monitored, and did not interview victims).

³¹¹ Eric Schmitt & Douglas Jehl, *Army Says CIA Hid More Iraqis Than It Claimed*, N.Y. TIMES, Sept. 10, 2004, at A1, available at http://www.nytimes.com/2004/09/10/politics/10abuse.html?_r=0. It is the same pattern played out among the White House, CIA, Pentagon, Chalabi’s INC, and the mainstream media for the false information that manipulated Americans into an illegal war with Iraq. *see generally* Bejesky, *Politico*, *supra* note 22. *See generally* Robert Bejesky, *Congressional Oversight of the “Marketplace of Ideas”: Defectors as Sources of War Rhetoric*, 63 SYRACUSE L. REV. 1 (2012).

³¹² The finger-pointing and avoidance of responsibility for the Abu Ghraib scandal and the sequence of prolonging a full account of wrongdoing, denying responsibility, and making misrepresentations was similar to the pattern that Britain followed when it got caught committing human rights atrocities and torture during interrogation on Irish detainees in the early-1970s, which was a case brought before the European Court of Human Rights. App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980). MCCOY, *supra* note 28, at 152; Martha Minow, Book Review: *What is the Greatest Evil?: The Lesser Evil: Political Ethics in an Age of Terror*, 118 HARV L. REV. 2134, 2162 (2005). There were years of cover-ups until Britain officially acknowledged before the world community that what they were doing was illegal and that it would not happen again. *See* Bejesky, *Utilitarian Rational Choice*, *supra* note 106, at 405-11.

³¹³ Ragavan & Mireles, *supra* note 60, at 620; Katherine Gallagher, *Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture*, ICJ 7 5 (1087 (2009) (noting that investigations “did not look up the chain of command”); Neil MacMaster, *Torture: from Algiers to Abu Ghraib*, 46 RACE & CLASS 1, 14 (2004) (stating that “Bush and Rumsfeld ... claimed ignorance ... Implicit in such a discourse was the claim that there was no systematic deployment of torture interrogation techniques in the US army and that sadistic acts were isolated to degraded individuals and did not reach up through the chain of command.”); Philip Carter, *The Road to Abu Ghraib*, WASH. MONTHLY, Nov. 2004, at 21. Neoconservative William Kristol, Editor of the conservative

the explanation. David Luban stated: “Abu Ghraib is the fully predictable image of what a torture culture looks like ... Abu Ghraib is not a few bad apples—it is the apple tree.”³¹⁴ Professor Mark Drumbl explained that the “‘few bad apples’ theory is the official story: namely, that a warped fringe group of individuals on the night-shift at Abu Ghraib, acting independently, inflicted the abuses.”³¹⁵ The Republican-controlled Congress responded “with a combination of disingenuous disavowals, misleading direction, and outright obstruction,”³¹⁶ but after Democrats retook Congress, the Senate Armed Services Committee explained that “the abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own.”³¹⁷ Perhaps hitting the ratiocinative homerun, Yale Law Professor James Forman explained: “[T]he alleged bad apples are not low-level officers but Bush, Rumsfeld, and Cheney themselves.”³¹⁸

The final result appears to assume that the U.S., as a constitutional democracy, can assess internal accountability, while power prohibits international punishment and only leads to a shameful temporary reputational defilement.³¹⁹ When the evidence became apparent, Rumsfeld deflected blame toward failure to prevent harms

Weekly Standard, made many media appearances and also insisted that the conduct was caused by “a couple of extremely bad apples.” Benforado & Hanson, *supra* note 137, at 545; Strauss, *supra* note 39, at 1275 (noting that the Administration’s treatment of the abuse was to consider them a “sadistic renegade group engaged in ‘Animal House-type’ behavior”).

³¹⁴ Luban, *supra* note 68, at 1452; John Barry et al., *Abu Ghraib and Beyond*, *NEWSWEEK*, May 17, 2004, at 32 (Senator Lindsay Graham noting that “[t]his is not a few bad apples. This is a system failure, a massive failure.”).

³¹⁵ Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 *DRAKE L. REV.* 897, 914 (2005).

³¹⁶ Kreimer, *supra* note 84, at 1201.

³¹⁷ *Inquiry into the Treatment of Detainees in U.S. Custody Before the Senate Committee on Armed Services*, 110th Cong. xii (2008), available at http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

³¹⁸ James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 331, 338 (2009).

³¹⁹ See Bejesky, *Pruning*, *supra* note 6, at 866-87. See also Grant & Keohane, *supra* note 160, at 39.

when he told the Senate Armed Services Committee, “I am accountable for them and I take full responsibility,” but no responsibility or punishment was ever enforced on the top of the government hierarchy.³²⁰ It is true that Rumsfeld was on notice of prisoner abuses before any of this transpired due to Red Cross reports, human rights reports, and press accounts,³²¹ but he not only failed to curb abuses, but he approved of enumerated interrogation methods that violated international war crimes, the Geneva Convention, and the Convention against Torture.³²² Rumsfeld apologized for the wrong act.

Many commentators deemed the Pentagon investigations inadequate. Keith Rohman, a professor and president of Public Interest Investigations, Inc., explained that “time and time again, high-visibility investigations of public scandals not only fail to uncover truth, they seem to redirect the focus in the wrong direction. The Department of Defense’s (DoD) investigations of the detainee abuse scandal at the Abu Ghraib prison are a recent example of this.”³²³ Professor Henry R. Luce emphasized that the investigations were specifically designed to protect Bush Administration officials from scrutiny, and that pivotal documents involving Administration culpability remained hidden.³²⁴ Congressman David Obey contended: “This could not have happened without people in the upper echelon of the Administration giving signals. I just didn’t see how this was not systemic.”³²⁵ Rear Admiral John D. Hutson explained: “The investigations ... failed to address senior military and civilian

³²⁰ IRONS, *supra* note 69, at 253. *See also* Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT’L L. 433, 448 (2006) (Rumsfeld remarking: “[T]o those Iraqis who were mistreated by members of the U.S. armed forces, I offer my deepest apologies.”).

³²¹ *See* ZIMBARDO, *supra* note 8, at 407. *See also* Pearlstein, *supra* note 12, at 1268 n.56.

³²² *See* ZIMBARDO, *supra* note 8, at 407. *See also* Frontline: *The Torture Question* (PBS television broadcast, Oct. 18, 2005), transcript available at <http://www.pbs.org/wgbh/pages/frontline/torture/etc/script.html>.

³²³ Rohman, *supra* note 203, at 96.

³²⁴ *See* IN THE NAME OF DEMOCRACY, *supra* note 25, at 136-37.

³²⁵ Rohman, *supra* note 203, at 103.

command responsibility and in doing so separate culpability from responsibility.”³²⁶

As Harvey Volzer, a lawyer for one of the accused low-level soldiers, explained, “the higher up the [court-martials] go, the more problems they have with people leading to the Pentagon ... Pappas gives them Sanchez ... Sanchez can give them Rumsfeld ... Rumsfeld can lead to Bush and Gonzales.”³²⁷ Even Schlesinger admitted: “[T]he abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.”³²⁸ In *Getting Away with Torture?*, Human Rights Watch concluded that an independent investigation was required and believed that responsibility should extend up the government hierarchy to Rumsfeld and Tenet.³²⁹

V. CONCLUSION

Tens of thousands of Iraqi detainees were swept up in dragnet procedures and imprisoned during a war that was carried out without a valid justification and without Security Council authoriza-

³²⁶ *Id.*

³²⁷ MCCOY, *supra* note 28, at 168.

³²⁸ Schlesinger Report, *supra* note 124, at 5 (further noting that “[t]here is no evidence of a policy of abuse promulgated by senior officials or military authorities.”). This is abysmally inaccurate claim. Douglas Jehl, *A Trail of Major Failures Leads to Defense Secretary’s Office*, N.Y. TIMES, Aug. 25, 2004, available at <http://www.nytimes.com/2004/08/25/politics/25assess.html> (noting that responsibility extended to Rumsfeld’s office and that “some of Mr. Rumsfeld’s critics have demanded his resignation”); Strauss, *supra* note 39, at 1275-76 (Pentagon report explaining that “culpability extended far beyond a handful of low-level military police personnel, to include military intelligence soldiers in Iraq and up the chain of command in the Persian Gulf to the highest levels in Washington.”)

³²⁹ See ZIMBARDO, *supra* note 8, at 403. See also Brenner, *supra* note 7, at 68. (noting that former Army Colonel Lawrence Wilkerson, Secretary of State Colin Powell’s former chief of staff, acknowledged that those in the chain of command tolerated torture, higher level officials received immunity, and reiterated that the president and vice president publicly admitted that they were taking the gloves off).

tion, but the Abu Ghraib prison turpitude sparked more media scrutiny.³³⁰ The attention shifted public perceptions from an illegal war based upon false allegations about WMDs to vivid atrocities and nude Iraqis piled on top of each other while surrounded by MPs at Abu Ghraib. This was one key point during the Bush Administration's tenure, which might best be identified in terms as an era of successively bursting scandal with wrongs that were each independently condemnable, but each was displaced by something new.³³¹ Attention was redirected from previous actions, and outrage was redirected to new wrongs. In the case of Abu Ghraib, there was never a full accounting of chain of command responsibility as was urged by experts, organizations, and the international community.

The Bush Administration authorized despicable psychological interrogation methods across all detention facilities, and high-level military officials discussed explicit orders for interrogation in Iraq. Rumsfeld ordered Miller to implement harsh interrogation practices in Iraq and Karpinski's MPs were instructed to participate and assist interrogators in some capacity. Distinctions between torture and cruel and unusual punishment are insignificant because both are prohibited under Article 17 of the Geneva Conventions. The Bush Administration and intelligence officials escaped punishment for what transpired at Abu Ghraib prison in Iraq.³³² Several soldiers were blamed and faced punishment, but this selective punishment was unjust.

Each of the Pentagon investigations offered a slightly different causal combination to explain the injustices.³³³ The *Associated Press* explained that after several years of investigations, "no officers or civilian leaders [were] held criminally responsible for the prisoner abuse that embarrassed the U.S. military and inflamed the

³³⁰ See MCCOY, *supra* note 28, at 172 (noting that the *Washington Post* and the *New York Times* became avid truth seekers and conducted their own investigations on interrogation abuse, and placed their findings on front pages).

³³¹ Bejesky, *Flow*, *supra* note 244, at 430-34.

³³² IN THE NAME OF DEMOCRACY, *supra* note 25, at 86, 260-71; HUMAN RIGHTS WATCH, *supra* note 25.

³³³ Croessmann, *supra* note 117, at 947.

Muslim world.”³³⁴ There are fifty state attorney general’s offices in the U.S. and 193 UN member countries in the world that can potentially investigate civil or criminal aspects of war crimes and torture.³³⁵ Professor M. Cherif Bassiouni adeptly summarized:

The patterns of deceit, command influence, concealment, dereliction of duty to investigate and prosecute, intentional disregard of legal obligations, as well as elaborate schemes to evade the application of the law, have been recognized in many cases of criminal responsibility under Title 18 with respect to conspiracy to commit white collar crimes and violent crimes. Why the legal subterfuges ... have escaped legal scrutiny, both within the military and civilian systems of justice, has no other explanations except for the fact that the operators of these two systems of justice have looked the other way.³³⁶

³³⁴ Ben Nuckols, *Military Prosecution in Abu Ghraib Scandal Ends*, ASSOC. PRESS, Jan. 11, 2008, available at http://www.boston.com/news/nation/articles/2008/01/11/military_prosecution_in_abu_ghraib_scandal_ends/.

³³⁵ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium, 2002 I.C.J. ¶¶ 58-61 (Feb. 14) (holding that universal jurisdiction crimes, such as war crimes and crimes against humanity, can conflict with the customary law of official immunity so to limit the jurisdiction of foreign courts, and also referencing that the immunity holding applies to heads of state and foreign ministers); STEPHEN MACEDO, ET AL., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 16 (2001) (“The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.”). See generally Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U.L. REV. 698 (2011) (emphasizing the ability of state attorney general offices to enforce federal law in certain types of cases).

³³⁶ Bassiouni, *supra* note 207, at 418; Erwin Chemerinsky, Mary Ellen O’Connell & Jeremy Rabkin, *Spring 2010 Symposium—A Collision of Authority: The U.S. Constitution and Universal Jurisdiction: A Symposium Transcript*, 9 RICH. J. GLOBAL L. & BUS. 307, 314 (2010) (statement by Chemerinsky) (stating that the reason why we are “talking about universal jurisdiction in February of 2010” is because “individuals at the highest levels of American government violated American international law and have not been held accountable in American courts”).