

by both Dostum and the Americans to were killed were tied up at the time they reporters were briefed that "only" eight re being shot after the uprising started, is proposed by Luke Harding, is more st, because a photographer "saw the ters whose hands had been bound by re southern part of the fort," and that rs cut the scarves from the hands of : Alex Perry noted, "some of the dead liance soldiers used scissors to snip off less significantly, because so many of y was suppressed until the Pentagon ots in 2006—also talked about being id.¹⁶

CB 6
Shafiq Rasul

3

*The Convoy of Death***Yerghaneek and Qala Zeini**

On Sunday, November 25, 2001, as the uprising began in Qala-i-Janghi, a far larger group of Taliban soldiers—at least 4,500, but possibly as many as 7,000—made their way from Kunduz to Yerghaneek, five miles west of the city, where they surrendered to General Dostum. What no one either knew or cared about, however, was that among the surrendering soldiers were hundreds of civilians who had been caught up in the chaos or who were fleeing the hard-core al-Qaeda and Taliban fighters making a last stand in Kunduz itself.

One of the most vivid accounts of the surrender was provided by three young Britons who fell into this latter category. ~~Twenty-four~~ ²² ~~year-old Shafiq Rasul, 20-year-old Asif Iqbal and 20-year-old Ruhu~~ ~~Ahmed—childhood friends from Tipton in the West Midlands—~~ ~~had traveled to Pakistan in September 2001.~~ Iqbal was making arrangements for his forthcoming marriage to a young woman in Pakistan, Ahmed was his best man, and Rasul was planning to do a computer course once the wedding was over, but soon after their arrival, when the invasion of Afghanistan began, they made the fateful decision that an exciting adventure awaited them over the border, just a short bus-ride away. Using the money they had brought with them, they planned to provide humanitarian aid to Afghan villagers, a mission that also involved the adrenaline rush of being in a war zone, and, they hoped, the opportunity to sample the Afghans' enormous naan breads. Up close, however, the war zone was more frightening than they had anticipated. At risk from both US bombing raids and the Taliban, who were deeply suspicious of young men wandering

around without beards, they tried to return to Pakistan in a taxi, but were instead taken to Kunduz. As the first groups of Taliban soldiers began to surrender, they clambered onto a truck that was leaving the city, but the vehicle was immediately shelled, and almost everyone on board was killed. With nowhere else to turn, they surrendered to Alliance soldiers who took their money, their shoes and their warm clothes, and marched them to Yerghanek.¹

Very few of those who made their way to Yerghanek—70 at most—were eventually transferred to Guantánamo. Of these, only a handful have spoken about their experiences, and none were in the first convoys that set off for Sheberghan on the Sunday. Overwhelmed by the sheer numbers of people flooding out of the city, Dostum was obliged to keep thousands of them marooned in the desert while he arranged additional transportation over the next few days. As a result, neither the men from Tipton nor the others who ended up in Guantánamo—including Abdul Rahman, a 25-year-old shopkeeper from Kunduz, and Mohammed Saghir, a 49-year-old woodcutter from Pakistan's North West Frontier Province—had any inkling of the grisly fate that awaited them.

While the vast crowds of fighters and civilians were disarmed, Dostum's men recruited drivers to go to Qala Zeini, a road between Mazar-e-Sharif and Sheberghan, where those transported

One of the drivers, who was in the fort when a convoy of prisoners arrived that evening, said that, as soon as the Northern Alliance soldiers began stripping them of their turbans and vests, tying their hands behind their backs and transferring them to the containers, some of the prisoners—those who were familiar with recent Afghan history—realized that Dostum was planning to kill them. Since 1997, when a brutal Uzbek general had first seen the viability of containers as cheap and convenient killing machines, murdering 1,250 Taliban soldiers by leaving them in containers in the summer sun, they had become a familiar weapon of Afghan warfare. When the Taliban took Mazar-e-Sharif in 1998, they disposed of their conquered enemies in the same fashion.

According to one of the drivers, a few hours after the convoy had set off from Qala Zeini, the prisoners started pounding on the sides of the containers, shouting, "We're dying. Give us water! We are human,

behind." Three years later, having been transported from Sheberghan to Kandahar and then to Guantánamo, Abdul Rahman's nightmare had still not come to an end. In his tribunal, repeating his story as he had so many times before, he was obliged to refute allegations that he had bought a car for the Taliban while wearing a Taliban-style turban, accompanied by his personal security force of four Taliban soldiers, explaining that this was a story that had been conjured up by the men who falsely imprisoned him in the first place. Finally, someone believed his story, and, after 40 months in detention, he was released in April 2005.³

Mohammed Saghir faced a similar ordeal. The woodcutter was also a missionary with Jamaat-al-Tablighi, a vast worldwide proselytizing organization whose annual gatherings in Pakistan and Bangladesh attract millions of followers. Over the years he had been involved in numerous preaching missions to Afghanistan, but on this occasion he and nine other missionaries were seized by Northern Alliance troops. Saghir was also held for a night at Yerghanek, where he "witnessed wounded and injured men buried alive with the dead," and was then taken to Qala Zeini and herded into a container. "The journey took five hours," he said. "It was dark, hot and suffocating as there was not enough air in the container. Fifty out of the 250 prisoners died on [the] way." Unlike Abdul Rahman, however, it took Saghir less than a year to convince the Americans of his innocence. He was one of the first three prisoners to be freed, in November 2002, and was the first ex-Guantánamo prisoner to speak in detail not only about the horrors of detention in Afghanistan and Cuba, but also about the death convoys.⁴

The three men from Tipton waited for another day until their transportation was arranged, and in their case the container lorries came at night, and the whole sordid spectacle was illuminated by spotlights operated by US Special Forces soldiers. Once the doors were shut, their ordeal followed a now familiar pattern. "They'd herded maybe 300 of us into each container ... packed in so tightly our knees were against our chests," Asif Iqbal said, "and almost immediately we started to suffocate." As with some of the previous journeys, ventilation was provided by Northern Alliance soldiers, who made sure that their humanitarian gesture was accompanied by more killing. "We lived because someone made holes with a machine

ing been transported from Sheberghan to Guantánamo, Abdul Rahman's nightmare of his tribunal, repeating his story as he was obliged to refute allegations that he was a Taliban while wearing a Taliban-style uniform. Personal security force of four Taliban soldiers was a story that had been conjured up to protect him in the first place. Finally, after 40 months in detention, he was

similar ordeal. The woodcutter was also a religiously motivated, a vast worldwide proselytizing organization in Pakistan and Bangladesh for the years he had been involved in Afghanistan, but on this occasion he was seized by Northern Alliance troops. He was taken to Yorghaneh, where he "witnessed the dead alive with the dead," and was then thrown into a container. "The journey took was hot, hot and suffocating as there was no air. Fifty out of the 250 prisoners died in the container," however, it took Saghir less time to lose his innocence. He was one of the few freed, in November 2002, and was not allowed to speak in detail not only about his experience in Afghanistan and Cuba, but also about the

waited for another day until their trial. In their case the container lorries that carried the ordid spectacle was illuminated by the flashlights of al Forces soldiers. Once the doors of the container opened a now familiar pattern. "They'd throw the container ... packed in so tightly that the prisoners were like sardines," Asif Iqbal said, "and almost suffocated." As with some of the previous prisoners, the trial led by Northern Alliance soldiers, the humanitarian gesture was accompanied by the Taliban who made holes with a machine

gun," Iqbal said, "though they were shooting low and still more died from the bullets. The last thing I remember is that it got really hot, and everyone started screaming and banging. It was like someone had lit a fire beneath the containers. You could feel the moisture running off your body, and people were ripping off their clothes." When he finally awoke, he realized that he had not drunk anything for more than two days, and was seriously dehydrated. Using a cloth, he wiped the moisture off the wall and began sucking on it, until he realized he was drinking the blood of those who had died. "We were like zombies," he said. "We stank; we were covered in blood and the smell of death."⁵

Sheberghan

As the survivors spilled out of the container trucks at Sheberghan, they discovered that, although the mass executions were over, the conditions at Dostum's prison were almost unspeakably grim. Thirty-five hundred prisoners were crammed into a space that could only reasonably hold five hundred, and in order to sleep they took turns on the floor, squeezed together in four-hour shifts. Food was also a problem. Shafiq Rasul recalled that each prisoner received a quarter of a naan every day, and a small cup of water, and that sometimes prisoners fought over the food. Twenty-four-year-old Sulaiman Shah, an Afghan used car dealer, was another of the many innocents swept up by the Northern Alliance. On his release in March 2003, he mentioned his time at Sheberghan, where, he said, "life was inhuman, all the prisoners had diarrhea, some had tuberculosis, there was no food for days at a time and we were subjected to beatings and torture."⁶ Despite Shah's appraisal of the ill-health of the prisoners, medical attention was non-existent. Rasul recalled, "There were people with horrific injuries—limbs that had been shot off and nothing was done. I'll never forget one Arab who was missing half his jaw. For ten days until his death he was screaming and crying continuously, begging to be killed."

To make matters worse, reporters were swarming around Sheberghan, but for the most part they were blind to the suffering of the prisoners. "All they seemed to be interested in," Rasul said, "was if any of us knew the American Taliban John Walker Lindh." No one realized that Lindh was not even in Sheberghan. Instead, he

received injuries to their eyes in this manner, that "three brothers were blinded," and that many of the prisoners—himself included—had their noses broken by the soldiers. He was also one of the first prisoners to describe how the prisoners' copies of the Koran were regularly abused. He explained that some of the soldiers "treated the Koran terribly," dropping copies in the toilet bucket, scrawling obscenities on its pages, and tearing out pages which they used to shine their shoes or to wipe out the toilet bucket, and added that they also cursed Allah and the Prophet Mohammed on a regular basis. The abuse of the Koran was also noted by the Britons Tarek Dergoul, Shafiq Rasul, Asif Iqbal and Rhuheh Ahmed, and by Ehsanullah, a 28-year-old Afghan (released in March 2003), who said that soldiers in Kandahar hit him and taunted him by throwing the Koran in a toilet.¹¹

Some of the other Bahrainis also had vivid tales to tell of their treatment at Kandahar. Isa al-Murbati (whose capture is related in Chapter 12) said that he was "shackled to a pole outside in very cold weather," and that, "every hour, US military personnel threw cold water on [him] while he was shackled to the pole." He explained that this took place every night for a week, and added that on one occasion he was taken to an area away from the other prisoners, because Red Cross representatives were visiting the camp, and the authorities did not want them to see him. It was also clear that al-Murbati was not the only prisoner to be exposed to the extreme cold. The Pakistani interviewed by Human Rights Watch said that "he and other prisoners were occasionally taken outside and forced to lie on the frozen ground until they were numb with cold."¹²

Abdullah al-Noaimi "witnessed other detainees being bitten by military dogs," and said that "a female soldier, upon learning that [his] brother lived in the USA, threatened to kill him." He also developed a urinary tract infection and came down with a fever, which made him vomit and left him unable to eat, but explained that, when he was taken to the clinic, "a military doctor allowed a military policeman to inject him with an unknown substance. When he began to bleed as a result, the doctor and the policeman laughed." He was then placed in isolation for seven weeks, and was ignored by the medical staff, even though his eyes were yellow and there was blood in his urine, and added that a doctor told him, "you're about to die and there's nothing we can do for you."¹³

techniques allowed for a good deal of shouting and verbal abuse, but absolutely no physical contact whatsoever.¹⁸

It seems incredible, given the physical abuse to which the prisoners were subjected in detention, that Mackey could even claim that the interrogation rooms were violence-free zones, but there is evidence that the techniques were largely adhered to in the interrogations that he conducted or oversaw. Mourad Benchelali, for example, who reeled off a catalog of abuses in detention, did not allege that he was abused during his interrogations, which took place "several times a day." Instead, he said, the interrogators "were waiting for me to 'confess.' I repeated my story. No one believed me. I did not find out about the World Trade Center until several days before the Americans bombed Afghanistan." Even Juma al-Dossari, who was repeatedly abused during his time in Kandahar, did not claim that he was subjected to violence during his first interrogation (although he did say that the guards made him walk over barbed wire on the way there, and that the incident with the broken glass took place afterwards). "When I entered the investigation tent," he said, "I found that there were two Americans among the investigators ... I said to them, 'why are you torturing me and you haven't even started questioning me? What do you want from me? Give me a piece of paper and I will sign anything you want.'" He was, however, disappointed at the lack of concern that the interrogators showed, and said that one of them told him, "there is no torture here and there are no beatings," even though he "could clearly see the state I was in."¹⁹

Mackey's role as an interrogator is revealed in two sets of accounts—one by Mackey himself, and the other by his prisoners—which provide a unique opportunity to compare and contrast the versions of the truth presented by both parties. The prisoners were Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, and their interrogation gave Mackey a chance to demonstrate a number of interrogation skills: playing prisoners off against each other, and indulging in a little role-play to deceive them. Wearing a maroon beret, and affecting an English accent, he fooled them into thinking he was an SAS officer, although he failed in his attempt to undermine Rasul—with a fake letter from Scotland Yard claiming that his house had been raided 16 hours after he left for Pakistan—as Rasul had rung his family from Pakistan and no such raid had been mentioned, and he succeeded only in confusing

and terrifying the men with an allegation that they were members of the radical British organization al-Mahajiroun (which they were not), and with threats to send them to Belmarsh prison. He was also wide of the mark in his assessment of the men, saying that Iqbal's explanation that he went to Pakistan to get married "was so outrageous, it was almost comical," and attributing calculated guile to one of the other men, when he said that they made "a big mistake," and that they only went to Afghanistan in search of "adventure." Frustrated that they insisted on telling remarkably similar stories, he eventually conceded that they had perhaps been telling the truth.²⁰

The crucial difference between the two sets of accounts, however, was in additional details provided by Rasul and Ahmed. Rasul said that, in the interrogation when the fake letter was produced, "One of the US soldiers had his arm round his neck and was saying, 'wait until you get back to the tent; you will see what we are going to do to you,'" and Ahmed said that, in his interrogation, "one of the US soldiers had a gun to his head and he was told that if he moved they would shoot him." These statements do little to confirm Mackey's moral authority (which is further undermined by Asif's assertion that he told him he was not going to be beaten "because you are with me"), although it's clear from their accounts of other interrogations at Kandahar that he was the only interrogator who did not subject them to physical abuse. Recalling the interrogation that preceded the SAS subterfuge, Iqbal recalled:

An American came into the tent and shouted at me telling me I was al-Qaeda. I said I was not involved in al-Qaeda and did not support them. At this, he started to punch me violently and then, when he knocked me to the floor, started to kick me around my back and in my stomach. My face was swollen and cut as a result of this attack ... Whilst he was attacking me, the interrogator didn't ask me any other questions but just kept swearing at me and hitting me.²¹

One major problem for the interrogators at Kandahar was that a large proportion of the prisoners refused to "break." Mackey reported that most of them said that they went to Afghanistan to seek a pure Islamic state, to find a wife, or to teach or study the Koran. Although they also admitted receiving weapons training, they largely insisted that it was mandatory and had only taken a few days. He was aware that not everyone who passed through interrogation was a "high value"

kely that this was true, given the jubilation that
of Abdul-Haq Wasiq, and the fact that Turabi,
e for the strict, Saudi-influenced Ministry of
and Suppression of Vice, was regarded as a
ah Omar.

11

Guantánamo Opens

"Enemy Combatants"

The first 20 prisoners arrived at Guantánamo on January 11, 2002, after a 27-hour flight from Afghanistan. Three days later, a second flight, containing 30 prisoners, touched down, and by early February, 220 prisoners had arrived in Cuba, and another 237 were awaiting transportation from Kandahar. "I call the journey to Guantánamo 'the journey of death'" the Kuwaiti Adel al-Zamel explained in December 2006. "I discreetly wished that the plane would fall to end the pain I felt." Many other released prisoners also described the misery that they experienced on the flight. Shafiq Rasul, who explained that the prisoners were transported in what he and his friends from Tipton described as the "three-piece suit," consisting of handcuffs attached to a metal belt and leg irons, said that he spent the whole journey in extreme pain because the belt was digging into his side. "When I finally got to Cuba," he said, "I lost feeling in my hands for the next six months."¹

It's still not certain when the administration's Wild West bravado gave way to a realization that, not only would there be prisoners in the "War on Terror," but that, in order to exploit them as they saw fit, they would need to be detained outside the jurisdiction of the US courts. On November 28, 2001, the Pentagon was reportedly looking at plans to imprison captured terrorist suspects at Guantánamo or on the Pacific island of Guam,² but the catalyst was an extraordinary piece of legislation that was announced on November 13. Acting in his capacity as Commander-in-Chief of the Armed Services, and without consulting Congress, President Bush issued a Military Order declaring

Hamed Ahmed explained, "The questions were always the same: if I knew Osama bin Laden or someone of his inner circle, what I was doing in that region, who my contacts were, where I had fought, etc. This went on for two or three hours. They asked the same questions in different ways. They finally told me that if I wasn't more cooperative, I would never see my family again."¹⁷

Initially, the conditions of detention were the most severe obstacle facing the prisoners, prompting Asif Iqbal to declare that "the restrictions that were placed on us when we were in our cages were probably the worst things we had to endure." Importing tried and tested tactics from Afghanistan, the authorities prevented the prisoners from talking to one another and their cages were permanently floodlit. "I spent the first month in utter silence," Mohammed Saghir said after his release, and Hamed Ahmed added, "In the morning they woke us up at 8 o'clock with a song by Bruce Springsteen, 'Born in the USA,' which they played at full volume through the loudspeakers." The prisoners were allowed a handful of meager "comfort items"—two towels, a blanket, a sheet, a small toothbrush, shampoo, soap, flip-flops and an insulation mat to sleep on, as well as two buckets, one for water and one for use as a urinal—but if they wanted to defecate they had to be escorted to a portaloos by the guards, who unshackled one of their hands, but kept an eye on them the whole time. This was not only a source of humiliation for devout Muslims, but also, as Shafiq Rasul explained, "very often the guards would refuse to take us to the portaloos outside and therefore people started to use the buckets in the cells. Many of the people who were detained in Camp X-Ray were ill, often suffering from dysentery or other diseases and simply couldn't wait until the guards decided they would take them to the toilet ... The smell in the cell block was terrible." Asif Iqbal also described how, in the first few weeks, they were "not allowed any exercise at all," were only "allowed out for two minutes a week to have a shower and then returned to the cage," and were often only given a minute to eat their food before it was taken away.¹⁸

Although many prisoners said that the everyday violence that was common in Afghanistan was not replicated in Guantánamo, they explained that the psychological pressure was more intense, and that they were absolutely terrified during the first few weeks in Cuba. Shafiq Rasul explained, "During the whole time that we were in Guantánamo,

we were at a high level of fear. When we first got there the level was sky-high. At the beginning we were terrified that we might be killed at any minute. The guards would say to us, 'we could kill you at any time.' They would say, 'the world doesn't know you're here, nobody knows you're here, all they know is that you're missing and we could kill you and no one would know.'" At this stage, no one—not even the British prisoners, who could readily understand the Americans—had any idea of where they were, and when Red Cross representatives made their first visit, on January 20, they pointed out that in many Arab countries orange jumpsuits were "a sign that someone is about to be put to death." While the ICRC visit led to a few improvements in the prisoners' treatment—they managed to get the no-talking ban lifted, for example, and secured a promise that the prisoners would be supplied with underwear—they were less successful in their attempts to get the authorities to address the prisoners' complaints about their lack of privacy at the portaloos, their requests for more food (2,100 calories a day was considered adequate, which it is not), and their requests to be allowed to exercise and to be placed near other prisoners who spoke the same language. The issue of the jumpsuits was addressed in an extraordinary memorandum written by a member of the Joint Task Force after the visit. "Should we continue not to tell them what is going on?" the author of the memo wrote. "ICRC says they are very scared. What are the benefits in keeping them in the dark vs. telling them what is happening? The detainees think they are being taken to be shot." As for telling the prisoners where they were, the author concluded, "This request will be considered after the first round of interrogations."

While the prisoners were subjected to less random violence than in Afghanistan, however, they soon discovered that regular punishment was built into the system at Guantánamo. Shafigh Rasoul said that their "comfort items" would be removed for the most minor infringement of the rules—leaning against the mesh walls of the cell, for example. Many prisoners also pointed out that they were subjected to indiscriminate verbal abuse from large numbers of the military personnel. Briefed by their superiors that these were the most dangerous men on the face of the earth, many of the guards—two-thirds of whom were reservists or members of the National Guard—took the propaganda at face value. Asif Iqbal explained how, when the restrictions on talking to the guards were relaxed after the first few weeks, several

told him they had been briefed that they were "wild animals," who "would kill them with our toothbrushes at the first opportunity, that we were all members of al-Qaeda and that we had killed women and children indiscriminately."¹⁹

The Extreme Reaction Force

The most extreme brutality came from a special unit called the Extreme Reaction Force, which was—and is—a five-man riot squad responsible for beating supposedly recalcitrant prisoners into submission, and its use was so prevalent that a new phrase—"to be ERFed"—was coined by the prisoners. Mohammed Saghir explained that, in the early days of Camp X-Ray, even prisoners who attempted to pray were ERFed. "They wouldn't let us call for prayers," he said. "I tried to pray and four or five commandoes came and they beat me up. If someone would try to make a call for prayer they would beat him up and gag him." Tarek Dergoul, who spoke at length about the ERF after his release, confirmed that their attacks were largely prompted by minor disciplinary infractions, which he described as "an act of deliberate provocation." Explaining what happened to him on one of the five occasions that he was ERFed—for refusing to agree to a third cell search in a day—he said:

They pepper-sprayed me in the face and I started vomiting; in all I must have brought up five cupsfuls. They pinned me down and attacked me, poking their fingers in my eyes, and forced my head into the toilet pan and flushed. They tied me up like a beast and then they were kneeling on me, kicking and punching. Finally they dragged me out of the cell in chains, into the rec yard, and shaved my beard, my hair, my eyebrows.²⁰

Dergoul was the first released prisoner to point out that each ERF attack was filmed, by a sixth member of the team with a video camera, and this was confirmed by a spokesman for Guantánamo in 2004, who said that they were used to monitor whether or not excessive force had been used. He refused to discuss how many times the ERF had been used, but in July 2004 the Pentagon said that "only 32 hours" of the tapes showed the units using "excessive force."²¹

One of the most violent of all the ERF assaults took place in Camp X-Ray at the end of April 2002. The victim was Juma al-Dossari, and

~~David Hicks~~. The men from Tipton described al-Dossari as having mental health problems. "He used to shout all the time," they said. "The guards and the medical team knew he was ill. Whenever soldiers would walk past his cell he would shout out and say things to them. Not swearing but silly things. He would impersonate the soldiers. One day he was impersonating a female soldier. She called the officer in charge, [who] came to the block and was speaking to Juma." Rasul continued:

There were usually five people on an ERF team. On this occasion there were eight of them ... The first man is meant to go in with a shield. On this occasion the man with the shield threw the shield away, took his helmet off, and when the door was unlocked ran in and did a knee drop onto Juma's back just between his shoulder blades with his full weight. He must have been about 240 pounds in weight ... [he] grabbed his head with one hand and with the other hand punched him repeatedly in the face. His nose was broken. He pushed his face and he smashed it into the concrete floor ... There was blood everywhere. When they took him out they hosed the cell down and the water ran red with blood. We all saw it.²²

In late April, Camp X-Ray was closed down and the prisoners were moved to a new, purpose-built prison, Camp Delta. Made out of shipping containers, the camp consisted of blocks of 48 cells, arranged in two rows of mesh cages separated by a narrow corridor. Although the new cells were a small improvement—they were slightly larger than Camp X-Ray's cages, and each had a wall-mounted steel bed, a toilet and a tap—there was no improvement in the prisoners' general living conditions. The cells were cold at night, the piped water (from a desalination plant) was yellow, the lights still stayed on all night, and giant "banana" rats turned up to replace the snakes and scorpions that had plagued them in Camp X-Ray. The cells were similar to those in the US's notorious Supermax prisons, on which they were modeled, but there were still fundamental differences: not only had the inmates of America's harshest prisons been tried and convicted of crimes, they also, for the most part, were allowed regular visits by family members, and had unlimited access to books, TV, music, pens and paper. In contrast, the Guantánamo prisoners were still held in a legal limbo, with no access to lawyers, no access to their families, no books apart from the Koran, no other forms of recreation, and no notion of when, if ever, their detention would come to an end. What none of them knew at the time was that the worst was yet to come.

R
In
in
te
Fi
or
w
fir

ar
un
wl
hu
As
hei
bre
"te
wa
on
saic
saic
poi
V
pris

and was treated for a traumatic brain injury and discharged from the military in April 2004.⁴

“Setting the Conditions”

Although the abuse described above was directed at prisoners who were presumed to be significant suspects, it's clear that many other prisoners who have not spoken about their experiences also suffered brutal treatment. Not everyone was abused by their interrogators or picked on by the guards, but the new regime took as its starting point the presumption that the majority of the prisoners had something to hide, and came up with new forms of abuse, in an attempt to “break” them, which, according to a former interrogator, were applied to one-sixth of the prisoners in Guantánamo; in other words, to at least a hundred prisoners. He explained that “when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base.”⁵

Describing this period, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, who were rarely subjected to physical brutality, said that they became aware of the changes when the frequency and the length of their interrogations increased, and explained that they were each interrogated on about five occasions in 2002, but that from January 2003 until their release in March 2004 they were subjected to over two hundred interrogations. These kinds of figures have been confirmed by other prisoners, including, to cite just a few examples, the Moroccan Younis Chekhouri, who was interrogated over 150 times, the Frenchman Khaled bin Mustafa, who was interrogated over a hundred times, and—to demonstrate that the changes were not only directed at prisoners who were regarded with great suspicion—a 29-year-old Afghan, Abdel Rahman Noorani (released in July 2003), who said that he was “badly punished 107 times,” and added that “during his 20 months at Guantánamo, his captors had chained his hands and feet and had beaten him with a metal rod on his legs and back.”⁶

What made the prisoners' experiences even more disturbing, however, was the new framework in which the interrogations were couched. Before the interrogations, prisoners were frequently moved into isolation blocks, where they remained for days, weeks, or even months, and where the air conditioning was usually turned up full,

ers who spoke out in 2004—either “because they ‘objected to the badly-run system’”—added that “the authorities came up with a ‘You have a reservation’”—and added that he was “deprived of sleep for a month in 2003, and that he was ‘eventually,’ he said, ‘I’d need to try to tilt my chair and go on the other side of the one-way mirror. As soon as I went to sleep, I’d be in yelling, ‘Look what you’ve done!’ and they’d be taken back to his cell for three hours, and then they’d begin again. The prisoners were also ‘tied with an especially short chain to the floor. ‘After a while,’ Dergoul would hear the guards behind the mirror, ‘knocking on the walls. It was not just about trying to break you.’”

quantánamo in October 2002, a few were almost immediately subjected to sleep deprivation and left in a room for six hours, “the officer would enter the room to laugh at him until he urinated on himself, and then he’d pour urine over him and used him as a mess.” As if further humiliation was “not provided with clean clothes for them.”⁹

Other techniques were sleep deprivation, “waking the prisoners whenever they fell asleep,” and moving them repeatedly from cell to cell. Abdul Malik al-Rahabi was subjected

to prolonged periods of sleep deprivation, David Hicks was subjected to sleep deprivation “as a matter of policy,” and Mourad Benchellali explained, “We were treated differently depending on whether or not we responded to questions. Those who did not ‘cooperate’ were awakened every hour with the aim of preventing them from sleeping at all costs.” The prisoners who were moved from cell to cell—the “frequent fliers,” as the men from Tipton described them—included the Kuwaiti Fouad al-Rabia, who, they said, was picked on like all the prisoners who had spent time in the US, and was moved every two hours, leaving him “suffering from serious depression, losing weight in a substantial way, and very stressed because of the constant moves, deprived of sleep and seriously worried about the consequences for his children.” Mehdi Ghezali was “deprived of sleep for about two weeks by the constant switching of cells and interrogation,” and Isa al-Murbati was “moved from cell to cell in the Tango and Oscar [isolation] blocks, typically on an hourly basis.” As a result, he said, he was “never able to sleep for more than short periods.” Mohammed Khan Achakzai, a 24-year-old Afghan businessman (who was sold to the Americans by the Northern Alliance after the fall of Kunduz) said on his release in March 2004 that some prisoners had been deprived of sleep for up to 45 days at a time, and one particularly unfortunate Yemeni, Mohammed Ghanim (who was in the first group of prisoners captured crossing from Afghanistan to Pakistan in December 2001, but does not seem otherwise significant) was apparently moved between cells and blocks every two hours for a total of eight months, as a result of which he lost a lot of weight—and, presumably, found it increasingly difficult to keep a grip on his sanity.¹⁰

The authorities also made use of prisoners’ phobias, either through the use of dogs, as in the case of Saad al-Azmi, who was bitten by dogs while being hooded, or, as was more common, through sexual humiliation. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed explained that it happened “to the people who’d been brought up most strictly as Muslims,” and that they were frequently so ashamed that it took them some time to tell their neighbors about their experiences. Although the men from Tipton were referring primarily to the Gulf prisoners, very few of them have spoken about their experiences, although the Yemeni Yasin Ismail reported that when he refused to talk during an interrogation, a female soldier entered wearing a tight T-shirt. “Why

to hood them, to beat them mercilessly, to hang them from the walls of their cells for days, to set dogs on them, to lead them around the cell block on leashes, to pile them up in grotesque naked pyramids and, on one notorious occasion, to place a hooded, dark-robed figure on a box, with his arms outstretched, and with wires trailing from his fingers. Schlesinger's report was critical, but, as in other reports commissioned in the wake of the Abu Ghraib scandal, he pointedly refused to gaze up the chain of command to investigate where, ultimately, the responsibility lay for authorizing these techniques. Echoing Bush and Rumsfeld, who blamed the abuse on a "few bad apples," Schlesinger concluded that it was the result of "Animal House on the night shift," although he conceded that "techniques effective under carefully controlled conditions at Guantánamo became far more problematic when they migrated [to Iraq] and were not adequately safeguarded."¹⁵

Noticeably, however, the changes authorized by Rumsfeld did not meet with universal approval in Guantánamo. Shafiq Rasul, Asif Iqbal and Ruhel Ahmed noted that many of their guards, who kept them briefed about developments in the camp, "felt ashamed of the Army that these things were going on." More crucially, several major players in the US administration were also dismayed. Colin Powell's State Department remained implacably opposed to all the developments that sprang from the jettisoning of the Geneva Conventions, and Colonel Lawrence Wilkerson, one of Powell's Chiefs of Staff, was particularly incensed by Rumsfeld's note about standing for eight to ten hours, telling Jane Mayer, "It said, 'Carte blanche, guys.' That's what started them down the slope. You'll have My Lais then. Once you pull this thread, the whole fabric unravels."

The most trenchant criticism, however, came from two of the biggest law enforcement agencies, the FBI and the Naval Criminal Intelligence Service. The NCIS's battle was led by Alberto J Mora, the Navy's general counsel, who was informed about the abusive environment at Guantánamo in December 2002 by his colleague David Brant, who was overseeing a team of NCIS agents working with the FBI. In contrast to the military interrogators and the CIA—who were seeking to "break" al-Qaeda, and whose road to torture was paved by the highest powers in the land—the NCIS's mission was to seek out evidence that could eventually be used in military tribunals and civilian courts. Brant told Mora that the military interrogators, most of whom

ted to ludicrous allegations whose which were clearly implausible. 33-year-old Pakistani, who was small store in Pakistan. Caught ling to Afghanistan to look for rghani and another three years ins that he was not a military adrassas," through which he was ada, and that he had led this vast Arab al-Qaeda operatives"—in until he was captured in Kunduz. id, "The person who made these doesn't even have a brain," and rd Member told him, "I don't r a great general, or this person come with you on a moment's l in October 2006.³⁰

was captured in Pakistan while t foot in Afghanistan, also had gations, which included claims 999, and that he was "a senior ," in contact with Osama bin ew board, the source of these r explained. A Board Member identified you as belonging to him for details he was unable er bizarre allegations involved reportedly caught smuggling e managed to keep the money asement of the Qala-i-Janghi uwari, who responded to an , where he was "in charge of t he asked one of the prisoners t, and was told that "the camp

ve were obtained through ough General Miller's much- kinder on the informers than

coercion—allowing them to move to Camp 4, where they shared dormitories with nine others, ate communally and were allowed to play sports together—was just as damaging in terms of the value of the intelligence produced.³² Numerous prisoners were, of course, aware that other prisoners were telling lies in the hope of being released, but Miller was oblivious to it, proudly telling David Rose that his graduated system of 29 extra "comfort items" for cooperative prisoners had contributed to the 600 percent increase in intelligence under his watch, all of which, he maintained, was "enormously valuable intelligence," which was "distributed around the world." This was clearly nonsense—Anthony Christinó said that he saw no dramatic improvement in the quality of the intelligence, but noted an increase in quantity and an attempt to "improve the way it was packaged"—but although it was more palatable to sell bribery as the key tactic that had apparently transformed Guantánamo, the blunt truth was that coercion—combined with a credulous approach to "evidence" on the part of the authorities—had played a more prominent part.³³

It's uncertain quite how many prisoners were presented with patently false information that they either refuted, leading to horrendous punishment, or accepted under duress, producing self-incriminating false confessions, but the examples of several of the British prisoners suggest that both the scenario and its responses were widespread. It was in Guantánamo, under Miller's command, that Omar Deghayes was unexpectedly confronted with a grainy video of Chechen militants, in which, it was alleged, he was a prominent player, even though it has been established that the man in the video was actually a militant who died in Chechnya in 2004,³⁴ and it was under Miller that Shafiq Rasul, Asif Iqbal and Ruhu el Ahmed suddenly found themselves under intense suspicion when another grainy video surfaced purporting to show them in the crowd at a meeting between Osama bin Laden and Mohammed Atta in Afghanistan. In the case of the three men from Lipton, British intelligence agents, having been useless up to that point, finally intervened to confirm that Rasul's alibi—that he was working in an electrical store in the West Midlands at the time—was the truth, and not, as alleged, a devious cover story concocted by a hardened terrorist. This, in turn, led to their release, but not until all three men cracked under the pressure and "confessed" that the allegation was true. In a similar scenario, Ahmed Errachidi, the Moroccan chef, was

ation's accounts to public scrutiny. For al-Matrafi has also come from the Ayman Batarfi pointing out that, his long relationship with the Taliban, his humanitarian work, and both Batarfi and the organization was regarded with suspicion of its Saudi links. What has largely been called into doubt by US intelligence, is in Guantánamo—al-Matrafi and whatever he has to do with al-Qaeda.⁶ None of what has probably counted against the discovery, in August 2002, of a plot by al-Wafa in Kabul, which included the use of fuses and terrorist guide books, "has anything to do with him is unknown. His role at the organization had no links to the organization. He repeatedly said we have no terrorist affiliation. Official or non-governmental, is free quarters. We are only helping the

kidnapping, 47-year-old Mamdouh Habib from Quetta to Karachi when it was taken from his seat as a suspected terrorist to jail for three weeks, interrogated and tortured by the Pakistani authorities. He is 18, drifted to Europe and settled in Germany. He came a citizen, married a Lebanese woman and ran a cleaning business. He later moved to Sydney, but became "chronically ill" and unable to benefit. In summer 2001, he set off for Pakistan to look for his family over to join him, but when he was caught by the Americans that they had caught him. Habib admitted that one of his reasons

for leaving Australia was because he was "caught between police who suspected him of terror links and an often hostile Muslim community that was sometimes suspicious of his activities," and these suspicions were triggered after a visit to the US, when he met followers of the Egyptian-born cleric, Sheikh Omar Abdul Rahman. Also known as the "Blind Sheikh," Abdul Rahman was a major source of inspiration for Osama bin Laden, and was serving a life sentence for his role in the 1993 World Trade Center bombing and a plot to blow up several New York landmarks. Habib's troubles began when he stayed in touch with Abdul Rahman's associates in New York on his return to Sydney, and spoke out in his defense, but although there was nothing in his activities to suggest that he was actually involved in any kind of terrorist activity, as soon as the Americans found out about his history they rendered him to Egypt. For six months, he was "suspended from hooks on the walls while his feet rested on a rotating metal drum that delivered electric shocks," "kicked, punched, beaten with a stick and rammed with what can only be described as an electric cattle prod," and handcuffed and left in a room that gradually filled with water until it was just beneath his chin. "Broken" by the Egyptians, he made a number of false confessions—in particular, that he "trained several of the September 11 hijackers in martial arts and had planned to hijack a plane himself"—which were then used against him after he was transferred to Guantánamo, via Afghanistan, in June 2002.⁸

In Guantánamo, he continued to be treated brutally, and several prisoners reported his suffering. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed said that he was "in catastrophic shape, mental and physical," and that, as a result of his torture, "he used to bleed from his nose, mouth and ears when he was asleep." Habib also made allegations about his treatment in Guantánamo—in particular that he was "smeared with the menstrual blood of a prostitute" during an interrogation—and complained vociferously about being kept in solitary confinement in Camp Echo: "They use every possible [way] to make me crazy. They put me in isolation all the time. I never see the sun. I never have shower like a human being. I never have soap. I never have cup to drink. I never treated like a human being." Given this catalog of abuse, and the allegations against him, it came as a surprise to everyone—including the Australian authorities—when he was released from Guantánamo in January 2005, and returned to Australia as a free man.⁹

or one of them "to meet Osama bin Laden, then swore allegiance to Osama bin Laden and influential al-Qaeda member." He tried to implicate Slahi in all manner of ways. Ressaam's plot to blow up Los Angeles, he falsely confessed to being part of the plot, and explained that, although he was going to find work as an electrical engineer, he was arrested, and returned to Mauritania in 1999, kept under constant surveillance by the Americans. "I went I had people right behind me," he said. "I said what the heck? This is not the

the Americans in November 2001 has been as if he was an unknown quantity. In Canada, he had been investigated in 1998, in Senegal on his way to Mauritania, he had been questioned on two occasions by three FBI agents and "another guy" in Mauritania in February 2000, when an American agent took part in an interview with Slahi, threatened to bring in "black

an extraordinary and unprecedented story in the US embassy in Sarajevo asked Bosnian citizens of Algerian origin—40-year-old Sabir Lahmar, 34-year-old Mustafa Ait Idr, 36-year-old Lakhdar Boumedienne al-Hajj—because of a suspicion of a plot to bomb the US embassy. The content of a diplomatic note, which contained information, and the Bosnians refused to be threatened to close their embassy and unless the men were arrested. Human rights activists noted that "the threats from the

Americans were enormous. There was a hysteria in their behaviour." Unwilling to defy the Americans, the Bosnians then arrested the men, but after a three-month investigation, in which they conducted extensive searches of their apartments, their computers and their documents, they found "literally no evidence" to justify the arrests. The Supreme Court ordered their release, and, with rumors circulating that the Americans were going to seize them anyway, the Bosnian Human Rights Chamber ruled that they had the right to remain in the country and were not to be deported. On the night of January 17, 2002, a huge crowd of supporters gathered outside the prison in Sarajevo to protect them on their release, but riot police dispersed the crowd with tear gas, and at dawn, as the men emerged, they were seized by American agents, hooded, handcuffed and rendered to Guantánamo.

Since arriving in Guantánamo, the embassy plot has never been mentioned. Instead, the six men have been subjected to relentless allegations that they were associated with al-Qaeda. Although they all traveled to Bosnia to support Muslims during the 1992–95 civil war and were then granted citizenship, they married Bosnian women and spent the next six years working with orphans for various Muslim charities, including the Red Crescent, and, in the case of Lahmar, an Islamic scholar, the Saudi High Committee for Relief, and there was no evidence that any of them maintained a sideline dealing with international terrorists. According to their lawyers, the source of the false allegations was Lahmar's embittered ex-brother-in-law, who ran a "smear campaign" against him. Another allegation made by the Americans—that Belkacem made seventy phone calls to Afghanistan after 9/11 and was "the top al-Qaeda facilitator" in Bosnia—has never been substantiated, and there seems no doubt that all six men are innocent. Manfred Novak, the UN Special Rapporteur on Torture, explained, "It's implausible to say that they are enemy combatants. They were fighters during the Bosnian war, but that ended in 1995. They may be radical Islamists, but they have definitely not committed any crime."¹³

Despite this, they have been treated brutally in Guantánamo. Shafiq Rasul, Asif Iqbal and Rihel Ahmed reported that during Geoffrey Miller's tenure, "They were treated particularly badly. They were moved every two hours. They were kept naked in their cells. They were taken to interrogation for hours on end. They were short-shackled for

re, and had received dental treatment, in his case at least, Guantánamo was democratic values. "Kakai will ultimately educated Afghan citizen," Norwitz participate in political change, engage turn to herding livestock. The choice : based on options he would not have inamo."¹⁶

18

Challenging the Law

The First Challenges

The first legal challenge to Guantánamo began as soon as the camp opened on January 11, 2002. Within a week, a "Coalition of Clergy, Lawyers and Professors," including former Attorney General Ramsey Clark, filed a habeas petition on behalf of the Guantánamo prisoners. It was dismissed a month later, largely because the petitioners had no relationship with the accused, but by then the court's complaint had already been addressed. Breaking through the strict secrecy surrounding Guantánamo, the identities of three of the prisoners became known, and, with the support of the Center for Constitutional Rights (CCR), the parents of Shafiq Rasul, Asif Iqbal and David Hicks filed suit on behalf of their sons. *Rasul v. Bush* began its long journey to the Supreme Court on February 19, 2002. Noting that, despite regular interrogation by US agents, the three men had not been charged with an offense, put before a tribunal, or given access to lawyers, the petition challenged the legality of the November 2001 Military Order authorizing indefinite detention without due process, describing it as "unconstitutional and a violation of international law." Joseph Margulies, one of seven lawyers involved in the case, explained the significance of the petition: "We distinguish ourselves from terrorists only by our commitment to the rule of law, and the law is perfectly clear that the President can't order a person locked up indefinitely, without legal process. Unless the US says the law is simply a matter of convenience, something we are free to ignore whenever and wherever we choose, we have to change what we're doing in Cuba."¹

hospital, were watching, "the guards took tubes from one detainee, and with no sanitization whatsoever, reinserted it into the nose of a different detainee. When these tubes were reinserted, the detainees could see the blood and stomach bile from other detainees remaining on the tubes."¹⁰

Medical Malpractice

With these methods—and the use of five "restraint chairs," which were ordered in December—the authorities succeeded in convincing the majority of the 84 hunger strikers who were holding out in early January 2006 to give up their protest by the end of the month, and by March only a few young Gulf prisoners, including Ghassan al-Sharbi, were still on strike.¹¹ It was noticeable, however, that both the methods used and the complicity of the medical staff raised uncomfortable questions about the role of the doctors in Guantánamo which had, up to that point, largely been concealed, even though numerous prisoners had spoken about the various ways in which, instead of maintaining a professional distance, the doctors and medical staff were intimately involved in every aspect of the prison's operations.

This had been apparent in a general sense from the beginning, when the prisoners were required to take unknown drugs on a regular basis. Shafiq Rasul, Asif Iqbal and Rihel Ahmed described an incident in August 2002 when medical staff toured the cell blocks asking the prisoners if they wanted an injection, "although they wouldn't say what it was for." They said that most of the prisoners refused, but the medical staff then returned with an ERF team who forced them to have the injections anyway. Ahmed said that the drug made him feel "very drowsy," and added, "I have no idea why they were giving us these injections. It happened perhaps a dozen times altogether and I believe it still goes on at the camp. You are not allowed to refuse it and you don't know what it is for." Abdullah al-Noaimi told his lawyers that within his first few days at Guantánamo he "was injected with an unknown substance which made him depressed and despondent. He was unable to control his thoughts and his mind raced. He was also unable to control his body and fell to the floor." He was then placed in isolation for three days, where medical staff administered an unknown medicine "that made him feel drunk," until he refused to take

087
Asif Iqbal

by both Dostum and the Americans to
were killed were tied up at the time they
porters were briefed that "only" eight
re being shot after the uprising started,
s proposed by Luke Harding, is more
st, because a photographer "saw the
tters whose hands had been bound by
re southern part of the fort," and that
rs cut the scarves from the hands of
Alex Perry noted, "some of the dead
lance soldiers used scissors to snip off
less significantly, because so many of
y was suppressed until the Pentagon
its in 2006—also talked about being
d.¹⁶

3

The Convoy of Death

Yerghanek and Qala Zeini

On Sunday, November 25, 2001, as the uprising began in Qala-i-Janghi, a far larger group of Taliban soldiers—at least 4,500, but possibly as many as 7,000—made their way from Kunduz to Yerghanek, five miles west of the city, where they surrendered to General Dostum. What no one either knew or cared about, however, was that among the surrendering soldiers were hundreds of civilians who had been caught up in the chaos or who were fleeing the hard-core al-Qaeda and Taliban fighters making a last stand in Kunduz itself.

One of the most vivid accounts of the surrender was provided by three young Britons who fell into this latter category. Twenty-four-year-old Shafiq Rasul, 20-year-old Asif Iqbal and 20-year-old Rhuhel Ahmed—childhood friends from Tipton in the West Midlands—had traveled to Pakistan in September 2001. Iqbal was making arrangements for his forthcoming marriage to a young woman in Pakistan, Ahmed was his best man, and Rasul was planning to do a computer course once the wedding was over, but soon after their arrival, when the invasion of Afghanistan began, they made the fateful decision that an exciting adventure awaited them over the border, just a short bus-ride away. Using the money they had brought with them, they planned to provide humanitarian aid to Afghan villagers, a mission that also involved the adrenaline rush of being in a war zone, and, they hoped, the opportunity to sample the Afghans' enormous naan breads. Up close, however, the war zone was more frightening than they had anticipated. At risk from both US bombing raids and the Taliban, who were deeply suspicious of young men wandering

around without beards, they tried to return to Pakistan in a taxi, but were instead taken to Kunduz. As the first groups of Taliban soldiers began to surrender, they clambered onto a truck that was leaving the city, but the vehicle was immediately shelled, and almost everyone on board was killed. With nowhere else to turn, they surrendered to Alliance soldiers who took their money, their shoes and their warm clothes, and marched them to Yerghanek.¹

Very few of those who made their way to Yerghanek—70 at most—were eventually transferred to Guantánamo. Of these, only a handful have spoken about their experiences, and none were in the first convoys that set off for Sheberghan on the Sunday. Overwhelmed by the sheer numbers of people flooding out of the city, Dostum was obliged to keep thousands of them marooned in the desert while he arranged additional transportation over the next few days. As a result, neither the men from Tipton nor the others who ended up in Guantánamo—including Abdul Rahman, a 25-year-old shopkeeper from Kunduz, and Mohammed Saghir, a 49-year-old woodcutter from Pakistan's North West Frontier Province—had any inkling of the grisly fate that awaited them.

While the vast crowds of fighters and civilians were disarmed, Dostum's men recruited drivers to go to Qala Zeini, an old fort on the road between Mazar-e-Sharif and Sheberghan, where those transported from Yerghanek were transferred into containers for the last stage of the journey to Sheberghan. One of the drivers, who was in the fort when a convoy of prisoners arrived that evening, said that, as soon as the Northern Alliance soldiers began stripping them of their turbans and vests, tying their hands behind their backs and transferring them to the containers, some of the prisoners—those who were familiar with recent Afghan history—realized that Dostum was planning to kill them. Since 1997, when a brutal Uzbek general had first seen the viability of containers as cheap and convenient killing machines, murdering 1,250 Taliban soldiers by leaving them in containers in the summer sun, they had become a familiar weapon of Afghan warfare. When the Taliban took Mazar-e-Sharif in 1998, they disposed of their conquered enemies in the same fashion.

According to one of the drivers, a few hours after the convoy had set off from Qala Zeini, the prisoners started pounding on the sides of the containers, shouting, "We're dying. Give us water! We are human,

TF
nc
wa
wa
wa
su
tru
op
"T
:
At
frc
he
his
rea
rac
wa
on
the
Pa:
the
see
the
wh
up,
Af
/
shc
fre
nig
the
he :
dirt
anc
wei
wei
"W
air,
arri

behind." Three years later, having been transported from Sheberghan to Kandahar and then to Guantánamo, Abdul Rahman's nightmare had still not come to an end. In his tribunal, repeating his story as he had so many times before, he was obliged to refute allegations that he had bought a car for the Taliban while wearing a Taliban-style turban, accompanied by his personal security force of four Taliban soldiers, explaining that this was a story that had been conjured up by the men who falsely imprisoned him in the first place. Finally, someone believed his story, and, after 40 months in detention, he was released in April 2005.³

Mohammed Saghir faced a similar ordeal. The woodcutter was also a missionary with Jamaat-al-Tablighi, a vast worldwide proselytizing organization whose annual gatherings in Pakistan and Bangladesh attract millions of followers. Over the years he had been involved in numerous preaching missions to Afghanistan, but on this occasion he and nine other missionaries were seized by Northern Alliance troops. Saghir was also held for a night at Yerghanek, where he "witnessed wounded and injured men buried alive with the dead," and was then taken to Qala Zeini and herded into a container. "The journey took five hours," he said. "It was dark, hot and suffocating as there was not enough air in the container. Fifty out of the 250 prisoners died on [the] way." Unlike Abdul Rahman, however, it took Saghir less than a year to convince the Americans of his innocence. He was one of the first three prisoners to be freed, in November 2002, and was the first ex-Guantánamo prisoner to speak in detail not only about the horrors of detention in Afghanistan and Cuba, but also about the death convoys.⁴

The three men from Tipton waited for another day until their transportation was arranged, and in their case the container lorries came at night, and the whole sordid spectacle was illuminated by spotlights operated by US Special Forces soldiers. Once the doors were shut, their ordeal followed a now familiar pattern. "They'd herded maybe 300 of us into each container ... packed in so tightly our knees were against our chests," Asif Iqbal said, "and almost immediately we started to suffocate." As with some of the previous journeys, ventilation was provided by Northern Alliance soldiers, who made sure that their humanitarian gesture was accompanied by more killing. "We lived because someone made holes with a machine

ing been transported from Sheberghan to Guantánamo, Abdul Rahman's nightmare became his tribunal, repeating his story as he was obliged to refute allegations that he was a Taliban while wearing a Taliban-style uniform. A personal security force of four Taliban soldiers accompanied him in the first place. Finally, after 40 months in detention, he was

similar ordeal. The woodcutter was also a religiously motivated proselytizing cleric, a vast worldwide proselytizing network in Pakistan and Bangladesh over the years he had been involved in Afghanistan, but on this occasion he was seized by Northern Alliance troops. He was taken to Yerghanek, where he "witnessed the living with the dead," and was then thrown into a container. "The journey took a long time, hot and suffocating as there was no air. Fifty out of the 250 prisoners died during the journey," Rahman, however, it took Saghir less time to realize his innocence. He was one of the first to be freed, in November 2002, and was the first to speak in detail not only about his experience in Afghanistan and Cuba, but also about the

waited for another day until their names were read in their case the container lorries. The ordirid spectacle was illuminated by the flashlights of the Forces soldiers. Once the doors of the container were opened, a now familiar pattern. "They'd packed the container ... packed in so tightly that the prisoners were almost suffocating," Asif Iqbal said, "and almost suffocating." As with some of the previous prisoners, the arrest by Northern Alliance soldiers, the arrest gesture was accompanied by someone made holes with a machine

gun," Iqbal said, "though they were shooting low and still more died from the bullets. The last thing I remember is that it got really hot, and everyone started screaming and banging. It was like someone had lit a fire beneath the containers. You could feel the moisture running off your body, and people were ripping off their clothes." When he finally awoke, he realized that he had not drunk anything for more than two days, and was seriously dehydrated. Using a cloth, he wiped the moisture off the wall and began sucking on it, until he realized he was drinking the blood of those who had died. "We were like zombies," he said. "We stank; we were covered in blood and the smell of death."⁵

Sheberghan

As the survivors spilled out of the container trucks at Sheberghan, they discovered that, although the mass executions were over, the conditions at Dostum's prison were almost unspeakably grim. Thirty-five hundred prisoners were crammed into a space that could only reasonably hold five hundred, and in order to sleep they took turns on the floor, squeezed together in four-hour shifts. Food was also a problem. Shafiq Rasul recalled that each prisoner received a quarter of a naan every day, and a small cup of water, and that sometimes prisoners fought over the food. Twenty-four-year-old Sulaiman Shah, an Afghan used car dealer, was another of the many innocents swept up by the Northern Alliance. On his release in March 2003, he mentioned his time at Sheberghan, where, he said, "life was inhuman, all the prisoners had diarrhea, some had tuberculosis, there was no food for days at a time and we were subjected to beatings and torture."⁶ Despite Shah's appraisal of the ill-health of the prisoners, medical attention was non-existent. Rasul recalled, "There were people with horrific injuries—limbs that had been shot off and nothing was done. I'll never forget one Arab who was missing half his jaw. For ten days until his death he was screaming and crying continuously, begging to be killed."

To make matters worse, reporters were swarming around Sheberghan, but for the most part they were blind to the suffering of the prisoners. "All they seemed to be interested in," Rasul said, "was if any of us knew the American Taliban John Walker Lindh." No one realized that Lindh was not even in Sheberghan. Instead, he

received injuries to their eyes in this manner, that "three brothers were blinded," and that many of the prisoners—himself included—had their noses broken by the soldiers. He was also one of the first prisoners to describe how the prisoners' copies of the Koran were regularly abused. He explained that some of the soldiers "treated the Koran terribly," dropping copies in the toilet bucket, scrawling obscenities on its pages, and tearing out pages which they used to shine their shoes or to wipe out the toilet bucket, and added that they also cursed Allah and the Prophet Mohammed on a regular basis. The abuse of the Koran was also noted by the Britons Tarek Dergoul, Shafiq Rasul, Asif Iqbal and Rhuheh Ahmed, and by Ehsanullah, a 28-year-old Afghan (released in March 2003), who said that soldiers in Kandahar hit him and taunted him by throwing the Koran in a toilet.¹¹

Some of the other Bahrainis also had vivid tales to tell of their treatment at Kandahar. Isa al-Murbati (whose capture is related in Chapter 12) said that he was "shackled to a pole outside in very cold weather," and that, "every hour, US military personnel threw cold water on [him] while he was shackled to the pole." He explained that this took place every night for a week, and added that on one occasion he was taken to an area away from the other prisoners, because Red Cross representatives were visiting the camp, and the authorities did not want them to see him. It was also clear that al-Murbati was not the only prisoner to be exposed to the extreme cold. The Pakistani interviewed by Human Rights Watch said that "he and other prisoners were occasionally taken outside and forced to lie on the frozen ground until they were numb with cold."¹²

Abdullah al-Noaimi "witnessed other detainees being bitten by military dogs," and said that "a female soldier, upon learning that [his] brother lived in the USA, threatened to kill him." He also developed a urinary tract infection and came down with a fever, which made him vomit and left him unable to eat, but explained that, when he was taken to the clinic, "a military doctor allowed a military policeman to inject him with an unknown substance. When he began to bleed as a result, the doctor and the policeman laughed." He was then placed in isolation for seven weeks, and was ignored by the medical staff, even though his eyes were yellow and there was blood in his urine, and added that a doctor told him, "you're about to die and there's nothing we can do for you."¹³

K

th
a:
le
o:
K
sp
m
surev
Un
Inf
ab
by
anc
of J[
te
b
aj
st
ai
at
aj
ha

Aba

Alth
assu

techniques allowed for a good deal of shouting and verbal abuse, but absolutely no physical contact whatsoever.¹⁸

It seems incredible, given the physical abuse to which the prisoners were subjected in detention, that Mackey could even claim that the interrogation rooms were violence-free zones, but there is evidence that the techniques were largely adhered to in the interrogations that he conducted or oversaw. Mourad Benchellali, for example, who reeled off a catalog of abuses in detention, did not allege that he was abused during his interrogations, which took place "several times a day." Instead, he said, the interrogators "were waiting for me to 'confess.' I repeated my story. No one believed me. I did not find out about the World Trade Center until several days before the Americans bombed Afghanistan." Even Juma al-Dossari, who was repeatedly abused during his time in Kandahar, did not claim that he was subjected to violence during his first interrogation (although he did say that the guards made him walk over barbed wire on the way there, and that the incident with the broken glass took place afterwards). "When I entered the investigation tent," he said, "I found that there were two Americans among the investigators ... I said to them, 'why are you torturing me and you haven't even started questioning me? What do you want from me? Give me a piece of paper and I will sign anything you want.'" He was, however, disappointed at the lack of concern that the interrogators showed, and said that one of them told him, "there is no torture here and there are no beatings," even though he "could clearly see the state I was in."¹⁹

Mackey's role as an interrogator is revealed in two set of accounts—one by Mackey himself, and the other by his prisoners—which provide a unique opportunity to compare and contrast the versions of the truth presented by both parties. The prisoners were Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, and their interrogation gave Mackey a chance to demonstrate a number of interrogation skills: playing prisoners off against each other, and indulging in a little role-play to deceive them. Wearing a maroon beret, and affecting an English accent, he fooled them into thinking he was an SAS officer, although he failed in his attempt to undermine Rasul—with a fake letter from Scotland Yard claiming that his house had been raided 16 hours after he left for Pakistan—as Rasul had rung his family from Pakistan and no such raid had been mentioned, and he succeeded only in confusing

and terrifying the men with an allegation that they were members of the radical British organization al-Mahajiroun (which they were not), and with threats to send them to Belmarsh prison. He was also wide of the mark in his assessment of the men, saying that Iqbal's explanation that he went to Pakistan to get married "was so outrageous, it was almost comical," and attributing calculated guile to one of the other men, when he said that they made "a big mistake," and that they only went to Afghanistan in search of "adventure." Frustrated that they insisted on telling remarkably similar stories, he eventually conceded that they had perhaps been telling the truth.²⁰

The crucial difference between the two sets of accounts, however, was in additional details provided by Rasul and Ahmed. Rasul said that, in the interrogation when the fake letter was produced, "One of the US soldiers had his arm round his neck and was saying, 'wait until you get back to the tent; you will see what we are going to do to you,'" and Ahmed said that, in his interrogation, "one of the US soldiers had a gun to his head and he was told that if he moved they would shoot him." These statements do little to confirm Mackey's moral authority (which is further undermined by Asif's assertion that he told him he was not going to be beaten "because you are with me"), although it's clear from their accounts of other interrogations at Kandahar that he was the only interrogator who did not subject them to physical abuse. Recalling the interrogation that preceded the SAS subterfuge, Iqbal recalled:

An American came into the tent and shouted at me telling me I was al-Qaeda. I said I was not involved in al-Qaeda and did not support them. At this, he started to punch me violently and then, when he knocked me to the floor, started to kick me around my back and in my stomach. My face was swollen and cut as a result of this attack ... Whilst he was attacking me, the interrogator didn't ask me any other questions but just kept swearing at me and hitting me.²¹

One major problem for the interrogators at Kandahar was that a large proportion of the prisoners refused to "break." Mackey reported that most of them said that they went to Afghanistan to seek a pure Islamic state, to find a wife, or to teach or study the Koran. Although they also admitted receiving weapons training, they largely insisted that it was mandatory and had only taken a few days. He was aware that not everyone who passed through interrogation was a "high value"

00000024

Hamed Ahmed explained, "The questions were always the same: if I knew Osama bin Laden or someone of his inner circle, what I was doing in that region, who my contacts were, where I had fought, etc. This went on for two or three hours. They asked the same questions in different ways. They finally told me that if I wasn't more cooperative, I would never see my family again."¹⁷

Initially, the conditions of detention were the most severe obstacle facing the prisoners, prompting Asif Iqbal to declare that "the restrictions that were placed on us when we were in our cages were probably the worst things we had to endure." Importing tried and tested tactics from Afghanistan, the authorities prevented the prisoners from talking to one another and their cages were permanently floodlit. "I spent the first month in utter silence," Mohammed Saghir said after his release, and Hamed Ahmed added, "In the morning they woke us up at 8 o'clock with a song by Bruce Springsteen, 'Born in the USA,' which they played at full volume through the loudspeakers." The prisoners were allowed a handful of meager "comfort items"—two towels, a blanket, a sheet, a small toothbrush, shampoo, soap, flip-flops and an insulation mat to sleep on, as well as two buckets, one for water and one for use as a urinal—but if they wanted to defecate they had to be escorted to a portaloo by the guards, who unshackled one of their hands, but kept an eye on them the whole time. This was not only a source of humiliation for devout Muslims, but also, as Shafiq Rasul explained, "very often the guards would refuse to take us to the portaloo outside and therefore people started to use the buckets in the cells. Many of the people who were detained in Camp X-Ray were ill, often suffering from dysentery or other diseases and simply couldn't wait until the guards decided they would take them to the toilet ... The smell in the cell block was terrible." Asif Iqbal also described how, in the first few weeks, they were "not allowed any exercise at all," were only "allowed out for two minutes a week to have a shower and then returned to the cage," and were often only given a minute to eat their food before it was taken away.¹⁸

Although many prisoners said that the everyday violence that was common in Afghanistan was not replicated in Guantánamo, they explained that the psychological pressure was more intense, and that they were absolutely terrified during the first few weeks in Cuba. Shafiq Rasul explained, "During the whole time that we were in Guantánamo,

we were at a high level of fear. When we first got there the level was sky-high. At the beginning we were terrified that we might be killed at any minute. The guards would say to us, 'we could kill you at any time.' They would say, 'the world doesn't know you're here, nobody knows you're here, all they know is that you're missing and we could kill you and no one would know.' At this stage, no one—not even the British prisoners, who could readily understand the Americans—had any idea of where they were, and when Red Cross representatives made their first visit, on January 20, they pointed out that in many Arab countries orange jumpsuits were "a sign that someone is about to be put to death." While the ICRC visit led to a few improvements in the prisoners' treatment—they managed to get the no-talking ban lifted, for example, and secured a promise that the prisoners would be supplied with underwear—they were less successful in their attempts to get the authorities to address the prisoners' complaints about their lack of privacy at the portaloos, their requests for more food (2,100 calories a day was considered adequate, which it is not), and their requests to be allowed to exercise and to be placed near other prisoners who spoke the same language. The issue of the jumpsuits was addressed in an extraordinary memorandum written by a member of the Joint Task Force after the visit. "Should we continue not to tell them what is going on?" the author of the memo wrote. "ICRC says they are very scared. What are the benefits in keeping them in the dark vs. telling them what is happening? The detainees think they are being taken to be shot." As for telling the prisoners where they were, the author concluded, "This request will be considered after the first round of interrogations."

While the prisoners were subjected to less random violence than in Afghanistan, however, they soon discovered that regular punishment was built into the system at Guantánamo. Shafiq Rasul said that their "comfort items" would be removed for the most minor infringement of the rules—leaning against the mesh walls of the cell, for example. Many prisoners also pointed out that they were subjected to indiscriminate verbal abuse from large numbers of the military personnel. Briefed by their superiors that these were the most dangerous men on the face of the earth, many of the guards—two-thirds of whom were reservists or members of the National Guard—took the propaganda at face value. Asif Iqbal explained how, when the restrictions on talking to the guards were relaxed after the first few weeks, several

told him they had been briefed that they were "wild animals," who "would kill them with our toothbrushes at the first opportunity, that we were all members of al-Qaeda and that we had killed women and children indiscriminately."¹⁹

The Extreme Reaction Force

The most extreme brutality came from a special unit called the Extreme Reaction Force, which was—and is—a five-man riot squad responsible for beating supposedly recalcitrant prisoners into submission, and its use was so prevalent that a new phrase—"to be ERFed"—was coined by the prisoners. Mohammed Saghir explained that, in the early days of Camp X-Ray, even prisoners who attempted to pray were ERFed. "They wouldn't let us call for prayers," he said. "I tried to pray and four or five commandoes came and they beat me up. If someone would try to make a call for prayer they would beat him up and gag him." Tarek Dergoul, who spoke at length about the ERF after his release, confirmed that their attacks were largely prompted by minor disciplinary infractions, which he described as "an act of deliberate provocation." Explaining what happened to him on one of the five occasions that he was ERFed—for refusing to agree to a third cell search in a day—he said:

They pepper-sprayed me in the face and I started vomiting, in all I must have brought up five cupfuls. They pinned me down and attacked me, poking their fingers in my eyes, and forced my head into the toilet pan and flushed. They tied me up like a beast and then they were kneeling on me, kicking and punching. Finally they dragged me out of the cell in chains, into the rec yard, and shaved my beard, my hair, my eyebrows.²⁰

Dergoul was the first released prisoner to point out that each ERF attack was filmed, by a sixth member of the team with a video camera, and this was confirmed by a spokesman for Guantánamo in 2004, who said that they were used to monitor whether or not excessive force had been used. He refused to discuss how many times the ERF had been used, but in July 2004 the Pentagon said that "only 32 hours" of the tapes showed the units using "excessive force."²¹

One of the most violent of all the ERF assaults took place in Camp X-Ray at the end of April 2002. The victim was Juma al-Dossari, and the attack was witnessed by Shafiq Rasul, Asif Iqbal, Feroz Abbasi and

00000026

David Hicks. The men from Tipton described al-Dossari as having mental health problems. "He used to shout all the time," they said. "The guards and the medical team knew he was ill. Whenever soldiers would walk past his cell he would shout out and say things to them. Not swearing but silly things. He would impersonate the soldiers. One day he was impersonating a female soldier. She called the officer in charge, [who] came to the block and was speaking to Juma." Rasul continued:

There were usually five people on an ERF team. On this occasion there were eight of them ... The first man is meant to go in with a shield. On this occasion the man with the shield threw the shield away, took his helmet off, and when the door was unlocked ran in and did a knee drop onto Juma's back just between his shoulder blades with his full weight. He must have been about 240 pounds in weight ... [he] grabbed his head with one hand and with the other hand punched him repeatedly in the face. His nose was broken. He pushed his face and he smashed it into the concrete floor ... There was blood everywhere. When they took him out they hosed the cell down and the water ran red with blood. We all saw it.²²

In late April, Camp X-Ray was closed down and the prisoners were moved to a new, purpose-built prison, Camp Delta. Made out of shipping containers, the camp consisted of blocks of 48 cells, arranged in two rows of mesh cages separated by a narrow corridor. Although the new cells were a small improvement—they were slightly larger than Camp X-Ray's cages, and each had a wall-mounted steel bed, a toilet and a tap—there was no improvement in the prisoners' general living conditions. The cells were cold at night, the piped water (from a desalination plant) was yellow, the lights still stayed on all night, and giant "banana" rats turned up to replace the snakes and scorpions that had plagued them in Camp X-Ray. The cells were similar to those in the US's notorious Supermax prisons, on which they were modeled, but there were still fundamental differences: not only had the inmates of America's harshest prisons been tried and convicted of crimes, they also, for the most part, were allowed regular visits by family members, and had unlimited access to books, TV, music, pens and paper. In contrast, the Guantánamo prisoners were still held in a legal limbo, with no access to lawyers, no access to their families, no books apart from the Koran, no other forms of recreation, and no notion of when, if ever, their detention would come to an end. What none of them knew at the time was that the worst was yet to come.

R

In
in
to
Fr
or
we
finari
un
wh
hu:
As
her
bro
"to
way
on :
saic
said
poir
W
pris

and had no experience in intelligence gathering. Backed up by the Pentagon, who admired his "can-do" approach and his reputation as a strict disciplinarian, he decided that the intelligence was so poor because the activities of the two elements that made up Guantánamo's personnel—the Joint Detention Group (the guards) and the Joint Intelligence Group (the interrogators and intelligence analysts)—were not coordinated. His flash of morbid inspiration came when he decided that their functions should be merged, and that the guards should be responsible for "setting the conditions" for the interrogations; in other words, that every aspect of the prisoners' physical existence—their conditions of detention, their food, their medical support, and every single "comfort item," which now included their solitary Styrofoam cup—would be geared to the interrogators' requirements. Miller insisted that this system was primarily directed towards rewards for cooperative prisoners, but it concealed a darker truth: not only was Guantánamo now the most oppressive of prison environments, but those who refused to cooperate—or were unable to cooperate, because they had no information—were subjected to horrendous abuse.

Under Miller's watch, incidents of abuse during interrogations became widespread, as did acts of violence from the guards. Although much of this violence was tied in to the total control of the prisoners, other incidents were purely gratuitous. Asif Iqbal, for example, heard an MP boasting that he had "beaten someone in isolation with a large metal rod used to turn on the water to the blocks," because "there was no one to tell," and the Bahraini Isa al-Murbati said that on one occasion, after an interrogation, the guards dragged him back to his cell by his shackles, causing his ankles to bleed, and then forced his head into the toilet and flushed it, and described another occasion when the lights in his block were suddenly turned off at night, and a group of guards, accompanied by a dog, entered his cell and sprayed mace in his eyes. David Hicks reported that he was repeatedly beaten, once for eight hours, and frequently while he was restrained and blindfolded. "I have been beaten before, after and during investigations," he said, adding that he had also been "menaced and threatened, directly and indirectly, with firearms and other weapons before and during investigations."²

As a result of the increased violence, several prisoners were hospitalized. The Kuwaiti Saad al-Azmi said that, during an interrogation, the guards beat him so hard that they broke his leg, and Sami al-Hajj, the al-Jazeera

cameraman, reported that another by stamping on his leg." When I in October 2004, he was wearing a series of incidents of escalating brutality he asked one of his guards—a young man—for being difficult—for a spoon. After returning to his cell after an interrogation, he put his hands through the slot in the door and the sergeant grabbed the belt attachment violently, even putting his foot on it for leverage," which caused him "significant pain." One prisoner suffered irreparable damage when interrogators stomped on the back of his head and dropped him on the floor and repeated the process, which resulted in two broken vertebrae. He was then "denied the necessities of life" and "denied the necessities of life" to have saved him from permanent damage.

As well as these attacks, the violence continued unabated. Sami al-Hajj reported that in ten days, and Omar Deghayes reported that he lost an eye during another ERF attack. Jaber al-Jabir, as the Muslim chaplain at Guantánamo, reported that in September 2003, when, astonished by the ERF's tactics of spying, and held for 76 days in isolation, he was cleared of all charges; he was put back into the ERF teams. He noted that "the conditions kept to the bare minimum and caused a lot of pain" over weeks when it occurred even "excitement" that followed each attack. "They high-fived each other and acted like professional basketball players. I ... I wasn't accustomed to seeing a lot of strength versus weakness." In the brutal the ERF's tactics were, in January 2004, a policeman, took part in an ERF attack on a prisoner. Beaten mercilessly until he was unconscious, that revealed that he was actually

and was treated for a traumatic brain injury and discharged from the military in April 2004.⁴

"Setting the Conditions"

Although the abuse described above was directed at prisoners who were presumed to be significant suspects, it's clear that many other prisoners who have not spoken about their experiences also suffered brutal treatment. Not everyone was abused by their interrogators or picked on by the guards, but the new regime took as its starting point the presumption that the majority of the prisoners had something to hide, and came up with new forms of abuse, in an attempt to "break" them, which, according to a former interrogator, were applied to one-sixth of the prisoners in Guantánamo; in other words, to at least a hundred prisoners. He explained that "when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base."⁵

Describing this period, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, who were rarely subjected to physical brutality, said that they became aware of the changes when the frequency and the length of their interrogations increased, and explained that they were each interrogated on about five occasions in 2002, but that from January 2003 until their release in March 2004 they were subjected to over two hundred interrogations. These kinds of figures have been confirmed by other prisoners, including, to cite just a few examples, the Moroccan Younis Chekhouri, who was interrogated over 150 times, the Frenchman Khaled bin Mustafa, who was interrogated over a hundred times, and—to demonstrate that the changes were not only directed at prisoners who were regarded with great suspicion—a 29-year-old Afghan, Abdel Rahman Noorani (released in July 2003), who said that he was "badly punished 107 times," and added that "during his 20 months at Guantánamo, his captors had chained his hands and feet and had beaten him with a metal rod on his legs and back."⁶

What made the prisoners' experiences even more disturbing, however, was the new framework in which the interrogations were couched. Before the interrogations, prisoners were frequently moved into isolation blocks, where they remained for days, weeks, or even months, and where the air conditioning was usually turned up full,

00000029

brain injury and discharged from the

above was directed at prisoners who t suspects, it's clear that many other about their experiences also suffered was abused by their interrogators or ew regime took as its starting point the f the prisoners had something to hide, abuse, in an attempt to "break" them, terrogator, were applied to one-sixth ; in other words, to at least a hundred en new interrogators arrived they were xtracting information from detainees s did not apply at the base."⁵

Rasul, Asif Iqbal and Rhuhel Ahmed, vsical brutality, said that they became equency and the length of their inter- ed that they were each interrogated !, but that from January 2003 until were subjected to over two hundred gures have been confirmed by other few examples, the Moroccan Younis ed over 150 times, the Frenchman interrogated over a hundred times, changes were not only directed at ith great suspicion—a 29-year-old i (released in July 2003), who said ' times," and added that "during his ptors had chained his hands and feet rod on his legs and back."⁶

xperiences even more disturbing, k in which the interrogations were as, prisoners were frequently moved remained for days, weeks, or even itioning was usually turned up full,

so that the cell was freezing. Aryat Vakhitov recalled, "During the interrogations they left you in a cold room for a few weeks ... We weren't given anything to lie on—no carpet. All of us have problems with our kidneys because we slept on the iron [floor] with [the] air conditioning on. It was freezing cold. The ceilings began to be covered with condensation from the cold. We were held like that for months. I was in the isolation ward for five months." Mehdi Ghezali, the Swede, who was interrogated daily for the first six months; but gave up talking when his interrogators kept asking the same questions, was subjected to Miller's regime in the three months before his release in July 2004: "They put me in the interrogation room and used it as a refrigerator. They set the temperature to minus degrees so it was terribly cold and one had to freeze there for many hours. 12–14 hours one had to sit there, chained." Similar experiences were reported by many other prisoners, and, demonstrating yet again that these techniques were not only applied to those who were regarded as being of particular significance, Parkhudin, the Afghan farmer, who had already been traumatized when his friend Dilawar was murdered in Bagram, said on his release, "They made me stand in front of an air-conditioner. The wind was very cold," and added that he was interrogated for up to twenty hours at a time. On other occasions, the authorities used heat instead of cold, and several prisoners reported this technique, including Isa al-Murbati, who was not only repeatedly held in a cell in which the air conditioning had been turned off, but said that on several occasions the floor was "treated with a mixture of water and a powerful cleaning agent," which was then thrown on his face and body, "causing great irritation" and making it difficult to breathe.⁷

Prisoners were also subjected to loud music, sustained noise and strobe lighting, which were clearly designed to "break" them. Isa al-Murbati was played songs "that had Arabic language lyrics praising Jesus Christ," and on other occasions "very loud music and white noise was played through six speakers arranged close to [his] head" for twelve hours, and "multiple flashing strobe lights were used as well," which were so strong that he "had to keep his eyes closed." These reports have been corroborated by other prisoners, including Asif Iqbal, who was forced to listen to Eminem, Bruce Springsteen and techno music, accompanied by strobe lighting, and Mehdi Ghezali, who was "exposed to powerful flashes of light in a dark room, and to very loud music

ers who spoke out in 2004—either “because they objected to the badly-run system”—added that “the system and Rage Against the Machine, the sound of babies crying and the television on which the jingle consists of repetition

in that place while the prisoners were being interrogated. Several described how, when they were interrogated, they were actually left alone, often forced to soil themselves as a punishment. That the authorities came up with a punishment “You have a reservation”—and added that he was in there for a month in 2003, and that he was there. “Eventually,” he said, “I’d need to try to tilt my chair and go on the floor. It was like a one-way mirror. As soon as I went to the mirror, I was in yelling, ‘Look what you’ve done!’ I was taken back to his cell for three hours, and began again. The prisoners were also in the cell, tied with an especially short chain to the floor. “After a while,” Dergoul said, “I could hear the guards behind the mirror, talking, knocking on the walls. It was not just about trying to break you.” In Guantánamo in October 2002, a few prisoners were almost immediately subjected to isolation and left in a room for six hours, and an officer would enter the room to laugh at them until he urinated on himself, and then pour urine over him and used him as a mess.” As if further humiliation was “not provided with clean clothes for them to wear.”⁹

Other techniques used were sleep deprivation, waking the prisoners whenever they fell asleep, and moving them repeatedly from cell to cell. Abdul Malik al-Rahabi was subjected

to prolonged periods of sleep deprivation, David Hicks was subjected to sleep deprivation “as a matter of policy,” and Mourad Benchellali explained, “We were treated differently depending on whether or not we responded to questions. Those who did not ‘cooperate’ were awakened every hour with the aim of preventing them from sleeping at all costs.” The prisoners who were moved from cell to cell—the “frequent fliers,” as the men from Tipton described them—included the Kuwaiti Fouad al-Rabia, who, they said, was picked on like all the prisoners who had spent time in the US, and was moved every two hours, leaving him “suffering from serious depression, losing weight in a substantial way, and very stressed because of the constant moves, deprived of sleep and seriously worried about the consequences for his children.” Mehdi Ghezali was “deprived of sleep for about two weeks by the constant switching of cells and interrogation,” and Isa al-Murbati was “moved from cell to cell in the Tango and Oscar [isolation] blocks, typically on an hourly basis.” As a result, he said, he was “never able to sleep for more than short periods.” Mohammed Khan Achakzai, a 24-year-old Afghan businessman (who was sold to the Americans by the Northern Alliance after the fall of Kunduz) said on his release in March 2004 that some prisoners had been deprived of sleep for up to 45 days at a time, and one particularly unfortunate Yemeni, Mohammed Ghanim (who was in the first group of prisoners captured crossing from Afghanistan to Pakistan in December 2001, but does not seem otherwise significant) was apparently moved between cells and blocks every two hours for a total of eight months, as a result of which he lost a lot of weight—and, presumably, found it increasingly difficult to keep a grip on his sanity.¹⁰

The authorities also made use of prisoners’ phobias, either through the use of dogs, as in the case of Saad al-Azmi, who was bitten by dogs while being hooded, or, as was more common, through sexual humiliation. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed explained that it happened “to the people who’d been brought up most strictly as Muslims,” and that they were frequently so ashamed that it took them some time to tell their neighbors about their experiences. Although the men from Tipton were referring primarily to the Gulf prisoners, very few of them have spoken about their experiences, although the Yemeni Yasin Ismail reported that when he refused to talk during an interrogation, a female soldier entered wearing a tight T-shirt. “Why

to hood them, to beat them mercilessly, to hang them from the walls of their cells for days, to set dogs on them, to lead them around the cell block on leashes, to pile them up in grotesque naked pyramids and, on one notorious occasion, to place a hooded, dark-robed figure on a box, with his arms outstretched, and with wires trailing from his fingers. Schlesinger's report was critical, but, as in other reports commissioned in the wake of the Abu Ghraib scandal, he pointedly refused to gaze up the chain of command to investigate where, ultimately, the responsibility lay for authorizing these techniques. Echoing Bush and Rumsfeld, who blamed the abuse on a "few bad apples," Schlesinger concluded that it was the result of "Animal House on the night shift," although he conceded that "techniques effective under carefully controlled conditions at Guantánamo became far more problematic when they migrated [to Iraq] and were not adequately safeguarded."¹⁵

Noticeably, however, the changes authorized by Rumsfeld did not meet with universal approval in Guantánamo. Shafiq Rasul, Asif Iqbal and Ruhel Ahmed noted that many of their guards, who kept them briefed about developments in the camp, "felt ashamed of the Army that these things were going on." More crucially, several major players in the US administration were also dismayed. Colin Powell's State Department remained implacably opposed to all the developments that sprang from the jettisoning of the Geneva Conventions, and Colonel Lawrence Wilkerson, one of Powell's Chiefs of Staff, was particularly incensed by Rumsfeld's note about standing for eight to ten hours, telling Jane Mayer, "It said, 'Carte blanche, guys.' That's what started them down the slope. You'll have My Lais then. Once you pull this thread, the whole fabric unravels."

The most trenchant criticism, however, came from two of the biggest law enforcement agencies, the FBI and the Naval Criminal Intelligence Service. The NCIS's battle was led by Alberto J Mora, the Navy's general counsel, who was informed about the abusive environment at Guantánamo in December 2002 by his colleague David Brant, who was overseeing a team of NCIS agents working with the FBI. In contrast to the military interrogators and the CIA—who were seeking to "break" al-Qaeda, and whose road to torture was paved by the highest powers in the land—the NCIS's mission was to seek out evidence that could eventually be used in military tribunals and civilian courts. Brant told Mora that the military interrogators, most of whom

ted to ludicrous allegations whose which were clearly implausible. 33-year-old Pakistani, who was small store in Pakistan. Caught ling to Afghanistan to look for rghani and another three years ins that he was not a military adrasas," through which he was eda, and that he had led this vast Arab al-Qaeda operatives"—in until he was captured in Kunduz. id, "The person who made these doesn't even have a brain," and rd Member told him, "I don't r a great general, or this person come with you on a moment's l in October 2006.³⁰

o was captured in Pakistan while t foot in Afghanistan, also had gations, which included claims 999, and that he was "a senior ," in contact with Osama bin ew board, the source of these r explained. A Board Member identified you as belonging to him for details he was unable er bizarre allegations involved reportedly caught smuggling ie managed to keep the money asement of the Qala-i-Janghi uwari, who responded to an where he was "in charge of t he asked one of the prisoners t, and was told that "the camp

ove were obtained through ough General Miller's much- kinder on the informers than

coercion—allowing them to move to Camp 4, where they shared dormitories with nine others, ate communally and were allowed to play sports together—was just as damaging in terms of the value of the intelligence produced.³² Numerous prisoners were, of course, aware that other prisoners were telling lies in the hope of being released, but Miller was oblivious to it, proudly telling David Rose that his graduated system of 29 extra "comfort items" for cooperative prisoners had contributed to the 600 percent increase in intelligence under his watch, all of which, he maintained, was "enormously valuable intelligence," which was "distributed around the world." This was clearly nonsense—Anthony Christino said that he saw no dramatic improvement in the quality of the intelligence, but noted an increase in quantity and an attempt to "improve the way it was packaged"—but although it was more palatable to sell bribery as the key tactic that had apparently transformed Guantánamo, the blunt truth was that coercion—combined with a credulous approach to "evidence" on the part of the authorities—had played a more prominent part.³³

It's uncertain quite how many prisoners were presented with patently false information that they either refuted, leading to horrendous punishment, or accepted under duress, producing self-incriminating false confessions, but the examples of several of the British prisoners suggest that both the scenario and its responses were widespread. It was in Guantánamo, under Miller's command, that Omar Deghayes was unexpectedly confronted with a grainy video of Chechen militants, in which, it was alleged, he was a prominent player, even though it has been established that the man in the video was actually a militant who died in Chechnya in 2004,³⁴ and it was under Miller that Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed suddenly found themselves under intense suspicion when another grainy video surfaced purporting to show them in the crowd at a meeting between Osama bin Laden and Mohammed Atta in Afghanistan. In the case of the three men from Tipton, British intelligence agents, having been useless up to that point, finally intervened to confirm that Rasul's alibi—that he was working in an electrical store in the West Midlands at the time—was the truth, and not, as alleged, a devious cover story concocted by a hardened terrorist. This, in turn, led to their release, but not until all three men cracked under the pressure and "confessed" that the allegation was true. In a similar scenario, Ahmed Errachidi, the Moroccan chef, was

ation's accounts to public scrutiny. For al-Matrafi has also come from the Ayman Batarfi pointing out that, his relationship with the Taliban, humanitarian work, and both Batarfi and the organization was regarded with its Saudi links. What has largely in May 2006, an audiotape from bin Laden called into doubt by US intelligence, is in Guantánamo—al-Matrafi and whatever with al-Qaeda.⁶ None of what has probably counted against the discovery, in August 2002, of a copy of al-Wafa in Kabul, which included maps, fuses and terrorist guide books, nothing to do with him is unknown. His role at the organization had no links to al-Qaeda. He repeatedly said we have no terrorist affiliation or non-governmental, is free quarters. We are only helping the

kidnapping, 47-year-old Mamdouh Habib from Quetta to Karachi when it was taken from his seat as a suspected terrorist to jail for three weeks, interrogated and tortured by the Pakistani authorities. Habib, 18, drifted to Europe and settled in the UK. He came a citizen, married a Lebanese woman, ran a cleaning business. He later moved to Sydney, but became "chronically ill" as a result of his torture. In summer 2001, he set off for Pakistan to look for his family over to join him, but when he was captured by the Americans that they had caught him. Habib admitted that one of his reasons

for leaving Australia was because he was "caught between police who suspected him of terror links and an often hostile Muslim community that was sometimes suspicious of his activities," and these suspicions were triggered after a visit to the US, when he met followers of the Egyptian-born cleric, Sheikh Omar Abdul Rahman. Also known as the "Blind Sheikh," Abdul Rahman was a major source of inspiration for Osama bin Laden, and was serving a life sentence for his role in the 1993 World Trade Center bombing and a plot to blow up several New York landmarks. Habib's troubles began when he stayed in touch with Abdul Rahman's associates in New York on his return to Sydney, and spoke out in his defense, but although there was nothing in his activities to suggest that he was actually involved in any kind of terrorist activity, as soon as the Americans found out about his history they rendered him to Egypt. For six months, he was "suspended from hooks on the walls while his feet rested on a rotating metal drum that delivered electric shocks," "kicked, punched, beaten with a stick and rammed with what can only be described as an electric cattle prod," and handcuffed and left in a room that gradually filled with water until it was just beneath his chin. "Broken" by the Egyptians, he made a number of false confessions—in particular, that he "trained several of the September 11 hijackers in martial arts and had planned to hijack a plane himself"—which were then used against him after he was transferred to Guantánamo, via Afghanistan, in June 2002.⁸

In Guantánamo, he continued to be treated brutally, and several prisoners reported his suffering. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed said that he was "in catastrophic shape, mental and physical," and that, as a result of his torture, "he used to bleed from his nose, mouth and ears when he was asleep." Habib also made allegations about his treatment in Guantánamo—in particular that he was "smeared with the menstrual blood of a prostitute" during an interrogation—and complained vociferously about being kept in solitary confinement in Camp Echo: "They use every possible [way] to make me crazy. They put me in isolation all the time. I never see the sun. I never have shower like a human being. I never have soap. I never have cup to drink. I never treated like a human being." Given this catalog of abuse, and the allegations against him, it came as a surprise to everyone—including the Australian authorities—when he was released from Guantánamo in January 2005, and returned to Australia as a free man.⁹

or one of them "to meet Osama bin then swore allegiance to Osama bin it and influential al-Qaeda member." l to implicate Slahi in all manner of Ressam's plot to blow up Los Angeles e falsely confessed to being part of the dan, and explained that, although he g to find work as an electrical engineer, mists, and returned to Mauritania in pt under constant surveillance by the I went I had people right behind me . I said what the heck? This is not the

the Americans in November 2001 has t as if he was an unknown quantity. Canada, he had been investigated in in Senegal on his way to Mauritania , been questioned on two occasions y three FBI agents and "another guy e" in Mauritania in February 2000, on an American agent took part in an Slahi, threatened to bring in "black

ordinary and unprecedented story n the US embassy in Sarajevo asked nian citizens of Algerian origin—40-3-year-old Sabir Lahmar, 34-year-old Mustafa Ait Idr, 36-year-old Lakhdar udella al-Hajj—because of a suspicion lot to bomb the US embassy. The of a diplomatic note, which contained gation, and the Bosnians refused to eated to close their embassy and nless the men were arrested. Human ic noted that "the threats from the

Americans were enormous. There was a hysteria in their behaviour." Unwilling to defy the Americans, the Bosnians then arrested the men, but after a three-month investigation, in which they conducted extensive searches of their apartments, their computers and their documents, they found "literally no evidence" to justify the arrests. The Supreme Court ordered their release, and, with rumors circulating that the Americans were going to seize them anyway, the Bosnian Human Rights Chamber ruled that they had the right to remain in the country and were not to be deported. On the night of January 17, 2002, a huge crowd of supporters gathered outside the prison in Sarajevo to protect them on their release, but riot police dispersed the crowd with tear gas, and at dawn, as the men emerged, they were seized by American agents, hooded, handcuffed and rendered to Guantánamo.

Since arriving in Guantánamo, the embassy plot has never been mentioned. Instead, the six men have been subjected to relentless allegations that they were associated with al-Qaeda. Although they all traveled to Bosnia to support Muslims during the 1992-95 civil war and were then granted citizenship, they married Bosnian women and spent the next six years working with orphans for various Muslim charities, including the Red Crescent, and, in the case of Lahmar, an Islamic scholar, the Saudi High Committee for Relief, and there was no evidence that any of them maintained a sideline dealing with international terrorists. According to their lawyers, the source of the false allegations was Lahmar's embittered ex-brother-in-law, who ran a "smear campaign" against him. Another allegation made by the Americans—that Belkacem made seventy phone calls to Afghanistan after 9/11 and was "the top al-Qaeda facilitator" in Bosnia—has never been substantiated, and there seems no doubt that all six men are innocent. Manfred Novak, the UN Special Rapporteur on Torture, explained, "It's implausible to say that they are enemy combatants. They were fighters during the Bosnian war, but that ended in 1995. They may be radical Islamists, but they have definitely not committed any crime."¹³

Despite this, they have been treated brutally in Guantánamo. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed reported that during Geoffrey Miller's tenure, "They were treated particularly badly. They were moved every two hours. They were kept naked in their cells. They were taken to interrogation for hours on end. They were short-shackled for

hospital, were watching, "the guards took tubes from one detainee, and with no sanitization whatsoever, reinserted it into the nose of a different detainee. When these tubes were reinserted, the detainees could see the blood and stomach bile from other detainees remaining on the tubes."¹⁰

Medical Malpractice

With these methods—and the use of five "restraint chairs," which were ordered in December—the authorities succeeded in convincing the majority of the 84 hunger strikers who were holding out in early January 2006 to give up their protest by the end of the month, and by March only a few young Gulf prisoners, including Ghassan al-Sharbi, were still on strike.¹¹ It was noticeable, however, that both the methods used and the complicity of the medical staff raised uncomfortable questions about the role of the doctors in Guantánamo which had, up to that point, largely been concealed, even though numerous prisoners had spoken about the various ways in which, instead of maintaining a professional distance, the doctors and medical staff were intimately involved in every aspect of the prison's operations.

This had been apparent in a general sense from the beginning, when the prisoners were required to take unknown drugs on a regular basis. Shafiq Rasul, Asif Iqbal and Ruhel Ahmed described an incident in August 2002 when medical staff toured the cell blocks asking the prisoners if they wanted an injection, "although they wouldn't say what it was for." They said that most of the prisoners refused, but the medical staff then returned with an ERF team who forced them to have the injections anyway. Ahmed said that the drug made him feel "very drowsy," and added, "I have no idea why they were giving us these injections. It happened perhaps a dozen times altogether and I believe it still goes on at the camp. You are not allowed to refuse it and you don't know what it is for." Abdullah al-Noaimi told his lawyers that within his first few days at Guantánamo he "was injected with an unknown substance which made him depressed and despondent. He was unable to control his thoughts and his mind raced. He was also unable to control his body and fell to the floor." He was then placed in isolation for three days, where medical staff administered an unknown medicine "that made him feel drunk," until he refused to take

Dostum and the Americans to
ed were tied up at the time they
were briefed that "only" eight
; shot after the uprising started,
sed by Luke Harding, is more
use a photographer "saw the
ose hands had been bound by
ern part of the fort," and that
the scarves from the hands of
erry noted, "some of the dead
oldiers used scissors to snip off
nificantly, because so many of
suppressed until the Pentagon
006—also talked about being

3

*The Convoy of Death***Yerghaneck and Qala Zcini**

On Sunday, November 25, 2001, as the uprising began in Qala-i-Janghi, a far larger group of Taliban soldiers—at least 4,500, but possibly as many as 7,000—made their way from Kunduz to Yerghaneck, five miles west of the city, where they surrendered to General Dostum. What no one either knew or cared about, however, was that among the surrendering soldiers were hundreds of civilians who had been caught up in the chaos or who were fleeing the hard-core al-Qaeda and Taliban fighters making a last stand in Kunduz itself.

One of the most vivid accounts of the surrender was provided by three young Britons who fell into this latter category. Twenty-four-year-old Shafiq Rasul, 20-year-old Asif Iqbal and 20-year-old Rubeel Ahmed—childhood friends from Tipton in the West Midlands—had traveled to Pakistan in September 2001. Iqbal was making arrangements for his forthcoming marriage to a young woman in Pakistan, Ahmed was his best man, and Rasul was planning to do a computer course once the wedding was over, but soon after their arrival, when the invasion of Afghanistan began, they made the fateful decision that an exciting adventure awaited them over the border, just a short bus-ride away. Using the money they had brought with them, they planned to provide humanitarian aid to Afghan villagers, a mission that also involved the adrenaline rush of being in a war zone, and, they hoped, the opportunity to sample the Afghans' enormous naan breads. Up close, however, the war zone was more frightening than they had anticipated. At risk from both US bombing raids and the Taliban, who were deeply suspicious of young men wandering

around without beards, they tried to return to Pakistan in a taxi, but were instead taken to Kunduz. As the first groups of Taliban soldiers began to surrender, they clambered onto a truck that was leaving the city, but the vehicle was immediately shelled, and almost everyone on board was killed. With nowhere else to turn, they surrendered to Alliance soldiers who took their money, their shoes and their warm clothes, and marched them to Yerghanek.¹

Very few of those who made their way to Yerghanek—70 at most—were eventually transferred to Guantánamo. Of these, only a handful have spoken about their experiences, and none were in the first convoys that set off for Sheberghan on the Sunday. Overwhelmed by the sheer numbers of people flooding out of the city, Dostum was obliged to keep thousands of them marooned in the desert while he arranged additional transportation over the next few days. As a result, neither the men from Tipton nor the others who ended up in Guantánamo—including Abdul Rahman, a 25-year-old shopkeeper from Kunduz, and Mohammed Saghir, a 49-year-old woodcutter from Pakistan's North West Frontier Province—had any inkling of the grisly fate that awaited them.

While the vast crowds of fighters and civilians were disarmed, Dostum's men recruited drivers to go to Qala Zeini, an old fort on the [redacted] and Sheberghan, where [redacted] reported [redacted] the journey to Sheberghan. One of the drivers, who was in the fort when a convoy of prisoners arrived that evening, said that, as soon as the Northern Alliance soldiers began stripping them of their turbans and vests, tying their hands behind their backs and transferring them to the containers, some of the prisoners—those who were familiar with recent Afghan history—realized that Dostum was planning to kill them. Since 1997, when a brutal Uzbek general had first seen the viability of containers as cheap and convenient killing machines, murdering 1,250 Taliban soldiers by leaving them in containers in the summer sun, they had become a familiar weapon of Afghan warfare. When the Taliban took Mazar-e-Sharif in 1998, they disposed of their conquered enemies in the same fashion.

According to one of the drivers, a few hours after the convoy had set off from Qala Zeini, the prisoners started pounding on the sides of the containers, shouting, "We're dying. Give us water! We are human,

not animals
walls and p
were caught
were not e
suffocating
trucks pulle
opened, me
"They open

Back at
Abdul Rahi
from Zabul
he establish
his family's
reassured th
radio they v
was only ag
on the day
the Norther
Pashtuns an
them up." V
seek US and
their way th
when we se
up," he said
Afghanistan

Abducted
shock as se
free, while h
night. He b
the night. "I
he said. "Th
dirt on their
and his com
were waitin
were throw
"We did no
air, a lot of
arrived at St

received injuries to their eyes in this manner, that "three brothers were blinded," and that many of the prisoners—himself included—had their noses broken by the soldiers. He was also one of the first prisoners to describe how the prisoners' copies of the Koran were regularly abused. He explained that some of the soldiers "treated the Koran terribly," dropping copies in the toilet bucket, scrawling obscenities on its pages, and tearing out pages which they used to shine their shoes or to wipe out the toilet bucket, and added that they also cursed Allah and the Prophet Mohammed on a regular basis. The abuse of the Koran was also noted by the Britons Tarek Dergoul, Shafiq Rasul, Asif Iqbal and Rihel Ahmed, and by Ehsanullah, a 28-year-old Afghan (released in March 2003), who said that soldiers in Kandahar hit him and taunted him by throwing the Koran in a toilet.¹¹

Some of the other Bahrainis also had vivid tales to tell of their treatment at Kandahar. Isa al-Murbati (whose capture is related in Chapter 12) said that he was "shackled to a pole outside in very cold weather," and that, "every hour, US military personnel threw cold water on [him] while he was shackled to the pole." He explained that this took place every night for a week, and added that on one occasion he was taken to an area away from the other prisoners, because Red Cross representatives were visiting the camp, and the authorities did not want them to see him. It was also clear that al-Murbati was not the only prisoner to be exposed to the extreme cold. The Pakistani interviewed by Human Rights Watch said that "he and other prisoners were occasionally taken outside and forced to lie on the frozen ground until they were numb with cold."¹²

Abdullah al-Noaimi "witnessed other detainees being bitten by military dogs," and said that "a female soldier, upon learning that [his] brother lived in the USA, threatened to kill him." He also developed a urinary tract infection and came down with a fever, which made him vomit and left him unable to eat, but explained that, when he was taken to the clinic, "a military doctor allowed a military policeman to inject him with an unknown substance. When he began to bleed as a result, the doctor and the policeman laughed." He was then placed in isolation for seven weeks, and was ignored by the medical staff, even though his eyes were yellow and there was blood in his urine, and added that a doctor told him, "you're about to die and there's nothing we can do for you."¹³

KANDAHAR

In addition that his father and wrote a left hand, as of psychologic Kuwaiti prisoner specifically made allegations subsequently

All indicated and Pakistan they told and beaten, naked in front of guards/interrogators confirmed that they just could

Confirmation revealed in the Union released information abuse of prisoners by interrogation and bruises" of pain and suffering

[He] stated to four guards but he was approached and stated that he and left. I at which time apparent that had happened

Abandoning

Although the assumption that

techniques allowed for a good deal of shouting and verbal abuse, but absolutely no physical contact whatsoever.¹⁸

It seems incredible, given the physical abuse to which the prisoners were subjected in detention, that Mackey could even claim that the interrogation rooms were violence-free zones, but there is evidence that the techniques were largely adhered to in the interrogations that he conducted or oversaw. Mourad Benchellali, for example, who reeled off a catalog of abuses in detention, did not allege that he was abused during his interrogations, which took place "several times a day." Instead, he said, the interrogators "were waiting for me to 'confess.' I repeated my story. No one believed me. I did not find out about the World Trade Center until several days before the Americans bombed Afghanistan." Even Juna al-Dossari, who was repeatedly abused during his time in Kandahar, did not claim that he was subjected to violence during his first interrogation (although he did say that the guards made him walk over barbed wire on the way there, and that the incident with the broken glass took place afterwards). "When I entered the investigation tent," he said, "I found that there were two Americans among the investigators ... I said to them, 'why are you torturing me and you haven't even started questioning me? What do you want from me? Give me a piece of paper and I will sign anything you want.'" He was, however, disappointed at the lack of concern that the interrogators showed, and said that one of them told him, "there is no torture here and there are no beatings," even though he "could clearly see the state I was in."¹⁹

Mackey's role as an interrogator is revealed in two sets of accounts—one by Mackey himself, and the other by his prisoners—which provide a unique opportunity to compare and contrast the versions of the truth presented by both parties. The prisoners were Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, and their interrogation gave Mackey a chance to demonstrate a number of interrogation skills: playing prisoners off against each other, and indulging in a little role-play to deceive them. Wearing a maroon beret, and affecting an English accent, he fooled them into thinking he was an SAS officer, although he failed in his attempt to undermine Rasul—with a fake letter from Scotland Yard claiming that his house had been raided 16 hours after he left for Pakistan—as Rasul had rung his family from Pakistan and no such raid had been mentioned, and he succeeded only in confusing

and terrifying the men with an allegation that they were members of the radical British organization al-Mahajiroun (which they were not), and with threats to send them to Belmarsh prison. He was also wide of the mark in his assessment of the men, saying that Iqbal's explanation that he went to Pakistan to get married "was so outrageous, it was almost comical," and attributing calculated guile to one of the other men, when he said that they made "a big mistake," and that they only went to Afghanistan in search of "adventure." Frustrated that they insisted on telling remarkably similar stories, he eventually conceded that they had perhaps been telling the truth.²⁰

The crucial difference between the two sets of accounts, however, was in additional details provided by Rasul and Ahmed. Rasul said that, in the interrogation when the fake letter was produced, "One of the US soldiers had his arm round his neck and was saying, 'wait until you get back to the tent, you will see what we are going to do to you,'" and Ahmed said that, in his interrogation, "one of the US soldiers had a gun to his head and he was told that if he moved they would shoot him." These statements do little to confirm Mackey's moral authority (which is further undermined by Asif's assertion that he told him he was not going to be beaten "because you are with me"), although it's clear from their accounts of other interrogations at Kandahar that he was the only interrogator who did not subject them to physical abuse. Recalling the interrogation that preceded the SAS subterfuge, Iqbal recalled:

An American came into the tent and shouted at me telling me I was al-Qaeda. I said I was not involved in al-Qaeda and did not support them. At this, he started to punch me violently and then, when he knocked me to the floor, started to kick me around my back and in my stomach. My face was swollen and cut as a result of this attack ... Whilst he was attacking me, the interrogator didn't ask me any other questions but just kept sweating at me and hitting me.²¹

One major problem for the interrogators at Kandahar was that a large proportion of the prisoners refused to "break." Mackey reported that most of them said that they went to Afghanistan to seek a pure Islamic state, to find a wife, or to teach or study the Koran. Although they also admitted receiving weapons training, they largely insisted that it was mandatory and had only taken a few days. He was aware that not everyone who passed through interrogation was a "high value"

00000040

and was treated for a traumatic brain injury and discharged from the military in April 2004.⁴

"Setting the Conditions"

Although the abuse described above was directed at prisoners who were presumed to be significant suspects, it's clear that many other prisoners who have not spoken about their experiences also suffered brutal treatment. Not everyone was abused by their interrogators or picked on by the guards, but the new regime took as its starting point the presumption that the majority of the prisoners had something to hide, and came up with new forms of abuse, in an attempt to "break" them, which, according to a former interrogator, were applied to one-sixth of the prisoners in Guantánamo; in other words, to at least a hundred prisoners. He explained that "when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base."⁵

Describing this period, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, who were rarely subjected to physical brutality, said that they became aware of the changes when the frequency and the length of their interrogations increased, and explained that they were each interrogated on about five occasions in 2002, but that from January 2003 until their release in March 2004 they were subjected to over two hundred interrogations. These kinds of figures have been confirmed by other prisoners, including, to cite just a few examples, the Moroccan Younis Chekhouri, who was interrogated over 150 times, the Frenchman Khaled bin Mustafa, who was interrogated over a hundred times, and—to demonstrate that the changes were not only directed at prisoners who were regarded with great suspicion—a 29-year-old Afghan, Abdel Rahman Noorani (released in July 2003), who said that he was "badly punished 107 times," and added that "during his 20 months at Guantánamo, his captors had chained his hands and feet and had beaten him with a metal rod on his legs and back."⁶

What made the prisoners' experiences even more disturbing, however, was the new framework in which the interrogations were couched. Before the interrogations, prisoners were frequently moved into isolation blocks, where they remained for days, weeks, or even months, and where the air conditioning was usually turned up full,

to prolonged periods of sleep deprivation, David Hicks was subjected to sleep deprivation "as a matter of policy," and Mourad Benchellali explained, "We were treated differently depending on whether or not we responded to questions. Those who did not 'cooperate' were awakened every hour with the aim of preventing them from sleeping at all costs." The prisoners who were moved from cell to cell—the "frequent fliers," as the men from Tipton described them—included the Kuwaiti Fouad al-Rabia, who, they said, was picked on like all the prisoners who had spent time in the US, and was moved every two hours, leaving him "suffering from serious depression, losing weight in a substantial way, and very stressed because of the constant moves, deprived of sleep and seriously worried about the consequences for his children." Mehdi Ghezali was "deprived of sleep for about two weeks by the constant switching of cells and interrogation," and Isa al-Murbati was "moved from cell to cell in the Tango and Oscar [isolation] blocks, typically on an hourly basis." As a result, he said, he was "never able to sleep for more than short periods." Mohammed Khan Achakzai, a 24-year-old Afghan businessman (who was sold to the Americans by the Northern Alliance after the fall of Kunduz) said on his release in March 2004 that some prisoners had been deprived of sleep for up to 45 days at a time, and one particularly unfortunate Yemeni, Mohammed Ghanim (who was in the first group of prisoners captured crossing from Afghanistan to Pakistan in December 2001, but does not seem otherwise significant) was apparently moved between cells and blocks every two hours for a total of eight months, as a result of which he lost a lot of weight—and, presumably, found it increasingly difficult to keep a grip on his sanity.¹⁰

The authorities also made use of prisoners' phobias, either through the use of dogs, as in the case of Saad al-Azmi, who was bitten by dogs while being hooded, or, as was more common, through sexual humiliation. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed explained that it happened "to the people who'd been brought up most strictly as Muslims," and that they were frequently so ashamed that it took them some time to tell their neighbors about their experiences. Although the men from Tipton were referring primarily to the Gulf prisoners, very few of them have spoken about their experiences, although the Yemeni Yasin Ismail reported that when he refused to talk during an interrogation, a female soldier entered wearing a tight T-shirt. "Why

to hood them, to beat them mercilessly, to hang them from the walls of their cells for days, to set dogs on them, to lead them around the cell block on leashes, to pile them up in grotesque naked pyramids and, on one notorious occasion, to place a hooded, dark-robed figure on a box, with his arms outstretched, and with wires trailing from his fingers. Schlesinger's report was critical, but, as in other reports commissioned in the wake of the Abu Ghraib scandal, he pointedly refused to gaze up the chain of command to investigate where, ultimately, the responsibility lay for authorizing these techniques. Echoing Bush and Rumsfeld, who blamed the abuse on a "few bad apples," Schlesinger concluded that it was the result of "Animal House on the night shift," although he conceded that "techniques effective under carefully controlled conditions at Guantánamo became far more problematic when they migrated [to Iraq] and were not adequately safeguarded."¹⁵

Noticeably, however, the changes authorized by Rumsfeld did not meet with universal approval in Guantánamo. Shafiq Rasul, Asif Iqbal and Rihel Ahmed noted that many of their guards, who kept them briefed about developments in the camp, "felt ashamed of the Army that these things were going on." More crucially, several major players in the US administration were also dismayed. Colin Powell's State Department remained implacably opposed to all the developments that sprang from the jettisoning of the Geneva Conventions, and Colonel Lawrence Wilkerson, one of Powell's Chiefs of Staff, was particularly incensed by Rumsfeld's note about standing for eight to ten hours, telling Jane Mayer, "It said, 'Carte blanche, guys.' That's what started them down the slope. You'll have My Lais then. Once you pull this thread, the whole fabric unravels."

The most trenchant criticism, however, came from two of the biggest law enforcement agencies, the FBI and the Naval Criminal Intelligence Service. The NCIS's battle was led by Alberto J. Mora, the Navy's general counsel, who was informed about the abusive environment at Guantánamo in December 2002 by his colleague David Brant, who was overseeing a team of NCIS agents working with the FBI. In contrast to the military interrogators and the CIA—who were seeking to "break" al-Qaeda, and whose road to torture was paved by the highest powers in the land—the NCIS's mission was to seek out evidence that could eventually be used in military tribunals and civilian courts. Brant told Mora that the military interrogators, most of whom

were poorly trained, were "engaging in psychological abuse," and he later told would be a good word to describe the ordered his men to "stand clear and report what they saw, and explained that he didn't want them to or participate in any level of physical or psychological abuse. No slapping, deprivation of water, etc. It was pretty basic, black and white. It was what the rules were that had been set at that point. We were going to do what was legally permissible." He also explained the "reliability of forced confessions": "The methods would 'taint the cases' of detainees, undermining any attempts at a fair trial by law." Moreover, he added, "it just ain't right."

Mora was equally appalled, especially the abuse wasn't "rogue activity," but was authorized at a high level in Washington. The interrogation techniques were "clearly never taught about American values. The people who justify the new regime were fatally flawed. One day they could face criminal charges." On November 20, he confronted his immediate superior, the Pentagon's general counsel (and a personal friend of his), with him that, "whatever its intent, what was being done was torture." Haynes disagreed, but Mora pressed its ramifications: "What did 'deprivation of water' mean? Could a prisoner be locked in a box for a month? What, precisely, did the authority to detain a detainee be held in a coffin? What could an interrogator push this? Unthinkable."

Mora's appeal was ultimately seen whether his fears about the consequences of its actions will one day come true. He was in the direction that his country was taking, and his revulsion at the tactics that were being used by the FBI. As early as November 20

ations whose implausible. ni, who was stan. Caught 1 to look for r three years ot a military which he was d led this vast eratives"—in ed in Kunduz. io made these a brain," and im, "I don't or this person n a moment's i.³⁰

Pakistan while stan, also had cluded claims was "a senior h Osama bin ource of these oard Member belonging to e was unable tions involved ght smuggling eep the money Qala-i-Janghi ponded to an "in charge of f the prisoners har "the camp

ined through Miller's much-nformers than

coercion—allowing them to move to Camp 4, where they shared dormitories with nine others, ate communally and were allowed to play sports together—was just as damaging in terms of the value of the intelligence produced.³² Numerous prisoners were, of course, aware that other prisoners were telling lies in the hope of being released, but Miller was oblivious to it, proudly telling David Rose that his graduated system of 29 extra "comfort items" for cooperative prisoners had contributed to the 600 percent increase in intelligence under his watch, all of which, he maintained, was "enormously valuable intelligence," which was "distributed around the world." This was clearly nonsense—Anthony Christino said that he saw no dramatic improvement in the quality of the intelligence, but noted an increase in quantity and an attempt to "improve the way it was packaged"—but although it was more palatable to sell bribery as the key tactic that had apparently transformed Guantánamo, the blunt truth was that coercion—combined with a credulous approach to "evidence" on the part of the authorities—had played a more prominent part.³³

It's uncertain quite how many prisoners were presented with patently false information that they either refuted, leading to horrendous punishment, or accepted under duress, producing self-incriminating false confessions, but the examples of several of the British prisoners suggest that both the scenario and its responses were widespread. It was in Guantánamo, under Miller's command, that Omar Deghayes was unexpectedly confronted with a grainy video of Chechen militants, in which, it was alleged, he was a prominent player, even though it has been established that the man in the video was actually a militant who died in Chechnya in 2004,³⁴ and it was under Miller that Shafiq Rasul, Asif Iqbal and Rihel Ahmed suddenly found themselves under intense suspicion when another grainy video surfaced purporting to show them in the crowd at a meeting between Osama bin Laden and Mohammed Atta in Afghanistan. In the case of the three men from Tipton, British intelligence agents, having been useless up to that point, finally intervened to confirm that Rasul's alibi—that he was working in an electrical store in the West Midlands at the time—was the truth, and not, as alleged, a devious cover story concocted by a hardened terrorist. This, in turn, led to their release, but not until all three men cracked under the pressure and "confessed" that the allegation was true. In a similar scenario, Ahmed Errachidi, the Moroccan chef, was

to public scrutiny. s also come from pointing out that, with the Taliban, and both Batarfi was regarded with What has largely udiotape from bin by US intelligence, —al-Matrafi and -Qaeda.⁶ None of y counted against August 2002, of a il, which included ist guide books,” is unknown. His n had no links to : have no terrorist ernmental, is free only helping the

ur-old Mamdouh achi when it was at as a suspected eks, interrogated stani authorities. rope and settled rried a Lebanese isiness. He later ame “chronically n summer 2001, istan to look for im, but when he t they had caught ne of his reasons

for leaving Australia was because he was “caught between police who suspected him of terror links and an often hostile Muslim community that was sometimes suspicious of his activities,” and these suspicions were triggered after a visit to the US, when he met followers of the Egyptian-born cleric, Sheikh Omar Abdul Rahman. Also known as the “Blind Sheikh,” Abdul Rahman was a major source of inspiration for Osama bin Laden, and was serving a life sentence for his role in the 1993 World Trade Center bombing and a plot to blow up several New York landmarks. Habib’s troubles began when he stayed in touch with Abdul Rahman’s associates in New York on his return to Sydney, and spoke out in his defense, but although there was nothing in his activities to suggest that he was actually involved in any kind of terrorist activity, as soon as the Americans found out about his history they rendered him to Egypt. For six months, he was “suspended from hooks on the walls while his feet rested on a rotating metal drum that delivered electric shocks,” “kicked, punched, beaten with a stick and rammed with what can only be described as an electric cattle prod,” and handcuffed and left in a room that gradually filled with water until it was just beneath his chin. “Broken” by the Egyptians, he made a number of false confessions—in particular, that he “trained several of the September 11 hijackers in martial arts and had planned to hijack a plane himself”—which were then used against him after he was transferred to Guantánamo, via Afghanistan, in June 2002.⁸

In Guantánamo, he continued to be treated brutally, and several prisoners reported his suffering. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed said that he was “in catastrophic shape, mental and physical,” and that, as a result of his torture, “he used to bleed from his nose, mouth and ears when he was asleep.” Habib also made allegations about his treatment in Guantánamo—in particular that he was “smeared with the menstrual blood of a prostitute” during an interrogation—and complained vociferously about being kept in solitary confinement in Camp Echo: “They use every possible [way] to make me crazy. They put me in isolation all the time. I never see the sun. I never have shower like a human being. I never have soap. I never have cup to drink. I never treated like a human being.” Given this catalog of abuse, and the allegations against him, it came as a surprise to everyone—including the Australian authorities—when he was released from Guantánamo in January 2005, and returned to Australia as a free man.⁹

of them "to meet Osama bin
wore allegiance to Osama bin
influential al-Qaeda member."
plicate Slahi in all manner of
his plot to blow up Los Angeles
y confessed to being part of the
id explained that, although he
I work as an electrical engineer,
and returned to Mauritania in
er constant surveillance by the
I had people right behind me
what the heck? This is not the

mericans in November 2001 has
ic was an unknown quantity.
, he had been investigated in
gal on his way to Mauritania
uestioned on two occasions
FBI agents and "another guy
auritania in February 2000,
merican agent took part in an
hreatened to bring in "black

ry and unprecedented story
s embassy in Sarajevo asked
zens of Algerian origin—40-
d Sabir Lahmar, 34-year-old
Ait Idr, 36-year-old Lakhdar
Hajj—because of a suspicion
omb the US embassy. The
omatic note, which contained
nd the Bosnians refused to
to close their embassy and
men were arrested. Human
that "the threats from the

Americans were enormous. There was a hysteria in their behaviour." Unwilling to defy the Americans, the Bosnians then arrested the men, but after a three-month investigation, in which they conducted extensive searches of their apartments, their computers and their documents, they found "literally no evidence" to justify the arrests. The Supreme Court ordered their release, and, with rumors circulating that the Americans were going to seize them anyway, the Bosnian Human Rights Chamber ruled that they had the right to remain in the country and were not to be deported. On the night of January 17, 2002, a huge crowd of supporters gathered outside the prison in Sarajevo to protect them on their release, but riot police dispersed the crowd with tear gas, and at dawn, as the men emerged, they were seized by American agents, hooded, handcuffed and rendered to Guantánamo.

Since arriving in Guantánamo, the embassy plot has never been mentioned. Instead, the six men have been subjected to relentless allegations that they were associated with al-Qaeda. Although they all traveled to Bosnia to support Muslims during the 1992–95 civil war and were then granted citizenship, they married Bosnian women and spent the next six years working with orphans for various Muslim charities, including the Red Crescent, and, in the case of Lahmar, an Islamic scholar, the Saudi High Committee for Relief, and there was no evidence that any of them maintained a sideline dealing with international terrorists. According to their lawyers, the source of the false allegations was Lahmar's embittered ex-brother-in-law, who ran a "smear campaign" against him. Another allegation made by the Americans—that Belkacem made seventy phone calls to Afghanistan after 9/11 and was "the top al-Qaeda facilitator" in Bosnia—has never been substantiated, and there seems no doubt that all six men are innocent. Manfred Novak, the UN Special Rapporteur on Torture, explained, "It's implausible to say that they are enemy combatants. They were fighters during the Bosnian war, but that ended in 1995. They may be radical Islamists, but they have definitely not committed any crime."¹³

Despite this, they have been treated brutally in Guantánamo. Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed reported that during Geoffrey Miller's tenure, "They were treated particularly badly. They were moved every two hours. They were kept naked in their cells. They were taken to interrogation for hours on end. They were short-shackled for

hospital, were watching, "the guards took tubes from one detainee, and with no sanitization whatsoever, reinserted it into the nose of a different detainee. When these tubes were reinserted, the detainees could see the blood and stomach bile from other detainees remaining on the tubes."¹⁰

Medical Malpractice

With these methods—and the use of five "restraint chairs," which were ordered in December—the authorities succeeded in convincing the majority of the 84 hunger strikers who were holding out in early January 2006 to give up their protest by the end of the month, and by March only a few young Gulf prisoners, including Ghassan al-Sharbi, were still on strike.¹¹ It was noticeable, however, that both the methods used and the complicity of the medical staff raised uncomfortable questions about the role of the doctors in Guantánamo which had, up to that point, largely been concealed, even though numerous prisoners had spoken about the various ways in which, instead of maintaining a professional distance, the doctors and medical staff were intimately involved in every aspect of the prison's operations.

This had been apparent in a general sense from the beginning, when the prisoners were required to take unknown drugs on a regular basis. Shafiq Rasul, Asif Iqbal and Rihel Ahmed described an incident in August 2002 when medical staff toured the cell blocks asking the prisoners if they wanted an injection, "although they wouldn't say what it was for." They said that most of the prisoners refused, but the medical staff then returned with an ERF team who forced them to have the injections anyway. Ahined said that the drug made him feel "very drowsy," and added, "I have no idea why they were giving us these injections. It happened perhaps a dozen times altogether and I believe it still goes on at the camp. You are not allowed to refuse it and you don't know what it is for." Abdullah al-Noaimi told his lawyers that within his first few days at Guantánamo he "was injected with an unknown substance which made him depressed and despondent. He was unable to control his thoughts and his mind raced. He was also unable to control his body and fell to the floor." He was then placed in isolation for three days, where medical staff administered an unknown medicine "that made him feel drunk," until he refused to take

it any more, and on another occasion he was told to take a drug "so that he would hear voices." When he was losing his mind," the authorities told him, "the doctors were doing nothing sinister about the injections." al-Hajj believes that they are conducting experiments on the whole of the camp, "the inoculations that have been made in the past that contain diseases."¹²

Whether or not there is a medical staff have persisted in the quest to "break" the prisoners, pronounced after Geoffrey D. Moore, a former prison personnel—including the doctors—were involved in the interrogations. This was the first and most common method used until the prisoners cooperate. It is reported by numerous prisoners that they have seen countless false confessions. Sami al-Hajj, who has refused to falsely confess that al-Jaish al-Islami was behind the 9/11 attacks, complained that the authorities denied him access to the drugs he needed to prevent a recurrence of his cancer in 1998, and Abdel Hamid al-Afghani, an Afghan prisoner with his Afghan cancer, presumably because he was a terrorist and not a shopkeeper.

Others include David H. Moore, who had a hernia at a time when the authorities were "gone downhill" and appealed for confessions to alleviate his pain, but was told that unless he cooperated, he would be moved from cell to cell for a treatment for hemorrhoids. He was submitting to this blackmail, but the treatment was not carried out correctly,

Detention in Afghanistan and Guantanamo Bay



Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed

Composite statement: Detention in Afghanistan and Guantanamo Bay

Shafiq Rasul, Asif Iqbal and Ruhel Ahmed

1. All three men come from Tipton in West Midlands, a poor area with a small community of Pakistani and Bangladeshi origin. The school all three attended is considered one of the worst in England. Ruhel Ahmed and Asif Iqbal who are now both aged 22 were friends from school, although one year apart. Neither was brought up religiously but each was drawn towards Islam. Shafiq Rasul is now aged 27 and had a job working at the electronics store, Currys. He was also enrolled at the University of Central England.
2. This statement jointly made by them constitutes an attempt to set out details of their treatment at the hands of UK and US military personnel and civilian authorities during the time of their detention in Kandahar in Afghanistan in late December 2001 and throughout their time in American custody in Guantanamo Bay Cuba. This statement is a composite of the experiences of all 3. They are referred to throughout by their first names for brevity. There is far more that could be said by each, but that task is an open-ended one. They have tried to include the main features.

Index

Topic	Paragraph
Detention in Afghanistan	3 – 21
Arrival in Kandahar	22 - 30
Interrogation at Kandahar	31 – 36
Interrogation by British Army	37 – 44
Removal from Kandahar	45 – 55
Guantanamo Bay	56 – 77
Interrogations (Camp X-Ray)	78 – 87
Interrogations (generally at Camp X-Ray)	88 – 107
Interrogations by MI5	108 – 123
Camp Delta – Conditions	124 – 153
Explanation for Detention	154 – 163
Camp Echo	164
Assaults at Guantanamo	165 – 169
Interrogations at Camp Delta	170 – 173
Isolation and Interrogations (pre May 2003) – Shafiq	174 – 179
Isolation and Interrogations (May/August 2003) – Shafiq	180 – 215
Isolation and Interrogations - Asif	216 – 232
Isolation	233 – 239
Isolation and Treatment – Rhuheel	240 – 244
Returning to England (Asif)	245 – 249
Contact with the Outside World	250 – 251
Legal Advice	252 – 255
Red Cross	256 – 260
MI5	261 – 263
Re British Interrogators	264
Suicides	265 – 266
Medical Care	267 – 272
Re Psychiatrists	273 – 275
Shafiq – Medical Problems/Injuries	276 – 278
Rhuheel – Medical Problems/Injuries	279
Military Personnel	280
The State of Some Other Prisoners	281 - 309
1) Jamil el-Banna and Bisher al-Rawi	282 – 287
2) Bisher al-Rawi	288 – 292
3) Moazzam Begg	293 – 295
4) Mamdouh Habib	296 – 297
5) Omar Khadr	298

6) Mohamed Rajab	299
7) Algerian detainees kidnapped in Bosnia	300 – 304
8) David Hicks	305
9) The Kuwaitis	306
10) Other detainees (including detainees sold to the Americans)	307
11) Camp Four	308 – 309

Illustrations Index

<i>Illustration</i>	<i>Paragraph</i>
Kandahar Reception	22
Kandahar Interrogation	31
Interrogation at Kandahar	31
Reception at Guantanamo	56
In for the Long Shackle – Camp X-Ray 'Reservation'	78
Escort to a 'Reservation' – Camp X-Ray	88
Softening the Detainees for Interrogation – Camp X-Ray	92
Long Shackled – Camp X-Ray	95
Delta Cell	124
Pacification – Guantanamo	165
Short Shackled – Camp Delta	180
Guantanamo Haircut	288

Detention in Afghanistan

3. All three men were detained in Northern Afghanistan on 28 November 2001 by forces loyal to General Dostum. They were loaded onto containers and transported to Sherbegan prison. The horrors of that transportation are well documented elsewhere and are not described in detail here.

4. According to information all three were given later, there were US forces present at the point they were packed into the containers together with almost 200 others. Asif became unconscious and awoke to find that in an attempt to allow air into the containers Dostum's forces had fired machine guns into the sides of the containers. Asif was struck in the arm by a bullet as a result. The journey to Sherbegan took nearly 18 hours and the containers were not opened until they reached the prison. All three men remained in the containers amongst the dead and dying throughout this time. Asif reports that to get water he had to lick the side of the container or wipe a cloth on the top of the container where the condensation had collected and squeeze the drips of water into his mouth. On arrival at Sherbegan of the 200 originally in the container only 20 were alive, some of them seriously injured.

Sherbegan Prison

5. This prison is an old fortress, a court yard surrounded by buildings open to the air. The 3 men were held in a room approximately 10m by 10m in which 70 men were held. After several days they were moved to another much smaller room with about 30 others.
6. Conditions in Sherbegan were appalling, Asif says; ***'in the first week the only food we got was a tiny portion of bread per day and a very small amount of water. This was to last us the whole day'***. When the Red Cross arrived, after about a week, some more food was provided and also blankets. Shafiq was given plastic sandals at this point but Rhuheel and Asif were barefoot (their boots having been stolen by Dostum's forces). Asif had a 'Kameez' or traditional Pakistani top and jogging bottoms. Shafiq and Rhuheel each had a thin Kameez and Pakistani trousers known as 'shalwar'. These were thin summer clothes and provided no protection against the freezing weather, it being now December.
7. After one Red Cross visit a lorry load of grain was left to feed them which was however stolen by Dostum's forces. The prisoners had, in consequence less food than they had previously. It was at this point that conditions sharply deteriorated. Shafiq says that, ***'we all had body and hair lice. They were big and would bite. I still have the scars from their bites on my body. We all got dysentery and the toilets were disgusting. It was just a hole in the ground with shit everywhere. The whole prison stank of shit and unwashed bodies'***. After the food rations were reduced the prisoners started fighting over food. Rhuheel says ***'I was asleep and got up to pray. There was also food being distributed. I got my piece and there was a piece missing and someone accused me of having a piece extra and he attacked me'***.
8. Whilst in Sherbegan Asif's arm which had been injured in the container became infected but he was given no medical treatment other than some iodine and gauze.

9. They were held in Sherbegan for approximately 30 days during which the Red Cross saw them. They gave their names and asked for families in England to be contacted. Asif says ***'the Red Cross told us that they had contacted the British Embassy in Islamabad, Pakistan and that the Embassy officials would be coming to see us on Friday. In fact on that day (28th December 2001) it was US Special Forces who arrived at the prison'***.
10. After their identities were revealed to the US forces, they were woken up one morning by the guards in Sherbegan and together with other "foreigners" they were herded towards the main gates. The weather was freezing. Shafiq says ***'I had a pair of flimsy shoes supplied by the Red Cross but no socks. At this time I was extremely weak. I was suffering from dysentery and my clothes were extremely thin and provided very little protection from the weather. We were all covered in hair and body lice and I had not washed for at least 6 weeks and I was filthy'***.
11. As they stood at the main gate, US Special Forces personnel surrounded them pointing their guns. One by one they were stripped of all their clothes despite the freezing temperature. They stood there naked, being held by two of the Special Forces soldiers whilst their pictures were taken. They were searched and after about five minutes, they were allowed to put their clothes back on but were already suffering from the effects of the cold.
12. Shafiq says ***'I was very weak. I had not eaten for at least two days and only a little water in the morning'***. All three believed that ***"the British officials" would arrange for us to be taken out of the prison and possibly sent back to the UK even if that meant being interrogated by British officials'***.

First interrogation by U.S Army

13. After the search the men were taken into a room within the grounds of the prison.

This location is best described as a shed and it offered very little protection from the cold. Shafiq describes the interrogations as follows, ***'My hands and feet were tied with plastic cuffs. The room was about 5 foot by 5 foot and as I was dragged in, soldiers forced me onto my knees in front of an American soldier in uniform. There were no tables or chairs in the room. The soldier did not identify himself to me but straight away started asking questions. Whilst I was in this position, one of the soldiers who had come in with me stood in the corner of the room with a machine gun pointed at me. He said if you move that guy over there (with the gun) will shoot you. The American interrogator asked my name, where I was from and what I was doing in the prison. I was so weak that I was barely able to walk and had difficulty concentrating on the questions, but I answered as well as I could in the circumstances. The interview lasted about 10 minutes and was conducted in English. I think there were interpreters for some of the other foreign detainees. At the end of the interview I was asked how I was feeling, and I told the interrogator that I was scared. He said that this was nothing compared with what they could do to me'***.

14. Asif says of this first interrogation ***'the soldier did not identify himself to me but straight away started asking questions. Whilst I was in this position there was a soldier in the room standing right next to me holding a black 9mm automatic pistol to my temple. The barrel of the pistol was actually touching my temple'***.

15. After the interrogation they were all placed outside the shed side by side. As soon as they walked out of the shed, an American soldier put a sandbag on their head and then wrapped thick masking tape around their head, to further cover their eyes. Asif says that ***'despite this, it was just about possible to see underneath the masking tape and through the sand bag that was being used as a hood if you angled your head correctly. It was obviously impossible to properly***

distinguish between people and identify features, but I could roughly distinguish figures'. After the hood was placed on their head they were sat outside in the main yard against the wall. They were all sitting side by side in the freezing cold. They estimate that there were approximately 30 to 50 prisoners, all of whom were non Afghani.

16. The Special Forces were standing in a semi circle in front of them. They had to wait until all of the detainees were interrogated and for the Americans to bring transport to the prison. This meant that they were sitting with no shoes or socks, in flimsy clothes and legs and arms tied with tight plastic cuffs for at least three to four hours.
17. Rhuheel says *'I think we were all suffering from the cold, dehydration, hunger, the uncertainty as well as the pain caused by the plastic ties. Added to this, periodically Special Forces soldiers would walk along a line of sitting detainees and kick us or beat us at will*'. Asif adds that *'they would abuse us in English, constantly swearing and threatening us. I recall that one of them said "you killed my family in the towers and now it's time to get you back". They kept calling us mother fuckers and I think over the three or four hours that I was sitting there, I must have been punched, kicked, slapped or struck with a rifle butt at least 30 or 40 times. It came to a point that I was simply too numb from the cold and from exhaustion to respond to the pain*'.
18. Eventually large trucks were brought up to the prison. Still hooded they could not see the trucks but could distinguish the distinctive sound they make. They were picked up one by one and thrown in. It was impossible to walk because of the plastic ties around their legs so they were dragged everywhere. As they did not have any shoes or socks, this meant that the ground would scrape the skin off their feet. When they were thrown into the lorry, there was somebody else in there that grabbed them who dragged them in. They were not allowed to talk or communicate in any way.
19. They were driven for about 45 minutes until they arrived at what they now know was an airport. Whilst in the truck, they could distinguish flashes of light which they

recognized to be from a camera/flash. Shafiq says *'I believe they were constantly taking photographs of us. I can't imagine these photographs were for identification purposes because of the hoods we were wearing, or to provide evidence that they were not maltreating us, because the abuse we were suffering was serious. I think, in light of what I now know that these photographs were trophies'*.

20. When they got to their destination, they could hear the soldiers talking about "birds" arriving at 18.00 hours. They had to wait in the truck at the airport for some time. Shafiq says *'Asif and I were taken on the first plane. We did not know where we were being taken. I was not allowed to use the toilet, or given any food, extra clothes or water. Throughout this time we still had the hoods on which made the experience even more terrifying. The plane itself was I believe a large cargo plane. It had hooks on the floor and they sat us down attaching each of us to some form of metal belt. The belt was then attached to a chain on either side and also padlocked to the floor. Because our hands were tied behind us and our legs were still tied in plastic cuffs, we had to keep our legs straight out in front of us. In normal circumstances this position would have been difficult to maintain for any length of time. Given that I was extremely weak and that I was suffering from dysentery, dehydration, hunger and exhaustion it was impossible to maintain this position for more than a few minutes at a time. If however I leant back or tried to move, I would be struck with a rifle butt. These blows were not designed to prevent us from falling back or to adjust our position, they were meant to hurt and punish us'*.

21. All three men explain the aircraft was freezing. Whilst the three men were not suffering from any major injuries (other than Asif's infected arm), there were others on the plane, including amputees and the victims of bombing raids, who were extremely unwell and yet had to maintain this position with the constant threat of being struck by rifle butts or kicked and beaten by the soldiers. Rhuhel says *'I took the last plane. The conditions in my plane were same as those described by Shafiq'*.



Arrival in Kandahar

22. The plane eventually landed in Kandahar and as they were being taken off, each detainee was taken to the side of the plane and in front of the engines. Shafiq says ***'The cargo plane had no heating and given the flimsy clothes we were wearing I believe I was close to hypothermia. My feet were still tied with the plastic cuffs, and therefore once again we were dragged out of the plane and in front of the engines. I believe the reason we were placed in front of the engines was to try and heat us up'.***
23. After this a rope was tied around their right arm and even though they were wearing a hood they understood that this rope was then connected to the man behind and the man in front. The rope was extremely thin and bit deep into their arm.
24. After the ropes were placed on their arms, they had to walk for nearly an hour. They believe they were actually walking around in circles rather than heading straight for their destination. Their feet were bound with plastic ties and so they could only shuffle. If the man in front or behind went too fast or too slow the rope would become taut and dig into their arm. This together with the pain of shuffling, in bare feet (and in the freezing cold) on the gravel, made this walk unbearable.
25. The hood and blindfold were still in place when they arrived at their destination, and all of them had deep cuts on their feet and rope burns on their right arm.
26. Asif says ***'We were eventually herded into a tent and the rope was removed. I knew it was a tent because I couldn't feel the wind. We were made to kneel with our legs underneath us and our foreheads resting on the ground. Our hands were tied behind us as were our feet'.*** Shafiq adds that ***'in normal circumstances, it might have been possible to keep my head one or two centimeters above the ground so that the sand and stones on the ground***

didn't dig into my head. By this time however I was so weak that I simply sunk forward and my head landed on the ground quite heavily. As I was in this position the sand and stone was cutting into my forehead and so occasionally I tried to lift my head to get some relief. Each time I would do this I was hit or assaulted in some way. My head was forced down on one occasion with a rifle butt. The soldier didn't stop when my head hit the ground but continued pushing down. On another occasion someone came up and pulled the plastic ties around my ankle which caused my legs which were folded under me to straighten, this meant my face and chest hit the ground heavily'.

27. They found out later that at this time the Americans were processing them and they were eventually given plastic wrist bands with numbers on them. Shafiq says '*I was number 78. As I was lying on the ground, two soldiers came up and carried me outside. They then laid me on the floor and started searching me. I still had my clothes on at this point. One of them kicked me a few times, as a result of which I suffered a lot of bruising. Whilst I was being searched, one of the soldiers would kneel on my back and the other carried out the search. After my search, I was taken to another tent. I still had the hood on and as I was taken to this tent, they were asking me "where are you from" and also they kept asking me what I was "doing in Afghanistan". In the tent, they cut off my clothes and they then carried out a "forced cavity search", but this took place with the hood still on my head and I was terrified and humiliated'.*

28. After this tent, Shafiq was taken by the soldiers who were carrying a blanket and clothes (though he had to walk naked) through a maze made out of barbed wire. Even the doors in the maze were made of barbed wire. If he tripped or slipped, which was likely given how exhausted he was, the wire would cut him. This barbed wire maze was in the open air.

29. Asif and Rhuheel describe the same treatment and all three eventually found themselves in a large hanger where they stayed over-night. In relation to the processing carried out by the American personnel Asif adds that he saw a doctor in

the tent, *'I showed him my arm and he said that it was infected. He put some sort of a plastic bandage on it. I also told him about my feet which were badly cut up. He looked at them and then said "you'll live"'*.

30. They had still not been given food or water. Shafiq says *'I was totally dehydrated, exhausted and suffering from the effects of malnutrition, dysentery and the beatings. Despite this I was called for interrogation by somebody shouting out my number. I had a sack placed on my head and for the first time, I was placed in shackles. These were not the "three piece suits" (see below) used in Guantanamo, but leg irons and handcuffs. I was taken into the interview room bent double with the sack on my head. I had received a change of clothes at this stage and was wearing a thin shalwar kameez which is a type of clothing commonly worn in Pakistan'*. Asif and Rhuhel describe the same treatment.





Interrogation at Kandahar

31. When they got into the interrogation tent, the hood was taken off and they were told to sit on the floor. There was a table in the middle of the tent with two men behind it. There was also a soldier with a gun standing behind them. All three were told forcefully that if they moved they would be shot. Shafiq says ***'I was questioned for about half an hour. I could see four water bottles sitting on the table and I said I needed water. One of the interrogators told me that he did not have any despite the fact that I could see the bottles sitting in front of him. He told me that if I cooperated I would get some water later'.***
32. They all answered the questions put to them truthfully. The bulk of each interview was about their backgrounds including address, telephone number etc. After this they were photographed and had their fingerprints and DNA taken. The DNA included a swab from their mouth as well as hairs plucked from their beard.
33. After the first interrogation by the Americans, they were taken to an open tent (with the sides open to the elements) and given a blue jump suit. They were also given a couple of crackers each and some peanut butter and at this point the Americans started to insist that they drink a lot of water.
34. The first interrogations were done in English by the Americans. None of the interrogators identified themselves to the detainees.
35. Asif explains that his second interview was also with an American but on this occasion he was badly beaten by his interrogator and the guard, He states that, ***'My second interview took place a couple of days later. I was taken away from the others, with my hood on and walked (bent double) by some soldiers to a tent. An American came into the tent and shouted at me telling me I was Al-Qaeda. I said I was not involved in Al-Qaeda and did not support them. At this, he started to punch me violently and then when he knocked me to the floor started to kick me around my back and in my stomach. My face was swollen***

and cut as a result of this attack. The kicks to my back aggravated the injuries I had received from the soldier striking me with a rifle butt. After a few moments the guards dragged me back to the tent. Whilst he was attacking me, the interrogator didn't ask me any other questions but just kept swearing at me and hitting me'.

36. After about one week when they had been interrogated several times by American military personnel they were each separately brought in to be questioned by a British soldier.

Interrogation by British Army

37. Their first contact with British military personnel was whilst held in the US prison camp in Kandahar. The interrogator was wearing a maroon beret. He told them that he was from the SAS. Throughout this interrogation as well as the earlier ones, the hood was removed.
38. Shafiq describes being brought into a tent by two US soldiers first thing in the morning. He had very thin clothes on and was freezing. He had a sandbag placed over his head which was removed once inside the tent. He was handcuffed from behind and had leg irons on. One of the US soldiers had his arm round his neck and was saying "wait until you get back to the tent you will see what we are going to do to you". The British officer produced two letters. He said one was from Scotland Yard and the other from Interpol.
39. There were a number of names on a list. Shafiq was able to see the letters, only briefly before they were pulled away. He says that the letter claimed that 16 hours after he had left home for Pakistan his house was raided. Shafiq knew this wasn't true as he had phoned home from Pakistan shortly after his arrival and no mention had been made of such a raid. The SAS man went on to say that he had a report that Shafiq was a member of the Al Muhajeroon (this is not true). He went on to suggest that Shafiq had attended a march in London on September 19th (just after the September 11th attacks) and that he had been recruited to join them.
40. Rhuhei says that he was taken before the British officer and interrogated for about 3 hours. He said that one of the U.S. soldiers had a gun to his head and he was told that if he moved they would shoot him. The SAS officer said, "You are funded by the Al Muhajeroon to fight." He was told to admit that he came to Afghanistan for holy "jihad".
41. He was questioned as to how he paid for his ticket. The SAS man also mentioned three maximum security prisons in Britain, including Belmarsh, and said that he

would be sent there. When he was taken back from there the soldiers forced his head right down and threw him on the floor, forced to his knees with his head forced onto the ground and hands pulled up backwards, forcing his head right down into the broken glass and stones on the ground. When he screamed, the force was increased. The floor consisted of sand, broken glass and stones and Rhuheh's hands were cuffed at the back and his feet were shackled.

42. Asif also was told that he would be going to one of the three maximum security prisons back in England. He says that prior to being questioned by the British soldier he had been interrogated by US soldiers on two occasions in Kandahar and one in Sherbagan. The SAS officer asked him to set out his story and he was asked for a description of the area where he lived in England.

43. He was taken back to see the British SAS officer a second time the following day. He was told that "***your friends have confessed to being members of the Al Muhajeroon***". He asked him to admit that he was also a member. He showed him a list of names and suggested that a particular doctor from the Central Mosque in Birmingham paid for him to go out to fight in Afghanistan. The SAS man then left the tent and the U.S. soldiers roughed him up again (as Rhuheh has also described). Asif was taken on a third day again to see the British SAS officer and was told that he hadn't told the truth. He was then threatened that because he wasn't telling the truth he would go straight back to England and be placed in Belmarsh or one of the other high security prisons. Asif thinks that the first time that he was questioned was for about 6 or 7 hours, the second time for about 2 hours and the third time for about 40 minutes. On the first occasion he was told by the SAS man that he was not going to be beaten 'because you are with me'.

44. Asif says '***I was told of maximum security prisons in the United Kingdom, including Belmarsh. The British officer told me that within a few weeks I would probably be taken there to be tried***'.

Removal from Kandahar

45. Shafiq says *'I was at the Kandahar camp for just less than two weeks. During that period I was interrogated about four times. We slept in a tent. I was in a tent with Rhuheel but Asif was in a different tent. There were about 20 of us in each tent. The tents were surrounded by barbed wire. We had to sleep straight on the ground, on the gravel. We were not allowed to talk and as Rhuheel explains (see below) they were deliberately stopping us from sleeping. Around midnight, probably on the 12th or 13th January 2002, US Army men came in and everyone in the tent was told to move to the back. They then shouted out three numbers. They called out my number (78) and I was taken out after the other two. It was raining and absolutely freezing cold. By this stage I was wearing the blue cotton boiler suit that we'd all been given and sandals. I was made to lie on the ground face down. A sergeant put his knee on my back and a soldier put shackles on my wrists and on my ankles. Then a rice sack was placed over my head. The sack was made from very coarse material and there were no holes to see through. I was then led about 300 to 400 yards with one guard abusing me and swearing at me. When we stopped the other guard, for no reason, hit me on the back of my head with a hand gun. I had been taken to another tent where I remained to sleep that night (the shackles and sacks were removed). There were about 20 people in that tent. The tent had a wooden floor although it had got wet from the rain. There was no bed or mattress or anything'*.

46. In the morning all the prisoners in this tent were made to sit at the back of the tent and one by one their numbers were called out. They did not have any idea what was going on. Again, the same procedure was adopted, they were brought out and made to lie on the ground and shackled with a rice sack placed over their heads. This time Shafiq says *'I had to run as fast as I could with my legs shackled and I was bent over with a sack over my head. We were taken to another tent. There they cut off all my clothes and forcefully shaved our beards and heads. I was taken outside. I was completely naked with a sack on my head and I could*

hear dogs barking nearby and soldiers shouting "get 'em boy". Although I couldn't see I had a sense that there were a lot of soldiers around. I was taken, still naked with a sack on my head, to another tent for a so called cavity search. I was told to bend over and then I felt something shoved up my anus. I don't know what it was but it was very painful. I was then taken over to another part of the tent where the head sack was removed and photographs were taken of me. I think they were head and shoulder, full face and profile. After the photos I was given an orange uniform, of polyester trousers and t-shirt. Then new chains were put on. These were handcuffs connected to a box that was held in between our wrists and from this box another chain went around the waist and then a different chain came down to other cuffs which were placed around our ankles. They were on extremely tight and cut into my wrists and ankles. I asked if they could be loosened but they refused. Then black thermal mittens were placed on my hands and taped on around the wrist. Goggles were placed on my eyes. These were rather like ski goggles but with the eye pieces painted out. Then ear muffs were put on like builders' ear muffs. A face mask, which was rather like a surgical mask, was put round my nose and mouth and I was given orange socks and plimsoles to wear. I was then taken outside. I could barely hear or see a thing and was made to sit down on the gravel ground. I was left there for hours and hours, perhaps nine or ten altogether. It was freezing and I was not allowed to move, I sat cross legged. I was aware that others sat beside me. Throughout that time I was given no food or water, the last meal I'd had was the night before. Whilst on the runway, they pulled down our face masks and gave us an MRE (meals ready to eat) packet. However, it was impossible to eat it because the packet was placed in our hands but as we were shackled and still had all the other stuff such as mittens on, you couldn't open the packet or reach your mouth with the food. They gave us no water and then they just took the food away. I was not able to eat any of it. We were then all made to stand up and I was given a sort of denim jacket which was placed over my shoulders with the top button tied but our arms were not in the sleeves. A thin strong rope was tied around my arm and connected, I believe, from my arm to the arms of other detainees. We were made to walk for a long time. I think we were simply

walking round and round in circles. Because of the rope round our arms if it got pulled it became extremely tight. As we were walking I could sense that cameras were flashing and I suspect that they were also videoing us'. It was at this point that it became clear they were going to be transported by airplane out of Kandahar but they were not told their destination.

47. Asif who was on the same plane as Shafiq describes very similar experiences. He says *'I'd been in a different tent from Shafiq and Rhuheel. I remember three numbers being called out. I was number 79 and I was taken in the same way as Shafiq described to the wooden floored tent. In the morning we were all made to sit on our knees and I waited about three hours until my number was called out. I was also called into the tent and the same process happened of being shaved and stripped naked. I do also remember having a brief examination with a doctor who looked into my eyes and asked if there were any problems. I explained that I had stomach problems as I was still suffering from dysentery. He simply gave me some tablets*'.

48. Rhuheel was not taken out of Kandahar at this time. He remained there for another month. His number was 102. It was never explained to him why he was left behind.

49. Shafiq and Asif describe being led onto large cargo planes. They were taken one by one up onto the plane. They estimate that the whole process would have taken about two or three hours. They were made to sit on benches that had no back. They still had on gloves, face masks, head muffs and they were shackled although the rope around their arms was removed. A further chain was then put around their waist and legs and this was then connected to the floor. Shafiq says *'my legs were in a painful position but if I tried to move to get comfortable they would kick you*'.

50. The plane took off and they were in the air for many hours. They had to remain sitting in this very painful position with the shackles cutting into their wrists throughout this time. Asif says *'I was very tired, not having slept at all. During the flight at some stage the face masks were removed and we were fed peanut*

butter and jelly sandwiches and orange segments. Then the mask was replaced. It was absolutely freezing during the plane journey. When we eventually landed, it was obviously somewhere very hot. We could tell as we came off the airplane that it was in the middle of the day, it was very light and very hot. I had no idea where we were. I was then led from this plane onto another plane. On the way to the other plane we were moved, bent double quite quickly. A soldier at some point, stamped on the chain between my ankles which brought the cuffs around my ankles down very hard. It was extremely painful. I was not offered the opportunity to use the toilet at any stage. I was again made to sit in the same position, shackled to the ground on this other plane and we waited for a couple of hours before take off. The second journey was shorter than the first. Eventually we arrived in Cuba; although at that stage we didn't know it was Cuba'. Asif and Shafiq have no idea where they changed planes but Rhuhel who describes a similar experience on his flight was told by soldiers that they had landed in Turkey. All three describe the plane journey as a nightmare with Asif saying that he was by this stage 'done for', he thought he would not survive the second flight but was too weak and too frightened to do or say anything.

51. Shafiq says *'during the plane journey the shackles had been on so tight that they really cut into me. I still have scarring on my left arm from them and I lost the feeling in my right hand for a long time because they were on so tight'.*

52. Whilst Asif and Shafiq were on their way to Guantanamo Bay Rhuhel remained in Kandahar. He describes the routine continuing as before. He states he was further interrogated, once by MI5 and separately by the Foreign Office. He asked after Asif and Shafiq but was told by the MI5 official in the first interrogation that they had gone home because they had cooperated. He was also interrogated on four further occasions by the Americans. He reports that after Shafiq and Asif left conditions in Kandahar started to deteriorate. He states *'they kept moving us around from tent to tent. This went on all day and night so it was impossible to settle down for the night. They also shone powerful lights into the tents which made things worse. There were no cages in the tents but you were separated from the*

person next to you by barbed wire. You were not allowed to communicate with anyone in the tent. I started to feel crazy from the isolation. About a week before I left I knew I was going to Guantanamo. I was told this by one of the soldiers. My conversations with the soldiers were the only real relief I had because it was human contact'.

53. Rhuheel says that just before he was flown to Cuba in February 2002 he was visited by somebody from the Foreign Office. It was a few days before he flew out. There was also somebody present from MI5 who said that he had seen his friends in Cuba and they had confessed to everything. *He said if you admit to everything you will go home.* At that point Rhuheel was starving, frightened and living in appalling conditions at the prison camp. He had been surviving on only two biscuits a day and was sleep deprived. He had not been allowed to talk to anyone and at night was woken up every hour on the hour. *He decided to agree with everything put to him so that he could be returned to England. He admitted that he was paid for by the Al Muhajeroon and that he had flown to Afghanistan to fight holy "jihad". He said that he 'couldn't hack it'. Rhuheel says that 'I was in a terrible state. I just said 'OK' to everything they said to me. I agreed with everything whether it was true or not. I just wanted to get out of there'.* He says that the British officials could see the state he was in but did not seem to care or even ask him about the conditions. Five days later (on the day he left) the Foreign Office representative came to see him. He was pleasant and dressed in a suit. He told Rhuheel that he was going to Cuba. He was not concerned by Rhuheel's health and was not prepared to give him any information about what was happening.

54. The Foreign Office did not inform Shafiq and Asif's families that their whereabouts were known until they were in Cuba. Rhuheel's family was told when he was in Kandahar. Shafiq and Asif saw no one from the Foreign Office whilst they were in Kandahar.

55. All three talk of the use of particular interrogation techniques in Kandahar. Shafiq explains that *'when the soldiers would come into the tents in Kandahar they came with dogs. If you made any sudden movements the dogs would be*

brought right up to you snarling and barking very close to your face'. As described above by Asif the interrogators and guards used physical violence and all three had their beards and head shaved when they were placed on the plane for Guantanamo. They believe that forced cavity searches were used to degrade and humiliate them. They were systematically deprived of sleep, whether or not an interrogation was pending and all believe they were deliberately kept on a very restricted diet in order to further physically weaken them.



Guantanamo Bay

56. When they arrived in Cuba Shafiq states **'we were taken off the plane and made to sit on the ground outside somewhere. I was still goggled and masked. At that stage they took my shoes off. We were then led onto a bus. I think there were maybe about 40 of us altogether. I later learned that we were the second group of detainees from Afghanistan taken to Guantanamo Bay. On the bus we sat cross legged on the floor (the seats had been removed) and were thrown about because of the movement of the bus, but soldiers would still punch or kick us if we moved. The bus then went onto a ferry which went over to the camp. On our arrival at the camp somebody lifted the earmuffs I was wearing and shouted into my ear "you are now the property of the US Marine Corps". We were told this was our final destination. There would be one soldier speaking in English and another in Arabic. We had arrived at Camp X-Ray'**. Asif describes very similar experiences.

57. Rhuheel, who arrived a month later, was also taken to Camp X-Ray. His journey on the plane was very similar to Asif and Shafiq but on the ferry to the actual camp he was kicked and punched by a US soldier. He states he was assaulted **'because we had been told to keep our hands by our sides. This was uncomfortable as we were shackled and after some time I moved my hands into my lap. A soldier came up to me and said put your hand on your left knee which I did. The soldier said "this motherfucker speaks English", and then kicked me about 20 times to my left thigh and punched me as well. I had a large bruise on my leg and couldn't walk for nearly one month. There was never anyone to complain to about these sorts of attacks and I think they are still going on'**.

58. At Camp X-Ray, after they were taken off the bus, they had to sit outside for hours still shackled with the gloves, ear muffs and masks on. They were given no water

even though it was extremely hot. Occasionally somebody would come round and wet their lips with water but it wasn't enough.

59. Asif states that *'after a couple of hours of squatting in that position I fell over and started shaking. I went into a sort of fit. I was taken on a stretcher into a processing room where I was given an IV tube into my arm. I was still shackled and goggled at that stage. I was in the room for about an hour and was then given a shower. Everything was taken off, all my clothing except for the goggles and the shackles. The shower was very brief, it didn't give me an opportunity to wash properly. After the shower I was taken over to a table and told to bend over (I was naked). Again somebody prodded up my anus. I don't know what they possibly could have thought I had hidden since I had been completely shackled since the last cavity search. I was then dressed and more or less carried across to another part of the tent where I was questioned by a woman who asked for my details, including my name, date of birth etc. My fingerprints were done, also a DNA mouth swab and photographs taken. I was given a new wristband which had my name and number printed on it'*.

60. Shafiq who describes a similar experience when he was processed (as does Rhuheh) also states that *'when we arrived at Camp X-Ray I was made to squat in the boiling heat outside for about six or seven hours altogether. I became desperate and eventually asked for some water. The soldiers realized I was English and a man from the ERF team (Extreme Reaction Force – see below) came and started kicking me in the back and calling me a traitor. There were dogs present barking nearby. They were very close to me but I couldn't see them. I wasn't allowed to move, if I did I would be kicked. Eventually I was taken in to be processed, I was taken to a tent and my clothes were removed. Each hand was uncuffed in turn to allow them to take my top off and then recuffed. The same happened with my trousers. I was then led to a shower. While I was in the shower, a soldier pressed me firmly against the wall using a riot shield or ERF shield. This meant that I was pressed against the wall with a dribble of water dropping on my head and couldn't wash properly. I also had my goggles on in the shower. After this I was walked naked to another table*

where a cavity search was conducted. This was both painful and humiliating. Having been subjected to the same search before we left Kandahar and having been kept shackled throughout the time we were transported, there can have been no purpose to this search other than to further humiliate or punish us. I was taken, naked, to a woman who processed me as Asif describes. I think this was meant to further humiliate me. When I was questioned by the woman about my details I told her I was British but she wouldn't believe me'.

61. After processing, their clothes were put back on by the guards. Each was walked around the tent at least twice and then photographs were taken. Shafiq states *'I was given a wrist band. This wrist band had a photograph, name, date of birth, height and weight. When I arrived at Guantanamo I was 140lbs, but I was 195lbs when I had left the UK'.*

62. After the photographs and processing had been completed they were told they had to write a letter to their families. They found it almost impossible to write anything because their hands were still cuffed together and they had lost all feeling in them. Shafiq states that *'I think all I managed to write was "I am in American custody". After I had done this the goggles were put back on and I was taken to a cage. At that stage the goggles and shackles were removed'.*

Camp X-Ray

63. After processing they were taken to the cages in Camp X-Ray. They describe the cage as being about 2 meters by 2 meters. There was a gap between the top of the cage (itself made of mesh) and the roof of the structure (made from corrugated iron). Asif states that **'in my cage there were 2 towels, 1 blanket, 1 sheet, 1 small toothbrush, shampoo, soap, flip flops and an insulation mat to sleep on as well as two buckets, one for water and one to use as a toilet (urinal)'**. There were 60 people in each block each of which consisted of 6 groups of 10 cages. Throughout the time that they had been in custody, both in Kandahar and now in Camp X-Ray, they were not allowed to pray. If they tried to pray, the soldiers would deliberately disrupt them.

64. Asif states that **'on the first night after I arrived from Afghanistan at Camp X-Ray I weighed 120 pounds, I am normally 165 pounds. When I was placed in the cage I had the goggles as well as the shackles removed and I thought I was hallucinating. I could just see a series of cages with people wearing orange. Then I also noticed people outside who were veiled. I thought they were women at first. In fact they turned out to be men who were employed to do building work on the camp. It seemed that the people building the camp were mainly Indian and South East Asian. We found out later that they were paid only about one dollar or less per hour and had to work 12 hours per day. They were under the control of the company that had been contracted to build the camp. We weren't supposed to talk to them and in fact they were escorted and guarded by the US Army. Occasionally, however, we managed to exchange some conversation with them in Urdu'**.

65. Asif also sets out the aspects of Camp X-Ray he found most difficult to deal with. He states that, **'I think Shafiq will agree that the restrictions that were placed on us when we were in our cages were probably the worst things we had to endure. By the time Rhuheel arrived things had improved a bit but in the first few weeks, we were not allowed any exercise at all; this meant that all day**

*every day we were stuck in a cage of 2 meters by 2 meters. We were allowed out for 2 minutes a week to have a shower and then returned to the cage. Given the extreme heat, we sweated a lot and the area obviously began to smell. During the day we were forced to sit in the cell (we couldn't lie down) in total silence. We couldn't lean on the wire fence or stand up and walk around the cage. We were fed three times a day, but given very little time to eat the food. The quantity of food we were given was also very little. It is not an exaggeration to say that sometimes we were only allowed about one minute in which to eat our food. This was not too much of a problem if the food was on a plate, but occasionally it would be in packets and we would not be able to open the packet before the food was taken back. At this point, the US marines ran the camp and they were very brutal'. Conditions in Camp X-Ray were very difficult, especially in the first month. The cells were often under direct sunlight for hours on end. Shafiq says '**the way my cell was located I got more sunlight than the others and had to put up with direct sunlight for most of the day**'.*

66. It was extremely hot but they were not allowed to take their tops off. They still had no idea why they were there. In fact for the first 7 days Asif and Shafiq did not know they were in Cuba. They did not know when their ordeal would end. All three say that they simply could not understand what the interrogators wanted from them.

67. Rhuheel says that when he arrived he gradually developed a technique of staring at the wire mesh or at the ground and letting '**my mind go blank**'. The area around Camp X-Ray was lit with very powerful (like football stadium) flood lights. At night, the area was lit up as though it were the middle of the day. The floodlights were used throughout their time at Camp X-Ray. There were also snakes, scorpions and a variety of unusual insects. Rhuheel says that '**I remember that a number of detainees were bitten by scorpions in my block (I was still separate from Asif and Shafiq) and we always had to be on the look out.** (If bitten by a scorpion, flesh had to be dug out from the bitten limb to remove the infection.) Asif says in Camp X-Ray his comfort items had been removed for some reason. They would place removed items outside the cage. When they came to return the items they

lifted my blanket and underneath there was a snake. It was impossible to sleep or get any rest. When they were sleeping, they had to keep their hands outside their blankets. In addition, the noise of the construction work going on (they were extending Camp X-Ray) was such that it would have been impossible to sleep anyway.

68. Another aspect of detention in Camp X-Ray which caused considerable distress was the toilet facilities. In the cages there were two buckets. One was for urinating in and the other was for water. The bucket which was used for a toilet was emptied once a day and the bucket that was for water was filled on average twice a day with a hose pipe brought into the cell block by the guards, but this depended on their discretion. The detainees had to use the water in the bucket to drink, wash and for ablutions. If they wanted to **"do a number 2"**, they had to ask permission from a guard who would shackle them and then escort them to a portaloos outside the blocks. The guards would stand staring at them with the door of the portaloos open and with their hands in shackles as they sat on the toilet. Because of the shackles they were also unable to clean themselves.

69. Shafiq says **'very often the guards would refuse to take us to the portaloos outside and therefore people started to use the buckets in the cells. Many of the people who were detained in Camp X-Ray were ill, often suffering from dysentery or other diseases and simply couldn't wait until the guards decided they would take them to the toilet. I think the guards also knew how importance cleanliness is to Muslims and took a sick pleasure from seeing us degraded like this. The smell in the cell block was terrible and in the early days this was made worse by the fact that we had to sit in the middle of the room, described above, without leaning on the cage, talking, praying or moving around the cage'**.

70. After some time the conditions improved by that they mean that they got slightly more food and could talk to each other – i.e. the restrictions on conversations were slightly relaxed. They could put their hands underneath the blankets when they went

to sleep. The conditions improved slightly after they 'confessed' to allegations put to them during interrogation. They were also given shorts for decency.

71. A complaint all three make is that the orange jump suits they were given as a uniform had a long slit down the side. This meant that when they prayed (if they were allowed) the jump suit would open to reveal their groin area when they bent down. In Islam a man must be covered from his midriff to just above his knees when he prays and so the prisoners took to wearing their towels around their waists when they prayed. This became a source of a lot of conflict with the guards. The detainees were also prevented from calling out the Azzan or call to prayers. Asif says that when people called out the Azzan ***'The Americans would respond by either silencing the person who was doing it, or, more frequently, play loud rock music to drown them out. They would also go into the person's cage and shackle them, leaving them there for 4 or 5 hours'***.

72. They were never given prayer mats and initially they didn't get a Koran. When the Korans were provided, they were kicked and thrown about by the guards and on occasion thrown in the buckets used for the toilets. This kept happening. When it happened it was always said to be an accident but it was a recurrent theme.

73. Eventually the prisoners went on hunger strike because of the way that they were treated and in particular the way their religion was treated (see below).

74. Asif says that ***'it was impossible to pray because initially we did not know the direction to pray, but also given that we couldn't move and the harassment from the guards, it was simply not feasible. The behaviour of the guards towards our religious practices as well as the Koran was also, in my view, designed to cause us as much distress as possible. They would kick the Koran, throw it into the toilet and generally disrespect it. It is clear to me that the conditions in our cells and our general treatment were designed by the officers in charge of the interrogation process to "soften us up"'***.

75. After Asif and Shafiq had spent about a week in Camp X-Ray, the Americans brought along someone they referred to as "the Chaplain". They believe that he was in fact an American Muslim. Asif states ***'he started to read the prayers and I think the idea was that he would be leading us in prayer. In fact, nobody knew what was going on and we were all uncertain as to whether we were allowed to participate. Nobody knew or trusted this individual and as a result he was left to pray on his own. This did not stop the Americans from filming him and suggesting that he was leading regular prayer groups'***.

76. As set out above, after the first month or so, at about the time Rhuhel arrived, things were relaxed to the extent that they managed to speak to some of the Military Police ('MPs'). These MPs told the detainees that their superiors had briefed them before they had arrived. In these briefings, the detainees were described as wild animals. As Asif says, ***'they were told that we would kill them with our toothbrushes at the first opportunity, that we were all members of Al-Qaeda and that we had killed women and children indiscriminately'***. This obviously affected the way they treated the prisoners.

77. Rhuhel was in a different block from the other two in Camp X-Ray. After processing he was put in his cage but taken out 20 minutes later. He had a full medical, was stripped naked in front of a woman and blood was taken from him. He was then put back in his cell. He says that ***'you could move around but couldn't speak. After about 5 days I was allowed to talk to my neighbours but they were all Arabs and I did not understand what they were saying'***.



Interrogations

78. The first interrogation at Camp X-Ray didn't take place until the second or third day after they arrived.

79. The first interrogations for Asif and Shafiq took place in a tent. By the time Rhuheel arrived they had built some booths (see below). Shafiq says **'In the tent, there was somebody who introduced himself as being from the British Embassy in Washington and a civilian from MI5. There was also an American soldier behind the table. There were at least 7 or 8 others standing in the tent behind me, but I was not allowed to look back. I was put in a chair with an armed soldier nearby. I was asked my name, address and family details. I was also asked for my phone number and other information about my family. The MI5 officers told me, in no uncertain terms, that if I did not cooperate they could make life very difficult for me. They kept insisting that I tell them I had gone to Afghanistan for "jihad". They told me that if I agreed to this, then I could go back to England.'**

80. During the first several weeks the American interrogations with all three consisted of pressing them to **'just say you're a fighter'**. Asif was told **'if you just say you're a fighter, because of the Geneva Convention when the war is over you'll get sent back to England'**. Rhuheel was told **'just say you're a fighter and you'll go home'**. He was told **'you've come to kill American and British soldiers, coalition forces'**. They talked about **'allied forces'**. They referred to the Northern Alliance as being the same as **'allied forces'**.

81. Asif comments **"we were aware that the first thing that appeared in our American files was something like 'I went to Afghanistan to kill American and British and allied soldiers'. We never signed anything but the interrogators had us one way or another after some weeks of interrogation agreeing to this. We did not all of us say we did."** In Asif's case he eventually just nodded.

82. Asif describes the way that the interrogation would go. He was accused of meeting Mullah Omar, and money laundering for Bin Laden in England. He was given what

they called the 'big fish chart' with Osama Bin Laden at the top, money launderers who seemed to be in the middle, and at the bottom was 'fighters', so "I was led to think that the best thing to admit to was to being a fighter. The trouble is once you admitted you were a fighter they then wanted to get you up to the next stage up the chart. So even if you said that you were a fighter to get them off your back, that wouldn't stop them. They would still continue. They just want you to say something and once they've got you to say something they then keep pressing for something else. So you think that you're in the end saying something that will stop them but it just encourages them if you do."

83. The series of questions asked in the early stages of captivity would be asking your whole life story and would last at least four hours each, hours and hours and hours. We were very tired. We were dehydrated. We had very little food and we were already completely exhausted from the whole experience in Afghanistan. One day in the heat of Cuba knocks you out anyway. We were completely unused to the heat. You came out from the slight shelter of your cell into the full scale Cuban heat which was even worse. There was a bit of a roof over your cell providing some shelter but it was pointless as the sun would hit directly at different times of day and if there was rain the rain would hit you too. When you came out of that to interrogation then the full heat of the sun would hit you. The interrogation tent in those early stages didn't have air conditioning."

84. The first interview Asif and Shafiq had was with English officials (Ruhel's first interview was with an American). In all their interviews the interrogator kept saying 'just say you are a fighter'. Eventually all three said 'yes, I was a fighter' one way or another to the US interrogators. They couldn't take any more.

85. Shafiq says 'I was interviewed by MIA at least twice when I was in Camp X-Ray. After about 2 or 3 weeks in Camp X-Ray, I was also interviewed by US forces interrogators. This time, I was interviewed in a booth. I continued to be interviewed in these booths until I left. The Americans kept insisting that I say I knew Mullah Omar. I began to realize that in each interview they wanted me

to admit to something more serious until they forced me to say I was in Al-Qaeda. This was not true and I started to refuse to agree with the interrogator, but I was desperate to get out and eventually I just accepted things they put to me.

86. Rhuheel was interrogated by Americans on the second day he arrived. His interrogation was similar to Asif and Shafiq. On the third day he was seen by MI5. He told them the same thing he had said in Kandahar. They came on the next day and insisted he say he was a fighter. He refused to say he was a fighter or that he had gone for "jihad" to MI5.
87. After this interrogation he was not spoken to for 4 or 5 months. In Camp X-Ray the only people around him were Arabs. He did not speak Arabic and couldn't communicate. On describing the conditions Rhuheel says '***I couldn't talk to the guys in my cell block so I would just sit there staring at the wires all day. This went on for 5 months. I used to try and speak to the guards but they wouldn't speak to me. I felt totally isolated.***'



Interrogations at Camp X-Ray (generally)

88. In the interrogation booths, used after the tent, there was a table in the middle, often screwed to the floor. There was also a chair on which the detainees were ordered to sit and in front of this chair there was a metal hoop screwed into the ground. When they were walked into the interrogation room, they had to sit down and then their leg shackles were in turn attached to this hoop using a huge padlock. This is described as being 'long shackled'.

89. Asif says ***'I should explain that in the early days, we had to go from the cages to the interrogation booths on foot which was extremely difficult as we had to shuffle along, constantly being pushed and harassed by the guards, wearing the leg irons. This made it very difficult to walk and the leg irons would cut into our ankles. After a while, they began to introduce trolleys which I think have been seen in photographs. Many months later, they introduced golf carts and we would be loaded onto the cart and driven to the interrogation booth'***.

90. As described earlier in the interviews, they would be told that the interrogators had information that each of the detainees had met people like Mullah Omar. Shafiq says, ***that in my case they told me they found my personnel file in a cave in Afghanistan and that it was clear I was linked to Al-Qaeda. This is ridiculous, but they insisted that I accept this. The interrogators would keep saying "tell us you're a fighter, tell us you're a fighter". This would go on for hours on end'***. Asif and Rhuhel describe similar interrogations.

91. In Camp X-Ray whenever they were interrogated, they were never given any notice. The process was that an escort team of usually 2 or 3 military police officers would arrive at the cages. They would be carrying chains and it would be obvious at this point that somebody was going for interrogation. When they would reach the cage of the particular detainee they wanted to speak to, he was told he was going to "reservation" which was the term they used for interrogation.



SOFTENING THE DETAINEE FOR INTERROGATION - X RAY

© 2001

92. Shafiq says *'the guard came to the cage, told me to go to the back of the cage, put my hands behind my head with my fingers interlocking, face away from the entrance and kneel down. I was then shackled in a three piece shackle which basically meant my hands were tied, in front of me, and then attached to a belt which went round my waist. The chain of the leg irons I had around my ankles was about a foot in length which meant that I could not walk properly but rather I had to shuffle. If I was forced to move quickly as sometimes the guards would push or shove us, the metal restraints of the leg irons around my ankle would dig in and cut the skin around my ankles. This was how I was taken to my first interrogation, but things changed slightly (see below) when they built the booths'*.

93. All three report that the leg shackles would cut their ankles. Before they set off to the interrogation block they would be frisked, usually done very aggressively. As they were led off to the interrogation block, they had to have their heads down (almost bent double) and shuffle to the interrogation room with an MP on each side and one behind. They would insist on putting the shackles on their skin and not over their trousers which would have given them some protection from the sharp edges of the shackles and the scraping. Asif says *'one thing that always stuck with me was that the handcuffs had "made in England" written on them'*. Eventually, in Camp Delta, after almost one year, the authorities agreed to put the shackles over the detainees' trousers which restricted them in the way they wanted, but did not cut into their ankles.

94. Shafiq says that in the early days before they introduced the trolleys (and later the golf carts) *'the MPs would compete to see who could get their detainee to the interrogation booths the fastest. They would push, pull and try to force us to go as fast as possible. If you tripped, (which was very likely given that the leg irons were tight and it was impossible to move your feet properly) they would assume you were trying to escape and force you to the ground jumping on top of you. Often detainees were kicked and punched when this happened. The suggestion that somebody could try and escape in these circumstances is ridiculous and I believe it was an additional part of the process of "softening us up" for interrogation'*.



95. As set out above, in Camp X-Ray, the tents that they used for interrogation in the first few days were replaced by booths. These were a long way from the cages (at least 300 meters). They had to cover the whole distance in the manner described above.
96. When they got to the booths the MP would announce that they had arrived over the radio. They would refer to the detainees as "packages" rather than by their names or numbers. Shafiq says ***'we were then taken into the interrogation block with an armed escort. We were led into the room whilst the armed officer (usually armed with a rifle or a shot gun) stood outside the door. In the booths we were searched again and then sat down on a chair. The MPs would then padlock us to a hook which was attached to the floor (see above).'***
97. They were usually left in the room waiting for an interrogator to turn up. Sometimes the interrogator was already there but other times they would be made to wait for up to 3 hours. Shafiq says ***'I would like to think there was some purpose to these silly games, however it is equally likely that it was simply incompetence. Whilst we waited in the booths, there was a guard who stayed there throughout. He was not armed but he was told not to talk to us. The guard would just stand there staring at us. When the interrogator came into the room, the guard would remain'***.
98. The interrogators very rarely introduced themselves. Occasionally they lied about the organization they worked for and all three men believe the names they gave were almost always false. This misinformation was quite common. As an example, on one occasion Rhuhel told an investigator that one of her colleagues from the FBI had kept him in the interrogation room for 18 hours (this was in Camp Delta). He described the interrogator. The person to whom he was complaining told him that he knew the woman and that she was not from the FBI but from Military Intelligence.
99. In relation to the interrogators, they generally changed. It was very rare to have the same interrogator on a regular basis. Shafiq says ***'I only ever saw the same interrogator on three occasions at the most'***.

100. The organizations that were involved in the interrogations included the CIA, FBI, DOD, MI5, NCI (Navy Crime Investigators), NSA, Army CID.

101. When the interrogators came into the room, they did not always have files with them. It varied however and occasionally they would have notebooks or other statements with them. In Camp X-Ray they usually came in without files. Rhuhel says that ***'I am fairly certain that the information about us was not shared by the different organizations and often they would attend and ask the same questions time and again. As an example, I don't think they had received any information about us from our interrogations in Kandahar'.***

102. Each interrogation started right from the beginning. The first question was always "do you speak English" which was an absurdity since knowledge of the detainees and who they were was the presumed starting point for interrogation. On occasion the interrogators even brought in a translator because they simply had no idea whether they spoke English or not. They would then proceed to ask them their name, date of birth and detailed questions about their background.

103. Rhuhel says that ***'all the interrogators seemed to know was that I had been detained in Afghanistan and transferred to Guantanamo from Kandahar. After they had obtained my background details, they would start to ask me what I was doing in Afghanistan. My experiences with the second interrogation in Camp X-Ray were very similar to Asif's. They kept asking me whether I was a fighter or not. I eventually told them I was because they kept promising to send me back to England or put me in front of a tribunal'.***

104. The interrogation system was based on written statements. It was made clear to the detainees that whatever was set down on the statement was the official version of events in the interrogation room. All three report knowing of many examples where prisoners became involved in arguments with the interrogator or refused to cooperate and in turn the interrogator would write lies in the statements and the

detainee would spend months being questioned based on his alleged "admissions" which were nothing other than malicious accounts inserted by the interrogator. There was no system of redress and no way of challenging this behaviour. The same would apply if the detainee had an argument with an interpreter. Asif says *'there was one detainee who spoke English and Arabic. The interpreter wrongly translated something he said and he interrupted to say 'no I never said that'. The interrogation continued in English but those detainees who couldn't correct the interpreter often found they were supposed to have said things they never had. Many of the detainees decided to try to learn English because the interpreters could not be relied upon'*.

105. To illustrate the power of the guards, Asif gives an example of an incident that took place when Rhuhel, Shafiq and he were in isolation because of the "Bin Laden video" (see below). Asif states *'on one occasion there was a change over in the units who were guarding us. The captain who had been in charge of the block came to introduce his replacement to the block and to the detainees in isolation (see below). I was talking to them when further down the isolation block an inmate spat on one of the guards. Obviously I did not do it and I had two captains to witness this, but the sergeant who had been spat on hated me so much that in his statement he said that I did it. The captain knew this was false because every move that we made was monitored, timed and our conversations listened to, but also he knew it was false because he was with me at the time of the incident. One of the senior officers decided that I was to be punished for this so I remember very clearly that the captain went to speak to a major to tell him that the sergeant's statement was not true. The major apparently said that the allegation had been written up and therefore because it was in a sworn statement it must stand and I had to do my punishment. As a result of this I was sent to another part of the camp for a week and lost all my comfort items'*.

106. All three were told in their interrogations that if they accepted they were a fighter they would be sent back to England very soon. Asif says that *'in Camp X-Ray, I was interrogated 4 times by MI5 and 5 times by the Americans over 3 months.*

~~All the interrogations seemed to cover the same ground. I thought this must~~
~~mean that they had run out of questions or were not reading the results of my~~
~~previous interrogations. As with others, I started to confess to everything and~~
~~agreed to anything they put to me. I remember that at one point after this~~
~~General Lenhart came up to us in the cages and said that we would be going~~
~~home soon'.~~

107. It was very clear to all three that their conditions were being carefully monitored and controlled by the interrogation/intelligence officers.

Interrogations by MI5

108. Asif says that he had a number of interrogations by MI5 officials in Camp X-Ray (see above). He states that ***'in my first interview with the MI5 official, I was also told that I should say that I had gone to Afghanistan for "jihad". He said that I did not need to say I'd been a fighter because there are lots of ways that one can do jihad. This interrogation is the first one that took place in a tent. It lasted about 6 to 8 hours'.***

109. The MI5 interrogators changed over the time that the men were in Guantanamo. The first one who interviewed Asif however came back at least a couple of times. They nicknamed him "rat face" but believe his name was Chris. Shafiq was also interrogated by this man. At the first interview with him he insisted that Shafiq admit he had gone for "jihad" and when he refused to admit this, on leaving the room, he said that it was not looking good for Shafiq and that he would stay in Guantanamo for the rest of his life. He was supported in this by an official from the UK Embassy in Washington (see above).

110. It was only in his third interview that Asif was interrogated by an American.

Protest at Camp X-Ray

111. After some months, there was a slight alteration of conditions at Camp X-Ray so that it was possible for the first time to sleep at night. At the discretion of the soldiers (based on the standard operating procedures) they were allowed, once a week, to walk in a small recreation yard for about 5 minutes. Because of the acute lack of space in their cages and the fact that they were not allowed to move or walk around in their cages their legs would often suffer cramps and pains.
112. After their initial processing, on arrival at Camp X-Ray, there were no further cavity searches (though they would be frisked before each interview). All three men however witnessed other prisoners being stripped of their clothes and being humiliated. This was done in full view of all those on the block and not only humiliated the prisoner involved but caused deep resentment in the others in sight.
113. Rhuhel says that one protest in Camp X-Ray started in his block. He says ***'I saw a guard walk into a detainee's cell, search through the Koran and drop it on the floor. The detainee told him to pick it up and put it into its holder. I remember the guard looked at the Koran on the floor and said 'this' and then kicked it. Every one started shouting and banging the doors. The guard ran out of the cell and the entire camp was on lock down for half a day. On that day there was a hunger strike for three days. I did not join in. I was very isolated and did not really know what the other detainees were talking about'***.
114. About one week later whilst Asif was in interrogation there was an incident in the block he shared with Shafiq. Asif says, ***'I cannot remember the date; however, about a week before the incident I describe, a guard in Rhuhel's block kicked the Koran. This happened often in the early days, and we were eventually promised it would not happen again. When this guard kicked the Koran, people were extremely upset and went on a short hunger strike. In our block, one of the detainees who had wrapped a towel around his waist to pray (our jump suits would open at the side when we prayed which is contrary to Islam,***

in that we are required to be covered when we pray) and an MP told the detainee, who's name was Qureshi from Saudi Arabia (his photo is on the cageprisoner's website), to remove the towel. Qureshi was in the middle of his prayer and ignored them. The MP then opened his cage, which was a breach of the rules, and when Qureshi still wouldn't stop his prayers, the MP punched him violently to the face, knocking him to the ground and then kicked him. The MP's colleagues then removed Qureshi's comfort items as well as the towel. I did not see the incident itself but found out about when I got back from interrogation'. Shafiq says 'I saw the incident happen about 10 to 15 meters away from me. I clearly saw the MP punch him, knock him to the ground and beat him violently'.

115. This incident led to another hunger strike. The detainees had not been allowed to give the prayer call or Azzan, to pray properly, to have prayer mats or to practice their religion. As a result of what happened to Mr Qureshi someone shouted out that they should stop cooperating. (The whole camp went on hunger strike although Asif, Shafiq and Rhuhel did not participate.) The second day of the protest was filmed as people threw their comfort items out of their cells as a result of yet another incident.

116. Asif says that *'to be clear, the food was very limited and insufficient. When they brought the food during the hunger strike, I would eat the food that had been assigned to the other prisoners as well as my own. The hunger strike lasted for up to a month and in some cases detainees continued for 6 to 8 weeks. I think there were others who went longer. I remember clearly that people started to suffer with stomach and bowel problems. On the other hand I put on 25 pounds. This was the only time I put back any weight and that was because I was so desperate I was eating many people's rations. I did not participate because I do not believe in a hunger strike'.*

117. The detainees had also agreed not to speak at their next interrogation. In Asif's case this was to be his fourth interrogation. He explains that despite this he was put under considerable pressure so took the opportunity to set out some of their

grievances. He says 'we had all agreed not to speak at our next interrogation as part of the protest. My next interrogation was a day or two later and when I was taken into the interrogation room I refused to talk to them. This interrogation was with an MI5 man who was questioning me together with an American. I continued to refuse to talk to them until the MI5 man said that this was nothing to do with the British and that it was an American matter.

118. At this the FBI man left the room and the MI5 official continued to question me but I still wouldn't answer. Shortly after this an Embassy official came in. This was a different one to the person who had questioned me in the tent a few weeks earlier. He said that he was not from the intelligence services but he was from the Embassy. He said that I should talk to him and he could do something about our grievances. I continued to stay silent and then he showed me letters that he said were from my family and that I would only get them if I cooperated. I was desperate to get some letters from my family so I started to speak. During the course of my discussions with him, he also took my picture without my permission but he said that it was for my family. They never received any pictures. I gave this official a long list of grievances which I know he noted down. Usually when we would give a list of grievances to Embassy officials they would never bother to write it down but I remember this clearly that he wrote down everything I said. I mentioned that I was upset about the following:

- 1. Medical – I said that I together with others were suffering with infections on our ankles as a result of the scraping by the shackles. The officials would tell us that we simply needed to wash our ankles with soap and water, but this was impossible as we only had a one minute shower per week. Often, when we were in the shower, we had barely put the soap on when they would turn the water off and take us away.*
- 2. In relation to the showers I also complained that they would usually lead us to and from the showers naked and wouldn't even let us wear a towel around us.*
- 3. I also complained about the quality and quantity of the food, the lack of any religious rights and I asked for them to respect our religion. I*

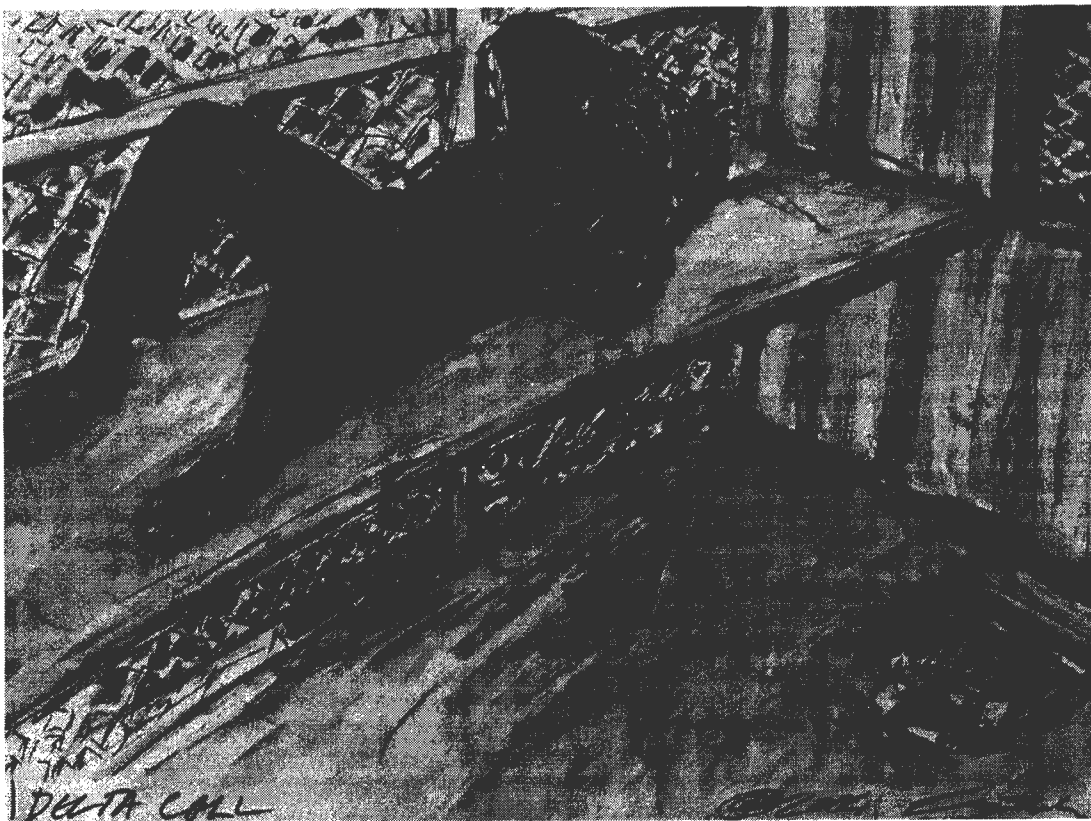
complained about the flood lights and the constant lack of sleep. My complaints ran to some two pages but despite this nothing changed.

119. *After two weeks of the hunger strike, General Lenhart came into the blocks, took his cap off and pleaded with the detainees to eat. They also started to improve the conditions. Gradually, as more and more people stopped the hunger strike, we got more food, we were allowed to wear shorts and we could keep our towels on as we went for a shower. The guards were also told not to disturb us when we were praying (though they continued to do this anyway) and we were also allowed, for the first time, to talk more freely to the person in the cage next to us'.*
120. *Shafiq says of the others in his block (which he shared with Asif), 'In my block, which was Bravo block at Camp X-Ray, there were other English speaking detainees including David Hicks, four French detainees, and Feroz Abbasi. I remember Feroz was getting a very hard time and he was interrogated more regularly than the rest of us. They also treated David Hicks in a very aggressive way. From my recollection, Feroz was a very quiet individual and as with most people he wouldn't describe what was happening to him. David Hicks and us three (when we were together) would always talk about our interrogations and I remember that David Hicks told me the interrogators had promised to get him prostitutes if he agreed to work with them'.*
121. *Asif also says of the general conditions, 'we were also aware, in Camp X-Ray and later in Delta, that we were being listened to and our conversations were being recorded. On the question of observation I wish to add that being under constant observation was an additional stress. We would all joke about it and sometimes make things up in order to irritate those listening. I know that the intelligence officers disregarded most of this material but it was all brought up again and put to us when the video incident took place (see below). The observations conducted were not just in relation to what we were saying, but everything we did. They would look to see if we stared at women MPs or looked down when they walked passed. They looked to see if we used*

particular comfort items more regularly than others or had any habits that they could clearly identify. As an example, if we were suffering because of the small portions, they would identify this as a weakness or alternatively if we required medical help, this would depend on our cooperation in interview. In my view it was clear that they were identifying weaknesses upon which they could play for the purposes of interrogation'.

122. All three men spoke freely to the women guards and MP's without any problems but many others would not do this. These individuals would then be interrogated by provocatively dressed women interrogators. Shafiq says that *'In my case they knew I hated isolation and this was the reason they used it as the main means of punishing me'*. Asif and Rhuheel both say they found sleep deprivation was the main strategy used against them.

123. Rhuheel says *'I have problems with my eyes and need special lenses to correct my vision. If untreated this condition can cause permanent damage, I would get severe headaches because it would strain my eyes to read the Koran. After one and a half years I got the lenses but it was considered a comfort item which they would threaten to take unless I co-operated. In any case they never gave me the solution I needed for the lenses so it was pointless'*. (Rhuheel's eyesight is now permanently severely damaged as a result.)



Camp Delta – Conditions

124. After Camp X-Ray all three were transferred to Camp Delta about May 2002.

The conditions in Camp Delta were more permanent than those in Camp X-Ray. The cells were made out of large shipping containers. The sides at either end had been removed as had the front. Inside each container they had constructed 6 mesh cages. The back wall, the floor and the roof were from the metal container but the side walls and the front were made of mesh. In the back wall there was cut out a square to act as a window, but this also had thick mesh across it.

125. Shafiq says that *'one of the effects of these mesh cages that I was surprised to discover was that looking through them 24 hours a day for weeks on end was causing damage to my eye sight. It became difficult to focus on things and when I was taken out of the cage either for a shower or interrogation, it would take me some time to adjust my vision'*.

126. A continuing problem was lack of privacy.

127. The conditions were inappropriate. When it rained, rain would come into the cage. It was also very humid and hot in Camp Delta which was made worse by the fact that they were in a metal container. The heat could become unbearable during the days and at night it was extremely cold. The detainees were never given any extra blankets despite the cold.

128. The detainees were transferred to Delta on a bus in the same way they were taken to Camp X-Ray. When they arrived in Delta, the interrogators and guards started using the idea of "comfort items" ("CI's") more often. Comfort items included almost anything that was not screwed or welded down in the cages. Ordinary items such as blankets, towels, face cloths, toothbrushes, toothpaste and even regulation single Styrofoam cups were considered "comfort items". They were removed at the discretion of the interrogators or the guards depending on the standard of behaviour and the extent of co-operation. Comfort items were also used as part of a "carrot and stick" approach to their interrogation. If they cooperated, they were given or

allowed to retain certain items. If they were perceived not to be cooperating, items were taken away.

129. Delta was placed very close to the sea and as such, the salt air would cause the containers to rust. This meant that there was constant reconstruction work and therefore large electric generators were running 24 hours a day. This made it difficult to sleep. There was also constant noise from the 48 or so other men all detained in the same "block". An unusual, but foreseeable problem that emerged in Delta was that the cages and the entire area around the containers were infested with rats. These were huge "banana" rats which would climb over the containers or around the cages. Every morning, the men would wake up to find rat droppings on their blankets or on the floor. There were also snakes in Delta but less than Camp X-Ray.

130. *In normal circumstances such conditions would be difficult to endure. In Guantanamo Bay however we were deliberately kept hungry the whole time. We were constantly in a state of anxiety about our future and totally at the mercy of the guards'.*

131. All three men say that they believe the conditions were designed specifically to assist the interrogators. They were able, with great precision, to control the behaviour of the detainees depending on the type of answers or the level of cooperation they believed they were getting. The interrogators had already made up their mind as to what they wanted and it often became a question of trying to gauge what they wanted to hear and give the right answer.

132. Those detainees who did not cooperate with them, despite the loss of comfort items and recreation (recreation was considered a comfort item and even the five minutes exercise a week could be removed if they thought you weren't cooperating) were taken to another camp altogether and detained in total isolation (see below).

133. Shafiq comments *"while we were in Guantanamo each of us was interrogated for hundreds and hundreds of hours by the Americans. The same questions were repeated over and over and over again.*
134. *During the whole time that we were in Guantanamo, we were at a high level of fear. When we first got there the level was sky-high. At the beginning we were terrified that we might be killed at any minute. The guards would say to us 'we could kill you at any time'. They would say 'the world doesn't know you're here, nobody knows you're here, all they know is that you're missing and we could kill you and no one would know'.*
135. *After time passed, that level of fear came down somewhat but never vanished. It was always there. We were in a situation where there was no one we could complain to and not only could they do anything to any of us but we could see them doing it to other detainees. All the time we thought that we would never get out. Most especially if we were in isolation there would be a constant fear of what was happening and what was going to happen. If it hadn't been for the Arabs knowing by the position of the sun when to pray, we wouldn't have known even that. We didn't know the time. We know the dates we do know because we counted for ourselves and some soldiers would tell us enough to let us slightly keep track, otherwise there was no way and there was never meant to be any way. Sometimes the prayer call would be played five times a day, but then it would be stopped again.*
136. *We were deliberately kept in a state of enforced boredom which increases the despair. After a year one day they came with boxes of books all in English. They were given out to people including those who couldn't speak English. We each got something to read. It seemed to be completely accidental what we got given. We read and reread our first book, as many as ten times each."*
[Shafiq was given a book called 'Killing Time' about Americans going to Afghanistan to wipe out the Taliban regime. Rhuheel got 'Planet of the Apes'.] *"There were a limited number of books. You soon had read all. In 2003, the books that we were given started to have a large amount of the contents torn out – for*

instance novels would have large chunks ripped out but we would still read them because we were so desperate for something to distract ourselves. The Red Cross told us that they had brought 2000 books but they had mysteriously disappeared and never got to the detainees."

137. *"We were also told that the Red Cross had brought a large number of language books. For instance, people were interested to learn Arabic or English, etc. We briefly had access to them and then they were taken away again and we never saw them again."* Shafiq recollects them saying *"you're not here to learn anything, you're a prisoner, you're here to be punished"*.

138. Although in Delta the cages had a sink, with running water and a toilet (squat toilet) with a flush, (Shafiq says that *'to go to the toilet we would put up a blanket, though some MPs would, in the early days, insist on taking these down'*), the cells were smaller than those at Camp X-Ray mainly because there was a bunk/bed welded to the floor of the container from which the cell block had been created. This restricted the space. Shafiq still suffers from pain in his back, legs and knees as a result of the cramped space and lack of exercise (15 minutes twice a week).

139. (In the first few months, they were allowed a one minute shower per week. Later this increased to 5 minutes per week and after 7 or 8 months in Delta, they were allowed 2 showers a week. This was still not enough because as a result of the heat and the humidity they would be constantly sweating and feel dirty. Most of the people in the cell blocks grew their beards, but if they shaved they were allowed a razor for 2 or 3 minutes once a week and then had to hand it back.)

140. When Rhuheel arrived at Delta he went to isolation straight away. He was never told why. He had not done anything wrong and believes the move was at the direction of intelligence officers. He stayed in isolation for about one month.

141. After he was taken out of isolation Rhuheel was taken to one of the blocks. He was put in a cage next to Martin Mubanga, another British detainee. Asif and Shafiq

were in the same block as David Hicks, Feroz Abbasi and Jamal Hareeth. The only person, close enough for Rhuheel to speak to though was Martin. Rhuheel says ***'Martin and I would talk about things in the UK, football, boxing and our interrogations. He was very quiet'.***

142. During this time they were interrogating Rhuheel every Sunday. They asked the same questions over and over again. This continued for 6 months. The interrogators were mostly American though MI5 officers came on one occasion. He always maintained the same account to his interrogators. They also started to show photographs of people from the UK (people he did not know).

143. (It was very clear to all three that MI5 was content to benefit from the effect of the isolation, sleep deprivation and other forms of acutely painful and degrading treatment including 'short shackling' (see below). There was never any suggestion on the part of the British interrogators that this treatment was wrong or that they would modify their interrogation techniques to take this into account or the long-term consequences of isolation, humiliation and despair. All three men express considerable anger at the fact that the MI5 agents were content and in fact quite happy that they were long shackled and attached to a hook through-out their interrogations.)

144. The quality of the questioning was extraordinarily low. Each was asked repeatedly for names and details of all of his relatives in England, in Pakistan or Bangladesh or other countries where their families had a connection (in the case of Asif his father was born in Kenya which led to questioning about bombings in Kenya in 1998). He was also asked about the 'Cole'. He did not know what the 'Cole' was (a ship in the Yemen that had been attacked). It was they who told him about these events.

145. After 6 months Rhuheel was moved to the cell opposite Shafiq. Asif had been taken to isolation over the incident with the food (see below). (He stayed there for about one month). This was the first time Rhuheel had seen Shafiq since Kandahar.

146. After about a month, Shafiq and Rhuheel were moved to Camp 2 together.

Rhuheel was then not interviewed for the next 6 or 7 months. They were there for about one month and then Shafiq was moved back next to Asif. Rhuheel stayed in the new block in Camp 2 for about another month. Again there was no one to speak to. They were all French speakers, but there were also many prisoners from Uzbekistan. After this Rhuheel was moved back to the same block as the other two. Within a week he was moved to isolation. Rhuheel says ***'I complained about the food. The portions were less than normal and this was seen as a disciplinary offence. I was not ERF'd but was taken in shackles to isolation where I stayed for one week'***.

147. After this he was moved back opposite Shafiq and Asif. He was then moved to another block for a night and then a third block where he stayed for about 3 months. There were mainly Arabs and Afghanis in the third block but by then he had learnt Arabic so he could communicate. After some 3 months he went back to the same block as Shafiq and Asif but within a week he was moved to isolation. Rhuheel says ***'I was in my cage singing a song but this was again seen as a disciplinary offence. The song I was singing was an American rap song with some abusive words in it. One of the female guards took offence and I was sent to isolation. This is an example of how difficult it is to get by without there being any clear rules because singing by itself was not necessarily an offence. I stayed in isolation for one week and then moved back next to Asif. We stayed there for a few months. At this point I was on tier two, but I was still not getting interrogated, unlike the other two'***.

148. (Rhuheel's next move was following the 'discovery' of the video and his 8 hour interrogation (see below). He had started to be interrogated for a few times by Steve but was handed over to "Sarah".)

149. Asif was also moved on occasion to isolation. He says that ***'after about one month at Camp Delta, I was moved to isolation as a punishment. The reason for this punishment was that I'd been making fun of a military policeman. As a result of my jokes, I was told that I'd be given less food. When the next meal***

time came around I was given such little food that it was ridiculous. I agreed with one or two others that we would not condone this treatment by eating the food, and therefore when they came to collect the paper plate, I ripped mine up and threw it out of the cell. The guards then said that they wanted to search me and therefore I had to put my hands through the cage in the regulation fashion so that they could be chained. I refused to do this as well. I was lucky that the guards did not rely on the ERF team but I was told to leave the cell and accompany the guards. I was shackled as usual but because I was cooperating they did not rely on the ERF team. I was taken from my cage to isolation. On another occasion I scratched 'have a nice day' on my Styrofoam cup and this was seen as a disciplinary offence for which I spent another week in isolation'.

150. After this second period of isolation Asif was moved to a block which housed only Chinese speaking detainees. Given that every move was observed, recorded and monitored he takes the view that was a deliberate move to 'break him'. He also believes that the British were complicit in this decision because he explains that shortly before, he had been taken to be interrogated by two officials from MI5 (including 'rat face' – see above). There was also an Embassy official present. He says that the guards who came to take him to this interrogation were extremely aggressive and as they secured him to place the shackles on his hands one of them put such pressure on Asif's neck that he was in terrible pain. When he got to the interview he refused to speak to the interrogators. The Embassy official on this occasion suddenly started acting as a third interrogator which upset Asif even more. He told them that he had been promised for months that if he co-operated with them he could go home but they had done nothing for him. He had sworn at them and refused to identify people in photographs they put in front of him which they said were of people from Tipton.

151. The move to the block with the Chinese (possibly Uighurs) was very difficult for Asif. There was no-one to talk to. As a result he explains, *'I started to suffer what I believe was a break down. I couldn't take it any more. I asked to speak to a psychologist but all they said was that I should be given Prozac which I didn't*

want to have. The other prisoners who had this were just like zombies and put on loads of weight. I was having flash backs and nightmares about the containers and couldn't sleep at night. I was in this block for 3 months. While I was there I was interrogated three times. I kept telling the interrogator that I was about to crack up and I'm sure it was obvious that I was in a bad way. All he would say to me was that I should 'behave on the blocks' which made it clear to me that they had thought carefully about the best way to punish me and break me and decided that as I am quite sociable and like talking I should be kept with people I couldn't communicate with. I began to behave in the way they wanted. I would not make jokes in the interrogation and just answered their questions. At the end of my third interview the interrogator told me to 'hang in there' because he could see how distressed I was. I was moved from the Chinese block three weeks later'.

152. Recreation in Delta was compulsory. Initially this was quite restricted, but eventually the regime was 15 minutes of exercise/recreation twice a week. If a detainee did not go to recreation at his allotted slot, the ERF would come and take him. Shafiq says *'you had to attend even if you were ill. We did look forward, occasionally, to recreation, because it was an opportunity to stretch our legs; however the exercise had to be done alone in a small yard watched over by the guards. Initially we had to wear shackles but they eventually let us walk freely. The problem with recreation was that whenever it was your time to come to the yard you had to leave immediately. Even if you were in the middle of your prayers they would give you at the most one minute to finish and then drag you out. This was the same with the showers'.*

153. Asif says, *'returning to the question of the monitoring and observation, I should say that when we moved to Delta, a short time later, we found out that all the cages had been bugged. One of the detainees accidentally broke a tap by the sink and a microphone literally fell out. In Delta, you could talk to the people next to you without much difficulty, or opposite you but you couldn't shout or yell further down the block. This made things a little easier because we could share experiences and talk fairly openly (notwithstanding the bugs)'.*

Explanation for Detention

154. Shafiq says *'as far as I know, none of us were ever told why we were in Cuba other than we had been detained in Afghanistan. Of course we were told that they considered us "unlawful combatants" but whenever any of us asked what this meant they refused to give us a definition'*. Asif says that *'I was told it is easy to get to Cuba but hard to get out'*.

155. As set out above, there was never any redress when they were mistreated or rules were broken. Throughout their time none of the men ever heard of any procedure or rules, guidebook or structural process for complaining. The Americans operated according to their 'standard operating procedures' (which also governs their operations on bases in the UK but is so secret prosecutors in English Courts and the police are not allowed to see it) but no one was allowed to see these or become aware of the details other than from experience. They were never told how they could progress through the system (or indeed what the system was). They found out, through discussions with others and their own experiences, that the interrogators were applying a four tier system that was based on a degree of cooperation from a particular detainee.

156. In this system level or tier four was considered the worst. Such detainees were often removed (as set out above) and placed in a separate camp. This was called Camp Echo (see below). Level or tier one denoted the highest degree of cooperation. As far as the men understood it, many of the detainees were admitting to almost any of the allegations put to them simply to alleviate the harsh conditions. Asif says that *'in my case I admitted to many things in an attempt to get home and to have an easier time whilst I was in Cuba'*.

157. Shafiq says, *'I was moved from Camp X-Ray to Camp Delta at around the beginning of May 2002. Throughout my time at Guantanamo I had never been placed in isolation. Towards the end of December 2002 a new system was introduced, although we weren't aware of it as a system as such whereby*

detainees would be placed on different levels or tiers depending on their level of co-operation and their behaviour in the camp. At the beginning I was placed on Level 2, the second highest level. This meant that I had all the so called comfort items, including toothpaste, soap, cups etc. The only better position to be would have been Level 1 where you were also given a bottle of water. Apart from the time when I was questioned about a video I remained on tier two until after the video incident when I went to tier one'.

158. Despite this, different people were still placed on different tiers for no apparent reason. Many people took the view that some of those being given tier one status were simply getting it as part of an attempt to suggest that they were informers or to try and encourage people to believe that they were cooperating where as in fact they weren't.

(Re the 'level that you were placed on)

159. *"It wasn't always possible to know why you were on the level you were on.*

So far as there seemed to be a rational explanation, in relation to the 'intel blocks', ie a block where the interrogators put you, these are blocks where the people placed in them are people the interrogators think have special knowledge. They might be people who are cooperating or who are not cooperating but they've been put there because they're of interest to the interrogators. We were on 'intel' blocks all the time. The military police told us that if you looked in the computer at our files it would say 'high priority' on them and that no one else in the camp had that, but we've no idea why that was. It apparently was only there for the last year and we wonder now if it could have been because of our Court case in America although we did not know anything about that at the time or we knew nothing about that except for what one guard once let slip to us."

160. The authorities in Guantanamo have absolute power over the detainees. They are not accountable to anybody and there is, as far as the men can see, no control on their behaviour. Shafiq says that *'when you are detained in those conditions, you are entirely powerless and have no way of having your voice heard. This has led me and many others to "cooperate" and say or do anything to get away'.*

161. *"It is clear to us that the military police were not free to make individual decisions at all and that ... We had the impression that at the beginning things were not carefully planned but a point came at which you could notice things changing. That appeared to be after General Miller around the end of 2002. That is when short-shackling started, loud music playing in interrogation, shaving beards and hair, putting people in cells naked, taking away people's 'comfort' items, the introduction of levels, moving some people every two hours depriving them of sleep, the use of A/C air. Isolation was always there. 'Intel' blocks came in with General Miller. Before when people were put into*

isolation they would seem to stay for not more than a month. After he came, people would be kept there for months and months and months. We didn't hear anybody talking about being sexually humiliated or subjected to sexual provocation before General Miller came. After that we did. Although sexual provocation, molestation did not happen to us, we are sure that it happened to others. It did not come about at first that people came back and told about it. They didn't. What happened was that one detainee came back from interrogation crying and confided in another what had happened. That detainee in turn thought that it was so shocking he told others and then other detainees revealed that it had happened to them but they had been too ashamed to admit to it. It therefore came to the knowledge of everyone in the camp that this was happening to some people. It was clear to us that this was happening to the people who'd been brought up most strictly as Muslims. It seemed to happen most to people in Camps 2 and 3, the 'intel' people, ie the people of most interest to the interrogators."

162. *"In addition, military police also told us about some of the things that were going on. They would tell us just rather like news or something to talk about. This was something that was happening in the camp. It seemed to us that a lot of the MPs couldn't themselves believe it was happening. They said to us they wanted to get out when their time was done and they would not go back in. They said that they felt ashamed of the Army that these things were going on. Most of these people were reservists. Many of those at the camp were people who as reservists had been recently drafted. And many of them thought that it was a big personal mistake they'd made. We got the impression that most of them had done it because they wanted the pension that being a reservist carried or to put them through college and then suddenly found themselves in Cuba as a result and they had no choice. They told us that they couldn't say no and that otherwise they would be sent to a military prison. Some of the MPs had Muslim friends in America and they were ones who were nicest to us."*

163. *"They told us about the fact that they were going to be sent to Iraq and how they didn't want to go. They'd come and tell us about how they read of soldiers being killed each day in Iraq. Although they didn't want to be in Cuba, for them it was at least better than going to Iraq."*

Camp Echo

164. The three men never saw Camp Echo but report that Moazzam Begg (see below) and Feroz Abbasi are detained there. In this Camp the detainees are held in total isolation indefinitely. They are apparently allowed a Koran with them but all the other conditions of isolation described below also apply. They are kept under 24 hour watch by a guard sitting outside the cell, though the guard is not allowed to speak to them. This means that the only people they are ever allowed to speak to are the interrogators.



Assaults at Guantanamo

165. All three report that when they were at Camp Delta around August 2002 the medical corps came round to see them and asked if they wanted an injection although they wouldn't say what it was for. Most of the detainees therefore refused to have one. A few hours later the medical corps returned, this time bringing the Extreme Reaction Force (ERF team). The ERF team was dressed in padded gear so they had pads on from their boots, padded vest, helmets like motorcycle helmets with visors, thick gloves up to their elbows and some of them had riot shields. They were always accompanied by someone who filmed them.

166. Rhuheel says *'the ERF team would come into the cell, place us face down on the ground then putting our arms behind our backs and our legs bending backwards they would shackle us and hold us down restrained in that position whilst somebody from the medical corps pulled up my sleeve and injected me in the arm. They left the chains on me and then left. The injection seemed to have the effect of making me feel very drowsy. I was left like that for a few hours with my legs and arms shackled behind me. If I tried to move my legs to get in a more comfortable position it would hurt. Eventually the ERF team came back and simply removed the shackles. I have no idea why they were giving us these injections. It happened perhaps a dozen times altogether and I believe it still goes on at the camp. You are not allowed to refuse it and you don't know what it is for'*. Asif and Shafiq describe similar experiences but they were not left shackled.

167. One example of such an assault happened in the same block as Asif and Shafiq as well as David Hicks and Feroz Abassi. Jumah al Dousari from Bahrain, who had lived in America for some time, was already mentally ill. He used to shout all the time. The guards and the medical team knew he was ill. Whenever soldiers would walk past his cell he would shout out and say things to them. Not swearing but silly things. He would impersonate the soldiers. One day he was impersonating a female soldier. She called the officer in charge, the commander that day, whose name was Blanche (the same person who was in charge the day that the dog was brought into Asif's cell; see below) – a staff sergeant E6, E6 being his rank structure. He came to

the block and was speaking to Jumah. Shafiq says *"I don't know what was said but the next thing he called the ERF team. While the ERF team was coming he took the female officer to one side. I heard him say 'when you go in that cell you're going to f-ing kick him'. She seemed apprehensive. He kept shouting at her to make her say back to him what he had said. It was very odd. There were usually five people on an ERF team. On this occasion there were eight of them. When Jumah saw them coming he realised something was wrong and was lying on the floor with his head in his hands. If you're on the floor with your hands on your head, then you would hope that all they would do would be to come in and put the chains on you. That is what they're supposed to do. The first man is meant to go in with a shield. On this occasion the man with the shield threw the shield away, took his helmet off, when the door was unlocked ran in and did a knee drop onto Jumah's back just between his shoulder blades with his full weight. He must have been about 240 pounds in weight. His name was Smith. He was a sergeant E5. Once he had done that the others came in and were punching and kicking Jumah. While they were doing that the female officer then came in and was kicking his stomach. Jumah had had an operation and had metal rods in his stomach clamped together in the operation. The officer Smith was the MP Sergeant who was punching him. He grabbed his head with one hand and with the other hand punched him repeatedly in the face. His nose was broken. He pushed his face and he smashed it into the concrete floor. All of this should be on video. There was blood everywhere. When they took him out they hosed the cell down and the water ran red with blood. We all saw it."*

168. Asif describes being in isolation. They took his Koran away from him having already taken his other possessions. His hands were shackled in front of him. He was looking back. The guard taking him held his neck to push it back so he couldn't look back. He was pushed into a corner and was punched in the face numerous times and kneed in his thigh. They opened his chains, put him on the floor of his cell and then left and locked the door before he could get up. The doctor came shortly after, not for that reason but to give him Ensure because he was seriously underweight. She saw the heavy bruising all over his thigh. Asif asked to call the

senior officer to complain about what was done to him. "***The guards saw me talking to the doctor, called her over and told her to do nothing.***" That was the last Asif saw or heard of anyone. He told the next shift and they told him that he should have told the previous shift.

169. On another occasion Asif witnessed a man on the toilet. The guards came to take him for interrogation. He was still on the toilet. (The guards are not supposed to open the door unless you stick your hands out. That's the procedure.) So they pulled him off the toilet, shackled him and took him to interrogation. He complained, that is to other guards in the block and were told those were the orders from interrogation. There were many many further assaults. An MP even boasted that he had beaten someone in isolation with a large metal rod used to turn on the water to the blocks. He said there was no one to tell.

Interrogations at Camp Delta

170. In relation to the interrogation blocks at Delta, they fell into the following categories: yellow building, brown building, gold building, blue building, grey building and orange building. All the booths either had a miniature camera hidden in them (it was possible to see the cameras in the air vents) or they had one way glass behind which sometimes it was possible to make out other individuals using video cameras. Asif states that ***'during one particular interview with MI5, I remember seeing people behind the MI5 man filming me. Most of the interrogations in Camp 1 were in the brown or the yellow building. After they built Camp 2, most of the routine interrogations took place in the gold building and the brown building was then used for the torture'***.

171. After a while it became apparent that the interrogators were no longer interested in any "information" they might obtain from the men, or indeed in getting "confessions". Asif states that in early 2003 he was told by one of the interrogators that 'this source has no further value'. Shafiq says ***'I certainly began to think that junior interrogators were being brought in to "practice" on us because they would repeatedly go over the same ground that had been covered by another interrogator say a week or ten days earlier. They were often junior and confused about our background or the circumstances that had led to us arriving in Guantanamo'***. The interrogations continued however in the same way. They would often continue for 2 to 3 hours (sometimes 5 or 6 hours). The men would be chained to the hoop in the middle of the floor having to put up with question after question which they had answered a hundred times before.

172. ***So far as the American interrogators were concerned they did not seem knowledgeable at all about the subjects they were questioning us about. The Americans wanted to know about Afghanistan, who we knew there, who we met, what we saw. They asked us, for instance, if we saw laptops, explosives, chemical weapons, barrels, metal containers with skull and crossbones on and a danger sign and missiles and ammunition dumps and anyone with***

satellite phones. We hadn't seen anything. We hadn't even seen electricity. One interrogator, James, said to us, looking at his piece of paper, 'some of these questions are so ridiculous I'm not going to ask you'. However, Shafiq was asked questions like 'if I wanted to get surface to air missiles from someone in Tipton who would I go to?' We were asked if we had seen laptops and computers in Afghanistan with pictures of liquids and laboratories and chemical weapons.

173. *At some interrogations we were shown photographs of Donald Duck, Mickey Mouse, Tom & Jerry, Rug Rats, Abraham Lincoln, Michael Jackson, Fidel Castro, Che Guevara, Osama Bin Laden and famous people from different countries. Actresses for instance, Sharon Stone, etc. One American interrogator called Mike Jackson, from LA FBI, said that he had been sent by 'the Queen' according to him. He said that MI5 had sent him photographs because they couldn't come and had asked him to ask us about them. These were photographs of British citizens. There was one English woman with blonde hair amongst the photographs. These were all surveillance photographs taken of people as they went shopping in Tesco's, etc. or with their friends. Very different people came in fact with the same set of photos (all Americans) and none of them knew that we had already been asked about the photographs on other occasions. This in fact happened numerous times during the interrogations. We'd be asked the same thing again and again by different sets of interrogators who didn't know the answers. There seemed to be no coordination of the information that they were getting or trying to get. The Army would come and show the pictures to us, then the FBI and then the CIA. They didn't seem to pass information amongst themselves. And from the FBI different people would come from different departments.*

Isolation and interrogations (pre May 2003) – Shafiq

174. Shafiq says ***'between October 2002 and May 2003 I was interrogated maybe 5 or 6 times. Most of the interrogators simply repeated the questions I had been asked before although they did also introduce some maps of Pakistan and Afghanistan and asked me to point out what routes I'd taken when I had entered the country and where I'd stayed. They also showed photographs of Muslims who I assumed were British although I didn't recognise anybody. Around about the end of March, beginning of April 2003, I was taken to the Gold building for an interrogation. I was taken into a room where I met somebody I had not met before who was not formally an interrogator. He was there to conduct a polygraph test. Before I entered the room I met two interrogators who had interrogated me right at the start when I first arrived at Camp X-Ray. One of them said to me that hopefully if I passed the polygraph test I would be allowed to return home. I felt very hopeful that this might be the beginning of the end at Guantanamo Bay. For the first time since being detained by the U.S, I was asked questions without being shackled.***

175. ***I was made to sit on a chair facing the wall and the man placed some pads on my fingers which were connected to a lap top machine he had on a desk behind me. Additionally I had a blood pressure pad tied around the calf of my left leg, also connected to the lap top and something else was tied around my chest. I was then asked a series of questions. Throughout the period of about an hour when I was questioned I was told that I must not move at all. He first asked a couple of control questions like: 'are the lights on in the room' and 'do you drink water'. He then went on to ask me if I was a member of Al-Qaeda. He had a list of training camps and he asked me if I'd trained at any of those camps. He asked if I had special weapons training and if I had any experience or training in chemical warfare. I answered truthfully and negatively to all the questions put to me. He asked the same questions about six times each and I gave the same answers on each occasions.***

176. *After about two hours of questioning he didn't say anything to me but just left the room. After that I was taken away back to my cell and I never saw that man again. I had no idea what the results of the tests were at that stage.*

177. *About two weeks later I was taken to the Brown building where I met a female interrogator who I had met previously in the block but she had not asked me questions before. She was Army personnel, I believe, but in civilian clothing. She said to me: "congratulations, you have passed your polygraph test." I was obviously very pleased and asked if I would be allowed to return back to England. She said she couldn't give me any information about that.*

178. *I then waited for about a month and didn't hear anything. I did not have to attend any interrogations during that period.*

179. *I was aware that Asif had also been asked to do a polygraph test in fact we were both taken at the same time. Rhuheel was not taken for polygraph testing at that time (see below). I am not aware as to whether any other detainees were asked to do polygraph tests.*



Isolation and interrogations (May/August 2003) – Shafiq

180. ***After a while the guards suddenly came to collect me and moved me to Tango block (I'd previously been on Lima block). Tango block was for Level 4 detainees and all my comfort items were therefore removed. I asked why I was being moved but nobody would explain the reason.***
181. ***After about a week I was in my cell when I heard a guard talking to a detainee in the cell next to me and saying "look at that British guy next to you, we have found out that he and his two friends from Britain are terrorists and linked to Al-Qaeda as well. We have found videos which prove that they are linked to the men who carried out the September 11th attacks". When I heard this I called the soldier over and said "what is all this about?" He told me that "my superiors have told me that they have found video evidence on you and your two friends". I was extremely shocked and did not have a clue about what he was talking about. I didn't see that soldier again.***
182. ***About a week later I was suddenly collected and taken to one of the three isolation blocks, 'November'. I asked the Sergeant why I was being moved and he simply said "we don't know. The order is from the interrogators". I was placed in a metal cell painted green inside. It was filthy and very rusty. There was a tap, sink, toilet and a metal bunk. It was extremely hot, hotter than the other cells I'd been in previously. Although there was an air conditioning unit it was turned off so the cells were much hotter than the ones I was previously held in because they were completely closed off and no air could come into the cell. There was a glass panel at the hatch at the front of the cell so they could keep an eye on us. Whilst it was extremely hot in the daytime, at night when it got cold, anyway, they would turn the air conditioning up so that it became freezing. I didn't have a blanket or a mattress and had only my clothes to keep me warm so I got absolutely freezing at night. For the first week I had no idea what was going on. I was not taken to interrogation; I just had to sit there waiting. I felt like I was going out of my mind. I didn't know where the others were, I didn't know why I was being held there. Nobody would talk to me. I was taken out maybe just twice for showers but that was it.***

I was extremely anxious. Then about a week later I was taken by two soldiers to interrogation at the Gold building.

183. *I was taken into a room and short shackled. This was the first time this had happened to me. It was extremely uncomfortable. Short shackling means that the hands and feet are shackled together forcing you to stay in an uncomfortable position for long hours. Then they turned the air conditioning on to extremely high so I started getting very cold. I was left in this position on my own in the room for about 6 or 7 hours, nobody came to see me. I wanted to use the toilet and called for the guards but nobody came for me. Being held in the short shackled position was extremely painful but if you tried to move the shackles would cut into your ankles or wrists. By the time that I was eventually released to be taken back to my cell I could hardly walk as my legs had gone completely numb. I also had severe back pains.*

184. *I was returned to my cell with no explanation as to why I had been brought to interrogation and I was then left in the Isolation cell for a further week. Again, nobody would explain to me what was going on and I felt I was going crazy inside my head. Some time during that week I saw Asif and Rhuhel being brought into the November block and placed in cells further down the corridor.*

185. *The next day after Asif and Rhuhel had arrived I was taken to interrogation in the Gold building. I was long shackled and chained to the floor. There was an interrogator in the room this time. He showed me some pictures which I later discovered were stills taken from a video. The pictures showed about 40 people sitting on the floor in a field. He asked me if I recognised anybody in the picture. The picture was not very clear and I didn't recognise anybody.*

186. *He then showed me another picture where three people were sitting together and there were arrows pointing with my name as well as Asif and Rhuhel's name. Behind the three men who were supposedly the three of us there was another person with an arrow indicating that he was Mohammed*

Atta one of the September 11th hijackers. I don't know whether the picture was Mohammed Atta or not, the man in the photograph had a beard whereas the only pictures I've seen of Mohammed Atta are of him being clean shaven. I believe the interrogator was from Army Intelligence. He was an American Arabic guy who I knew by the name Bashir although other interrogators called him Danny. He started basically accusing me of being present at the meeting, of being the person in the picture and of being involved with Al-Qaeda and with September 11th hijackings. I was denying it but he wouldn't believe me.

187. *When I saw the photographs I could see that they were purportedly from 2000 and I knew that I was in England during that time, which I told him.*

188. *After the first interrogation I was brought back to my cell and then a few days later brought out again. This time I was short shackled. I was left squatting for about an hour and then this Bashir came back again and he started questioning me again about the photographs and trying to get me to admit that I was in the photographs. I was telling him that if you check you will find out that I was in England during this time. After a while he left the room and I was left again in the short shackle position for several hours (I think for about 4 hours) before I was eventually taken back to the cells. When we were left in the interrogation rooms we were not provided with food and we missed meals. We also missed our prayers.*

189. *After this I was taken back to my cell and then at intervals of about 4 or 5 days at a time I was brought back to the same interrogation block where I was short shackled and left for hours at a time and not interrogated at all. This happened about 5 or 6 times.*

190. *On a couple of occasions when I was left in the short shackle position they would play extremely loud rock or heavy metal music which was deafening. Probably the longest period of time I was left in the short shackle position was 7 or 8 hours, which was on the first occasion. On other occasions I would be left in the room for up to 12 to 13 hours but in the long shackle position.*

Nobody would come in. Occasionally someone would come and say that an interrogator was on their way but they wouldn't turn up. For a period of about 3 weeks I was taken backwards and forwards to interrogation but not actually asked any questions.

191. *Also during that period a marine captain, together with a number of soldiers and some interrogators turned up at my cell in isolation. I was told to get on my knees I was shackled and then moved from November block to Tango block.*
192. *About 10 to 15 minutes earlier I had seen Asif being moved in the same manner. I have no idea why I was moved. It was slightly better than being in isolation because at least it was open. However, after only three days I was then moved back again to November block. By this time Rhuhel had been moved and I'd no idea where he and Asif were being held.*
193. *I remained in isolation after this for a further two months without any comfort items at all, apart from a blanket and mat.*
194. *On one occasion when I had been questioned by Bashir I said to him how can you ask me these questions when you know I've passed my polygraph test. Bashir told me that I'd actually failed my polygraph.*
195. *On an earlier occasion when I was brought to interrogation from isolation I met with a different set of interrogators who were from Criminal Intelligence (CID). They told me that they were the ones that were going to start the tribunals. One of the guys was called Drew and another Terry. They were asking me questions about the video again and I was asking what date the video was taken because I could show that I was in Britain. He told me, "I'm not going to tell you". I said "are you trying to screw me over?" He said "maybe".*

196. *I was interrogated repeatedly about my presence at this meeting but the Americans had made up their mind and refused to accept my account. I told them in detail that at the time the video was supposed to have been taken I was working in Currys in England and going to college. When I said this, they would turn it around and say that I knew I was going to Afghanistan at the relevant time and therefore I had laid a false alibi trail before I left. Whatever I said they would ignore and refused to listen to me.*
197. *About a month after I'd first been brought into isolation for the second time I was taken to interrogation and met Bashir again. I was in long shackle position and on this occasion he also brought along a female in civilian clothing. Bashir told me that she had come all the way from Washington to show me a video. I was then shown a video on a 14" tv on the table in front of me. Before they put the video on they told me that it was an Osama Bin Laden rally in Afghanistan. Apparently the rally took place at somewhere called Turnok Farms somewhere in Afghanistan.*
198. *There was no sound on the video but you could see a number of men sitting down and Osama Bin Laden appearing and giving a speech. I wasn't sure whether it may have been filmed by a hidden camera. The quality of the picture was not good. She suggested to me that the three men sitting down that had previously been pointed out in the photograph were me, Asif and Rhuheel.*
199. *I said it wasn't me but she kept pressing that I should admit it. She was very adamant. She said to me "I've put detainees here in isolation for 12 months and eventually they've broken. You might as well admit it now so that you don't have to stay in isolation". Every time I tried to answer a question she insisted I was lying. She kept going on and on at me, pressuring me, telling me that I was lying, telling me that I should admit it. Eventually I just gave in and said "okay, it's me". The reason I did this was because of the previous five or six weeks of being held in isolation and being taken to interrogation for hours on end, short shackled and being treated in that way.*

was going out of my mind and didn't know what was going on. I was desperate for it to end and therefore eventually I just gave in and admitted to being in the video.

200. *I was the only one out of the three of us to see the video. I could not bear another day of isolation let alone the prospect of another year and can only imagine how terrifying it must be for Feroz Abbasi or Moazzam Begg being in detention and isolation for so long.*

201. *As soon as I broke down and admitted that it was me she just got up and left the room and then I was taken back to my cell.*

202. *After that I remained in isolation for another five or six weeks. I was not taken for interrogation, apart from to Brown building where the FBI showed me photographs of various people asking if I knew any of them but I didn't. Apart from those periods I was left on my own in isolation, not knowing what was going to happen to me or what was going on. I thought that perhaps now I would be tried for a crime although I didn't know what was going on with Asif and Rhuheel.*

203. *After about five or six weeks I was moved to Oscar block (another isolation block) where I became aware Asif and Rhuheel were being held. I wasn't able to speak to them as I was at the other end of the block. I must have been there for a further few weeks, again I was denied 'comfort items', denied everything apart from showers two or three times a week. During this period they stopped allowing us out for exercise at all, until the International Red Cross told them that they had to let us exercise. Whilst I was held on Oscar block I was not taken for any interrogation.*

204. *Then, around the middle of August 2003, I was moved to another camp within Camp Delta and placed on Echo block. This time I was placed on Level 1 and was given back all my comfort items and additionally given a bottle of water. Nobody explained why I had been moved back to this block. About two*

weeks after being on Echo block I was called into the Brown building where I met for the first time an interrogator called James, from Army Intelligence. He told me that I would be moving into the same block in cells next to Asif and Rhuheel. He didn't ask me any questions. I asked him what was going on with the video and everything and he said I will be seeing you later in the week and I'll explain what's going on.

205. *After that meeting I was then taken to Kilo block where Asif already was. Kilo block is run by Intel (ie by the interrogators who decide what you're entitled to and what you're not entitled to). I had previously been on an Intel block when I was held in Lima before being moved to isolation.*

206. *Rhuheel was brought to Kilo block the next day and the three of us were able to talk to each other. I think that the reason we were taken away from isolation to this block was because the same interrogators were now dealing with us and they may have thought they would get more information out of us if they allowed us to talk to each other as the blocks were bugged so they could overhear our conversations.*

207. *Over the next two weeks every day I was brought to the Brown building to be questioned by the new interrogator James, from Army Intelligence.*

208. *During the first two weeks I was on Kilo I was brought every day to be questioned by James. We would be brought in succession, usually Asif first, then Rhuheel and then myself. He started asking me lots of questions about my movements during the period of the video in 2000. He was asking for alibi evidence. I told him where I was working and when I was at university and that he could get my records to prove that I was in England. He was gathering various details.*

209. *On one occasion he asked me to do a voice stress analyzer test. He told me that it was better than a polygraph. I said to him that I didn't want to do it as I had already passed my polygraph test, even though Bashir had said I had*

failed. He told me I would have to do it but I refused. The reason I refused was because I felt they were playing a game. They had previously told me that I had passed my polygraph and I would be going home and then they told me I had failed my polygraph. I felt they kept moving the goalposts and I didn't want to co-operate with their tests any more.

210. *During the time I was questioned by James he would bring cakes in to eat. The last interrogations I had with James he started showing me photographs of other detainees at Guantanamo Bay and asking me if I knew them. I said well, yes, I do, because I've seen them here. I felt that he was clutching at straws to try and find a way of implicating me in some way or other. This seemed to be part of a pattern of encouraging people not just to give information in interviews but also to inform on others in the camp. They would announce upon loud speakers (particularly when people were released) that if we co-operated with them they would release us. We knew this included acting as an informant.*
211. *After the last interrogation with James I was told I was now going to be handed over to Navy Intelligence. However, before this happened, whilst I was still being questioned by James in September 2003 I was brought into interrogation and I was left to sit on my own for 8 hours waiting for the interrogators to arrive. I had been fasting that day and when it was the end of the day I asked for a glass of water but was told I could not have any. I also asked for food and to pray but they refused to allow me. Nobody came to see me that day and I was taken back that evening. Then the next day I was brought to interrogation and this time the British officials arrived. These included a British Embassy official who I knew by the name of Martin and two MI5 agents named Lucy and Alex.*
212. *During the first consultation with Martin, he asked me if I was okay, or if I had any problems. I told him that I'd been kept in isolation for three months for no reason. I also told him my knees were in a lot of pain because of the lack of exercise I was getting. He told me that he had two letters, one from my*

mother and one from my brother which he took out and I actually saw them but he said he wasn't allowed to give them to me until they had been cleared with the authorities. I never actually saw those letters. I hadn't heard any news from home since about February 2003. I asked him what was happening, whether I was going to be tried, whether I would have lawyers, and various other questions. He said MI5 officers would be coming the next day and they would answer my questions. I should say at this point that in our experience if MI5 were to visit the camp we were never left in isolation. We think this is because they would ask each time what level we were on (after the level system started). We don't know if it was for their records. We know however, that they would know we'd been in isolation if only because we told them.

213. *I was returned to my cell that night and the next evening all three of us were taken to the interrogation block (this time it was the CIA building). I was taken to Orange building where I met the two MI5 officers, Alex and Lucy. I had previously met Lucy on two occasions, once in December 2002 and once in April 2003. I had previously met Alex in June 2002. They asked me some questions about what I was doing during the year 2000. I became quite angry and said look, you've got all my files, and you know what I was doing in 2000 and I explained that I was not in the videos. I told them that I was working and had been at university during this period in England. They then said we don't need to ask you any more questions. I asked what was going to happen to me, whether I was going to get to see a lawyer and the other questions I had asked the Embassy guys. They told me that they couldn't answer those questions that the Embassy man should have answered those questions for me. That was the last I saw of any British officials except Martin who I saw the day before I was released. I carried on seeing James a few times before being handed over to Navy Intelligence.*

214. *After this we were still held on Kilo building and would occasionally be brought for questioning by Navy Intelligence and a guy called Romo. I was asked similar questions to before and was told that basically they believed us but we were a political pawn now.*

215. *This was because some British detainees were, they said, lying, therefore we couldn't go back to England and they seemed to be playing games with us'.*

Isolation and interrogations – Asif

216. Asif says in relation to the isolation and treatment experienced following the recovery of the Bin Laden video, that ***'in about March/April 2003 I was at Camp Delta. I was taken one day to interrogation and asked to perform a polygraph test. During that test I was asked questions such as had I trained in Afghanistan? Had I handled chemicals, bombs, explosives? Am I a member of Al-Qaeda? They asked the same questions on a number of occasions and I answered each question truthfully, most of the answers were 'yes' or 'no'. Immediately after the test the man who conducted the polygraph said I had failed but he would send it away for tests.***

217. ***I'd been at the doctors one day and when I returned I found that I had been moved to a different block and relegated to Level 4. Level 4 was the lowest tier. It meant that you had all your comfort items removed, ie you had no soap, toothpaste, cup, towels or blanket. You only had your clothes and had to sleep on the bare metal. You had to drink water with your hands. I had been on Level 4 on a couple of occasions before. I was left there for two weeks without any explanation and then I was taken to the isolation block. I had previously been in isolation as punishment.***

218. ***When I had been in isolation before, you would be left for maybe three or four days and the guards would have to write a sworn statement, although there was no adjudication or anything, but you were then put in isolation.***

There seemed to be two reasons why you would be placed in isolation:

- 1) for punishment and you would be informed of the reason and told that you would be spending, e.g. three days in isolation for that reason;***
- 2) the other would be for interrogation where there was no specific time limit.***

219. ***After I had been on Level 4 for about two weeks I was then taken to isolation on the instructions of intelligence officers. Shafiq has already***

described the conditions in Isolation. I was taken to the November block and found myself placed in a cell opposite Rhuhel. He had been brought to the block about the same time as me. I could see him through the glass panel and tried talking to him but soldiers became aware of this and after a couple of days I was moved to a cell further along the corridor. This cell had been occupied by a guy who had developed severe mental health problems and had smeared excrement everywhere. It was absolutely disgusting. I had no soap or anything and I was left in this cell. I could not sit anywhere. It stank. It was extremely hot. Finally different soldiers came on the night shift and they gave me some cleaning material and I scrubbed the whole place down.

220. *After about a week I was taken to interrogation. I was taken there by guards from 9/4. These were the Rhode Island, Massachusetts Soldiers. They had a reputation for the worst violence. I remember once General Miller had to investigate them for using excessive force as they had beaten up one man who ended up as a cabbage.*

221. *I was taken to "Res" ie Reservation, and brought into a carpeted room with swivel chairs. I was placed on a seat and long shackled and met somebody called Mr Smith. He had magazines on the table, drinks, nuts, cigarettes, crisps. I asked him why I was in isolation and he told me because I was being influenced by other detainees. He said he had some photographs he wanted me to look at. I told him that I wouldn't look at them. I was then led away. I wasn't given any of the treats that were on the table.*

222. *After about a week I was called back to another room. On this occasion I had been having my shower, my hair was still wet, and I was taken to this other room and placed in the short shackle position. This had not happened to me before and it was extremely uncomfortable. I was then left in this room and they turned the air conditioner down to 40° Fahrenheit (there was a sign on the conditioning unit which said it should not be put below 70°). I was then left in this room in the short shackle position for about three hours. I was absolutely freezing, particularly also because my hair had still been wet from*

the shower. Then Mr Smith came into the room and said "it's nice and cold in here". He asked me if I was going to look at the photographs. He said "I can get you anything you want". He was sitting at a desk while I was in the short shackle position. He then pulled out some pornographic magazines. He showed me a photograph and said "look, you're going to see pussy again". At that I started laughing as the whole thing seemed so ridiculous. Then I swore at him and he walked out. I told him I wouldn't talk. He left me in that room for another three or four hour. I was absolutely shaking and shivering with the cold and when I was finally returned to my cell I came down with the flu. That day I had been short shackled for seven or eight hours. One of the military police told me that intelligence had said I wasn't allowed any medication.

223. *The next day I was escorted by a Marine Captain and about 15 soldiers to Oscar block. This was also isolation. I was left in a cell there for a couple of days and then taken to interrogation. I was suffering from a temperature and felt very ill.*

224. *This time I was short shackled again. A different interrogator who I came to know by the name of James, came in to question me. I had been left in the short shackle position for about three or four hours. It was agony because I had back problems, I was calling out in agony. James came in and said "who has authorised this?" He apologised to me and I was unshackled.*

225. *He said to me "I am the new interrogator and I will see you in a couple of day's time." We then just chatted before I was returned to the cell.*

226. *After three days I was taken to "the Brown building". I was long shackled and sat in a chair. I was left in a room and strobe lighting was put on and very loud music. It was a dance version of Eminem played repeatedly again and again. I was left in the room with the strobe lighting and loud music for about an hour before I was taken back to my cell. Nobody questioned me.*

227. *The next day I was taken back to the interrogation and this time I was short shackled and left for maybe five or six hours before returning to the cell. Again, nobody came to question me. That night I asked to see James in Reservation. He denied he knew anything about the short shackling. I told him I would co-operate. I was asked a series of questions about the photographs. He told me that the photographs were with Bin Laden. I just answered all his questions as honestly as I could. He said to me you are not being consistent. I was next taken to interrogation with a man I came to know as Drew. He was in the Criminal Intelligence Department. There were some other men present as well. He showed me photographs but I refused to look at them. They then left the room and I was short shackled for maybe about four or five hours. They came back. By that time I couldn't bear it any longer and I just said "it's me in the photograph". I didn't even look at the photographs. I was returned to my cell.*

228. *About four days later I was taken to be interviewed by FBI. They asked me questions about what I had been doing during 2000. I gave them full details. They said that they were going to check out my story for the relevant period.*

229. *I was then back in the isolation cell. I was brought to 'Res' at some stage and chatted with somebody from the FBI. He was trying to be friendly. He brought me magazines and I asked if there was any news. He brought some articles he had taken from the internet and read some extracts of news about myself. He said "I really like talking to you but I need some information". He said "I need some help from you, there are some evil people here, I need some information". He was obviously trying to get me to spy for him. I said I can't speak Arabic and I'm not here to spy on people. He left me in the room for maybe 12 hours long shackled. I was not given anything to eat and eventually I was just taken back to my cell.*

230. *During the period that I was in isolation and being interrogated by James, on one occasion I saw a Military Intelligence officer called OJ who asked me "have you ever been to New York?" I asked him what sort of question was*

that. He threatened to beat me up. He said "I am not like the other interrogators; if I want I'll beat you up". He was a very large guy, quite intimidating. He said to me "just answer the questions". I later found out that this man was in charge of Feroz Abbasi's case. I think his first name is Oscar.

231. *I remained in isolation for a further two or three months but I was not really interrogated again, or at least not seriously, after I had admitted to being present in the photographs. Perhaps after about a month Rhuheel was moved into the cell in front of me and we were allowed to talk and call to each other. I think after I'd made the admissions they wanted they weren't really interested in me.*

232. *The conditions in isolation were very hard. The cells were made of metal. They were extremely hot. The air conditioning was broken and hot air would come out. Sometimes the soldiers would put it on really hot. You had to sleep on a metal bunk. In the first few weeks I was given nothing, not a mattress or a blanket and I was denied all comfort items. I couldn't talk to anyone. The only thing I was given was my Koran. I sort of learned a way of dealing with it and tried not to let the isolation bother me. It was impossible to know what time it was. In fact throughout this time (in fact throughout the time that I was in Guantanamo) I had no concept of the time or date. We were not allowed to know what day it was and nobody was allowed to wear watches. The guards were told not to let us see their watches (though sometimes they forgot). They certainly never told us what time it was. They stopped doing the call for prayers after about a year. (In the first year it was on sometimes and not others.) It stopped after General Miller came.*

Isolation (Asif continued)

233. ***"Amongst the effects of isolation was that over a period of time it was certainly draining. You would get worn out from it. If you were already depressed it makes you more depressed because you keep thinking repetitively about the same thing and there's no one there to comfort you or distract you. Sometimes you welcome interrogation when you've been in isolation because there is someone to talk to and it's a release and no doubt that's what interrogators are counting on when they keep you there. The isolation blocks were it seemed to us, deliberately kept in as depressing a state as possible. The other blocks, they had to redo from time to time because the salt from the sea air corroded everything. With the isolation blocks it was all peeling paint and everything rusting. Even though things were modified or renovated, it wasn't painted. (While we were in Guantanamo in fact there were three renovations, showing the rate at which structures would deteriorate there.)"***
234. ***After about three months in isolation we were all brought out and moved to Kilo block. This was a normal block that was also run by Intel as opposed to the Army. The three of us were placed in this block and we were no longer in isolation, we were allowed to talk to each other.***
235. ***I was taken to interrogation and asked to do a voice stress analyzer. This is apparently another way of testing whether you are telling lies. A microphone was attached to my throat and I was asked a series of questions including "are you in the photos". I said "No". "Have you ever met Osama Bin Laden". I said "No". I was told that I had failed on these two questions. He asked me the same questions again and I answered "Yes" and he said I was telling the truth.***
236. ***During one of the sessions after this when I was being questioned by James and he was asking about my movements in the UK, I said "I can't wait***

until I go to the tribunal because I want to make you guys look stupid". He said "what do you mean?" I told him that during the relevant period that I was supposed to be in the photograph with Osama Bin Laden, I had been in trouble with the police in England. I said I could get ten policemen who could be witnesses, if necessary. I told him that I had court records. I had a solid alibi which they wouldn't have been able to deny.

237. *About four days later I was brought back and somebody read to me a letter which came from Britain. The letter basically proved that I was in England at the relevant time, although it said at the end that you should take into account that he may have traveled on a forged passport.*

238. *During the last six weeks or so of my time on Guantanamo Bay I remained in Kilo block and they started to treat me a lot better. Myself, Shafiq and Rhuhel would be taken to a place known as "the love shack" in the Brown building. This would be every Sunday where we would get to watch DVDs, eat McDonalds, eat Pizza Hut and basically chill out. We were not shackled in this area. The first three times or so Romo was present and then we were handed over to FBI, a woman called Lesley and she was the one that really treated us well and gave us treats and food. We had no idea why they were being like that to us. The rest of the week we were back in the cages as usual, but it was nice to have that period. I think we were the only three that were treated in this way. On one occasion Lesley brought Pringles, ice cream and chocolates, this was the final Sunday before we came back to England. Lesley told us that we would be leaving next week to go back to England.*

239. *About 5 days before we were due to return the five of us, me, Shafiq and Rhuhel and two other Brits, Jamal and Tarek were all taken to isolation to be kept apart from the other detainees. We weren't denied our comforts apart from Tarek who was on Level 4.*

Isolation and Treatment – Rhuhel

240. In relation to the treatment and isolation experienced following the 'discovery' of the Bin Laden video, Rhuhel says that ***'I was in my cage in a separate block to the others and an interrogator called Sarah took me to interrogation. I was in interrogation for about 8 hours. She went through my whole story again. Then she says I will assess your paperwork as this was part of a tier three interview, meaning if I passed I would move to the next stage. She also recorded my voice at that time. At the end of the interview she asked what I wore in Afghanistan. I said I took an Adidas tracksuit. She then pulled out a photo which looked like a still from a video and there was someone circled in it. She said who's this? It was someone in an Adidas top but it was not me. She said 'you are lying the person in the picture is you.' She pointed to another man next to the guy in the Adidas top and said this is your friend Asif. This went on for another 2 hours. By now I had been in interrogation for 11 hours. I was then taken back to my cage. The next day I was transferred to isolation. I remained there for three months.'***

241. ***I was interviewed every 3 or 4 days. The routine would be I was taken, short shackled and the air conditioner would be turned up to make the room freezing. The longest time I was short shackled was for about 6 or 7 hours. After about one month I was seen by someone we called 'Steve Smith'. He used to be my previous interrogator before Sarah. He pulled out photos from the video and said I had been lying to him. He said 'we know it's you – admit it!'. I said it's not me and kept insisting on this. He kept me there for 7 hours. Then I was not interrogated for ages until I saw James. He had a reputation as a torturer. His office was the Brown building. He took me in and showed me the photos again and insisted that I was in them. I was taken back to my cell, but then a few days later we were all three moved to an Intel block. A week after the move I did a stress analyzer test. He told me I had failed and that I was lying. He then showed me the date of the photos which was '1.8.2000'. I did not know whether this was the American dating system which would make***

it 8th January 2000 or the English system which would make it 1 August 2000. On both dates I was England and I told him to get my police, community service and probation records. He said he would check with MI5 who would look into it. Despite this on other occasions, after I had left isolation I would be taken to interrogation, short shackled and left in a room with very loud heavy metal music and sometimes Eminem. This would usually last for 4 or 5 hours. The interrogator would never come. After about three weeks I saw James and asked him about this but he denied it saying it was nothing to do with him. He then told us he would transfer us to Romo and the Navy Intel guy. Before I saw Romo, I saw Lucy and Alex from MI5 who asked about where I was at the time of the photos. I believe they had the photos with them and were just confirming things. The next day I saw Martin from the Foreign Office who just asked how I was. He showed me two letters but I never received them. After this we were dealt with by Romo and I was not short shackled after that point. He was trying to be nice and took all three of us to watch a movie. At my next interrogation with him he pulled out the photos and said 'admit it is you, be a man about it'. I got pissed off and said "yeah it's me. What are you going to do about it?" He said "it doesn't matter if it is you, just admit it." About a week after this I had my polygraph test.

242. I went into the room and there were two women from the FBI. I took about 4 tests and the woman says you failed all four and then said admit it is you. I said if you think it is me then it's me. She took me to another room and left me in the cold without food for hours. She then took me back into the original room but this time I wouldn't talk to her. She got her colleague, a male, to come and talk to me but we ended up arguing and swearing at each other. He then calmed down but said he would send me to isolation. I told him, I did not care. I told him Romo had already said the whole thing had been a big mistake and the Army had 'fucked up'. I think he contacted Romo whilst I was still in the room. That's why instead of sending me to isolation he sent me back to the block with Asif and Shafiq. A few weeks later I got a new interrogator called Leslie. She was an FBI agent.

243. She hardly ever interviewed me and she eventually said that we would probably be going home. She arranged for us to see movies on Sunday. This was because they knew they had messed us about and tortured us for two and half years and they hoped we would forget it.

244. Before we left five of us British detainees were taken to isolation.

Returning to England (Asif)

245. In relation to their return to the UK Asif says, *'on Sunday 7th March I was taken to see the Red Cross in Juliet building. This was just a formality for them to check how I was before returning back to England. After that I was taken to see some military officials who asked me to sign a piece of paper. I don't remember exactly what the piece of paper said but it was along the lines that I was a member of the Taliban and Al-Qaeda, however I have since changed. In other words I had changed my mind since I was detained at Guantanamo Bay. It went on to say that if I was suspected of anything at any time by the United States, I could be picked up and returned to Guantanamo Bay. Whilst I was shown this piece of paper I was also being photographed and filmed on video camera. I said that I would not sign it. An officer said to me if you don't sign it you're not going home. I didn't really believe him'*.

246. The men had known from at least four weeks earlier, having heard from the military police and others that it was all over and that they would be returning to England fairly soon. All three say this was the main reason they were not intimidated by the demands to sign the document described by Asif. Asif goes on to say that *'I was brought back from my cell a few hours later and this time I sat down and again more photographs were taken and film was taken and again this same document was read to me and I was asked to sign. I refused again. The woman who was dealing with me at that point asked if I agreed with the statement and I said no'*.

247. One morning all five British detainees scheduled for return were taken from their cells. Asif explains that they were to be taken for interrogation. They initially refused to go or be shackled. As Asif explains *'I was told that I had to have my beard shaved off and if I refused they would use force, in other words they would get the ERF team. When I refused the sergeant in charge said that I would definitely "get ERFed". I said "we'll see". However the captain in charge came in and said they are going home anyway so what's the point of shaving their*

beards off. Despite this some of the Army personnel working in the block were telling us that we weren't going home that we were going to spend the rest of our lives in prison'.

248. That evening all five detainees were (separately) brought before the British Embassy representative, Martin, and a police officer from the UK who read through a document saying that he had a right to handcuff them and to use reasonable force to move them. They were then each told that they would be returning to the UK the next day.

249. The next day they were collected and transported to a plane that was waiting for them. Despite protests from the Americans they were not hand cuffed and they were flown back to the UK where they were arrested

Contact with the outside world

250. Shafiq says, *'When we were in Afghanistan and captured, first by the Northern Alliance and then the Americans, we did not have any contact with our families or anyone in England. We were not allowed to write and we did not receive any correspondence. When we first arrived in Guantanamo Bay on the first day after the shackles were removed after the horrendous journey, we were told to write a letter. All I remember writing was that I was in American custody. I could hardly write because my hands were so numb from having been restrained in tight shackles for such a long period of time and when I was asked to write my hands were still cuffed together. I don't know whether those letters were ever sent.*

251. *About two weeks after we had first arrived and were in Camp X-Ray the Army came round with a piece of paper for each of us so that we could write home to our family. I wrote home at that time. I didn't hear anything from home until around about the end of February 2002 when MI5 came to see us. This was the second occasion when they came and they produced letters from home. I was given a letter from my brother. I think he had received my letter. After that we might get a letter perhaps once every two to three months. We continued to write letters until around about August 2003 when suddenly they stopped giving us any letters they may have received from home. For about 6 or 7 months I had no communication at all from my family'. Nor, all three men discovered later, had their families received any communications from them for a similar time.*

Legal advice

252. Shafiq states that the question of their legal rights was very much on all the detainees' minds. He goes on to say, *'we were never given access to legal advice. I asked at various points but they just said that this is not America this is Cuba and you have no rights here. Around about August 2003 I spoke to a guard who told me that he'd seen my name on the internet and that I was represented by a lawyer, Gareth Peirce in England. I never heard anything at all from the interrogators, the Embassy or the Red Cross about the fact that a case was being brought on my behalf through the US courts and was on its way to the US Supreme Court. I only found out about that when I got back to England. When we asked the interrogators and the Embassy and MI5 more about what the guard had said about a legal case they said they knew nothing.'*
253. They were intended to be kept without hope and starved of information. Asif says that in about January or February 2004 he had a conversation with a military guard who told him that he was going to go home. He goes on to say that *'the guard who was moving me (I was shackled and being brought to Reservation) said "It's true, you've probably heard it loads of times before, but this time it's true". He told me that the US can't fight my case, they will lose, and it will cost them too much money so they are going to send me home anyway.*
254. *The guards never spoke to us when we were on the block but individual guards on rare occasions passed on information when they were escorting us.*
255. *About three or four weeks before we left, perhaps around the end of February 2004, we saw the Red Cross and they said to us that "something's happening, but they are not sure exactly what" and they can't tell us until it's confirmed. Then a week later they told us that Jack Straw had made a speech in which he'd mentioned the five of our names and that we would be released.*

Red Cross

256. The International Red Cross used to visit the detainees from time to time to inspect the camps and the conditions they were being held in. The men would see them wandering around the blocks and occasionally they would call to see detainees. Shafiq says that *'the guards would bring us one by one to see them. We complained about the conditions and the Red Cross said that the Army were not following all the guidelines. They were concerned about whether or not complaints should be made or the matter taken to court because it would mean that individuals would be completely cut off from contact with the family as the Red Cross was the only means for contact.'*

Embassy visits

257. The officials from the British Embassy would always come together with officers from MI5. All three believe they saw somebody from the Embassy on about six separate occasions. They would ask if they had any problems but all three men got the impression that the officials didn't seem interested at all. Only Asif reports that on one occasion an official wrote down his list of complaints but the only changes came about as a result of the hunger strike by the prisoners themselves. Shafiq says that on one occasion the Foreign Office was due to come but he was told their plane hadn't got to the island. When they came the next day it seems they'd come with the MI5 officer who had arrived to interrogate them. When Shafiq asked the Foreign Office official what was going on he said ask MI5. When he asked MI5 they said ask the Foreign Office. The Foreign Office official asked him questions about his welfare. Nobody explained why he was there. Asif also reports that on more than one occasion the British Embassy officials acted as a third interrogator asking questions that had nothing to do with their welfare but were of interest to the interrogators. None of the men felt they could trust or rely upon the Embassy officials.

258. Shafiq believes he was interrogated by British personnel on about 6 or 7 occasions. Despite asking on many occasions he was never allowed access to lawyers. They were allowed to write home but they believe most of the letters were never sent out and they received few from their families. When they flew back to London, the Foreign Office man whom they knew as 'Martin' was present on the flight. He told them to ***'make sure you say you were treated properly'***.

259. All three men believe that the Foreign Office and MI5 were always in total co-operation with the Americans. When they asked about going home, the Americans would say ***"when the British want you home you can go home"***. But the British would say ***"we can't do anything because you are in US custody"***. When any of them complained about the treatment in Guantanamo Bay, about the food and

general conditions, the Foreign Office would always say there is nothing we can do. They seemed to try and make a joke of it.

260. Shafiq also adds, *'I would mention other problems. These included the lack of any proper medical treatment, for example with my knees and my back pain. We suffered sleep deprivation and did not get enough food. The water was undrinkable and they disrespected our religion and the Koran. I raised all these with the Embassy officials, sometimes they made brief notes, but didn't really comment on them and nothing changed. We asked about legal representation but on each occasion they would just say 'we don't know about that'. My impression was that they were told by the American authorities that they could not tell us anything. I also thought it was fairly certain that they had been briefed on everything that was going on, our treatment, conditions of detention, what came up in the various interrogations as well as our behaviour since they last visited. I am sure that they were aware of the abuses for example the short shackling. They certainly knew that we were in isolation for three months'*.

MI5

261. *"From approximately July 2002 MI5 officers interrogated us without American interrogators or guards present in the room. We were in exactly the same physical circumstances of interrogation as when the Americans interrogated us, sitting on a plastic chair shackled to the floor. We complained to MI5 as well as the Foreign Office about all the things that were being done to us in Guantanamo Bay. You couldn't tell the difference between the MI5 and the Foreign Office. Neither was interested in us other than to get information we didn't have. The last three interrogations Asif did not talk to them at all. When we saw the Foreign Office we were chained in exactly the same way as when we were being interrogated."*

262. *"Both MI5 and the Foreign Office wrote down on different occasions long lists of all of our complaints. We all made complaints. We understand that claims are now being made that we did not make complaints of at least some of the things that happened to us. We complained about everything that was being done to us and notes were made. We cannot believe how it can now be being said that we did not complain. After the guards had told us that they had seen on the news that we had a case happening on the outside we asked the Foreign Office and MI5 and our American interrogators about it and they all said they knew nothing. They didn't bring us news."*

263. *"Primarily MI5 were interested in getting from us information about people in England and the British detainees who were in Cuba but we didn't have any to give them. They also wanted us to get information out of other British detainees."*

Re British interrogators

264. ***"We know that the British asked questions not just of British detainees but certainly of French, Belgian, Danish, Swedish, Bosnian, Algerian and some Arabs, Libyans, anyone they thought had either been in Britain or had information about people in Britain."***

Suicides

265. While they were in Guantanamo Bay a large number of people tried to commit suicide. In addition, of those a number tried to commit suicide repeatedly. The attempts undoubtedly go into several hundred altogether, at least. (Asif recollects the first instance of which he was aware was in Camp X-Ray. The first time Asif saw it was during the day time. ***"Someone from Saudi Arabia just suddenly made a noose and hanged himself in front of me. I and everyone else shouted and in fact the guards came and he did not die."***)

266. ***"We were told by soldiers what happened to one detainee where we were not present. Someone called Michal from Saudi Arabia who we understand hung himself. His oxygen was cut off and he passed out. The guards took him down but then beat him up and now he is basically a cabbage. He is apparently slowly recovering. For a while someone had to feed him but we understood now he can eat by himself. We understand that he was in intensive care for over a year. He never went back to the block again. As well as being in intensive care he is apparently shackled to the bed by hand and foot. The guards told us and Rhuheel saw him when he was in hospital seeing a dentist. (This happened shortly prior to coming home – four days before because we were coming home and they wanted to show we were being treated decently. Rhuheel had been in pain for over a year and had been asking to see a dentist for over a year.)"***

Medical care

267. They describe a very high percentage of detainees there are now on antidepressants/Prozac and would say at least a hundred detainees have become observably mentally ill as opposed to just depressed. ***"For at least 50 of those so far as we are aware their behaviour is so disturbed as to show that they are no longer capable of rational thought or behaviour. We do not describe in detail here the behaviour but it is something that only a small child or an animal might behave like. All of those who have become seriously mentally affected seem to be kept in Delta block."*** Asif describes how the first time he walked past Delta block on the way to interrogation he could hear strange inhuman noises. ***"The military police told us that they liked working in Delta block because it was 'easy work'. On Delta block they would have 16 people working as opposed to four. Four of them would be medics, so you have very little work to do. Each guard was watching about five people. They seemed to take a malicious pleasure in describing the disturbed behaviour that they were watching. They said that they were playing music for them like drums and that pornographic pictures were put outside."***

268. ***"These people were obviously seriously ill and yet we understand they still get interrogated and if they say someone is from Al-Qaeda then that information is used. Military police told us this. We did not get the impression that what they were telling us they were making up for any purpose. The guards who were telling us this were telling us it with amusement and suggesting that they were getting information from people and that they were doing basically the job they were meant to be doing, i.e. the mission was successful."***

269. ***"The last year we were there, on Christmas Day the guards came through our cages with batons banging on the cages with dogs. The year before on Christmas Day they had taken everyone's sheets away apparently a rumour having been spread which was completely untrue that everyone in the camp***

was going to hang themselves. Dogs would be patrolling in the camp, around the camp all the time but would be brought in about three times a day to cages, into the blocks. They were Alsations and the guards ordered them to bark. Dogs were not used as directly as they were in Kandahar to intimidate but we knew of instances where people had been bitten in Guantanamo by dogs and there was always that fear that the dog would be let into your cell."

270. On one occasion this happened to Asif where as the dog went through the block someone said 'Meow' and Asif got the blame and was intimidated by the guard who came into his cell and brought the dog in.

271. There were aware of one man, Abdul Rahman Madini, a Saudi Arabian, where a dog was brought in to bark at him throughout his interrogation. Another man, Moussa Madini got bitten in his cell in isolation by a dog very badly, taking, they understood a big chunk of his leg out, the muscle part of his calf. They understood he was in hospital after that and then taken to Camp Echo. He was very mentally affected and for instance, he would hardly eat. (Ruhel used to be next to him. Shafiq also saw him. He was extremely skinny and could eat very little. He would be pacing around his cell really fast for hours. It would consist of stepping back and stepping forward because there was no space at all. This is a recurrent theme in the camp, that there are so many people seriously depressed and as a result they don't eat.) (The names referred to are familial names, as is customary.)

272. They noticed that detainees who had either visited America or lived in America for any length of time were given a particularly rough time. They were all being accused of being Al-Qaeda cells. These were men from Saudi Arabia, Kuwait, Bahrain. These were people who had been, most of them, students. One man, Jarullah, whose sister-in-law is in America and is American, was told that his sister-in-law would be treated very badly in America and that she would be imprisoned. They understood that he was told that she was already in prison in America and that bad things were being done to her. They were interrogated more than anyone. Arab nationals also had a particularly hard time. There were on the other hand Afghanis

and Pakistanis, mostly Afghanis, who were simply not interrogated for a very, very long time. They were just there without any reason for keeping them there.

Re psychiatrists

273. ***"We are aware that there were a large number of psychiatrists at Guantanamo Bay although we think they were not all qualified but many trainees there. The whole camp was aware that one detainee had fallen in love with a psychiatrist and cut her name in his arm. Her name was Fleur. She was specialist E4. We heard that perhaps she was disturbed as well and was said to have behaved most inappropriately with that detainee and that she was removed to outside the wires."***
274. ***"One psychiatrist there was good. He was a captain, actually a doctor. He used to worry about people. You could tell from his face."*** When Rhuheh and Asif complained about losing weight drastically he prescribed Ensure and MREs (prepacked meals) for them. Shafiq says ***"we used to tell him about other detainees who had problems and he would try to help. When he came on the block he would come to us three first and ask us about other people. He was unusual. The others would largely come to the block and ask us questions like 'do you want to kill yourself? Do you have any desire to kill American soldiers? Or cellmates/inmates?' If you answered 'no' to those questions then they'd say 'you're okay'. The psychiatrist that we thought was good would come onto the block with translators in Urdu, Arabic, Pashtu, Farsi and would try to understand people's problems. The others would come without translators and then disappear for five or six days before a translator would come back with them. He was unusual in that he was not prescribing Prozac across the board like the others were. He'd look at your problem, like 'you've got no one to talk to' and try to put you with someone. There was of course only a limited amount that he could do."***
275. ***"We didn't know the name of the good psychiatrist. They had to cover their names with black tape. The names that we know were because at the beginning they didn't have to cover up their names. We were told by soldiers that the soldiers were told that they had to cover up their names because"***

when the detainees were released they would go home and then come back to America and kill them. There were some who thought that they shouldn't cover their names and their attitude was 'why should we?' but they were ordered to."

Shafiq – medical problems/injuries

276. In relation to the medical facilities at the camp Shafiq adds that *'whilst I was in Kandahar I started experiencing some problems with my knees. These became a lot worse when I arrived at Camp X-Ray. I think the problem was aggravated a lot by the position I was made to sit in for so long on the plane journey. Throughout the time I was at Guantanamo and still today I have quite a lot of pain in my knees. I experience pain when I'm walking or when I kneel to pray. When I was at Guantanamo I asked for medical treatment. Often when you asked a corps man for a doctor no-one would come. Occasionally when a doctor was doing a round I would see him and explain my problems. Sometimes the doctor would give me some painkillers. I was always given them when I hadn't had anything to eat so the tablets caused severe stomach ache as the pain killers were obviously really strong.*
277. *I also had similar problems with my back. That seemed to start from when I was in Camp Delta sleeping on metal bunks and when I was made to squat, or sit, in really awkward positions. It was made much worse by the short shackling. I still have back pain in my lower back. I have been to my GP who can see there is a problem and has given me some medication.*
278. *The other injuries I have were from when I was handcuffed in Kandahar and when I was on the plane. I got very bad cuts on my ankles and wrists from the tightness of the cuffs. When we were taken off the plane they were pushing us about and kicking us so I sustained bruising'.*

Rhuhel – medical problems/injuries

279. Rhuhel in particular has suffered irreversible damage to his eyes. He suffers from a condition where the cornea of his eye is misshaping (into a shape like a rugby ball). The condition is controllable by a gas permeable contact lens which is what he had before he was detained. Throughout the time he was at Guantanamo he was urgently asking for lenses and the solution to go with them. His family wrote to him that they had sent lenses for him. No one ever told him they had come. There was some contact between the American authorities and Rhuhel's specialist in England but still no lenses were ever provided. Every time he asked his interrogators they would say ***"it's not a holiday camp"***. About a week before he left some more lenses were produced but again with no correct solution. Since he has seen his specialist and he has had it confirmed what he was of course aware of himself, that his eyesight has drastically deteriorated as a result of the lack of any medical attention at all. Rhuhel and Asif are also suffering from pain in their knees and lower back pain for the same reasons as explained by Shafiq.

Military personnel

280. One unit of guards came from Puerto Rican Infantry. They treated the detainees like human beings. They were noticeably pleasanter than other units that were based there. *"They did their job professionally, ie treating us like human beings. They were taken off duty. They told us that they were in trouble because they were treating us well. They told us that they knew what was right and what was wrong but that they got into trouble for doing what was right. They were blamed, we understood, for all the problems in the camp. To our knowledge it was not they who made problems. There were two units of Puerto Ricans. We are aware that the first unit got sent to Iraq and the second unit we believe also after it returned to America got sent to Iraq. The second group of Puerto Rican soldiers was in fact split up into different units so that they didn't work as one unit. There was also a unit from the Virgin Islands who were treated in a similar way. It was very clear to us that there was discrimination and racism. The soldiers themselves used to tell us about the racism and the discrimination they suffered."*

The state of some other prisoners

281. A few prisoners only are mentioned here.

1. Jamil el-Banna and Bisher al-Rawi

282. Asif says he was in Mike block in Camp Delta next to Suwad Al Madini (a Saudi national whose wife is British and whose children are British, also known as Shakir ...). He recollects, ***"A large number of the men were brought into the block from isolation. I believe they came in February 2003 having spent a month in isolation in Guantanamo Bay after they arrived. Abu Ennis, Jamil el-Banna, was put in the cell next to me. Given that he had been in isolation for a month and before that in Bagram Airbase (and before that I understood in Gambia), he was still coping but quite soon after he began to deteriorate. I didn't talk to him much about the Gambia but knew he'd gone there to set up a business. He said that Bagram was very rough. When he arrived at Guantanamo he had very little facial or head hair which he said had all been shaved off in Bagram Airbase. He said that he had been forced to walk around naked, coming and going from the showers, having to parade past American soldiers or guards including women who would laugh at everyone who was put in the same position. When he arrived at Guantanamo his English was not good and still is not good. Bisher al-Rawi was placed on the same row of cells and he used to translate for him. El-Banna was in constant pain from his joints because he suffered from rheumatism and he was diabetic. He told them repeatedly that he was diabetic and they would not believe him."***

283. ***"They used to come and take his blood and say that there was nothing wrong with him. Bisher al-Rawi also told them that el-Banna was not well. When you come new they come and take your blood."*** (Shafiq recollects that they were told by the guards and by the medical officers who were military, that costs were being cut in respect of food and medicine. They said that the cost of the military personnel was going up and that meant that they had to cut costs in other ways which included food for the prisoners and medical care for the prisoners.

284. ***"It was very noticeable by the time we left that the quality of food and the amount of food had gone down. The food had been particularly bad at the beginning. It had improved slightly during the time we were there, but used to noticeably improve just before there was a visit from the Foreign Office."***

285. (During the first Ramadan Asif recollects they were fasting, obviously. However they would only be provided with two meals a day and those were drastically reduced amounts like four teaspoonfuls of rice. ***"We were under the firm impression during the first Ramadan that it was part of a policy to stop us fasting and to cause us to abandon our religious practices. When Ramadan finished the food went back up to normal levels and therefore it was very obvious that it was designed to put pressure on us to stop fasting, which also the doctors and the guards were telling us to stop. The guards served us the food who had been told (they told us this) that they were under orders to give us that much food from their superior officers. When we asked after Ramadan why we were back to normal sized rations we were told that the General had ordered that now."***)

286. ***"It was very clear that el-Banna was devoted to his family. He had photographs of his children including his new daughter. These had come in through the Red Cross. I can recollect one day when the interrogator came to visit him in the block. When she visited him in the block he showed her the pictures of his children and started crying and she said to him we're trying to get you out of here (this was an American interrogator), we know you're an innocent man. I could see as the months went by,"*** says Asif, ***"that he was worrying more and more and that this was having an effect on his mental health. He constantly talked about his children and who would look after them."*** (Asif and Shafiq both comment that the repeated questions for Jamil el-Banna whom they questioned less than they questioned Bisher al-Rawi, concerned Abu Qatada and where he was. In the light of the fact that Abu Qatada is known to have been arrested in England in late 2002, it seems extraordinary that this was a question that the Americans were asking.)

287. Shafiq says that to his knowledge during the time that el-Banna was in Guantanamo he lost about 40 kilos in weight. He started off as someone quite bulky and became someone very, very thin. Asif is aware that el-Banna found it almost impossible to eat the food that was provided. What was provided was a meal packet. *"The meal packets were what we could eat. We were told they cost \$7 each and consisted of a main meal, pasta and Alfredo sauce, pasta and vegetables in tomato sauce, black bean burrito, cheese tortellini. The soldiers said that they were inedible, that they wouldn't eat them, but to us they were much much better than what we had before. There were more calories in them and they were more filling. They weren't nice but we felt fuller. Some of these packages were marked to show they were over 12 years old. But then they stopped them around July 2003 and we were told by the guards that they cost too much. (However, a brand new cafeteria was built for the guards. At that point we were told that they had ice cream added to their menu.) el-Banna could manage to eat the packaged meals (called MRE), but he couldn't eat anything else. When they stopped giving those el-Banna couldn't manage to eat anything else. He told the doctors but the General said no one could have these prepackaged meals anymore and he couldn't eat what was on offer. We're completely sure that for the three weeks before we left he wasn't able to eat at all. Eventually we are aware that they put Bisher al-Rawi next to him (they had been separated) to try to keep him going mentally and physically. We would say that mentally basically he's finished. The last thing we heard about him this year before we came back to England was that when he went to interrogation they told him that he was going to be sent back to Jordan and he was extremely scared of that prospect. We knew that he'd been living in England for about ten years and was a refugee and that his whole life was in England and his wife and children. They were clearly the centre of his whole existence and all he ever really thought about. The prospect of being sent to Jordan meant to him the end of his life. He knew that he would be tortured or killed there."*

2. Re Bisher al-Rawi

288. Asif and Shafiq both remember that he was taken for a lie detector test about two weeks after he arrived from isolation in Guantanamo Bay (about six weeks after he got to Cuba), and was told that he'd passed it. He was put up to Level 1, the highest level (when Shafiq was there) but then ***"for reasons we don't know and after he'd passed his lie detector test we suddenly heard that he was in isolation and the 'privileges' that he'd been given like magazines were taken away as was everything else. We asked him later on when we saw him why he'd been put in isolation and he had no idea. They kept saying to him that he knew more than he was saying."***
289. ***Bisher al-Rawi had an armband on saying 'Iraq' and Jamil el-Banna had an armband on saying 'Jordan', even though both of them lived in England.***
290. ***When Bisher was put in isolation they shaved his head and beard. We know that Bisher was interrogated probably more than 50 times (unlike el-Banna who was probably not interrogated more than about five times). We don't know the exact reasons why Bisher al-Rawi's hair and beard were shaved off but we know that what used to happen to others would be that if you said you didn't want to go to interrogation you would be forcibly taken out of the cell by the ERF team. You would be pepper-sprayed in the face which would knock you to the floor as you couldn't breathe or see and your eyes would be subject to burning pain. Five of them would come in with a shield and smack you and knock you down and jump on you, hold you down and put the chains on you. And then you would be taken outside where there would already be a person with clippers who would forcibly shave your hair and beard. Interrogators gave the order for that to be done; the only way in which this would be triggered would be if you were in some way resisting interrogation, in some way showing that you didn't want to be interrogated. Or if during interrogation you were non-cooperative then it could happen as well.***
291. ***(It was our view that they were looking for vulnerabilities all the time and that the people who seemed most comfortable having a beard or most used to***

it, those were the ones that they would shave it off. We think with the three of us that they thought we would not be so affected if it happened to us. They would watch how you wash, how you eat, how you pray and the guards would talk to you and perhaps because we sounded more like the guards themselves and western that they did not think that we had those same vulnerabilities. They undoubtedly thought we had vulnerabilities, but different ones such as liking to talk to people, not liking to be alone, etc., and those were the ones they focused on with us.)

292. *According to Bisher they seemed obsessed with what he was doing in Gambia and who sent him there and where he got the money from to go and to finance their business project. They were still asking him about a battery charger that he had in his possession in his baggage on the plane. The Americans were asking him about that.*

3. Moazzam Begg

293. *Moazzam Begg we never saw. We only heard about him, particularly from Saad Al Madini, who was a Pakistani brought up in Saudi Arabia. He had been in Bagram Airbase with Moazzam Begg and he had himself been taken from Bagram Airbase. He had been we think handed over by Indonesia to the Americans, kept in Bagram Airbase, taken from Bagram Airbase to Egypt where he had been tortured and then taken back to Bagram and then to Guantanamo.*

294. *While we never saw Moazzam Begg, we did talk to guards who had had contact with him and they told us that he had been in isolation all the time he was there and had only seen them and no one else. Four guards told us that he was in a very bad way. In addition, he was in Bagram for a year and no one that we know of had ever been there for a year and must be in a worse state coming out of it. People coming from there used to tell us that there was a British guy imprisoned there and that must have been Moazzam Begg.*

295. *We don't know but have the impression that he may have had 'admissions' forced out of him at Bagram which he did not want to continue when he got to Guantanamo Bay and the authorities kept him in isolation to stop him being able to go back on what he may have said or to have the chance of getting any support from anyone else that might cause him to resist what they wanted. We believe that he was in isolation in Camp Delta and then in isolation in Camp Echo. The impression we have is that the point of keeping people in complete isolation in Camp Echo was so that they would in every way be under the control of the people who held them there. They would have no other information than what they were given by the guards or the interrogators and would be obliged to put all their trust in what they said and would know nothing whatsoever about what was happening in the outside world or even in Guantanamo Bay. The guards were especially picked to go to Echo. We talked to people who had come back from Camp Echo.*

4. Mamdouh Habib

296. *One was Mamdouh Habib, who was the Australian. He said that there was no natural light at all there. Even when you went to the shower, which was 'outside', it was still sealed off so you couldn't see any natural light at all. You couldn't tell what time of day or night it was. You were in a room and a guard was sitting outside watching you 24 hours a day. That was his job, just to sit outside the cell and watch you.*

297. *Habib himself was in catastrophic shape, mental and physical. As a result of his having been tortured in Egypt where he was taken from Bagram and then brought back, he used to bleed from his nose, mouth and ears when he was asleep. We would say he was about 40 years of age. He got no medical attention for this. We used to hear him ask but his interrogator said that he shouldn't have any. The medics would come and see him and then after he'd asked for medical help they would come back and say if you cooperate with your interrogators then we can do something. (Shafiq says "Habib told me this and I have also heard them say it to other detainees as well".) Asif recollects*

that *"another man who'd been taken to Egypt and tortured there, Saad Al Madini, was also refused medical assistance for the same reason. We know from Al Madini that he had had electrodes put on his knees and that something had happened to his knees and something had happened to his bladder and he had problems going to the toilet. He told us that when he was in interrogation he was told by the interrogators that if he cooperated he would be first in line for medical treatment.*

5. Omar Khadr

298. Rhuhel recollects *"the same thing also, we are aware, happened to a young Canadian man, Omar Khadr, who was aged 17 when we left. He had been shot three times at point blank range and his lung punctured and had shrapnel in one eye and a cataract in the other. They would not operate on him. He was told that was because he would not cooperate. We were told one time when he was in isolation he was on the floor very badly ill. The guards called the medics and they said they couldn't see him because the interrogators had refused to let them. We don't know what happened to him (he had had some sort of operation when he was still in Afghanistan but he was in constant pain in Guantanamo and still undoubtedly is and they would not give him pain killers."* (He was one door from Rhuhel in the same block and all three used to talk to him.)

6. Mohamed Rajab

299. *One man, a Yemeni, Mohamed Rajab, was in a particularly bad state. Every two hours he would get moved from cell to cell, 24 hours a day, seven days a week, sometimes cell to cell, sometimes block to block, over a period of eight months. He was deprived of sleep because of this and he was also deprived of medical attention. He'd lost a lot of weight. We were aware that he had a painful medical problem, haemorrhoids, and that treatment was refused unless he cooperated. He said he would cooperate and had an operation. However, the operation was not performed correctly and he still had problems. He would not cooperate. We were aware that shortly before we*

came back to England he was put into Romeo block where you were stripped naked. We would see people go and come from Romeo. When they went they would go fully clothed. When they came back they would only have shorts on. They told us that they would have all their clothes taken off in the cell. The Red Cross is aware of this. If the interrogators after that thought you should be allowed clothes, then you were allowed them. This appeared to be an open-ended process depending on the interrogation and the interrogators. The people we know who went to that block were not people who caused problems or were disruptive. The whole application of these measures was entirely to do with interrogators and whether they thought they were getting out of them what they could and should get out of them. All the Bosnians were there for instance.

7. Algerian detainees kidnapped in Bosnia

300. *"By Bosnians we mean six Algerians who were unlawfully taken from Bosnia to Guantanamo Bay. They told us how they had won their Court case in Bosnia. As they walked out of Court, Americans were there and grabbed them and took them to Camp X-Ray, January 20, 2002. They arrived five days after us. They were treated particularly badly. They were moved every two hours. They were kept naked in their cells. They were taken to interrogation for hours on end. They were short shackled for sometimes days on end. They were deprived of their sleep. They never got letters, nor books, nor reading materials. The Bosnians had the same interrogators for a while as we did and so we knew the names which were the same as ours and they were given a very hard time by those. They told us that the interrogators said if they didn't cooperate that they could ensure that something would happen to their families in Algeria and in Bosnia. They had dual nationality. They had families in Bosnia as well as in Algeria.*

301. *(From what we could see interrogators used to prey on particular groups of nationality so that Europeans would have the same interrogators, North Africans would have the same, etc.). One of the methods of interrogation was*

to say that someone in Cuba had told them that we were in a particular place, for instance, the video we've described and training camps in Kandahar. When we asked who it was, they would not tell us."

302. (On one occasion Asif was told who had implicated him because he was shown the photograph of a particular detainee in Guantanamo and told that that man had implicated him and said that you were in a mosque in a training camp in Afghanistan. However, this was a detainee whom Asif knew was mentally ill. Before Asif was told this the man was placed in a cell opposite him for about five days and then taken away and it was after that that Asif was accused. ***"We could see the process by which the interrogators seemed to get excited, because they finally got some piece of 'real' evidence and simply didn't care that it had come from someone who was mentally unbalanced. One of the interrogators did also let slip that another detainee had identified us as the three who were in the video and said he'd seen us in Guantanamo Bay."*** (Shafiq recollects examples of interrogators inventing 'information' about us, about the three, and then informing other detainees of it. For example, one detainee came back after interrogation and said he'd been told that Shafiq said that he and another detainee should not be put together because they were in dispute with each other which was completely untrue. Shafiq had never said anything like that.

303. ***"We were told by one Algerian (not one of the Bosnian Algerians) that he had been taken to interrogation and been forced to stand naked. He also told us he had been forced to watch a video supposedly showing two detainees dressed in orange, one sodomising the other and was told that it would happen to him if he didn't cooperate."***

304. An issue that all three men have concerns about is the treatment of those detainees from countries with a worse human rights record than the UK. Whilst in the Chinese block Asif managed to understand from one of the other detainees that they had originally all denied they were from China. They had apparently said they were Afghani. He says that they were very rarely interviewed. Eventually the Americans told them that if they admitted where they were from they would not tell

their governments (it seems they did not know if they were Chinese or from one of the Southern republics due to their dialect). The detainees admitted to being Chinese and within one month Chinese officials arrived to interrogate them. The Chinese officials told them that the US had provided full co-operation. If they are returned to China they will all be executed. All three men report similar concerns in relation to the Russian detainees. It seems that a number of these (possibly 20) have been returned to Russia and their fate is unknown.

8. David Hicks

305. Asif says *"I first saw David Hicks in Camp X-Ray. He was a very surprising sight. A tiny white guy not more than 5'3" with a lot of tattoos on him. He told us he had endured an extremely bad experience having been held on a ship where he had been interrogated by Americans and hooded and beaten. Despite that experience, he was in better shape then that he was when we last saw him in Mike block. We thought that he had gone downhill. By downhill we mean that he seemed to be losing all hope and more willing to co-operate as a result. We were interrogated a lot but he used to get interrogated every two to three days, sometimes every day. He was told that if he didn't cooperate he would never go home. It started when he was moved to Delta, that he began to be moved all the time. They wouldn't let him settle with anyone. We met him again in Mike block after Delta and had the impression that he was being forced to make admissions, the "force" consisting of offers of benefits if he co-operated and removal of anything that could make life slightly easier if he did not. We were aware for instance that he needed essential medical treatment for a hernia and that he was told he would only get it if he cooperated. We do not know the reason for his appearance when he arrived at Mike block; he had always been proud of his hair, but when he arrived there his head hair was shaved off, although he still had a beard. We were told by some guards that he was taken to Echo after he started co-operating and that in Echo he had access to more basic comforts as a reward, although It is our understanding that he was in Camp Echo i.e. in complete isolation from the summer of 2003 onwards and we presume still there, where*

the only people he could communicate with would be interrogators. The same guards also told us that he had been taken out of Echo for another operation, but we don't know if that is correct

9. The Kuwaitis

306. *'Fouad Mahmoud Al Rabiah was a businessman, we understand, who had studied in America and graduated from Miami in aeronautical engineering. To us he sounded Scottish. He had lived in England/Scotland for approximately ten years. He was given a particularly hard time, being constantly moved around, every two hours, after General Miller came to the Camp. He took his polygraph test and passed a long time ago and was initially sent to the best section of the Camp but then brought back again after a while. He got extremely harsh treatment including short shackling. Because he was educated, we understand, wealthy, and they were determined that he had to be part of a cell. We understood that he was seized in Pakistan, basically sold by the Pakistanis and then the Americans invented accusations to try and fit. In 2004 the Kuwaiti government came and told all the Kuwaitis that they would be going home in June. When they wanted to know what would happen to them when they got home, they were told "you will find out when you get home." We could see that he was suffering from serious depression, losing weight in a substantial way and very stressed because of the constant moves, deprived of sleep and seriously worried about the consequences for his children. Every father in the camp had a huge worry about his family which added to the stress.'* Shafiq recalls when he was next to him in isolation that he was suffering from serious stomach pains and that medication was denied. He was told that he couldn't receive medication unless he cooperated.

10. Other detainees (including detainees sold to the Americans)

307. Asif describes a disturbing number of detainees who have clearly been sold. All three are convinced that there must be a paper trail which will show huge sums of money paid out by the USA for many of those now in Guantanamo. These are some examples (some of the names are familial names, as is customary).

- a) *'Two brothers from Pakistan, one is a scholar the other a reporter, reason they are there because they were having a feud with another family, the other family told some people they are al Qaeda now they are in Cuba. Both were sure that the Americans were paying money for captives.*
- b) *Numerous other people in Cuba who are from Afghanistan and Pakistan were sure they had been sold by corrupt individuals. A lot of people who were having land disputes were sold by the disputers to the Americans. These people were brought to Cuba. The Americans know they are innocent but still they are not letting them go.*
- c) *Abu Ahmed Makki, a Saudi Arabian citizen married to a Pakistani wife lived in Pakistan with his wife and was arrested in Pakistan by the Pakistan authorities. Most of his possessions were taken including his motorbike and cash. Upon his release in Pakistan by the authorities he asked for his valuables back but he was re-arrested and handed over to the Americans who took him to Cuba and he has been there for over two years. He was told he should not be there but they wanted him to spy in the camp for them. He was told once he had cooperated and helped the Americans they would release him.*
- d) *Abu Ahmad Sudani, a teacher in Pakistan who has a wife and a child in Pakistan believes he also was sold to the American forces. He was told that he would be released over a year ago but he is still in Cuba. He doesn't know when they will release him to. He wants to go to Pakistan because his wife and child are in Pakistan. His wife and child are Pakistani nationality and he is a Sudani.'*
- e) *One Afghani man, a farmer about 55 years old, is a farmer from Bamyam. He was next to Shafiq. He speaks Farsi and although in Cuba for over a year was only interrogated on two occasions; on one occasion there was no Farsi translator and he was brought back to his cage. He does not know what he has done to be in Cuba. He doesn't even know where Cuba is! He is depressed, scared and badly affected.*

11. Camp Four

308. Asif says *'numerous other detainees have been told that their interrogation has finished, they have passed numerous tests e.g. lie detector, stress analyser test. They have been taken to Camp 4 but they still have not been released.'*

309. *It is called a medium security section. When we were in Guantanamo there were four blocks. One block has four bays in it. Each bay has ten or twelve people in. Instead of wearing orange they all would be wearing white. These are the detainees who are always shown on TV playing football. They don't wear chains or shackles. They are said to be people who are about to go home but they yet have been there about one year. These are examples of the hundreds of people who should never have been in Cuba in the first place. The authorities seem paralyzed. They can't send them home, they don't bother to interrogate them so they are just stuck.'*

Shafiq Rasul

Asif Iqbal

Ruhel Ahmed

26th July 2004



For Opinion See 124 S.Ct. 2686 , 124 S.Ct. 1494 ,
124 S.Ct. 534

U.S.,2004.

Supreme Court of the United States.
Shafiq RASUL, et al., Petitioners,
v.
George W. BUSH, et al., Respondents.
No. 03-334.
January 22, 2004.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

Petitioners' Brief on the Merits

Joseph Margulies
Counsel of Record
Margulies & Richman, PLC
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900
MacArthur Justice Center
University of Chicago
Law School
1111 East 60th Street
Chicago, IL 60637
(773) 702-9560
Barbara J. Olshanky
Steven Macpherson Watt
Michael Ratner
Center for
Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430
John J. Gibbons
Gitanjali S. Gutierrez
Gibbons, Del Deo,
Dolan, Griffinger
& Vecchione, P.C.
One Riverfront Plaza

Newark, NJ 07102
(973) 596-4700
Attorneys for Petitioners

***i QUESTION PRESENTED**

Whether United States courts lack jurisdiction to
consider challenges to the legality of the detention
of foreign nationals captured abroad in connection
with hostilities and incarcerated at the Guantánamo
Bay Naval Base, Cuba.

***ii LIST OF PARTIES TO THE PROCEEDINGS
BELOW**

The following persons imprisoned at Guantánamo
Bay Naval Base appeared below as petitioners:
Mamdouh Habib; Shafiq Rasul, Asif Iqbal; and
David Hicks. The following individuals, who are
family members of the detainees listed above, also
appeared below as next friend petitioners: Maha
Habib, the wife of Mamdouh Habib; Skina Bibi, the
mother of Shafiq Rasul; Mohammed Iqbal, the fath-
er of Asif Iqbal; and Terry Hicks, the father of Dav-
id Hicks.

The following persons appeared below as respond-
ents: George W. Bush, President of the United
States; Donald H. Rumsfeld, Secretary of Defense;
Brigadier General Michael Lehnert, Commander of
Joint Task Force-160; Brigadier General Rick Bac-
cus, Commander of Joint Task Force-160; Colonel
Terry Carrico, Commander of Camp X-Ray,
Guantánamo Bay, Cuba; and Lieutenant Colonel
William Cline, Commander of Camp Delta,
Guantánamo Bay, Cuba.

***iii TABLE OF CONTENTS**

QUESTION PRESENTED ... i

LIST OF PARTIES TO THE PROCEEDINGS BE-
LOW ... ii

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... v

OPINION BELOW ... 1

JURISDICTION ... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ... 1

STATEMENT OF THE CASE ... 2

SUMMARY OF THE ARGUMENT ... 7

ARGUMENT ... 9

I. THE HABEAS STATUTE GIVES THE DISTRICT COURT JURISDICTION ... 9

A. Habeas Turns On Executive Detention, Not The Accident of Nationality or Situs ... 11

B. The Habeas Statute Should Not Be Read To Condone Creating A Prison Outside The Law ... 16

1. The Executive's Interpretation Of The Habeas Statute Would Raise Serious Doubts Under The Due Process Clause ... 17

2. The Executive's Interpretation Of The Habeas Statute Would Also Raise Serious Doubts Under The Suspension Clause ... 21

***iv** C. Unreviewable Executive Detention Is Rejected Not Only By Anglo-American Tradition, But Also By "Every Modern Government" ... 23

II. THE GOVERNMENT OFFERS NO PERSUASIVE REASON TO IGNORE THE UNAMBIGUOUS COMMAND OF THE HABEAS STATUTE ... 29

A. Introduction ... 30

B. The Court In *Johnson* Restrained The Exercise Of Habeas Where A Lawful And Independent System of Justice Had Allowed The Prisoners To Challenge Their Detention ... 32

C. Guantánamo Is Not Like Wartime China or Germany ... 41

D. The Current Hostilities Do Not Justify A Departure From Settled Practice ... 46

CONCLUSION ... 50

***v** TABLE OF AUTHORITIES

FEDERAL CASES

Addington v. Texas, 441 U.S. 418 (1979) ... 17

Ahrens v. Clark, 335 U.S. 188 (1948) ... 12

Atkins v. Virginia, 536 U.S. 304 (2002) ... 29

Balzac v. Porto Rico, 258 U.S. 298 (1922) ... 19

Bird v. United States, 923 F. Supp. 338 (D.Conn. 1996) ... 45

Bowen v. Johnston, 306 U.S. 19 (1939) ... 9

Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) ... 12, 38

Brown v. Allen, 344 U.S. 443 (1953) ... 13, 15, 39, 46

Burns v. Wilson, 346 U.S. 137 (1953) ... *passim*

Burt v. Schick, 23 M.J. 140 (U.S.C.M.A. 1986) ... 44

***vi** *Callas v. United States*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958) ... 46

Carlson v. Landon, 342 U.S. 524 (1952) ... 18

Chew Heong v. United States, 112 U.S. 536 (1884) ... 15

Chin Yow v. United States, 208 U.S. 8 (1908) ... 31, 37

DeMore v. Kim, 538 U.S. 510, 123 S.Ct. 1708 (2003) ... 13

- Downes v. Bidwell*, 182 U.S. 244 (1901) ... 20, 46
- Duncan v. Kahanamoku*, 327 U.S. 304 (1946) ... 30
- Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) ... 9
- Ex parte Hawk*, 321 U.S. 114 (1944) ... 37
- Ex Parte Hayes*, 414 U.S. 1327 (1973) ... 12
- Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874) ... 9
- Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1868) ... 12, 40
- *vii** *Ex parte Quirin*, 317 U.S. 1 (1942) ... *passim*
- Ex parte Royall*, 117 U.S. 241 (1886) ... 37
- Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) ... 13, 14
- Felker v. Turpin*, 518 U.S. 651 (1996) ... 13, 14
- Frank v. Mangum*, 237 U.S. 309 (1915) ... 37
- Gerstein v. Pugh*, 420 U.S. 103 (1975) ... 17
- Gherebi v. Bush*, __F.3d__, 2003 WL 22971053 (9th Cir. Dec. 18, 2003) ... 41
- Gusik v. Schilder*, 340 U.S. 128 (1950) ... 36
- Harris v. Nelson*, 394 U.S. 286 (1969) ... 15
- Hiatt v. Brown*, 339 U.S. 103 (1950) ... 34, 39
- Hirota v. McArthur*, 338 U.S. 197 (1949) ... 38
- In re Grimley*, 137 U.S. 147 (1890) ... 34
- *viii** *In re Yamashita*, 327 U.S. 1 (1948) ... *passim*
- INS v. St. Cyr*, 533 U.S. 289 (2001) ... *passim*
- Jackson v. Indiana*, 406 U.S. 715 (1972) ... 13, 15, 17
- Johnson v. Eisentrager*, 339 U.S. 763 (1950) ... *passim*
- Johnson v. Zerbst*, 304 U.S. 458 (1938) ... 9, 37
- Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) ... 18
- Kansas v. Hendricks*, 521 U.S. 346 (1977) ... 17
- Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993) ... 44
- Kwack Jan Fat v. White*, 253 U.S. 454 (1920) ... 37
- Lawrence v. Texas*, 123 S.Ct. 2472 (2003) ... 29
- Ludecke v. Watkins*, 335 U.S. 160 (1948) ... 18, 41
- McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) ... 15
- *ix** *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ... 11, 29
- Ng Fung Ho v. White*, 259 U.S. 276 (1922) ... 41
- Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) ... 15
- Padilla v. Rumsfeld*, __F.3d__, 2003 U.S. App. LEXIS 25616 (2d Cir. Dec. 18 2003) ... 44
- Ralpho v. Bell*, 569 F.2d 607, *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977) ... 46
- Rasul v. Bush*, __U.S.__, 124 S.Ct. 534 (2003) ... 1, 4
- Reid v. Covert*, 354 U.S. 1 (1957) ... 19, 20
- Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) ... 40
- Sterling v. Constantin*, 287 U.S. 378 (1932) ... 30
- Stone v. Powell*, 428 U.S. 465 (1976) ... 30, 37
- Swain v. Pressley*, 430 U.S. 372 (1977) ... 13, 23
- Toth v. Quarles*, 350 U.S. 11 (1955) ... 12
- *x** *United States v. Carmack*, 329 U.S. 230 (1946)

... 43

United States v. Castro, 124 S.Ct. 786 (2003) ... 10, 23

United States v. Lee, 906 F.2d 117 (4th Cir. 1990) ... 43

United States v. Salerno, 481 U.S. 739 (1987) ... 17

United States v. Spelar, 338 U.S. 217 (1949) ... 46

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) ... 19

Vermilya-Brown v. Connell, 335 U.S. 377 (1948) ... 44

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944) ... 11

Withrow v. Williams, 507 U.S. 680 (1993) ... 37

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ... 15

Zudvydas v. Davis, 533 U.S. 678 (2001) ... *passim*

*xi FEDERAL STATUTES

10 U.S.C. § 844(a) ... 44

10 U.S.C. §§ 1471-1593 ... 32

28 U.S.C. § 1254(1) ... 1

28 U.S.C. § 1331 ... 13

28 U.S.C. § 2241 ... *passim*

28 U.S.C. § 451 ... 35

28 U.S.C. § 452 ... 35

5 U.S.C. § 702 ... 13

Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 ... 12

Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 ... 13

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73 ... 12

Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001) ... 23

U.S. Const. amend. V ... 2

U.S. Const. art. I, § 9, cl. 2 ... 2

USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 107 Pub. L. No. 56, 115 Stat. 272 (2001) ... 14

*xii OTHER AUTHORITIES

Anita Snow *Cuba Rants About Use of U.S. Navy Base*, Ft. Worth Star-Telegram, Dec. 27, 2003, at 14 ... 45

Brief for Respondent, *Calcano-Martinez v. INS*, 533 U.S. 248 (2001) (No. 00-1011) ... 21

Charles Savage *Growth at Base Shows Firm Stand on Military Detention*, Miami Herald, Aug. 24, 2003, at A1 ... 5

Charles Savage *Inside Guantanamo*, Miami Herald, Aug. 24, 2003 at L1 ... 5

Cherif Bassiouni *Human Rights in The Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (1993) ... 24

Commentary on Geneva Convention IV of Aug. 12, 1949 (Jean S. Pictet ed., 1958) ... 27

European Parliament Resolution on the European Union's Rights, Priorities and Recommendations for the 59th Session of the U.N. Commission on Human Rights in Geneva (Mar. 17-Apr. 25, 2003), available at *xiii <http://europa.eu.int/abc/doc/off/bull/en/200301/p102001.htm> ... 28

Exec. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism., 66 Fed. Reg. 57,831 (2001) ... 4

Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 Stan. L. Rev. 1197 (1996) ... 7

Guantanamo Detainee Attempts Suicide, Raising Number to 30 (Associated Press Aug. 15, 2003) ... 6

Guantanamo Inmate Tries to Kill Himself, St. Louis Post-Dispatch, Jan. 7, 2004, at A8 ... 6

Howard S. Levie, *Prisoners of War 57* (Naval War College Press 1978) ... 47

Human Rights Committee, Gen. Cmt. 29, States of Emergency (art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) ... 26

Human Rights Committee, Gen. Cmt. 8, art. 9 (Sixteenth Session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994) ... 26

International Committee of the Red Cross (ICRC), *States Party to the Geneva *xiv Conventions and their Additional Protocols*, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party-gc#a7> (May 20, 2003) ... 27

International Committee of the Red Cross, Overview of the ICRC's Work for Internees, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList454/951C74F20D2A2148C1256D8D002CA8DC> (November 6, 2003) ... 27, 29

John Mintz *Guantanamo Bay Detainee Is First to Be Given a Lawyer*, Wash. Post, Dec. 4, 2003, at A8 ... 4

Johnson v. Eisentrager, 339 U.S. 763 (1950) (Case No. 306), Index to Pleadings filed in Supreme Court ... 33, 45

Katharine Seelye *A Nation Challenged: Captives: An Uneasy Routine at Cuba Prison Camp*, N.Y. Times, Mar. 16, 2002 at A8 ... 5

Lillich, Richard B. & Hannum, Hurst International Human Rights: Problems of Law, Policy, and Practice 136 (3d ed. 1995) ... 25

Lord Johan Steyn *Address to the British Institute of International and Comparative Law for the Twenty-Seventh F.A. Mann Lecture*, at www.nimj.org (Nov. 25, 2003) ... 24

*xv Mike Allen & Glenn Frankel *Bush Halts Military Proceedings Against 3*, Wash. Post, Jul. 19, 2003, at A15 ... 4

Nancy Gibbs *Inside "The Wire,"* Time Mag., Dec. 8, 2003) at 40 ... 6

Organization for Security and Co-operation in Europe Parliamentary Assembly Rotterdam Declaration and Resolutions Adopted during the 12th Annual Session (Rotterdam, July 5-9, 2003), available at http://www.osce.org/documents/pa/2003/07/495_en.pdf ... 29

Report on the Working Group on Arbitrary Detention, U.N. GAOR, Hum. Rts. Comm., 59th Sess., U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002) ... 28

Restatement (Third) of Foreign Relations Law of the United States § 114 (2000) ... 29

Rights of Persons Held in the Custody of the United States in Afghanistan and Guantánamo Bay, Parliamentary Assembly Resolution No. 1340 (2003) (Adopted June 26, 2003), available at http://assembly.coe.int/Documents/Adopted_Texts... 28

Roland Watson *Bush Law Chief Tried to Drop Habeas Corpus*, The Times (London), Dec. 3, 2001, at 14 ... 14

*xvi *Senate Resolution of Ratification Of Interna-*

tional Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, S4784, 102nd Cong. (1992) (ratified Apr. 2, 1992) ... 25

Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at U.S. Base in Guantánamo Bay, Cuba (Jan. 16, 2002) ... 28

Statement of Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/0C5F3E732DBFC069C1256CE8002D76C0?opendocument> (Mar. 12, 2003) ... 28

Statute of the International Court of Justice, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicctext/ibasicstatute.htm> (last visited Jan. 5, 2004) ... 26

United Nations Treaty Collection, at <http://www.unhchr.ch/html/menu3/b/treaty4.asp.htm>.) (last visited Jan. 5, 2004) ... 25

Universal Declaration of Human Rights, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ... 24

TREATIES

Agreement Between the United States and Cuba for the Lease of Lands for Coaling and *xvii Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418, 6 Bevans 1113 ... 6, 43

American Declaration of the Rights and Duties of Man, art. XXV, O.A.S.T.S. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II82 Doc. 6 rev. 1 (1992) ... 25

Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ... 2, 27

Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287 ... 2, 27

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR. Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) ... 2, 25, 26

Treaty Defining Relations with Cuba, May 29, 1934 U.S. - Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866 ... 45

DECISIONS OF INTERNATIONAL TRIBUNALS

Aksoy v. Turkey, 23 Eur. H.R. 553 (1996) ... 26

*xviii *Chahal v. United Kingdom*, 23 Eur. H.R. 413 (1997) ... 26

Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am.C.H.R. (Mar. 12, 2002), *reprinted in* 41 I.L.M. 532 (2002) ... 28

Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Advisory Opinion of July 8) *reprinted in* 35 I.L.M. 809 ... 26

Ocalan v. Turkey, Eur. Ct. Hum. Rts. App. No. 46221/99 (Mar. 2003) ... 26

R. v. Cook, 2 S.C.R. 587 (1998) ... 24

R. v. Sec'y of State for Foreign and Commonwealth Affairs, 2002 EWCA Civ 1598 ... 24

EXECUTIVE BRANCH DOCUMENTS

25 OP. ATT'Y GEN. 157 (1904) ... 43

6 Op. Off. Legal Counsel 236 (1982) ... 43

Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, *reprinted in* Documents on Germany, 1944-70, Comm. on Foreign Relations, 92nd Cong., (Comm. Print 1971) ... 46

***xix** Directive Number 20-5, United States Military Assistance Command, Vietnam (March 15, 1968), *reprinted in* 62 Am. J. Int'l L. 765 (1968) ... 48

Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, United States Army Regulation 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps) (October 1, 1997) ... 2, 47

Frederic L. Borch, Judge Advocates in Combat (Office of the Judge Advocate General 2001) ... 47

Protocol of the Proceedings of the Berlin (Potsdam) Conference, Aug. 1, 1945, *reprinted in* Documents on Germany, 1944-1961, Comm. on Foreign Relations, United States Senate, 87th Cong., 1st Sess. 8 (Comm. Print 1961) ... 46

United States Department of State, "Fact Sheet: Cuba," Feb. 22, 1993, *available at* 1993 WL 2977391 ... 45

United States Department of State, *Treaties in Force* (1995) ... 45

War Briefing, Army Col. John Della Jacono, Enemy Prisoner of War Briefing from Umm Qar, Iraq (May 8, 2003), *available at* 2003 WL 1864306 ... 49

*1 OPINION BELOW

The opinion of the D. C. Circuit is reported at 321 F.3d 1134 (D.C. Cir. 2003). P.A. 1a.^[FN1] The orders denying petitions for reconsideration by the panel and rehearing *en banc* are unreported, but are reprinted at P.A. 31a. The opinion of the district court is reported at 215 F. Supp.2d 55 (D.D.C. 2002). P.A. 32a.

FN1. References to the Appendix to the Petition for Writ of Certiorari are denoted P.A. ____; references to the Joint Appendix are denoted J.A. ____.

JURISDICTION

The D.C. Circuit denied timely petitions for reconsideration and rehearing *en banc* on June 2, 2003. Petitioners filed a timely Petition for Writ of Certiorari on September 2, 2003, and this Court granted certiorari on November 10, 2003. *Rasul v. Bush*, __U.S.__, 124 S.Ct. 534 (2003). J.A. 64-68. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2241, which provides in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions....

(c) The writ of habeas corpus shall not extend to a prisoner unless -

*2 1. He is in custody under or by color of the authority of the United States ...; or

3. He is in custody in violation of the Constitution or laws or treaties of the United States....

This case also involves the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V (P.A. 67a); the Suspension Clause, U.S. Const. art. I, § 9, cl. 2 (J.A. 128); Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (P.A. 69a-70a); Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287 (P.A. 69a-70a); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR. Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) (P.A. 69a); and *Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees*, U.S. Army Regulation 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps) (October 1, 1997) (P.A. 71a).

STATEMENT OF THE CASE

Seized in ostensible connection with hostilities abroad, the petitioners are in United States custody at Guantánamo Bay Naval Station, Cuba. They have been confined for two years without charges, access to counsel or courts, or recourse to any legal process. The Executive has presented no evidence to justify the detentions, and claims it is under no obligation to do so. It claims it may hold the petitioners under these conditions indefinitely.

*3 ~~Shafiq Rasul and Ashir Iqbal are British citizens;~~ Mamdouh Habib and David Hicks are Australian citizens.^[FN2] J.A. 75-108. After September 11, 2001, Petitioner Rasul traveled from his home in Britain to visit relatives in Pakistan, explore his culture, and continue his computer studies. ~~He was seized in Pakistan after leaving a visit with his aunt.~~ J.A. 83. Petitioner Iqbal also traveled to Pakistan from his home in Britain after September 11, intending to marry a woman from his father's small village. ~~Shortly before the marriage, his father allowed him to leave the village briefly; while away, he too was seized in Pakistan.~~ *Id.* Both men were ultimately detained by Northern Alliance or other forces and turned over to the United States in December 2001. In January 2002, they were transported to Guantánamo, where they have been held ever since. J.A. 86.

FN2. The allegations recounted above were accepted as true by the lower courts, for purposes of Respondents' Motion to Dismiss for lack of jurisdiction.

Petitioner Habib traveled to Pakistan from his home in Australia in August 2001, to look for work and a school for his teenage children. On October 5, 2001, he was arrested by Pakistani authorities, who turned him over to Egyptian authorities. Early in 2002, Egypt transferred Mr. Habib to United States custody, and on May 4, 2002, he was transported to Guantánamo. J.A. 112, 119. Petitioner Hicks was living in Afghanistan at the time of his seizure by the Northern Alliance, which transferred him to United States custody in December 2001. J.A. 84. Hicks' father believes his son may have joined the

army of the then-incumbent Government of Afghanistan, the Taliban. P.A. 40. Like Petitioners Rasul and Iqbal, he has been held at Guantánamo since January 2002. J.A. 86.

*4 The four Petitioners have never been enemy aliens or unlawful combatants. Prior to their detention, the Taliban had caused no American casualties, and the Petitioners neither caused nor attempted to cause harm to American personnel. The four Petitioners had no involvement, direct or indirect, in any terrorist act, including the attacks of September 11, 2001. They maintain today, as they have throughout this litigation, that they are innocent of wrongdoing, and the United States has never presented evidence to the contrary. J.A. 86, 112, 113.

All four Petitioners promptly identified themselves to the United States by correct name and nationality. Government agents at the prison have repeatedly interrogated all four Petitioners but no Petitioner has been charged with any wrongdoing or brought before any a military or civilian tribunal. J.A. 86, 113. With the recent exception of David Hicks,^[FN3] no Petitioner has been informed of his rights under domestic or international law, and the Executive claims the petitioners should not be so informed. They do not even *5 know they are the subject of this litigation. The Executive also claims the petitioners are not entitled to the protections of the Geneva Convention. J.A. 92, 119. Only Petitioner Hicks has received counsel. No charges are pending against him, and he, like the other petitioners, has no means by which he can establish his innocence or secure his release. Military officials have acknowledged that at least some detainees at Guantánamo are victims of circumstance and probably innocent. J.A. 121. *See Katharine Q. Seelye, A Nation Challenged: Captives: An Uneasy Routine at Cuba Prison Camp*, N.Y. Times, Mar. 16, 2002, at A8 (quoting Deputy Commander at Guantánamo).

FN3. In the lower courts, the Executive took the position the prisoners were held

pursuant to the President's power as Commander in Chief "and under the laws and usages of war." *E.g. Rasul v. Bush*, Government's Motion to Dismiss at 4. On July 3, 2003, the President designated David Hicks and five other detainees as being held pursuant to the President's Military Order of November 13, 2001, concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed. Reg. 57,831. Mike Allen & Glenn Frankel, *Bush Halts Military Proceedings Against 3*, Wash. Post, Jul. 19, 2003, at A15. According to the Government, this means Hicks *may*, but need not, be brought before a military commission. On December 3, 2003, the Executive assigned military counsel for Petitioner Hicks, and counsel has since visited with Hicks. John Mintz, *Guantanamo Bay Detainee Is First to Be Given a Lawyer*, Wash. Post, Dec. 4, 2003, at A8. At present, however, Hicks has not been charged, has no recourse to any procedure for demonstrating his innocence or seeking his release, and remains subject to indefinite detention without legal process.

The Executive has disclosed little information regarding the detainees. It has not indicated what they are believed to have done to justify their seizure or their continued detention. It does not report on their current welfare. It has, however, "allowed tightly controlled media visits." Charles Savage, *Inside Guantanamo*, Miami Herald, Aug. 24, 2003, at L1. According to published reports, the Guantánamo installation consists of four units, with construction underway on a fifth.^[FN4] The majority of the inmates are held in three camps described by the Government as maximum-security facilities. These inmates are in solitary confinement, restricted to their 6' 8" x 8' cells twenty-four hours per day, except for thirty minutes of exercise three times per week, followed by a five-minute shower. *Id.* The inmates are shackled while outside their cells. They

exercise on a "caged 25-foot by 30-foot concrete slab." *Id.* "Lights are kept on 24 hours a day, and guards pace the rows *6 constantly. Inside each cell, detainees have a hole-in-the-ground toilet, a sink with running water low enough to make washing feet for prayers easy, and an elevated shelf-bunk with a mattress."^[FN5] *Id.*

FN4. According to the prison commander, the new construction signals the Government's intention to rely on the prison "as long as the global war on terrorism is ongoing." Charles Savage, *Growth at Base Shows Firm Stand on Military Detention*, Miami Herald, Aug. 24, 2003, at A1. Current plans call for a capacity of 1,100 inmates. *Id.*

FN5. There have been thirty-four attempted suicides since the prison opened. *Guantanamo Inmate Tries to Kill Himself*, St. Louis Post-Dispatch, Jan. 7, 2004, at A8. Prison officials attribute the attempts "to the effects of the indefinite detentions on prisoner morale." *Guantanamo Detainee Attempts Suicide, Raising Number to 30* (Associated Press Aug. 15, 2003).

The prison currently holds approximately 660 inmates from 44 countries. Nancy Gibbs, *Inside "The Wire"*, Time Mag., Dec. 8, 2003, at 40, 40. Though some inmates have been released in the past two years, others have replaced them and the prison has maintained approximately the same number of inmates for the past year. *Id.* However, days after this Court's grant of certiorari in the present cases, the Executive announced its intention to release approximately 140 inmates, more than double the number that had been released since the prison opened. *Id.* at 41. As of this writing, these releases have not taken place.

The Government has occupied Guantánamo since 1903, pursuant to a lease that grants the United States "complete jurisdiction and control," while Cuba retains "ultimate sovereignty." Agreement

Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418, 6 Bevans 1113. These terms are not defined in the lease. The lease term is indefinite. *Id.* Guantánamo is a self-sufficient American enclave, larger than Manhattan, with thousands of military and civilian residents. The base operates its own schools, power system, water supply, and internal transportation system. Congress has repeatedly extended federal statutes to the base and United States courts have long *7 taken jurisdiction over disputes there. Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 Stan. L. Rev. 1197, 1228 (1996). Further facts about Guantánamo are set forth *infra*.

SUMMARY OF THE ARGUMENT

The district court had jurisdiction over the petitions for habeas corpus pursuant to 28 U.S.C. § 2241, which codifies the Great Writ. The statute grants the federal courts power to review Executive detentions “in violation of the Constitution or laws or treaties of the United States.” The prisoners in this case have been confined by the Executive for two years without legal process, in alleged violation of the Constitution, laws, and treaties of the United States.

The Executive contends that the federal judiciary is powerless to review the prisoners’ detention because they are foreign nationals imprisoned beyond the “ultimate sovereignty” of the United States. This claim should be rejected. First, nothing in the statute purports to limit jurisdiction based on nationality or territory, and Congress has done nothing to suggest that federal courts should be stripped of their jurisdiction in these circumstances. The Court has long taken jurisdiction over habeas petitions filed by persons detained beyond this country’s “ultimate sovereignty.”

Second, the construction of the statute urged by the Executive, if accepted, would raise serious due process questions by permitting “an indefinite, perhaps permanent, deprivation of human liberty without

any [judicial] protection.” *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). It would also raise serious questions under the Suspension Clause by denying an entire class of persons access to the writ *8 through Executive fiat. Under settled doctrines forbidding a reading of statutes that raises grave constitutional doubts or extinguishes habeas jurisdiction without the clearly expressed intention of Congress to do so, the Court should avoid such a construction of § 2241. The Executive’s proposed construction would also violate the principle that statutes must, when possible, be construed in conformity with international law, which prohibits prolonged detention without judicial recourse.

Johnson v. Eisentrager, 339 U.S. 763 (1950), is no bar to this proceeding. There, the Court considered whether enemy aliens convicted of war crimes by a lawful military commission during a declared war were entitled to post-conviction review in federal habeas. The prisoners were convicted, sentenced, and imprisoned in post-war China and Germany, which the military temporarily controlled as a result of wartime operations. At trial, the prisoners enjoyed a number of due process rights, and raised the same constitutional issues they would later urge before the Court. The Court held that these prisoners had “no right to the writ of habeas corpus.” *Id.* at 781.

The habeas statute gave the Court the power to consider the prisoners’ contentions in *Johnson*, and the Court exercised that power by examining their claims at length. First, the Court gave the prisoners “the same preliminary hearing” it had previously given to other war criminals imprisoned here and abroad. *Id.* at 780-81. Second, the Court scrutinized the prisoners’ application to determine whether the military commissions had jurisdiction over the alleged crimes. *Id.* at 790. And third, the Court analyzed and rejected the merits of the prisoners’ claims under both the Constitution and the Geneva Conventions. *Id.* at 785-90.

*9 *Johnson*, therefore, is best understood as a restraint on the exercise of habeas, rather than a limit-

ation on the *power* of the federal courts. The Court has often limited the exercise of habeas to avoid undue interference with a lawful coordinate system of justice that provided petitioners with a full and fair opportunity to litigate their claims. In *Johnson*, the Court limited habeas to a determination that the prisoners were convicted enemy aliens detained outside our territory lawfully tried by a properly constituted military commission.

By contrast, the prisoners here have been detained for two years without charges, trial, access to counsel or the courts or process of any kind. They are not citizens of enemy nations, but citizens of our closest allies who maintain that they are innocent of any wrongdoing. They are held at Guantánamo, far from the theatre of military operations and subject to the complete and exclusive jurisdiction and control of the United States Government. Far from seeking post-conviction relief after a trial, they complain that they have had no trial or other lawful process. The very factors that called for restraint in *Johnson* now call for review, and the district court has jurisdiction.

ARGUMENT

I. THE HABEAS STATUTE GIVES THE DISTRICT COURT JURISDICTION

The Great Writ stands as “the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.” *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). Since the founding, it has been the indispensable means for the judiciary to test the legality of executive detention. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874); *Johnson v. Zerbst*, 304 U.S. 458, 465-67 (1938); *10 *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001); *INS v. St. Cyr*, 533 U.S. 289, 301-04 (2001).

Yet the Executive argues that the federal courts are powerless to review these prisoners’ indefinite detentions because they are foreign nationals brought by the military to a prison beyond the “ultimate

sovereignty” of the United States. The Government is mistaken. First, nothing in the habeas statute supports such a limitation, nor has Congress manifested an intention to strip the federal courts of their jurisdiction under these circumstances. The Court has routinely taken jurisdiction of habeas petitions filed by persons in custody under the authority of the United States in places beyond its “ultimate sovereignty,” even during times of armed conflict. And the Court has never suggested that the Executive can incarcerate people indefinitely, beyond the reach of judicial recourse, simply by confining them in a facility that the United States Government controls through some arrangement other than “ultimate sovereignty.”^[FN6]

FN6. The Executive leans heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But *Johnson* cannot bear the weight, as we demonstrate at pages 30-46 *infra*.

Second, the Executive’s argument - if accepted - would raise “serious constitutional problem[s].” *Zadvydas*, 533 U.S. at 692. It would permit “an indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection,” *id.*, and would suspend the writ for an entire class of detainees on no firmer basis than Executive fiat. The Executive would have the Court “close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress’ intent.” *United States v. Castro*, 124 S.Ct. 786, 791 (2003). This country has rejected imprisonment without legal process, even during times of war, and the Court should not interpret the habeas statute in a manner that permits the creation of an offshore prison for *11 foreign nationals that operates entirely outside the law.^[FN7] *Id.*; *St. Cyr*, 533 U.S. at 314.

FN7. Even the prospect of judicial review is salutary. Only after this Court granted *certiorari* did the Executive announce its apparent intention to release 140 detainees. *Cf. Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43 (1944) (“Respondent

has consistently urged the validity of [its] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.”).

Third, construing the statute to exclude habeas jurisdiction would violate the well-established canon that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In recent decades 151 nations, including this one, have ratified the International Covenant on Civil and Political Rights, which guarantees judicial review of executive detentions, even in wartime. And 191 nations, including the United States, have joined the 1949 Geneva Conventions, which require that prisoners captured in combat zones have the right to be brought before a “competent tribunal” whenever there is “any doubt” as to their status. The Executive’s strained construction of the habeas statute, permitting indefinite incarceration with no legal process, would violate these fundamental precepts of international law. The statute should not be so construed.

A. Habeas Turns On Executive Detention, Not The Accident of Nationality or Situs

Title 28 U.S.C. § 2241 (c)(1) and (c)(3) confer jurisdiction on the district court to hear applications for habeas corpus filed by any person imprisoned “under or by color of the authority of the United States,” or “in violation of the Constitution or laws or treaties of the United States.” *12 Nothing in the text purports to exclude habeas jurisdiction on the basis of nationality or territory. On the contrary, “[t]his legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.”^[FN8] *Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 325-26 (1868).

FN8. Section 2241(a) empowers federal

judges to grant the writ “within their respective jurisdictions.” 28 U.S.C. § 2241(a). At one time, the Court interpreted this language to require the petitioner’s presence within the jurisdiction. *See Ahrens v. Clark*, 335 U.S. 188, 189-93 (1948). This is no longer the law, however, *see Braden v. 30th Judicial Cir. Ct.*, 410 U.S. 484, 494-95 (1973), and petitions challenging military detention overseas are properly filed in the District of Columbia because the courts have jurisdiction over the custodian. *E.g., McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282-83 (1960) (habeas filed in the District Court for the District of Columbia against Secretary of Defense by petitioner detained in Morocco at time of filing); *Toth v. Quarles*, 350 U.S. 11, 13 n.3 (1955) (habeas filed in the District Court of the District of Columbia against Secretary of the Air Force by sister of petitioner detained in Korea); *Ex parte Hayes*, 414 U.S. 1327, 1328-29 (1973) (Douglas, J., in chambers) (habeas filed in District Court of the District of Columbia against Secretary of the Army by petitioner detained in Germany).

The history of the statute is well known. In 1789, Congress granted habeas jurisdiction over prisoners “in custody, under or by colour of the authority of the United States.” Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. In 1842, Congress made explicit that federal habeas included foreign nationals. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539. In 1867, Congress expanded habeas review to include “all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States.” Act of Feb. 5, 1867, ch. 28, 14 Stat. *13 385, 385. The 1867 Act is the “direct ancestor” of 28 U.S.C. § 2241(c).^[FN9] *Felker v. Turpin*, 518 U.S. 651, 659 (1996).

FN9. The historical foundations of the writ are canvassed in greater detail by several *amici*. See Brief of the Commonwealth Lawyers Association as *Amicus Curiae*; Brief of Legal Historians as *Amici Curiae*.

Though habeas today often involves collateral review of criminal convictions (as in *Johnson v. Eisentrager*), “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” *St. Cyr*, 533 U.S. at 301; *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”). Indeed, at common law, “[w]hile habeas review of a court judgment was limited to the issue of the sentencing court’s jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.” *St. Cyr*, 533 U.S. at 301 n.14 (internal citations omitted).^[FN10]

FN10. In addition to the habeas statute, Petitioners relied on 28 U.S.C. § 1331 and 5 U.S.C. § 702 in the lower courts to establish jurisdiction. J.A.76, 107. Jurisdiction under these provisions is discussed by the Petitioners in *Al Odah v. United States*, No. 03-343, and we adopt their arguments.

The Court has always jealously guarded its power to review Executive detention. It has consistently required a clear and unequivocal statement of legislative intent before concluding that Congress stripped the federal courts of their habeas jurisdiction. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869); *DeMore v. Kim*, 538 U.S. 510 (2003); see also *St. Cyr*, 533 U.S. at 308-09. In *Kim*, the Court held that Congress had not removed habeas jurisdiction despite statutory language which provided that “[n]o court may set *14 aside any action or decision by the Attorney General” to detain criminal aliens while removal proceedings are ongoing. *Kim*,

123 S.Ct. at 1714. And in *St. Cyr*, the Court preserved habeas jurisdiction in the face of four statutory provisions that could have been read as excluding it, including one entitled “Elimination of Custody Review by Habeas Corpus.” 533 U.S. at 308-11, 314.^[FN11]

FN11. Other statutory language considered in *St. Cyr* provided that “judicial review” was available “only” by means other than habeas, and that “no court shall have jurisdiction to review” any final agency order. 533 U.S. at 308-11. Yet the Court found a “lack of clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law.” *Id.* at 314; see also, e.g., *Ex parte Yerger*, 75 U.S. at 102 (“We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law....”); *Felker*, 518 U.S. at 660-61 (statutory provisions purporting to strip federal courts of jurisdiction did not foreclose habeas review).

Unlike *Kim* and *St. Cyr*, where the Court was faced with explicit - although insufficiently categorical - statutory provisions appearing to restrict the courts’ habeas jurisdiction, the present case involves no remotely perceptible attempt by Congress to abridge jurisdiction.^[FN12] And certainly, the Executive cannot amend the statute by fiat. Cf. *15 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb....”); *Brown v. Allen*, 344 U.S. at 533 (Jackson, J., concurring) (“[I]f Congress intended a reversal of this traditional concept of habeas corpus it would have said so.”).

FN12. On the contrary, available evidence suggests that Congress *refused* to suspend the writ as part of the “war on terrorism.” Published accounts indicate the earliest

drafts of the USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 107 Pub. L. No. 56, 115 Stat. 272 (2001), included a provision entitled 'Suspension of the Writ of Habeas Corpus.' Representative James Sensenbrenner, Chairman of the House Judiciary Committee, later told reporters "[t]hat stuck out like a sore thumb. It was the first thing I crossed out." Roland Watson, *Bush Law Chief Tried to Drop Habeas Corpus*, *The Times* (London), Dec. 3, 2001, at 14; see also Steven Brill, *After: How America Confronted the Sept. 12 Era*, *Newsweek*, Mar. 10, 2003, at 66 (same). The USA PATRIOT Act passed by Congress does not alter § 2241. See USA PATRIOT Act § 412(b)(1) (codified at 8 U.S.C. § 1226a(b)(1)).

Over time, Executive detention has taken countless forms, limited only by the perceived demands of the day. But the genius of habeas is "its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).^[FN13] To that end, the Court has long recognized that federal courts have the power to review every species of Executive imprisonment, wherever it occurs and whatever form it takes. The Court has entertained habeas petitions by aliens detained on ships at sea, e.g., *Chew Heong v. United States*, 112 U.S. 536 (1884);^[FN14] by United States citizens detained at American military installations overseas, e.g., *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960);^[FN15] and even by enemy aliens convicted of war crimes during a declared war, whether in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), or in territories overseas, *In re Yamashita*, 327 U.S. 1 (1948). Even the Executive has conceded that the federal courts would have habeas jurisdiction over an American citizen imprisoned at Guantánamo.^[FN16]

FN13. As discussed in Part II, the Court on occasion limits the *extent* of habeas review, but distinguishes these limitations from a restriction on its *power* to review executive detention. See, e.g., *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality) (question is "not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power").

FN14. See also, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." (emphasis added)).

FN15. See *supra* note 8 (collecting additional cases).

FN16. Tr. of Nov. 17, 2003 Oral Argument at 16:25-19:8, *Padilla v. Rumsfeld*, __F.3d__, 2003 U.S. App. LEXIS 25616 (Nos. 03-2235, 03-2438), at <http://news.findlaw.com/hdocs/docs/padilla/padrums111703trans.pdf>.

Yet the Executive insists the prior decisions count for naught because no single case embraces all the circumstances presented here. This, of course, testifies to the unprecedented character of the Executive's position. Detention without legal process is the very antithesis of this country's wartime experience, as shown below.^[FN17] It is not surprising, therefore, that the Court has had no occasion to consider whether the Executive may unilaterally strip the federal courts of their statutory power to review the indefinite detention of foreign nationals without legal process, simply by deciding to detain them in an offshore prison.

FN17. See also Brief of Former American Prisoners of War as *Amicus Curiae*; Brief of the National Institute of Military Justice as *Amicus Curiae*.

B. The Habeas Statute Should Not Be Read To Condone Creating A Prison Outside The Law

The lower court did not discuss the scope of the habeas statute. Instead, it resolved the jurisdictional question by concluding the prisoners have no rights that may be vindicated in federal court, "under the due process clause or otherwise." P.A. 12a. In its view, foreign nationals may be subjected to an "indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection," *Zadvydas*, 533 U.S. at 692, so long as the Executive elects to detain *17 them outside the "ultimate sovereignty" of the United States. This holding creates a "serious constitutional problem," *id.*, both by approving prolonged detention without legal process, and by suspending the writ in the absence of any indication of congressional intent. To avoid these results, the Court should interpret the habeas statute to allow the prisoners to bring this challenge in federal court. See *St. Cyr*, 533 U.S. at 314.

1. The Executive's Interpretation Of The Habeas Statute Would Raise Serious Doubts Under The Due Process Clause

At its core, the Due Process Clause protects against unlawful bodily restraint. See, e.g., *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment - from government custody, detention, or other forms of physical restraint - lies at the heart of the liberty that Clause protects."). The Executive may not imprison people for more than brief periods unless it acts pursuant to narrowly circumscribed criteria and strict procedural restraints. *Id.* at 690-91 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."); cf. *Kim*, 123 S.Ct. at 1720 (contrasting the "indefinite" and "potentially permanent" detention condemned in *Zadvydas* with the "brief" detention

upheld in *Kim*).^[FN18]

FN18. See also *United States v. Salerno*, 481 U.S. 739, 747, 750-52 (1987) (stressing stringent time limitations and presence of judicial safeguards); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979); *Kansas v. Hendricks*, 521 U.S. 346, 356-58 (1977) (emphasizing strict procedural protections); *Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-39 (1972).

*18 Statutory schemes that subject a particular class of aliens to potential restraint have consistently been interpreted so as to respect these principles. Aliens detained pursuant to these schemes enjoy at least the right to a fair hearing to determine whether they fall within the defined class. See, e.g., *Ludecke v. Watkins*, 335 U.S. 160, 171 n.17 (1948) (administrative hearing followed by judicial review to determine whether person detained was in fact an "enemy alien"); *Carlson v. Landon*, 342 U.S. 524, 540-41 (1952) (administrative hearing followed by judicial review to determine whether detained alien was an active member of the communist party); *Kim*, 123 S.Ct. at 1722 (Kennedy, J., concurring) (detainee entitled to hearing "to demonstrate that he was not improperly included in a mandatory detention category."); *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting on other grounds) ("[I]nadmissible aliens are entitled to be free from detention that is arbitrary or capricious.").

During the Second World War, the Court repeatedly agreed that even convicted saboteurs and war criminals, seized here and abroad, were entitled at least to a hearing to determine their status. See *Quirin*, 317 U.S. at 24-25; *Yamashita*, 327 U.S. at 8; *Johnson*, 339 U.S. at 780-81 (prisoners received "the same preliminary hearing as to sufficiency of application that was extended in *Quirin*.... [and] *Yamashita*"). In this respect, the Executive "is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security." *Joint Anti-Fascist*

Refugee Comm. v. McGrath, 341 U.S. 123, 173 (1951) (Frankfurter, J., concurring).

Yet the Executive takes the position now that foreign nationals imprisoned by the military beyond the "ultimate sovereignty" of the United States have no rights that can be *19 protected by a federal court and may be detained indefinitely without legal process. This has never been the law:

The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place.

[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring).^[FN19] The Court later quoted this language with approval in a case involving a non-resident alien. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990); *see also id.* at 277-78 (Kennedy, J., concurring).^[FN20]

FN19. *See also Reid*, 354 U.S. at 56 (Frankfurter, J., concurring) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution -- for example, proceedings before American military tribunals, whether in Great Britain or in the United States, are subject to the applicable restrictions of the Constitution.").

FN20. In *Verdugo*, the Court held that the warrant clause of the Fourth Amendment does not apply to the search of a foreign national in Mexico by Mexican agents. *Dicta* cited *Johnson v. Eisentrager* for the "emphatic" rejection of the "extraterritorial application of the Fifth Amendment." *Verdugo*, 494 U.S. at 269. But this language

cannot be read in isolation. *Verdugo* cited the *Insular Cases*, *id.* at 268-69, in which the Court repeatedly recognized that the Due Process Clause embodies a fundamental right that constrains the Executive, even when it acts with respect to an alien outside the United States. As the Court stated in *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922):

[T]he real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power.... *The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law*, had from the beginning full application in the Philippines and Porto Rico....

Id. at 312-13 (emphasis added).

Verdugo then approvingly quoted Justice Harlan's *Reid* concurrence insisting that the extra-territorial reach of the Constitution depended on what process was due in a particular case. Although *Reid* had involved a U.S. citizen overseas, *Verdugo* did not hesitate to endorse Justice Harlan's guiding principle in a case involving a foreign national, just as it had in the *Insular Cases*. *E.g.*, *Downes v. Bidwell*, 182 U.S. 244, 283 (1901) (rejecting theory that aliens in unincorporated territories "have no rights which [Congress] is bound to respect."). It is thus incorrect to read *Verdugo* as establishing a categorical rule that the Due Process Clause cannot apply to aliens overseas. Indeed, Justice Kennedy's concurring opinion in *Verdugo* made explicit that the Court had not yet resolved the Constitution's extra-territorial reach "when

the Government acts, in reference to an alien, within its sphere of foreign operations." 494 U.S. at 277.

*20 The suggestion, therefore, that the Constitution tolerates the creation of a prison beyond the reach of the judiciary, reserved for foreign nationals who may be held on mere Executive fiat, is mistaken. Rather, the courts must undertake a more discriminating analysis of the interests at stake. Here, that analysis can wait for another day. For while "there is no table of weights and measures for ascertaining what constitutes due process," *Burns v. Wilson*, 346 U.S. 137, 149 (1953) (opinion of Frankfurter, J.), the Executive's claim that courts lack jurisdiction even to undertake the weighing misreads the habeas statute and would raise serious questions under the Due Process Clause.

***21 2. The Executive's Interpretation Of The Habeas Statute Would Also Raise Serious Doubts Under The Suspension Clause**

The Court should also avoid an interpretation of the habeas statute that suspends the writ for an entire class of claimants based solely on Executive proclamation. In *St. Cyr*, the Government argued that certain provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, should be construed as denying the alien petitioners the right to habeas review of their deportation proceedings. *St. Cyr*, 533 U.S. at 308-11. The Court rejected this position, noting that such a construction would raise grave constitutional doubts under the Suspension Clause. *Id.* at 305.

It was common ground among the parties in *St. Cyr* that Executive detention struck at the "historical core" of the writ, "and it is in that context that its protections have been strongest." *Id.* at 301. Furthermore, as the Court observed, "[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *Id.* at 301-02 (emphasis added) (footnote omitted). While the Government ac-

knowledgeed this historical understanding, it argued there was no unlawful suspension as long as " 'an official had statutory authorization to detain the individual.' " *Id.* at 303 (quoting Brief for Respondent at 33, *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (No. 00-1011)). It acknowledged "that the writ protected an individual who was held without legal authority, *id.*, but because the deportation statutes at issue in *St. Cyr* gave the Government authority to detain, the Government argued that the alien could complain of nothing more than a failure by the official detaining him to exercise his "discretionary power to determine whether the person should *22 be released," - a failing which, in the Government's view, raised no concern protected by the Suspension Clause. *Id.*

The Court rejected this argument. While acknowledging that the Government's "historical arguments are not insubstantial," the Court found that "the ambiguities in the scope of the exercise of the writ at common law identified by *St. Cyr*, and the suggestions in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution," convinced the Court "that the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant." *Id.* at 304.

The constitutional questions are even more "difficult and significant" here. Because the prisoners in this case "are nonenemy aliens" - they are citizens of allied nations - the writ would have been available to them even at the Founding.^[FN21] *St. Cyr*, 533 U.S. at 301; see also *id.* ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." (quotation marks omitted)). In addition, the detentions here are the very sort that the Government conceded in *St. Cyr* must, under the Suspension Clause, be subject to testing by habeas corpus because they are supported by no statutory authorization. There is no evidence that Congress meant to suspend the writ during the current hostilities, let alone the plain and unambiguous

statement required by the Court. *See supra* 14 and note 11.^[FN22]

FN21. The historic right of aliens to test their status as alleged “enemies” in habeas proceedings, even when detained beyond the “ultimate sovereignty” of the United States, is canvassed by the Brief of Legal Historians *Amici Curiae*.

FN22. The Use of Force Resolution that authorized the present military action hardly qualifies as explicit “statutory authorization” for a suspension of the writ. Congress’ Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001). During the Second World War, the Court held that the Articles of War did not strip the federal courts of habeas jurisdiction even though they explicitly purported to do so. *Yamashita*, 327 U.S. at 9 (“[Congress] has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.”); *Quirin*, 317 U.S. at 24-25 (despite Articles of War, federal courts retained habeas jurisdiction). *Johnson* is not to the contrary, since the prisoners in *Johnson* had the opportunity to litigate their claims in the military commission. *See Swain v. Pressley*, 430 U.S. at 381-83 (no suspension of the writ if petitioner had an adequate chance to mount a collateral attack in coordinate court system); *St. Cyr*, 533 U.S. at 305 (suspension clause problem arises if writ is suspended with “no adequate substitute for its exercise.”). *See Part II infra*.

*23 These grave constitutional questions would confront the Court if the habeas statute were read as the Executive suggests - to close the courthouse doors to an entire class of habeas petitioners

“without any clear indication that such was Congress’ intent.” *United States v. Castro*, 124 S.Ct. at 791. It should not be read that way.

C. Unreviewable Executive Detention Is Rejected Not Only By Anglo-American Tradition, But Also By “Every Modern Government”

Few canons of international law are now more universally accepted that the prohibition against prolonged, arbitrary detention. For centuries, the law in Anglo-American countries has not only prohibited indefinite detention without legal process, but allowed petitioners to challenge that detention by habeas.^[FN23] The Executive’s position that the prisoners at Guantánamo occupy a law-free zone recently *24 prompted the English Court of Appeal to note its “deep concern that, in apparent contravention of fundamental principles of law, [the prisoners] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of [their] detention before any court or tribunal.” *R. v. Sec’y of State for Foreign and Commonwealth Affairs*, 2002 EWCA Civ 1598, at ¶66. A senior judge in the United Kingdom recently described the detentions on Guantánamo as “a monstrous failure of justice.”^[FN24] This common tradition is further reflected in the holding of the Supreme Court of Canada. In *R. v. Cook*, 2 S.C.R. 587 (1998), ¶¶ 25, 44, 46, 48, that Court held that the Canadian Constitution protects foreign nationals outside Canadian territory, so long as the conduct in question is that of Canadian Government officials, and application of the constitution will not interfere with the sovereign authority of a foreign state.^[FN25]

FN23. *See* Brief for the Commonwealth Lawyers Association as *Amicus Curiae* and Brief of Legal Historians as *Amici Curiae*.

FN24. Lord Johan Steyn, Address to the British Institute of International and Comparative Law for the Twenty-Seventh F.A. Mann Lecture, at www.nimj.org (Nov. 25,

2003).

FN25. See the discussion of *R. v. Cook* in the Brief of Omar Ahmed Khadr as *Amicus Curiae*.

Judicial review of executive detentions is not limited to common law jurisdictions. This principle is enshrined in the Constitutions of nearly every country in the civilized world,^[FN26] as well as every major human rights instrument in force today, including the Universal Declaration of Human Rights,^[FN27] the International Covenant on Civil and Political *25 Rights (ICCPR),^[FN28] and the American Declaration of the Rights and Duties of Man.^[FN29] In 1950, when the Court decided *Johnson* - upon which the Executive places dispositive reliance - the Court took pains to note that "[t]he practice of every modern Government" is to refuse the protection of the "organic law" to enemy aliens convicted by a military trial. 339 U.S. at 784-85. In the present circumstances, the reverse is true: "the practice of every modern Government" *26 condemns prolonged Executive detention without legal process.

FN26. See M. Cherif Bassiouni, *Human Rights in The Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 261 n.177 (1993) (listing 119 national constitutions that protect the right to be free from arbitrary arrest and detention.).

FN27. Universal Declaration of Human Rights, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, 73 (Dec. 10, 1948). Though the Universal Declaration is not a treaty, the United States recognizes that Article 9 embodies a rule of customary international law. Richard B. Lillich & Hurst Hannum, *International Human Rights: Problems of Law, Policy, and Practice* 136 (3d ed. 1995).

FN28. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 15, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [ICCPR]. The relevant provisions of the ICCPR, which the United States ratified in 1992, are unambiguous:

Article 9(1): Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9(4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in other that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

ICCPR, art. 9(1), 9(4); *Senate Resolution of Ratification of International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781, S4784, 102nd Cong. (1992) (ratified Apr. 2, 1992). Of the one hundred fifty-one states, including the United States, that have ratified the ICCPR, none has made a relevant reservation to these provisions. See United Nations Treaty Collection, [at http://www.unhchr.ch/html/menu3/b/treaty4_...asp.htm](http://www.unhchr.ch/html/menu3/b/treaty4_...asp.htm).) (last visited Jan. 5, 2004).

FN29. American Declaration of the Rights and Duties of Man, art. XXV, O.A.S.T.S. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II82 Doc. 6 rev. 1 at 17 (1992).

War works no exception to this settled principle of international law. The International Court of Justice has observed that “the protection of the [ICCPR] does not cease in times of war.”^[FN30] See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240 (Advisory Opinion of July 8, 1996) reprinted in 35 I.L.M. 809, 820. The United Nations Human Rights Committee, which monitors compliance with the ICCPR, has held that Articles 9(1) (prohibiting arbitrary detentions) and 9(4) (guaranteeing judicial review of detentions) apply to all deprivations of liberty, and that Article 9(4) is non-derogable, even in times of armed conflict.^[FN31]

In any event, the United States has not declared any derogation from the Covenant. See also *Ocalan v. Turkey*, Eur. Ct. H. R. App. No. 46221/99 (Mar. 2003) ¶¶ 45, 66-76 (prompt judicial review required of detention of alleged terrorist accused of responsibility for more than 4,000 deaths).^[FN32]

FN30. Unlike this Court, the International Court of Justice is expressly charged to render advisory opinions at the request of an authorized body, See Statute of the International Court of Justice, arts. 65-68, available at <http://www.icj-cij.org/icjwww/basicdocuments/basicstatute.htm> (last visited Jan. 5, 2004).

FN31. See Human Rights Committee, Gen. Cmt. 8, art. 9 (Sixteenth Session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994) at para. 1; Human Rights Committee, Gen. Cmt. 29, States of Emergency (art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 16.

FN32. See also *Aksoy v. Turkey*, 23 Eur. H.R. 553 (1996) (though Turkey had lawfully declared a national emergency, it could not hold a suspected terrorist for

fourteen days without judicial intervention); *Chahal v. United Kingdom*, 23 Eur. H.R. 413, ¶ 131 (1997) (concern for national security, though legitimate, “does not mean...that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved”).

*27 International humanitarian law - part of the law of war - similarly provides that even during hostilities, prisoners may not be held without legal process. Over 190 countries, including the United States, are parties to the Geneva Conventions.^[FN33] Under the Conventions, the rights due to an individual vary with the person's legal status. The Official Commentary to the Fourth Geneva Convention,^[FN34] makes clear that “every person in enemy hands must have some status under international law...[N]obody in enemy hands can be outside the law.” Commentary on Geneva Convention IV of Aug. 12, 1949, at 51 (Jean S. Pictet ed., 1958). To implement this command, Article 5 of the Third Geneva Convention, governing prisoners of war, requires that any doubt regarding the status of a person captured by the detaining power must be resolved by a “competent tribunal,” and that all detainees enjoy prisoner of war status unless and until an Article 5 tribunal determines otherwise.^[FN35]

FN33. See International Committee of the Red Cross (ICRC), *States Party to the Geneva Conventions and their Additional Protocols*, at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc#a7 (May 20, 2003). The requirements of the Geneva Conventions are discussed in detail by several amici. See Brief of Former American Prisoners of War as *Amicus Curiae*; Brief of Retired Military Officials as *Amicus Curiae*.

FN34. Geneva Convention IV Relative to the Protection of Civilians in Time of War,

Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

FN35. Geneva Convention III Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, U.N.T.S. 135. This provision was not part of the 1929 Convention, which the Court considered in *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

In light of these settled principles, it is not surprising that the detentions at Guantánamo have come under sharp criticism from the international community, including the International Committee of the Red Cross, the United *28 Nations, and the European Parliament. In 2002, the Inter-American Commission on Human Rights of the Organization of American States, of which the United States is a member, decided that the Guantánamo prisoners may not be held "entirely at the unfettered discretion of the United States Government" and that the Government must convene competent tribunals to determine the legal status of the prisoners under its control. Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am.C.H.R. (Mar. 12, 2002), *reprinted in* 41 I.L.M. 532, 533 (2002). [FN36]

FN36. The United States has also rejected the view of the United Nations High Commissioner for Human Rights, the United Nations Working Group on Arbitrary Detention, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, the European Parliament, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of the Organization for Security and Cooperation in Europe, and the International Committee of the Red Cross (ICRC), all of which disagree with the Government's position on Guantánamo. See Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at U.S. Base in Guantánamo Bay, Cuba

(Jan. 16, 2002) P.A. 75a-76a; Report on the Working Group on Arbitrary Detention, U.N. GAOR, Hum. Rts. Comm., 59th Sess., U.N. Doc. E/CN.4/2003/8 at 19-21 (Dec. 16, 2002). P.A. 77a-82a; Statement of Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Kumaraswamy, at <http://www.unhchr.ch/huricane/huricane.nsf/0/0C5F3E732DBFC069C1256CE8002D76C0?opendocument> (Mar. 12, 2003); European Parliament Resolution on the European Union's Rights, Priorities and Recommendations for the 59th Session of the U.N. Commission on Human Rights in Geneva (Mar. 17-Apr. 25, 2003), available at <http://europa.eu.int/abc/doc/off/bull/en/200301/p102001.htm>; Rights of Persons Held in the Custody of the United States in Afghanistan and Guantánamo Bay, Parliamentary Assembly Resolution No. 1340 (2003) (Adopted June 26, 2003), available at <http://assembly.coe.int/Documents/AdoptedTexts>; Organization for Security and Cooperation in Europe Parliamentary Assembly Rotterdam Declaration and Resolutions Adopted during the 12th Annual Session (Rotterdam, July 5-9, 2003), available at http://www.osce.org/documents/pa/2003/07/495_en.pdf; International Committee of the Red Cross, Overview of the ICRC's Work for Internees, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpLis454/951C74F20D2A2148C1256D8D002CA8DC> (November 6, 2003).

*29 The Executive's proposed reading of the habeas statute would thus put the United States in flagrant disregard of globally recognized norms. Just as the Court should avoid an interpretation of the statute that runs afoul of the Constitution, it should avoid an interpretation in conflict with international law. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 18;

Restatement (Third) of Foreign Relations Law of the United States § 114 (2000) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). [FN37]

FN37. As the Court has recently observed, these international norms may also provide persuasive authority for the interpretation of constitutional values. *E.g.*, *Lawrence v. Texas*, 123 S.Ct. 2472, 2481, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); see also Brief *Amicus Curiae* of the Human Rights Institute of the International Bar Association (discussing obligations imposed by international law).

II. THE GOVERNMENT OFFERS NO PERSUASIVE REASON TO IGNORE THE UNAMBIGUOUS COMMAND OF THE HABEAS STATUTE

The Executive argues that the current hostilities demand indefinite detention without legal process. Indeed, the argument is broader still; the contention is made that Executive action has become “proof of its own necessity,” and that no court may inquire into the lawfulness of the detentions on Guantánamo. *30 *Duncan v. Kahanamoku*, 327 U.S. 304, 336 (1946) (Stone, J., concurring); see also *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”).

The Executive makes this argument despite the text of the habeas statute, the absence of any Congressional indication that federal courts should be stripped of their habeas jurisdiction, the settled practice of this Court to take jurisdiction of habeas petitions filed by people imprisoned beyond the “ultimate sovereignty” of the United States, and the considerable weight of constitutional doubt. To support its argument, the Executive relies heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

But as demonstrated below, this reliance is misplaced.

A. Introduction

In *Johnson*, the Court was asked to grant post-conviction habeas review to enemy aliens who were convicted of war crimes by a military commission. The commission had been created pursuant to explicit Congressional authorization during a declared war. The prisoners were convicted, sentenced, and imprisoned in occupied enemy territory temporarily controlled by the U.S. military as an incident of our wartime operations. At trial, the prisoners had the right to challenge the lawfulness of their detention. They also enjoyed due process protections that insured against the conviction of an innocent person. In fact, six of the original twenty-seven defendants were acquitted and released.

*31 The Court held that these convicted war criminals did not enjoy the “privilege of litigation” in the federal courts. *Id.* at 777. It couched some portions of its opinion in jurisdictional terms. [FN38] See, *e.g.*, *id.* at 791 (prisoners present “no basis for invoking federal judicial power in any district.”). Seizing on this language, the Executive assigns the broadest possible reading to the case: federal courts are always powerless to review executive detention of aliens outside the “ultimate sovereignty” of the United States, regardless of the circumstances. See Government’s Brief In Opposition to Certiorari at 16, 18-19. But *Johnson* is more ambiguous than that. It is useful to examine what the Court *did*, not merely what it occasionally said.

FN38. See also, *e.g.*, *Chin Yow v. United States*, 208 U.S. 8, 11-13 (1908) (if alien had a fair exclusion hearing, district court would not have jurisdiction to consider habeas application; but if petitioner did not have a fair hearing, district court had jurisdiction and could grant habeas relief); see also *infra* 40-41 and note 40.

Johnson is best understood not as a limitation on

the power of the federal judiciary, but as a restraint on the exercise of habeas based on the factors present in that case. The Court limited the exercise of habeas to a determination that the prisoners were enemy aliens imprisoned in occupied territory who had received a lawful trial before a properly constituted military commission. Because these threshold questions were not in dispute, the Court refused to countenance any further interference with the operation of a lawful and independent system of military justice.

The present case stands on entirely different footing. Congress has not authorized trials by military commission, and, even if it had, the prisoners here have been detained for two years with no legal process. They are not enemy aliens, but citizens of our closest allies who allege they have *32 committed no wrong against the United States, and whose allegations at this stage must be accepted as true. Because there have been no proceedings, they do not seek post-conviction relief from an overseas trial by a lawfully constituted tribunal. Instead, they challenge the fact that they have been cast into a legal limbo, held by the Executive without charges, without recourse to any legal process, and with no opportunity to establish their innocence.

B. The Court In *Johnson* Restrained The Exercise Of Habeas Where A Lawful And Independent System of Justice Had Allowed The Prisoners To Challenge Their Detention

By December 11, 1941, Congress had declared war on Germany and Japan. Within weeks, Congress passed the Articles of War. 10 U.S.C. §§ 1471-1593. These Articles authorized the President to convene military commissions to try suspected war criminals. *Quirin*, 317 U.S. at 28 ("Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.").

Throughout the Second World War, the Executive repeatedly invoked the power given it by Congress,

creating military commissions to try suspected war criminals captured here and abroad. See, e.g., *id.* ("[T]he President, as Commander in Chief, by his Proclamation in time of war has invoked [the Articles of War]"); *Yamashita*, 327 U.S. at 7-12 (Articles of War authorized creation of military commission in the Philippines); *Johnson*, 339 U.S. at 766, 786 (military commission had authority to preside over trials in Nanking, China). On January 21, 1946, the Executive invoked this *33 power and convened a military commission to try alleged war criminals in the China Theater. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Case No. 306), Index to Pleadings filed in Supreme Court, Ex. F "Regulations Governing the Trial of War Criminals in the China Theater," at 34 [hereinafter *Johnson*, Index to Pleadings]. J.A. 155-56.

Each commission consisted of at least three service members who had to be free from "personal interest or prejudice" and who could not preside over "a case which he personally investigated, nor if he [was] required as a witness in that case." J.A. 158. Whenever feasible, every commission was to include "one or more members" with legal training. J.A. 159. No sentence could be executed until approved by a commanding officer, who also had the power to reduce the sentence or order a new trial. J.A. 165.

The prisoners in *Johnson* were tried by these commissions. After Japan surrendered, the military arrested twenty-seven German nationals in China. A Bill of Particulars accused them of violating the laws of war. *Johnson*, Index to Pleadings, Ex. C "Charge and Bill of Particulars Against Lothar Eisentrager, et al., at 25-34. J.A. 142-55. Prior to trial, the commission conducted a two-day hearing, where the prisoners unsuccessfully urged the same constitutional issues they would later raise before the Supreme Court. *Johnson*, Index to Pleadings, Petition for Writ of Habeas Corpus, at 4-5. J.A. 127-40. After four weeks of trial, the commission granted motions for judgment of acquittal with respect to six prisoners. J.A. 134. The defense case

for the remaining prisoners lasted an additional eight weeks. J.A. 135.

The commission found each prisoner guilty of war crimes "by engaging in, permitting or ordering continued *34 military activity against the United States after surrender of Germany and before surrender of Japan." *Johnson*, 339 U.S. at 766. After the commission sentenced the prisoners to various terms, the reviewing authority reduced the sentences for three prisoners and approved the remainder. J.A. 136. Throughout these proceedings, the prisoners enjoyed the right to notice of the charges against them, to prompt appointment of counsel of choice, to prepare a defense, to call and confront witnesses, to compulsory process, to discover and introduce evidence, and to make an opening statement and closing argument. J.A. 160-65. After they were repatriated to Germany, the prisoners sought post-conviction relief in the District of Columbia, claiming unspecified violations of the Fifth Amendment and other provisions of the Constitution and the 1929 Geneva Convention. 339 U.S. at 767. In addition, the prisoners admitted they were enemy aliens. *Id.* at 784.

Thus, the prisoners in *Johnson* were tried by a lawfully constituted and independent military court that provided them an opportunity to challenge the lawfulness of their detention. The Court has long held that lawfully created military courts, sanctioned by Congress in the valid exercise of their Article I power, represent an independent judicial system whose lawful judgments are not subject to plenary review by the civilian courts. *See, e.g., In re Grimsley*, 137 U.S. 147, 150 (1890) ("[The] civil courts exercise no supervisory or correcting power over the proceedings of a court-martial."); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (same) (collecting cases). The Court reaffirmed this principle throughout the Second World War, and repeatedly applied it to military commissions. As the Court explained in *Yamashita*:

[O]n application for habeas corpus we are not concerned with the guilt or innocence of the *35 peti-

tioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged.... The military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court...Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty." 28 U.S.C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.

Yamashita, 327 U.S. at 8; *see also Quirin*, 317 U.S. at 24.

The Court has often restrained the exercise of habeas to avoid interference with lawful and independent military judicial systems. For example, three years after *Johnson*, the Court considered a habeas application from American servicemen court-martialed in Guam. *Burns*, 346 U.S. at 138. The Court readily concluded that the habeas statute provided jurisdiction. *Id.* at 139. The question was "not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power." *Id.*

In answering this question, the plurality noted that "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. Consistent with this responsibility, the military had provided *36 the petitioners in *Burns* with repeated opportunities to litigate their claims. *Id.* at 140-42. The Court concluded "it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings - of the fair determinations of the military tribunals after all military remedies have

been exhausted.” *Id.* at 142. This military process does not displace the civil courts’ jurisdiction over an application for habeas corpus from the military prisoner. But ... *when a military decision has dealt fully and fairly with an allegation ... it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.*

Id. (emphasis added) (citation omitted); *see also Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) (habeas petitioner must first exhaust available remedies in military system: “The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved.”).

As *Burns* intimates, the Court has sometimes limited the substantive claims for relief that the federal courts should entertain in habeas, in order to recognize an appropriate division of responsibility between those courts and another competent adjudicatory system. But these limitations have been imposed *only* when the habeas petitioners were challenging their confinement under orders issued by a lawfully created and convened coordinate system of tribunals in which they enjoyed a full and fair opportunity to present their claims; and the Court has always made clear that the limitations are upon the *extent of habeas review*, not upon the *existence of habeas jurisdiction*. *See, e.g., Ex parte Royall*, 117 U.S. 241, 252 (1886) (to avoid interference with the “courts of co-ordinate jurisdiction, administered under a single system,” and in the absence of any indication that the state court had abused its authority, Court declines to exercise its undisputed power under the habeas statute); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (federal court has jurisdiction under habeas statute, but will restrain exercise of judicial power for Fourth Amendment claims fully and fairly adjudicated in state court); *Frank v. Mangum*, 237 U.S. 309, 329, 334-36 (1915).^[FN39] Indeed, if the petitioner has been denied that opportunity, it is well settled that “a federal court should entertain his pe-

tition for habeas corpus, else he would be remediless.” *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (per curiam) (citations omitted).^[FN40]

FN39. *See also Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., dissenting on other grounds) (“[T]he most powerful equitable consideration [in deciding whether to restrain the exercise of habeas is whether petitioner] has already had full and fair opportunity to litigate [his] claim.”).

FN40. The Court has long recognized that federal habeas is available to fill the void created by an inadequate remedy in the coordinate system of justice. *See, e.g., Chin Yow*, 208 U.S. at 11-13; *Kwack Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (immigration findings by Executive are conclusive unless petitioner establishes in habeas that “the proceedings were manifestly unfair, were such as to prevent a fair investigation, or show manifest abuse of the discretion committed to the executive officers by the statute, or that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.”) (internal citations and quotations omitted); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (if state fails to provide an adequate “corrective process” to a trial dominated by mob sentiment, petitioner may seek review and secure relief by federal habeas); *Johnson v. Zerbst*, 304 U.S. at 467 (habeas must be available to provide remedy for constitutional violations that, through no fault of the petitioner, cannot be remedied elsewhere); *Burns*, 346 U.S. at 142 (plurality) (“Had the military courts manifestly refused to consider [petitioners’ claims], the District Court was empowered to review them *de novo*.”).

*38 As on these other occasions, the Court in *John-*

son restrained the exercise of habeas to avoid interfering with the military commissions. Thus, the Court refused to provide the prisoners with the right to appear before the District Court, "[a] basic consideration in habeas corpus practice" as it existed at that time.^[FN41] 339 U.S. at 778. The Court, however, did not consider itself powerless to inquire into the lawfulness of the prisoners' detention. On the contrary, the Court stated that "the doors of our courts have not been summarily closed upon these prisoners," *id.* at 780.

FN41. The habeas statute has been amended since *Johnson* and this is no longer an essential feature of habeas practice. 30th Judicial Cir. Ct., 410 U.S. at 497-98.

First, the Court reviewed at great length the legal disabilities imposed upon enemy aliens, and took pains to emphasize that these disabilities are "imposed temporarily as an incident of war and not as an incident of alienage." *Id.* at 772. Beginning with this historical understanding, the Court then undertook "the same preliminary hearing as to sufficiency of application" that was extended in *Quirin*, *Yamashita*, and *Hirota v. McArthur*, 338 U.S. 197 (1949). This review established, without the need for further inquiry, that the prisoners "are really enemy aliens," *id.* at 784, who have been "active in the hostile service of an enemy power," *id.* at 778, and who were convicted by a lawful military commission, *id.* at 777. Having heard "all contentions [the prisoners] have seen fit to advance and considering every contention we can base on their application and the holding below," the Court arrived "at the same conclusion" as in *Quirin*, *Yamashita*, and *Hirota*: "that no right to the writ of habeas corpus appears." *Id.* at 781.

Second, the Court reviewed the prisoners' challenge to the "jurisdiction" of the military commissions, and ultimately *39 concluded that it failed. *Id.* at 785-788; see also *id.* at 790 ("We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities"). Two

months before *Johnson*, the Court used this 'jurisdictional' formulation to describe its *merits* review of a habeas petition challenging military detention. *Hiatt v. Brown*, 339 U.S. at 110 ("[I]t is well settled that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial The single inquiry, the test, is jurisdiction" (internal quotations omitted)). The Court also used this articulation to describe its *merits* review of the habeas petitions brought in *Quirin* and *Yamashita*. *Quirin*, 317 U.S. at 27-29; *Yamashita*, 327 U.S. at 8-9. Yet in all of these cases, federal habeas jurisdiction was not in dispute. See also *Burns*, 346 U.S. at 142 ("We have held before that this [military process] does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner.").

And third, the Court in *Johnson* adjudicated the merits of the prisoners' claims under both the Constitution and the 1929 Geneva Convention. The Court rejected the prisoners' contention that the Fifth Amendment conferred "a right of personal security or an immunity from military trial and punishment upon an enemy alien engaged in the hostile service of a government at war with the United States," *Johnson*, 339 U.S. at 785, as well as their other arguments under the Constitution and the Convention. *Id.* at 788-790.

This extensive and multi-faceted review of the prisoners' claims cannot be squared with the Government's contention that the Court did not have jurisdiction. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of *40 announcing the fact and dismissing the cause." *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869).

To be sure, *Johnson* occasionally uses the term "jurisdiction" in its modern sense - i.e., "the courts' statutory or constitutional power to adjudicate the case," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) - and the decision is ambiguous for this reason.^[FN42] But the better reading - the

reading that is faithful to the language of the habeas statute, that considers what the Court *did*, and that avoids needless conflict with a lawfully created coordinate system of military justice - is to view *Johnson* as a restraint on the exercise of habeas, not as a limitation on the courts' power to act.

FN42. *Johnson* thus confirms that jurisdiction "is a word of many, too many, meanings." *Citizens for a Better Env't*, 523 U.S. at 90 (internal quotations omitted). Elsewhere, *Johnson* uses the term "jurisdiction" to refer to "the territorial jurisdiction" of the United States. *E.g., id.* at 768 ("We are cited to no instance where a court ... has issued [the writ] on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction.").

The formal denial of post-conviction review in *Johnson* is, in any event, no bar to habeas jurisdiction where, as here, the petitioners have been held completely without legal process for two years. They have had no opportunity to challenge the lawfulness of their detention and there has been no proceeding in a lawfully created coordinate system of justice to which this Court can defer. They are not enemy aliens, but citizens of our closest allies. Just as the habeas statute gave the Court the power to act in *Johnson*, the statute provides the power to act in this case; but the very factors that called for restraint in *Johnson* are notable here for their absence, and now call for the opposite result.^[FN43]

FN43. Even if *Johnson* were a jurisdictional holding - that federal courts do not have habeas jurisdiction over enemy aliens lawfully tried, convicted, and imprisoned in areas equivalent to post-war China and Germany - federal courts have at least the power to inquire whether these factors are present. Indeed, the Court in *Johnson* undertook precisely this inquiry. The Court has long recognized the power of a habeas court to inquire into the "jurisdictional

facts" that mark the outer bounds of its power. *See, e.g., Ludecke*, 335 U.S. at 163 n.5 (whether petitioner is alien enemy is a jurisdictional fact that may be tested in habeas); *Johnson*, 333 U.S. at 775 (same); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (claim of citizenship is a jurisdictional fact that may be tested in habeas prior to alleged alien's deportation: "The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status."); *see also* Brief *Amici Curiae* of Legal Historians (at common law, habeas courts had jurisdiction to resolve whether the prisoner was in fact an enemy alien).

As demonstrated below, Guantánamo is in no relevant respect akin to post-war China and Germany. But even if it were, the prisoners in this case, unlike the prisoners in *Johnson*, are not enemy aliens, have not been provided the benefit of the Geneva Conventions, and have not been tried by a military commission. The factors that led to the result in *Johnson* have never been established in this case, and the Petitioners' allegations are all to the contrary.

*41 C. Guantánamo Is Not Like Wartime China or Germany

Here, unlike in *Johnson*, the petitioners are held at Guantánamo. The Executive concedes that if the petitioners were being held in the United States, the federal courts would be open to them. *Gherebi v. Bush*, 352F.3d1278, 2003 WL 22971053, at *4 (9th Cir. Dec. 18, 2003). It offers no persuasive reason why an area subject to the complete, exclusive, and indefinite jurisdiction and control of the United States, where this country alone has wielded power for more than a century, should be treated the same

as occupied enemy *42 territory, temporarily controlled as an incident of wartime operations.

The Executive also concedes that if the prisoners at Guantánamo were U.S. citizens, federal habeas would lie.^[FN44] It offers no persuasive reason why the courthouse doors should be open to citizens detained at Guantánamo but not to citizens of our closest allies who allege they have committed no wrong against this country.

FN44. See *supra* 16 & note 16 (citing oral arguments in *Padilla*).

Once again, the Executive relies heavily on stray language in *Johnson*. And again the reliance is misplaced. The Court in *Johnson* repeatedly noted the prisoners' lack of connection to this country's "territory," or "territorial jurisdiction." See, e.g., *Johnson*, 339 U.S. at 768 ("We are cited to no instance where a court...has issued [the writ] on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction."); *id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *id.* at 781 (criticizing lower court for dispensing with "all requirement of territorial jurisdiction."); *id.* at 777 (writ should not extend to enemy alien detained "outside of our territory and there held in military custody as a prisoner of war.") The Court also observed that the prisoners had not come within United States sovereignty. *Id.* at 778. At no time did the Court indicate that this observation was essential to the result.^[FN45] Still, the Executive seizes on this language and *43 argues that this Nation's relationship to Guantánamo brings the case within *Johnson* because the lease governing the base grants Cuba "ultimate sovereignty" over the territory.

FN45. The *Johnson* dissenters certainly did not believe the holding depended on whether the petitioners had set foot within

the "ultimate sovereignty" of the United States. The dissent never uses the word 'sovereignty' and criticizes the majority for making the result turn on whether the prisoners had come within the "territorial jurisdiction." 339 U.S. at 796 (Black, J., dissenting) ("a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction.").

To suggest that because of these undefined terms, Guantánamo is no more amenable to federal habeas jurisdiction than occupied enemy territory defies reality.^[FN46] The Government has long considered Guantánamo to be "practically...a part of the Government of the United States." 25 Op. Att'y Gen. 157 (1904). Solicitor General Olson once described the base as part of our "territorial jurisdiction" and "under exclusive United States jurisdiction." 6 Op. Off. Legal Counsel 236, 242 (1982) (opinion of Asst. Attorney General Olson). The same treaty article that reserves an undefined quantum of "ultimate sovereignty" for Cuba grants the United States "complete jurisdiction and control" over the base. Agreement Between the United States And Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, art. III, T.S. No. 418, 6 Bevans 1113. The Executive determines who may enter and leave the base, and enjoys the power "to acquire....any land or other property therein by purchase or by exercise of eminent domain." *Id.*; see *United States v. Carmack*, 329 U.S. 230, 236 (1946) ("The power of eminent domain is essential to a sovereign government."). United States law governs the conduct of all who are present on the base, citizen and alien alike; and violations of criminal statutes are prosecuted in the Government's name. See, e.g., *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990).

FN46. A number of *amici* discuss the nature and history of Guantánamo in detail. See Brief of Former Guantánamo Officials as *Amicus Curiae*; Brief of National Institute of Military Justice as *Amicus*

Curiae.

*44 Consistent with the Treaty language, the United States has long exercised prescriptive and adjudicative jurisdiction over Guantánamo. In *Vermylya-Brown v. Connell*, 335 U.S. 377 (1948), the Court made clear that Guantánamo is presumptively covered by federal statutes regulating conduct in "territories and possessions" and that the rule against "extraterritorial application" of federal law has no provenance in a case arising from Guantánamo. *Id.* at 390 ("[W]here [the statute's] purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power.").

Unlike the conditions that prevailed in *Johnson*, Congress governs Guantánamo pursuant to its Article I and IV powers. Courts routinely take jurisdiction of cases that arise from the base, and have long exercised their power to test Government action on the base against the requirements of the Constitution. See, e.g., *Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) (finding violation of Takings Clause by Navy); *Burt v. Schick*, 23 M.J. 140, 142-43 (U.S.C.M.A. 1986) (granting writ of habeas corpus and holding that impending court martial proceeding on Guantánamo would constitute double jeopardy, in violation of 10 U.S.C. § 844(a)). Cf. *Johnson*, 339 U.S. at 780 ("[T]he scenes of [petitioners'] offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."). And while Guantánamo is a military installation, it is eight thousand miles from the theater of operations, and manifestly not under martial law. Compare *Padilla v. Rumsfeld*, ___ F.3d ___, 2003 U.S. App. LEXIS 25616 at *57-58 (2d Cir. Dec. 18 2003) (Chicago not in theater of operations), with *Johnson*, 339 U.S. at 780 (events in *Johnson* took place within "a zone of active military operations or under martial law").

*45 Equally important, Cuba's laws are wholly ineffectual in Guantánamo. United States governance,

now entering its second century, is potentially permanent and in no way dependent on the wishes or consent of the Cuban Government. Treaty Defining Relations with Cuba, May 29, 1934 U.S. - Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866. Indeed, the Cuban Government has long characterized the United States presence as "illegal" and refuses to cash the annual rent payment of \$4,085 the United States has tendered pursuant to the lease. See *Bird v. United States*, 923 F. Supp. 338, 341 n.6 (D.Conn. 1996). Recently, the Cuban Government added its voice to the chorus of governments criticizing the detentions on Guantánamo. Anita Snow, *Cuba Rants About Use of U.S. Navy Base*, Ft. Worth Star-Telegram, Dec. 27, 2003, at 14. However, "ultimate sovereignty" does not imply actual authority, as the United States has ignored Cuba's complaints and "continues to recognize the validity of these treaties." *Bird*, 923 F.Supp. at 341 (citing U.S. Dep't of State, *Treaties in Force* (1995); U.S. Dep't of State, "Fact Sheet: Cuba," Feb. 22, 1993, available at 1993 WL 2977391).

The extent of our jurisdiction and control in Guantánamo, and its amenability to judicial process, stands in stark contrast to the situation in *Johnson*. The Executive could not convene a military commission to try the *Johnson* petitioners unless it first secured permission from the Chinese Government. *Johnson*, Index to Pleadings, Ex. 4 - Message of 6 July 1946 to Wedemeyer from Joint Chiefs of Staff. J.A. 167. The same is true of Landsberg prison, where the *Johnson* petitioners were detained. The United States shared jurisdiction and control over detentions in occupied Germany with the United Kingdom and France. See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, *46 reprinted in Documents on Germany, 1944-1970, Comm. on Foreign Relations, 92nd Cong., (Comm. Print 1971), at 150-51, and the occupation in Germany was avowedly temporary. See Protocol of the Proceedings of the Berlin (Potsdam) Conference, Aug. 1, 1945, reprinted in Documents on Germany,

1944-1961, Comm. on Foreign Relations, United States Senate, 87th Cong., 1st Sess. 8 (Comm. Print 1961); *see also Johnson*, 339 U.S. at 797 (Black, J., dissenting)(China and Germany were “temporarily occupied countries.”).^[FN47]

FN47. The Government also relies on *United States v. Spelar*, 338 U.S. 217, 200 (1949), which held that plaintiffs injured on a United States base in Canada could not sue under the Federal Tort Claims Act (“FTCA”) because the base was in a foreign country. That case involved the interpretation of a particular statute; Congress’s authority to legislate was not in question, and the possibility that territory is “foreign” for some purposes and not for others is uncontroversial. *See Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (“Porto Rico ... was foreign to the United States in a domestic sense”); *see also Vermilya-Brown*, 335 U.S. at 386-390 (presumption against extraterritorial application does not govern in United States “possessions”). For that reason, courts have held that Government action in a territory is constrained by the Constitution, even though the territory may be in a foreign country, which precludes litigation under the FTCA. *Compare Ralpho v. Bell*, 569 F.2d 607, *reh’g denied*, 569 F.2d 636 (D.C. Cir. 1977) (fundamental constitutional rights apply in Pacific Trust Territories), *with Callas v. United States*, 253 F.2d 838, 839-40 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958) (FTCA does not extend to Pacific Trust Territory).

D. The Current Hostilities Do Not Justify A Departure From Settled Practice

Lastly, the Executive makes vague reference to the ongoing hostilities in Afghanistan, as though this were sufficient reason to permit the creation of a prison beyond the law, eight thousand miles away. But until this litigation began, the United States had

never proposed that military necessity demanded indefinite detention without legal process *47 for prisoners captured during hostilities, nor does the military take that position during the present conflict in Iraq.

On the contrary, the military has adopted a comprehensive set of regulations to insure that no person be detained without legal process. *Enemy Prisoners of War, Detained Personnel, Civilian Internees, and Other Detainees*, U.S. Army Regulation 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps (October 1, 1997)). P.A. 71a-74a. These regulations trace their origin to the Vietnam conflict, when the United States often captured people whose status under the Convention was in doubt. “[R]arely did the Viet Cong wear a recognizable uniform, and only occasionally did the guerrillas carry their arms openly. Additionally, some combat captives were compelled to act for the Viet Cong out of fear of harm to themselves or their families.” Frederic L. Borch, *Judge Advocates in Combat* 21 (Office of the Judge Advocate General 2001); Howard S. Levie, *Prisoners of War* 57 (Naval War College Press 1978). The nature of the conflict, in other words, created a distinct risk of capturing innocent civilians.

Rather than allow innocent detainees to languish in custody, the military created “Article 5 tribunals” to resolve all doubtful cases.^[FN48] Levie, *Prisoners of War* at 57. These tribunals, which operated during hostilities within the theater of operations, consisted of at least three officers, including one who was “a judge advocate or other military lawyer *48 familiar with the Geneva Convention.” Directive Number 20-5, United States Military Assistance Command, Vietnam (March 15, 1968), *reprinted in* 62 Am. J. Int’l L. 765 (1968). Detainees enjoyed the “fundamental rights considered to be essential to a fair hearing,” including the right to counsel and an interpreter. *Id.* at 771. Counsel had “free access” to his client, was given at least one week to prepare, and, at the hearing had the right to call and cross-

examine witnesses, to present evidence, and to make an opening and closing statement. The tribunal determined whether a detainee was a prisoner of war, a "civil defendant" subject to Vietnamese law, or an innocent civilian who should be released. *Id.* at 767; Borch, Judge Advocates in Combat, at 21. No one was held without a legal status. Directive Number 20-5, *reprinted in* 62 Am. J. Intl. L. at 768.

FN48. So named because they implement Article 5 of the Third Geneva Convention. As noted above, Article 5 requires that "any doubt" regarding the status of a person captured by the detaining power be resolved by a "competent tribunal," and that all detainees enjoy POW status unless and until an Article 5 tribunal determines otherwise. Geneva III, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142.

Today, Article 5 tribunals consist of three commissioned officers. Prisoners may attend all open sessions and they enjoy the services of a qualified interpreter. They may testify on their own behalf, call witnesses, present documentary evidence, and question witnesses called by the tribunal. Prisoners may also remain silent and cannot be compelled to testify. At the close of the hearing, the tribunal determines, in a written report, whether the person is a prisoner of war, who enjoys the full protections of the Geneva Convention, a religious person who is likewise "entitled to" POW protections, an innocent civilian "who should immediately be returned to his home or released," or a civilian internee "who for reasons of operational security, or probable cause incident to criminal investigation, should be detained." U.S. Army Regulation 190-8, at 1-6e. The tribunal may reach no other possible outcome, and no one is held without some defined status. *Id.* at 1-6e(10). Persons in the civilian-internee category may not be punished "without further proceedings to determine what acts they may have *49 committed and what penalty should be imposed." *Id.* at 1-6g. Finally, any decision denying POW status

"shall be reviewed for legal sufficiency" by the office of the Judge Advocate General. *Id.*

Since Vietnam, Article 5 tribunals have been a settled part of military practice. During the first Persian Gulf War, the United States conducted nearly 1,200 Article 5 tribunals, finding that 310 detainees were entitled to POW status, with the remainder entitled to refugee status. *See* Dep't of Defense, Conduct of the Persian Gulf War: Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25) App. L. at 577 (Apr. 1992). Even during the present conflict in Iraq, within the field of battle, the military continues to conduct these tribunals. War Briefing, Army Col. John Della Jacono, Enemy Prisoner of War Briefing from Umm Qar, Iraq (May 8, 2003), *available at* 2003 WL 1864306. Why the same process should be denied to citizens of our closest allies who have done no harm to the United States and who remain imprisoned half a world away, is a mystery.

In sum, whatever may have been the justification for restricting the exercise of habeas in *Johnson* - a matter on which the prisoners here take no position - the prisoners in *Johnson* were enemy aliens who were given the opportunity to litigate their claims in a coordinate system of justice created by the valid exercise of Congressional authority during a declared war. They were charged, tried, convicted, and held in occupied territory temporarily controlled by the military. The considerations that counseled in favor of restraint in that case now call for the opposite result - judicial exercise of jurisdiction to review indefinite detentions.

*50 CONCLUSION

The Court should reverse the judgment below and remand to the D.C. Circuit to allow the prisoners to challenge the lawfulness of their detention in the district court.

Shafiq RASUL, et al., Petitioners, v. George W.
BUSH, et al., Respondents.

2004 WL 162758 (U.S.) (Appellate Brief)

END OF DOCUMENT

For Opinion See 433 F.Supp.2d 58 , 414 F.Supp.2d 26

United States District Court, District of Columbia.
Shafiq RASUL Asif Iqbal Rhuheel Ahmed Jamal Al-harith, Plaintiffs,

v.

Donald RUMSFELD Department of Defense Air Force General Richard Myers Army Major General Geoffrey Miller Former Commander, Joint Task Force Guantanamo Bay Naval Base, Cuba, Army General James T. Hill Commander, United States Southern Command Army Major General Michael E. Dunlavey Former Commander, Joint Task Force Guantanamo Bay Naval Base, Cuba, Army Brigadier General Jay Hood Commander, Joint Task Force, GTMO Guantanamo Bay Naval Base, Cuba, Marine Brigadier General Michael Lehnert Army Colonel Nelson J. Cannon Commander, Camp Delta Guantanamo Bay Naval Base, Cuba, Army Colonel Terry Carrico Commander Camp X-Ray, Camp Delta Guantanamo Bay Naval Base, Cuba, Army Lieutenant Colonel William Cline Commander, Camp Delta Guantanamo Bay Naval Base, Cuba, ARMY Lieutenant Colonel Diane Beaver Legal Adviser to General Dunlavey Guantanamo Bay Naval Base, Cuba c/o United States Army, and John DOES 1-100, Individuals involved in the illegal Torture of Plaintiffs at Guantanamo Bay Naval Base

All in their personal capacities, Defendants.

No. 104CV01864.

October 27, 2004.

(Violations of the Alien Tort Statute, the Fifth and Eighth Amendments to the U.S. Constitution, the Geneva Conventions, and the Religious Freedom Restoration Act)

Complaint

Baach Robinson & Lewis, Eric L. Lewis D.C. Bar No. 394643, Jeffrey D. Robinson D.C. Bar No. 376037, Lois J. Schiffer D.C. Bar. No. 56630, 1201 F Street NW, Suite 500, Washington, D.C. 20040, 202/833-8900.

Barbara Olshansky (NY 0057), Jeffrey Fogel, Michael Ratner, Center for Constitutional Rights, 666 Broadway, 7th Floor, New York, NY, 20012, 212/614-6439, Attorneys for Plaintiffs.

Plaintiffs Shafiq Rasul, Asif Iqbal, Rhuheel Ahmed and Jamal Al-Harith, by and through their undersigned attorneys, Baach Robinson & Lewis PLLC and Michael Ratner at the Center for Constitutional Rights, as and for their complaint against Defendants Donald Rumsfeld, Air Force General Richard Myers, Army Major General Geoffrey Miller, Army General James T. Hill, Army Major General Michael E. Dunlavey, Army Brigadier General Jay Hood, Marine Brigadier General Michael Lehnert, Army Colonel Nelson J. Cannon, Army Colonel Terry Carrico, Army Lieutenant Colonel William Cline, Army Lieutenant Colonel Diane Beaver and John Does 1-100, hereby allege as follows:

INTRODUCTION

1. Plaintiffs are citizens and residents of the United Kingdom. They are not now and have never been members of any terrorist group. They have never taken up arms against the United States.

2. Plaintiffs Shafiq Rasul, Asif Iqbal and Rhuheel Ahmed were detained in Guantanamo Bay, Afghanistan on November

28, 2001, by General Rashid Dostum, an Uzbek warlord temporarily allied with the United States as part of the Northern Alliance. Thereafter, General Dostum placed Plaintiffs Rasul, Iqbal and Ahmed in the custody of the United States military. Because Plaintiffs Rasul, Iqbal and Ahmed were unarmed and not engaged in any hostile activities, neither General Dostum nor any of his troops ever could have or did observe them engaged in combat against the United States, the Northern Alliance or anyone else. On information and belief, General Dostum detained Plaintiffs Rasul, Iqbal and Ahmed and numerous other detainees who were not combatants; he handed detainees including Plaintiffs Rasul, Iqbal and Ahmed to the custody of the United States in order to obtain bounty money from the United States; and the United States took custody of Plaintiffs Rasul, Iqbal and Ahmed without any independent good faith basis for concluding that they were or had been engaged in activities hostile to the United States.

3. Plaintiff Jamal Al-Harith works as an internet web designer in Manchester, England. Intending to attend a religious retreat, Plaintiff Al-Harith arrived in Pakistan on October 2, 2001, where he was advised to leave the country because of animosity toward British citizens. Heeding the warning, he planned to return to Europe by traveling overland through Iran to Turkey by truck. While in Pakistan, the truck in which Plaintiff Al-Harith was riding was stolen at gunpoint by Afghans; he was then forced into a jeep which crossed the border into Afghanistan. Plaintiff Al-Harith was then handed over to the Taliban. Plaintiff Al-Harith was beaten by Taliban guards and taken for interrogation. He was accused of being a British special forces military spy and held in isolation. After the US invasion of Afghanistan, the Taliban released Plaintiff Al-Harith into the general prison population. When the Taliban government fell and the new government came to power, Plaintiff Al-Harith and others in the prison were told that they were free to leave and Plaintiff Al-Harith was offered transportation to Pakistan. Plaintiff Al-Harith thought it would be quicker and easier to travel to Kabul where there was a British Embassy. Officials of the International Committee of the Red Cross ("ICRC") instructed Al-Harith to remain at the prison and they offered to make contact with the British Embassy to fly him home. Plaintiff Al-Harith also spoke directly to British Embassy officials who indicated that they were making arrangements to fly him to Kabul and out of the country. After Plaintiff Al-Harith had been in contact with the British Embassy in Kabul for approximately a month discussing the logistics of evacuating him, American Special Forces arrived and questioned Plaintiff. The ICRC told Plaintiff Al-Harith that the Americans would fly Plaintiff Al-Harith to Kabul; two days before he was scheduled to fly to Kabul, American soldiers told Plaintiff Al-Harith, "You're not going anywhere. We're taking you to Kandahar airbase."

4. All four Plaintiffs were first held in United States custody in Afghanistan and later transported to the United States Naval Base at Guantanamo Bay Naval Station, Cuba ("Guantanamo"), where Defendants imprisoned them without charge for more than two years. During Plaintiffs' imprisonment, Defendants systematically and repeatedly tortured them in violation of the United States Constitution and domestic and international law, and deprived them of access to friends, relatives, courts and counsel. Defendants repeatedly attempted to extract confessions from Plaintiffs without regard to the truth or plausibility of these statements through the use of the illegal methods detailed below.

5. Plaintiffs were released without charge in March 2004 and have returned to their homes in the United Kingdom where they continue to suffer the physical and psychological effects of their prolonged arbitrary detention, torture and other mistreatment as hereinafter alleged.

6. In the course of their detention by the United States, Plaintiffs were repeatedly struck with rifle butts, punched, kicked and slapped. They were "short shackled" in painful "stress positions" for many hours at a time, causing deep flesh wounds and permanent scarring. Plaintiffs were also threatened with unmuzzled dogs, forced

to strip naked, subjected to repeated forced body cavity searches, intentionally subjected to extremes of heat and cold for the purpose of causing suffering, kept in filthy cages for 24 hours per day with no exercise or sanitation, denied access to necessary medical care, harassed in practicing their religion, deprived of adequate food, deprived of sleep, deprived of communication with family and friends, and deprived of information about their status.

7. Plaintiffs' detention and mistreatment were in plain violation of the United States Constitution, federal statutory law and United States treaty obligations, and customary international law. Defendants' treatment of Plaintiffs and other Guantanamo detainees violated various provisions of law including the Fifth Amendment to the United States Constitution forbidding the deprivation of liberty without due process; the Eighth Amendment forbidding cruel and unusual punishment; United States statutes prohibiting torture, assault, and other mistreatment; the Geneva Conventions; and customary international law norms prohibiting torture and other cruel, inhuman or degrading treatment.

8. Plaintiffs' torture and other mistreatment was not simply the product of isolated or rogue actions by individual military personnel. Rather it was the result of deliberate and foreseeable action taken by Defendant Rumsfeld and senior officers to flout or evade the United States Constitution, federal statutory law, United States treaty obligations and long established norms of customary international law. This action was taken in a misconceived and illegal attempt to utilize torture and other cruel, inhuman, or degrading acts to coerce nonexistent information regarding terrorism. It was misconceived because, according to the conclusion of the US military as expressed in the Army Field Manual, torture does not yield reliable information, and because Plaintiffs - along with the vast majority of Guantanamo detainees - had no information to give. It was illegal because, as Defendants well knew, torture and other cruel, inhuman or degrading treatment of detainees is not permitted under the United States Constitution, federal statutory law, United States treaty obligations, and customary international law.

9. On or about December 2, 2002, Defendant Rumsfeld signed a memorandum approving numerous illegal interrogation methods, including putting detainees in "stress positions" for up to four hours; forcing detainees to strip naked, intimidating detainees with dogs, interrogating them for 20 hours at a time, forcing them to wear hoods, shaving their heads and beards, keeping them in total darkness and silence, and using what was euphemistically called "mild, non-injurious physical contact." As Defendant Rumsfeld knew, these and other methods were in violation of the United States Constitution, federal statutory law, the Geneva Conventions, and customary international law as reflected in, *inter alia*, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). This memorandum of December 2, 2002, authorizing torture and other mistreatment, was originally designated by Defendant Rumsfeld to be classified for ten years but was released at the direction of President George W. Bush after the Abu Ghraib torture scandal became public.

10. After authorizing, encouraging, permitting, and requiring the acts of torture and other mistreatment inflicted upon Plaintiffs, Defendant Rumsfeld, on information and belief, subsequently commissioned a "Working Group Report" dated March 6, 2003, to address "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations." This report, also originally classified for a period of ten years by Defendant Rumsfeld, was also released after the Abu Ghraib torture scandal became public. This report details the requirements of international and domestic law governing interrogations, including the Geneva Conventions; the CAT; customary international law; the torture statute, 18 U.S.C. § 2340; assault within maritime and territorial jurisdiction, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112; interstate stalking, 18 U.S.C. § 2261a; and conspiracy 18 U.S.C. § 2 and § 371. The

report attempts to address "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal not unlawful." Working Group Report at p. 3 (emphasis in original). The memorandum is on its face an ex post facto attempt to create arguments that the facially criminal acts perpetrated by the Defendants were somehow justified. It argues first that the President as Commander-in-Chief has plenary authority to order torture, a proposition that ignores settled legal doctrine from King John at Runnymede to *Youngstown Sheet & Tube*, 343 U.S. 579 (1952). It next tries to apply common law doctrines of self-defense and necessity, arguing the erroneous proposition that the United States has the right to torture detained individuals because it needs to defend itself or because it is necessary that it do so. Finally, it suggests that persons inflicting torture and other mistreatment will be able to defend against criminal charges by claiming that they were following orders. The report asserts that the detainees have no Constitutional rights because the Constitution does not apply to persons held at Guantanamo. However, the report acknowledges that U.S. criminal laws do apply to Guantanamo, and further acknowledges that the United States is bound by the CAT to the extent that conduct barred by that Convention would also be prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution. On June 22, 2004, the conclusions of this report and other memoranda attempting to justify torture were repudiated and rescinded by President Bush.

11. In April 2003, following receipt of the Working Group Report, Defendant Rumsfeld issued a new set of recommended interrogation techniques, requiring approval for four techniques. These recommendations recognized specifically that certain of the approved techniques violated the Geneva Conventions and customary international law, including the use of intimidation, removal of religious items, threats and isolation. The April 2003 report, however, officially withdrew approval for unlawful actions that had been ongoing for months, including hooding, forced nakedness, shaving, stress positions, use of dogs and "mild, non-injurious physical contact." Nevertheless, on information and belief these illegal practices continued to be employed against Plaintiffs and other detainees at Guantanamo.

12. Defendants well knew that their activities resulting in the detention, torture and other mistreatment of Plaintiffs were illegal and violated clearly established law - i.e., the Constitution, federal statutory law and treaty obligations of the United States and customary international law. Defendants' after-the-fact attempt to create an Orwellian legal facade makes clear their conscious awareness that they were acting illegally. Therefore they cannot claim immunity from civil liability.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331 (federal question jurisdiction); and 28 U.S.C. § 1350 (Alien Tort Statute).

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(3) and 28 U.S.C. § 1391(b)(2). The alleged acts described below are "inextricably bound up with the District of Columbia in its role as the nation's capital." *Mundy v. Weinberger*, 554 F. Supp. 811, 818 (D.D.C. 1982). Decisions and acts by Defendants ordering, facilitating, aiding and abetting, acquiescing, confirming and/or conspiring in the commission of the alleged acts reached the highest levels of the United States Government. On information and belief, approval for all alleged acts emanated under color of law from orders, approvals, and omissions occurring in the Pentagon, numerous government agencies headquartered in the District of Columbia, and the offices of Defendant Rumsfeld, several of which are in the District of Columbia. Venue for claims arising from acts of Cabinet officials, the Secretary of Defense and United States agencies lies in the District of Columbia. *See id.*; *Smith v. Dalton*, 927 F. Supp. 1 (D.D.C. 1996).

PARTIES

15. Plaintiff Shafiq Rasul was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 24 years old.

16. Plaintiff Asif Iqbal was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 20 years old.

17. Plaintiff Rhuheh Ahmed was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 19 years old.

18. Plaintiff Jamal Al-Harith was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 35 years old.

19. Defendant Donald Rumsfeld is the United States Secretary of Defense. On information and belief, he is a citizen of Illinois and a resident of the District of Columbia. Defendant Rumsfeld is charged with maintaining the custody and control of the Guantanamo detainees, including Plaintiffs, and with assuring that their treatment was in accordance with law. Defendant Rumsfeld ordered, authorized, condoned and has legal responsibility for the arbitrary detention, torture and other mistreatment of Plaintiffs as alleged herein. Defendant Rumsfeld is sued in his individual capacity.

20. Defendant Myers is a General in the United States Air Force and was at times relevant hereto Chairman of the Joint Chiefs of Staff. On information and belief, he is a citizen and resident of Virginia. As the senior uniformed military officer in the chain of command, Defendant Myers is charged with maintaining the custody and control of the Guantanamo detainees, including Plaintiffs, and with assuring that their treatment was in accordance with law. On information and belief Defendant Myers was informed of torture and other mistreatment of detainees at Guantanamo and Abu Ghraib prison in Iraq and condoned such activities. Defendant Myers was in regular contact with Defendant Rumsfeld and participated in and implemented decisions taken in the District of Columbia. Defendant Myers is sued in his individual capacity.

21. Defendant Miller is a Major General in the United States Army and was at times relevant hereto Commander of Joint Task Force-GTMO. On information and belief, he is a citizen and resident of Texas. At times relevant hereto, he had supervisory responsibility for Guantanamo detainees, including Plaintiffs, and was responsible for assuring that their treatment was in accordance with law. On information and belief, Defendant Miller was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. On information and belief, Defendant Miller implemented and condoned numerous methods of torture and other mistreatment as hereinafter described. On information and belief, Defendant Miller was subsequently transferred to Abu Ghraib where he implemented and facilitated torture and other mistreatment of detainees there. These acts were

filmed and photographed and have justly inspired widespread revulsion and condemnation around the world. Defendant Miller is sued in his individual capacity.

22. Defendant Hill is a General in the United States Army and was at times relevant hereto Commander of the United States Southern Command. On information and belief, he is a citizen and resident of Texas. On information and belief, Defendant Hill was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. On information and belief, General Hill requested and recommended approval for several abusive interrogation techniques which were used on Guantanamo detainees, including Plaintiffs. Defendant Hill is sued in his individual capacity.

23. Defendant Dunlavey is a Major General in the United States Army and was at times relevant hereto Commander of Joint Task Forces 160/170, the successors to Joint Task Force-GTMO. On information and belief, he is a citizen and resident of Pennsylvania. At times relevant hereto, he had supervisory responsibility for Guantanamo detainees, including Plaintiffs, and for assuring that their treatment was in accordance with law. On information and belief, Defendant Dunlavey was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. On information and belief, Major General Dunlavey implemented and condoned the torture and other cruel, inhuman or degrading acts and conditions alleged herein. Defendant Dunlavey is sued in his individual capacity.

24. Defendant Hood is a Brigadier General in the United States Army and is the Commander of Joint Task Force-GTMO, which at all relevant times operated the detention facilities at Guantanamo. On information and belief, he is a citizen and resident of South Carolina. At times relevant hereto, he had supervisory responsibility for Guantanamo detainees, including Plaintiffs, and for assuring that their treatment was in accordance with law. On information and belief, Defendant Hood has been and continues to be in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Hood is sued in his individual capacity.

25. Defendant Lehnert is a Brigadier General in the United States Marine Corps and was at times relevant hereto Commander of the Joint Task Force responsible for the construction and operation of Camp X-Ray and Camp Delta at Guantanamo. On information and belief, he is a citizen and resident of Florida. At times relevant hereto, he had supervisory responsibility for Guantanamo detainees, including Plaintiffs, and for assuring that their treatment was in accordance with law. On information and belief, Defendant Lehnert was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Lehnert is sued in his individual capacity.

26. Defendant Cannon is a Colonel in the United States Army and the Commander of Camp Delta at Guantanamo. On information and belief, he is a citizen and resident of Michigan. At times relevant hereto, he has and continues to have supervisory responsibility for Guantanamo detainees including Plaintiffs and for assuring that their treatment was in accordance with law. On information and belief Defendant Cannon has been in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Cannon is sued in his individual capacity.

27. Defendant Carrico is a Colonel in the United States Army and was at times relevant hereto Commander of Camp X-Ray and Camp Delta at Guantanamo. On information and belief, he is a citizen and resident of Texas. At times relevant hereto, he had supervisory responsibility for Guantanamo detainees including Plaintiffs and for assuring that their treatment was in accordance with law. On information and belief, Defendant Carrico was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Carrico is sued in his individual capacity.

28. Defendant Beaver is a Lieutenant Colonel in the United States Army and was at times relevant hereto Chief Legal Adviser to Defendant Dunlavey. On information and belief, she is a citizen and resident of Kansas. On information and belief, knowing that torture and other mistreatment were contrary to military law and regulations, she nevertheless provided an opinion purporting to justify the ongoing torture and other mistreatment of detainees at Guantanamo, including Plaintiffs. On information and belief, Defendant Beaver was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Beaver is sued in her individual capacity.

29. Plaintiffs do not know the true names and capacities of other Defendants sued herein and therefore sue these defendants by fictitious names, John Does 1-100. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. John Does 1-100 are the military and civilian personnel who participated in the torture and other mistreatment of Plaintiffs as hereinafter alleged.

FACTUAL ALLEGATIONS

30. Plaintiffs are citizens and residents of the United Kingdom.

31. Plaintiffs Rasul, Iqbal and Ahmed are boyhood friends and grew up streets away from each other in the working-class town of Tipton in the West Midlands of England.

32. Plaintiff Shafiq Rasul attended a Catholic elementary school before studying at the same high school as Plaintiffs Iqbal and Ahmed. An avid soccer fan, Plaintiff Rasul played for a local team before going on to study computer science at the University of Central England. He also worked part time at an electronics store.

33. Plaintiff Asif Iqbal attended the same elementary school as Plaintiff Rasul and the same high school as both Plaintiffs Rasul and Ahmed. After leaving high school, Plaintiff Iqbal worked at a local factory making road signs and building bus shelters. He was also an active soccer player and volunteered at the local community center.

34. Plaintiff Rhuheh Ahmed attended the same high school as Plaintiffs Iqbal and Ahmed. Like Plaintiff Iqbal, he worked at a local factory and worked with children and disabled people at the local government-funded Tipton Muslim Community Center.

35. In September 2001, Plaintiff Iqbal traveled to Pakistan to join his father who had arranged a marriage for him with a young woman from his family's ancestral village. His longtime friend, Plaintiff Ahmed traveled from England in October in order to join him at his wedding as his best man. Plaintiff Rasul was at the same time in Pakistan visiting his family with the expectation of continuing his degree course in computer science degree within the month. Prior to the wedding in Pakistan, in October 2001, Plaintiffs Rasul, Iqbal and Ahmed crossed

the border into Afghanistan in order to offer help in the ongoing humanitarian crisis. After the bombing in Afghanistan began, Plaintiffs Rasul, Iqbal and Ahmed tried to return to Pakistan but were unable to do so because the border had been closed. Plaintiffs never engaged in any terrorist activity or took up arms against the United States.

36. Plaintiffs Rasul, Iqbal and Ahmed never engaged in combat against the forces of the United States or any other entity. Plaintiffs Rasul, Iqbal and Ahmed never conducted any terrorist activity or conspired, intended, or planned to conduct any such activity. Plaintiffs Rasul, Iqbal and Ahmed never belonged to Al Qaeda or any other terrorist organization.

Detention in Afghanistan

37. On November 28, 2001, Plaintiffs Rasul, Iqbal and Ahmed were captured and detained by forces loyal to General Rashid Dostum, an Uzbek warlord who was aligned with the United States.

38. No U.S. forces were present when Plaintiffs Rasul, Iqbal and Ahmed were detained. Therefore, no U.S. forces could have had any information regarding Plaintiffs other than that supplied by the forces of General Dostum, who were known to be unreliable and who were receiving a per head bounty of, on information and belief, up to \$ 35,000.

39. With U.S. military forces present, Plaintiffs Rasul, Iqbal and Ahmed, along with 200 to 300 others, were crammed into metal containers and transported by truck to Sherbegan prison in Northern Afghanistan. General Dostum's forces fired holes into the sides of the containers with machine guns, striking the persons inside. Plaintiff Iqbal was struck in his arm, which would later become infected. Following the nearly 18-hour journey to Sherbegan prison, Plaintiffs Rasul, Iqbal and Ahmed were among what they estimate to have been approximately 20 survivors in the container.

40. Plaintiffs Rasul, Iqbal and Ahmed were held in Sherbegan by General Dostum's forces for about one month, where they were exposed to extremely cold conditions without adequate clothing, confined to tight spaces, and forced to ration food. Prison conditions were filthy. Plaintiffs Rasul, Iqbal and Ahmed and other prisoners suffered from amoebic dysentery and were infested with lice.

41. In late December 2001, the ICRC visited with Plaintiffs Rasul, Iqbal and Ahmed and informed them that the British Embassy in Islamabad, Pakistan had been advised of their situation and that embassy officials would soon be in contact with Plaintiffs.

42. On December 28, 2001, U.S. Special Forces arrived at Sherbegan and were informed of the identities of Plaintiffs Rasul, Iqbal and Ahmed.

43. General Dostum's troops chained Plaintiffs Rasul, Iqbal and Ahmed and marched them through the main gate of the prison, where U.S. Special Forces surrounded them at gunpoint.

44. From December 28, 2001 until their release in March 2004, Plaintiffs Rasul, Iqbal and Ahmed were in the exclusive physical custody and control of the United States military. In freezing temperatures, Plaintiffs Rasul, Iqbal and Ahmed were stripped of their clothes, searched, and photographed naked while being held by Defendant John Does, two U.S. Special Forces soldiers. American military personnel took Plaintiffs Rasul, Iqbal and Ahmed to a room for individual interrogations. Plaintiff Rasul was bound hand and foot with plastic cuffs and

forced onto his knees before an American soldier in uniform. Both Plaintiffs Rasul and Iqbal were interrogated immediately and without knowledge of their interrogators' identities. Both were questioned at gunpoint. While Plaintiff Iqbal was interrogated, Defendant John Doe held a 9mm pistol physically touching his temple. At no time were Plaintiffs Rasul, Iqbal and Ahmed afforded counsel or given the opportunity to contact their families.

45. Following their interrogations, Plaintiffs Rasul, Iqbal and Ahmed were led outside where a Defendant John Doe immediately covered their eyes by putting sandbags over their heads and applying thick masking tape. They were placed side- by-side, barefoot in freezing temperatures, with only light clothing, for at least three to four hours. While hooded and taped, Plaintiffs Rasul, Iqbal and Ahmed were repeatedly threatened with beatings and death and were beaten by a number of Defendant John Does, U.S. military personnel. Plaintiff Iqbal estimates that he was punched, kicked, slapped, and struck by US military personnel with rifle butts at least 30 or 40 times.

46. Thereafter, Plaintiffs Rasul, Iqbal and Ahmed were placed in trucks with other detainees and transported to an airport about 45 minutes away.

47. Plaintiffs Rasul and Iqbal were led onto one plane and Plaintiff Ahmed was led onto a second plane. Plaintiffs Rasul, Iqbal and Ahmed, still hooded with their hands tied behind their backs and their legs tied in plastic cuffs, were fastened to a metal belt attached to the floor of each aircraft. The soldiers instructed Plaintiffs Rasul, Iqbal and Ahmed to keep their legs straight out in front of them as they sat. The position was extremely painful. When any of Plaintiffs or other detainees tried to move to relieve the pain, an unknown number of Defendant John Does struck Plaintiffs and others with rifle butts. Plaintiffs Rasul, Iqbal and Ahmed were flown by the U.S. military to Kandahar.

48. Upon arrival in Kandahar, Plaintiffs Rasul, Iqbal and Ahmed, still covered with hoods, were led out of the planes. A rope was tightly tied around each of their right arms, connecting the detainees together.

49. Plaintiffs Rasul, Iqbal and Ahmed, who were still without shoes, were forced to walk for nearly an hour in the freezing cold, causing them to sustain deep cuts on their feet and rope burns on their right arms.

50. Plaintiffs Rasul, Iqbal and Ahmed were herded into a tent, where soldiers forced them to kneel with their legs bent double and their foreheads touching the ground. With their hands and feet still tied, the position was difficult to maintain. Plaintiffs Rasul, Iqbal and Ahmed were repeatedly and violently beaten by Defendant John Does, US soldiers. Each was asked whether he was a member of Al Qaeda and when each responded negatively, each was punched violently and repeatedly by soldiers. When Plaintiffs Rasul Iqbal and Ahmed identified themselves as British nationals, Defendants John Doe soldiers insisted they were "not white" but "black" and accordingly could not be British. The soldiers continued to beat them.

51. Plaintiffs Rasul, Iqbal and Ahmed were "processed" by American soldiers, and had plastic numbered wristbands placed on their wrists. Soldiers kicked Plaintiff Rasul, assigned the number 78, several times during this process. American soldiers cut off his clothes and conducted a body cavity search. He was then led through an open-air maze constructed of barbed wire. Plaintiffs Iqbal, assigned number 79, and Ahmed, assigned number 102, experienced the same inhumane treatment.

52. Plaintiffs Rasul, Iqbal and Ahmed, dehydrated, exhausted, disoriented, and fearful, were summoned by number for interrogation. When called, each was shackled and led to an interrogation tent. Their hoods were removed and they were told to sit on the floor. An armed soldier stood behind them out of their line of sight. They

were told that if they moved they would be shot.

53. After answering questions as to their backgrounds, Plaintiffs Rasul, Iqbal and Ahmed were each photographed by soldiers. They were fingerprinted and a swab from their mouth and hairs plucked from their beards were taken for DNA identification.

54. An American soldier questioned Plaintiff Iqbal a second time. Plaintiff Iqbal was falsely accused by the interrogator of being a member of Al Qaeda. Defendant John Does, US soldiers, punched and kicked Plaintiff Iqbal in the back and stomach before he was dragged to another tent.

55. Personnel believed by Plaintiffs to be British military personnel later interrogated Plaintiffs Rasul, Iqbal and Ahmed, with US soldiers present. Plaintiffs Rasul, Iqbal and Ahmed were falsely accused of being members of the Al Muhajeroon. During the interrogation, Plaintiffs Rasul, Iqbal and Ahmed were threatened by Defendant John Does, armed American soldiers, with further beatings if they did not admit to various false statements.

56. Plaintiffs Rasul and Ahmed slept in a tent with about 20 other detainees. Plaintiff Iqbal was in another tent. The tents were surrounded by barbed wire. Detainees were not allowed to talk and were forced to sleep on the ground. American soldiers woke the detainees hourly as part of a systematic effort to deprive them of sleep.

57. Defendant John Does, interrogators and guards, frequently used physical violence and unmuzzled dogs to threaten and intimidate Plaintiffs Rasul, Iqbal and Ahmed and other detainees during the interrogations.

58. At or around midnight of January 12 or 13, 2002, US army personnel entered the tent of Plaintiffs Rasul and Ahmed. Both were made to lie on the ground, were shackled, and rice sacks were placed over their heads. They were led to another tent, where Defendant John Does, US soldiers, removed their clothes and forcibly shaved their beards and heads. The forced shaving was not intended for hygiene purposes, but rather was, on information and belief, designed to distress and humiliate Plaintiffs given their Muslim faith, which requires adult males to maintain beards.

59. Plaintiff Rasul was eventually taken outside where he could hear dogs barking nearby and soldiers shouting, "Get 'em boy." He was then given a cavity search and photographed extensively while naked before being given an orange uniform. Soldiers handcuffed Plaintiff Rasul's wrists and ankles before dressing him in black thermal gloves, dark goggles, earmuffs, and a facemask. Plaintiff Rasul was then left outside for hours in freezing temperatures.

60. Plaintiff Iqbal, who was in another tent, experienced similar treatment of being led from his tent to be shaved and stripped naked.

61. Plaintiffs Rasul and Iqbal were escorted onto large cargo planes. Still shackled and wearing facemasks, both were chained to the floor with no backrests. They were forced by Defendant John Does to sit in an uncomfortable position for the entire flight to Guantanamo (of approximately eighteen to twenty hours) and were not allowed to move or given access to toilet facilities.

62. Plaintiff Ahmed remained in Kandahar for another month. American soldiers interrogated him four more times. Sleep-deprived and malnourished, Plaintiff Ahmed was also interrogated by British agents who, on information and belief were from the British intelligence agency, MI5, and he was falsely told that Plaintiffs Rasul and Iqbal had confessed in Cuba to allegations of membership in the Al Muhajeroon. He was told that he could

return to the United Kingdom in exchange for admitting to various accusations. Distraught, fearful of further beatings and abuse, and without benefit of contact with family or counsel, Plaintiff Ahmed made various false confessions. Plaintiff Ahmed was thereafter transported to Guantanamo.

63. As noted above, Plaintiff Al-Harith was being held in custody by the Taliban in Southern Afghanistan as a suspected British spy. He was interrogated and beaten by Taliban troops. When the Taliban government fell, Plaintiff Al-Harith was in a Taliban prison. He contacted the British Embassy through the ICRC and by satellite phone and was assured he would be repatriated to Britain. Two days before his scheduled repatriation, US forces informed him that he was being detained and taken to Kandahar, where he was held in a prison controlled by US forces and interrogated and beaten by US troops. Plaintiff Al-Harith was flown to Guantanamo from Kandahar on or about February 11, 2002.

64. Prior to take-off, Plaintiff Al-Harith, like Plaintiffs Rasul, Iqbal and Ahmed, was hooded and shackled; mittens were placed on his hands and earphones over his ears. Chains were then placed around his legs, waist and the earphones. The chains cut into his ears. Goggles were placed on his eyes and a medical patch that, on information and belief, contained muscle relaxant was applied.

Captivity and Conditions at Camp X-Ray, Guantanamo

65. Plaintiffs Rasul and Iqbal were transported to Guantanamo in mid-January 2002. Plaintiffs Ahmed and Al-Harith were transported there approximately one month later. During the trip, Defendant John Does, US soldiers, kicked and punched Plaintiff Ahmed more than twenty times. Plaintiff Al-Harith was punched, kicked and elbowed repeatedly and was threatened with more violence.

66. Upon arrival at Guantanamo, Plaintiffs were placed on a barge to get to the main camp. Defendant John Does, US Marines on the barge, repeatedly beat all the detainees, including Plaintiffs, kicking, slapping, elbowing and punching detainees in the body and head. The Marines announced repeatedly, "You are arriving at your final destination," and, "You are now property of the United States Marine Corps."

67. Plaintiffs were taken to Camp X-Ray, the prison camp for detainees. Soldiers forced all four Plaintiffs on arrival to squat outside in stress positions in the extreme heat. Plaintiffs and the other detainees had their goggles and hoods removed, but they had to remain with their eyes closed and were not allowed to speak.

68. Plaintiff Iqbal, still shackled and goggled, fell over and started shaking. Plaintiff Iqbal was then given a cavity search and transported to another area for processing, including fingerprinting, DNA sampling, photographs, and another wristband.

69. Plaintiff Rasul was forced to squat outside for six to seven hours and went through similar processing. Unmuzzled barking dogs were used to intimidate Plaintiff Rasul and others. At one point, Defendant John Doe, a soldier from a unit known as the Extreme Reaction Force (ERF), repeatedly kicked Plaintiff Rasul in the back and used a riot shield to slam him against a wall.

70. After processing, Plaintiffs were placed in wire cages of about 2 meters by 2 meters. Conditions were cruel, inhuman and degrading.

71. Plaintiffs were forced to sit in their cells in total silence for extended periods. Once a week, for two minutes, Plaintiffs were removed from their cells and showered. They were then returned to their cells. Once a week,

Plaintiffs were permitted five minutes recreation while their hands remained chained.

72. Plaintiffs were exposed to extreme heat during the day, as their cells were situated in the direct sunlight.

73. Plaintiffs were deliberately fed inadequate quantities of food, keeping them in a perpetual state of hunger. Much of the food consisted of "MRE's" (meals ready to eat), which were ten to twelve years beyond their usable date. Plaintiffs were served out of date powdered eggs and milk, stale bread from which the mold had been picked out and fruit that was black and rotten.

74. Plaintiffs and other detainees were forced to kneel each time a guard came into their cells.

75. Plaintiffs at night were exposed to powerful floodlights, a purposeful tactic to promote sleep deprivation among the detainees. Plaintiffs and the other detainees were prohibited from putting covers over their heads to block out the light and were prohibited from keeping their arms beneath the covers.

76. Plaintiffs were constantly threatened at Camp X-Ray, with guards stating on multiple occasions, "We could kill you at any time; the world doesn't know you're here; we could kill you and no one would know."

77. Plaintiff Al-Harith was taken to the medical clinic and was told that his blood pressure was too high. He was given, on information and belief, muscle relaxant pills and an injection of an unspecified substance.

78. On various occasions, Plaintiffs' efforts to pray were banned or interrupted. Plaintiffs were never given prayer mats and did not initially receive copies of the Koran. Korans were provided to them after approximately a month. On one occasion, a guard in Plaintiff Ahmed's cellblock noticed a copy of the Koran on the floor and kicked it. On another occasion, a guard threw a copy of the Koran in a toilet bucket. Detainees, including Plaintiffs, were also at times prevented from calling out the call to prayer, with American soldiers either silencing the person who was issuing the prayer call or playing loud music to drown out the call to prayer. This was part of a continuing pattern of disrespect and contempt for Plaintiffs' religious beliefs and practices.

Interrogation at Camp X-Ray

79. Plaintiffs were extensively interrogated at Camp X-Ray.

80. During interrogations, Plaintiffs were typically "long shackled," whereby their legs were chained using a large padlock. The shackles had sharp edges that scraped the skin, and all Plaintiffs experienced deep cuts on and around their ankles, resulting in scarring and continuing chronic pain. During the interrogations, Plaintiffs were shackled and chained to the floor. Plaintiffs were repeatedly urged by American interrogators to admit that they were fighters who went to Afghanistan for "jihad." In return, Plaintiffs were promised that if they confessed to these false assertions, they could return to the United Kingdom. Plaintiff Iqbal, who was interrogated five times by American forces over three months at Camp X-Ray, was repeatedly encouraged and coerced to admit to having been a "fighter."

81. Plaintiff Al-Harith was interrogated approximately ten times at Camp X-Ray. He was interrogated by both British and American authorities. On one occasion, an interrogator asked Plaintiff Al-Harith to admit that he went to Pakistan to buy drugs, which was not true. On another occasion, Plaintiff Al-Harith was told that there was a new terrorism law that would permit the authorities to put his family out in the street if Plaintiff Al-Harith did not admit to being a drug dealer or a fighter. On another occasion, interrogators promised money, a car, a house and a job if he admitted those things. As they were not true, he declined to admit them.

82. Following Plaintiff Ahmed's first several interrogations at Camp X-Ray, he was isolated in a cellblock where there were only Arabic speakers. Plaintiff Ahmed, who does not speak Arabic, was unable to communicate with anyone other than interrogators and guards for approximately five months.

Conditions at Camp Delta

83. Around May 2002, Plaintiffs were transferred to Camp Delta.

84. At no time were Plaintiffs advised as to why they were being transferred, for what purpose they were detained, why they were considered "unlawful combatants," and what medical and legal resources might be available.

85. At Camp Delta, Plaintiffs were housed in mesh cages that were subdivided from a larger metal container. There was little to no privacy and the cages provided little shelter from the heat during the day or the cold at night. The cages quickly rusted because of the sea air. The cells contained metal slabs at waist height; detainees could not sit on the slabs because their legs would dangle off and become numb. There was not enough room in the cells to pray.

86. Constant reconstruction work and large electric generators, which ran 24 hours a day, were used as part of a strategic effort to deprive Plaintiffs and others of sleep. Lights were often left on 24 hours a day.

87. Plaintiffs Rasul and Iqbal were in the same cellblock. Plaintiff Ahmed was placed in isolation for about one month. There was no explanation given as to why Plaintiff Ahmed had been placed in isolation. Following this period, he was placed in a different cell and interrogated by mostly American interrogators who repeatedly asked him the same questions for six months.

88. After six months at Camp Delta, Plaintiff Ahmed was moved to a cell directly opposite Plaintiff Rasul. Plaintiff Iqbal was placed in isolation for about one month. Again, no explanation was given for the arbitrary placement in isolation.

89. Plaintiff Ahmed was repeatedly disciplined with periods of isolation for such behavior as complaining about the food and singing.

90. Plaintiff Iqbal, after about one month at Camp Delta, was moved to isolation and given smaller food portions because it was believed he was belittling a military policeman. He was disciplined with another week of isolation when he wrote "have a nice day" on a Styrofoam cup.

91. After his last period of isolation, Plaintiff Iqbal was moved to a block which housed only Chinese-speaking detainees. During his time there, he was exposed to aggressive interrogation. After being there for months, Plaintiff Iqbal's mental condition deteriorated further.

92. Plaintiff Al-Harith was put into isolation for refusing to wear a wristband. Plaintiff Al-Harith was also placed in isolation for writing the letter "D" on a Styrofoam cup. The isolation block was freezing cold as cold air was blown through the block twenty-four hours a day. The isolation cell was pitch black as the guards claimed the lights were not working. Plaintiff Al-Harith was placed in isolation a second time around Christmas 2002 for refusing to take an unspecified injection. When he refused, the ERF was brought in and Plaintiff Al-Harith was "ERFed": he was beaten, forcibly injected and chained in a hogtied position, with his stomach on the floor and his arms and legs chained together above him. The ERF team jumped on his legs and back and kicked

and punched Plaintiff Al-Harith. Plaintiff Al-Harith was then placed in isolation for approximately a month, deprived at various intervals of soap, toothpaste or a toothbrush, blankets or toilet paper. He was also deprived of a Koran during this second period of isolation.

93. On information and belief, "ERFings," i.e., the savage beatings administered by the ERF teams, were videotaped on a regular basis and should be available as evidence of the truth of the allegations contained herein.

94. The Camp Delta routine included compulsory "recreation" twice a week for fifteen minutes. Attendance was enforced by the ERF. As soon as fifteen minutes had passed, detainees were immediately returned to their cells. Plaintiff Rasul noted that one would be forced to return to his cell even if in the middle of prayers.

95. Around August 2002, medical corps personnel offered Plaintiffs Rasul, Iqbal and Ahmed injections of an unidentified substance. Plaintiffs Rasul, Iqbal and Ahmed, like most detainees, refused. Soon after, Defendant John Does, the medical corps, returned with the ERF team. The ERF team members were dressed in padded gear, thick gloves, and helmets. Plaintiffs Rasul, Iqbal and Ahmed were shackled and restrained with their arms and legs bent backwards while medical corps pulled up their sleeves to inject their arms with an unidentified drug that had sedative effects.

96. Plaintiffs Rasul, Iqbal and Ahmed received these injections against their will on approximately a dozen occasions. Plaintiff Al-Harith received 9 or 10 compulsory injections on six separate occasions.

97. Plaintiff Iqbal was deprived of his Koran and other possessions. His hands were shackled in front of him. When Plaintiff Iqbal looked back, a guard pushed him in the corner. There Defendant John Does punched him repeatedly in the face and kneed him in his thigh.

Isolation and Interrogations at Camp Delta

98. Interrogation booths either had a miniature camera hidden in them or a one-way glass window. Thus, on information and belief, some or all of the interrogations of Plaintiffs and other detainees are recorded and are available as evidence of the truth of Plaintiffs' allegations herein.

99. In December 2002, a tiered reward system was introduced at Camp Delta, whereby detainees were placed on different levels or tiers depending on their level of co-operation and their behavior at the camp.

100. Interrogators and guards frequently promised to provide or threatened to withdraw of essential items such as blankets or toothpaste - referred to as "comfort items" - in order to coerce detainees into providing information. The truthful assertion that Plaintiffs had no information to give did not result in the provision of "comfort items." To the contrary, the interrogators demanded that the Plaintiffs confess to false allegations and promised "comfort items" in exchange.

101. Isolation of detainees was frequently used as a technique to "wear down" detainees prior to interrogation. There were two primary ways in which prisoners would be placed in isolation: (1) for punishment, for a set period of time for a specific reason; or (2) for interrogation, with no specific time limit.

102. Between October 2002 and May 2003, Plaintiff Rasul was interrogated about five or six times. Most of the interrogations involved the same questions that had been asked before. In April 2003, Plaintiffs Rasul and Iqbal were given polygraph tests and were led to believe that they might be allowed to return home if they passed.

103. After two hours of questioning as to whether he was a member of Al Qaeda, Plaintiff Rasul was returned to his cell. Two weeks later, he was interrogated by a woman who may have been army personnel in civilian clothing. She informed him that he had passed the polygraph test. Plaintiff Rasul was transferred to a different cellblock and informed by interrogators that they had videos which proved that he and Plaintiffs Iqbal and Ahmed were members of Al Qaeda and linked to the September 11 attacks.

104. A week later, Plaintiff Rasul was transferred to an isolation block, called "November." Plaintiff Rasul asked the army sergeant why he was being moved and was informed that the order was from the interrogators. Plaintiff Rasul was placed in a metal cell. To make the conditions of confinement continuously debilitating, the air conditioning was turned off during the day and turned on high at night. Temperatures were near 100 degrees during the day and 40 degrees at night. The extremes of heat and cold were deliberately utilized to intimidate, discomfort and break down prisoners. For one week, Plaintiff Rasul was held in isolation without interrogation. Later, he was taken to a room and "short shackled" and placed in an extremely cold room for six to seven hours. Short shackling consists of chaining the ankles and wrists closely together to force the detainee into a contorted and painful position. He was unable to move in the shackles and was not afforded an opportunity to go to the bathroom. He was hardly able to walk and suffered severe back pains. He was taken back to his cell without explanation.

105. The next day Plaintiff Rasul was "short shackled" and chained to the floor again for interrogation by an US Army intelligence officer named Bashir, also known as Danny. He was shown photographs of three men who were supposedly Plaintiffs Rasul, Iqbal and Ahmed with a man purported to be Mohammed Atta. Plaintiff Rasul repeatedly and truthfully denied being the person in the photograph. Further, he repeatedly and truthfully denied any involvement with Al Qaeda or the September 11 attacks. On five or six more occasions, Plaintiff Rasul was interrogated in similar fashion. During these interrogations, Plaintiff Rasul was not provided with food and was not permitted to pray.

106. Following the first interrogation, on five or six occasions, Plaintiff Rasul was removed from his cell and brought back to the interrogation block for intervals of about four or five days at a time. He was repeatedly "short shackled," exposed to extremely loud rock or heavy metal music, and left alone in the interrogation room for up to 13 hours in the "long shackle" position.

107. During this period, a Marine captain and other soldiers arrived at Plaintiff Rasul's cell to transfer him to another block, where he would remain in isolation for another two months without "comfort items."

108. On one occasion, Plaintiff Rasul was brought to the interrogation room from isolation to be questioned by interrogators from the Criminal Investigations Division (CID). These interrogators, identified as "Drew" and "Terry," informed Plaintiff Rasul that they were going to begin military tribunals.

109. After continued interrogations as to his alleged presence in a photograph with Osama Bin Laden, Plaintiff Rasul explained that he was working in England and going to college at the time the photograph was taken. Plaintiff Rasul told interrogators his place of employment at an English electronics shop and his attendance at University of Central England and implored interrogators to corroborate what he was telling them. The interrogators insisted he was lying. To Plaintiffs knowledge, no effort was made to find corroborating information which would have confirmed that Plaintiff Rasul was living in England at the time of the alleged meeting with Bin Laden in the photograph.

110. About a month after his second isolation period, Plaintiff Rasul was "long shackled" and placed in a room,

where he was met by Bashir and a woman dressed in civilian clothing. Bashir informed Plaintiff Rasul that the woman had come from Washington to show him a video of an Osama Bin Laden rally in Afghanistan. After the woman showed Plaintiff Rasul a portion of the video, she asserted that it showed Plaintiffs Rasul, Iqbal and Ahmed sitting down with Bin Laden. The woman interrogator urged Plaintiff Rasul to admit that the allegation was true, but the persons in the video were not the Plaintiffs. Plaintiff Rasul continued truthfully to deny involvement. He was threatened that if he did not confess, he would be returned to isolation. Having been in isolation for five to six weeks, with the result that he was suffering from extreme mental anguish and disorientation, Plaintiff falsely confessed that he was in the video.

111. Plaintiff Rasul was then returned to isolation for another five to six weeks. During that period he had no contact with any human being except with guards and interrogators who questioned him regarding the identity of certain individuals in photographs.

112. Plaintiff Rasul was then transferred to another cellblock, where both Plaintiffs Iqbal and Ahmed were being held. Here, Plaintiff Rasul was denied "comfort items" and exercise privileges.

113. Around mid-August of 2003, Plaintiff Rasul was moved within Camp Delta and placed in another cell block without explanation. After about two weeks, Plaintiff Rasul was taken to a building known as the "Brown Building" and was informed by an army intelligence interrogator named "James" that he would soon be moving to a cell next to Plaintiffs Iqbal and Ahmed.

114. Following the meeting with the army intelligence interrogator, Plaintiff Rasul was brought to "Kilo Block" the next day, where Plaintiffs Rasul, Iqbal and Ahmed were reunited and able to speak with one another.

115. For the next two weeks, Plaintiffs Rasul, Iqbal and Ahmed were brought in succession to be questioned by an army intelligence officer, known only as "James," as to their purported involvement in the 2000 video of Bin Laden.

116. On one occasion, Plaintiff Rasul was administered a voice stress analyzer test by "James."

117. After his last interrogation by "James," Plaintiff Rasul was informed that he would soon be turned over to Navy Intelligence. Before that, however, in September 2003, Plaintiff Rasul was further interrogated. He was brought into an interrogation room for eight hours. He was denied requests to pray and to have food or water. The following day, British officials questioned Plaintiff Rasul. Plaintiff Rasul informed an official, who gave the name "Martin," that he had been kept in isolation for three months without cause and had severe knee pain from the lack of exercise. Later that evening, Plaintiffs Rasul, Iqbal and Ahmed were taken to what was, on information and belief, a CIA interrogation block.

118. Plaintiffs continued to be held in the Kilo Block and were occasionally brought in for interrogation by a navy intelligence officer who gave the name "Romeo."

119. Plaintiff Iqbal was treated in a manner similar to the other Plaintiffs.

120. Plaintiff Iqbal was interrogated on several occasions, sometimes for as long as eight hours.

121. The typical routine was to be "short shackled" and placed in an extremely cold room.

122. Plaintiff Iqbal was relegated to Level 4, the harshest level, for about two weeks, with virtually no "comfort

items." Soon after, he was placed in isolation on the instruction of intelligence officers.

123. Plaintiff Iqbal's isolation cell was covered in human excrement. Plaintiff Iqbal had no soap or towels and could not clean the cell. He was unable to sit anywhere.

124. Plaintiff Iqbal was interrogated periodically to review photographs. On one occasion, he was placed in a "short shackled" position and left in a room with the air conditioning turned down to 40°. Plaintiff Iqbal was left in the "short shackle" position for about three hours. Then, Defendant John Doe, an interrogator calling himself "Mr. Smith," entered the room and teased Plaintiff Iqbal about the temperature. "Mr. Smith" told Plaintiff Iqbal that he was able to get anything Plaintiff Iqbal wanted. "Mr. Smith" then pulled out pornographic magazines and taunted him. Plaintiff Iqbal refused to talk to "Mr. Smith." "Mr. Smith" left Plaintiff Iqbal alone for another three or four hours in the frigid room. In that one day, Plaintiff Iqbal had been "short shackled" for seven to eight hours. Upon returning to his cell, he became ill with flu and requested medication. One of the military police officers, Defendant John Doe, denied him medication, and informed him that he was acting under orders from intelligence.

125. The next day, a Marine Captain and about 15 soldiers escorted Plaintiff Iqbal to another isolation block. He was left there for several days. Prior to his interrogation, Plaintiff Iqbal was "short shackled" and then introduced to an interrogator who gave the name "James". Because the pain from the shackling became excruciating, Plaintiff Iqbal began to scream. After about three or four hours, "James" unshackled him.

126. After three days, Plaintiff Iqbal was taken to the "Brown Building," where he was "long shackled" and left in a room with strobe lighting and very loud music played repeatedly, making it impossible for him to think or sleep. After about an hour, Plaintiff Iqbal was taken back to his cell.

127. The next day, Plaintiff Iqbal was "short shackled" in the interrogation room for five or six hours before later being interrogated by "Drew," who identified himself as an agent from CID. Plaintiff Iqbal was shown photographs, but refused to look at them. He was "short shackled" for about four or five hours more. After a while, he was unable to bear the conditions and falsely confessed that he was pictured in the photographs.

128. Four days later, agents from the FBI interrogated Plaintiff Iqbal about his activities in 2000.

129. Plaintiff Iqbal remained in isolation and was questioned at one point by a military intelligence officer giving the name of "OJ." Soldiers threatened him with further beatings if he did not answer the questions.

130. Plaintiff Ahmed was interrogated on numerous occasions, particularly with respect to his knowledge of the Bin Laden video. He was interrogated every three or four days, and the typical procedure was that he was first "short shackled" and placed in a freezing room with loud music for several hours.

131. Before arriving at Guantanamo, Plaintiff Ahmed was seriously sleep-deprived and malnourished. He was the first of the Plaintiffs to admit to various false accusations by interrogators.

132. Upon Plaintiff Ahmed's arrival at Camp Delta, he was placed in isolation for about one month. Following this period, he was placed in a different cell and interrogated by mostly American interrogators who asked him the same questions for six months.

133. Plaintiff Al-Harith also was given a lie detector test approximately one year into his detention which he was told he passed.

134. Plaintiff Al-Harith on three or four occasions witnessed Defendant John Does, military police, using an industrial strength hose to shoot strong jets of water at detainees. He was hosed down on one occasion. A guard walked along the gangway alternating the hose on each cell. Plaintiff Al-Harith was hosed down continuously for approximately one minute. The pressure of the water forced him to the back of his cell. The contents of his cell, including his bedding and Koran, were soaked.

135. Plaintiff Rasul, in the next cell, also had all the contents of his cell soaked.

136. In or around February 2004, Plaintiffs heard from military police that they would be released and sent home soon. Before leaving Camp Delta, Plaintiffs all were interrogated a final time. Plaintiffs were asked to sign statements admitting to membership in Al Qaeda and participation in terrorist activity. Plaintiffs declined.

137. In March 2004, Plaintiffs were released from Camp Delta and flown to the United Kingdom.

Injuries

138. Plaintiffs suffered and continue to suffer from the cruel, inhuman, and degrading treatment they experienced during their detention. The "short shackling" which Plaintiffs were exposed to resulted in deep cuts at their ankles, permanent scarring, and chronic pain. Plaintiff Rasul has chronic pain in his knees and back. Plaintiff Ahmed also suffers from permanent deterioration of his eyesight because of the withholding of required special lenses as "comfort items."

139. Plaintiff Al-Harith suffers from severe and chronic pain in his knees from repeatedly being forced onto his knees and pressed downwards by guards whenever he left his cell. He also has experienced pain in his right elbow.

140. Plaintiffs further suffer from acute psychological symptoms.

Development and Implementation of a Plan of Torture and Other Physical and Psychological Mistreatment of Detainees

141. The torture, threats, physical and psychological abuse inflicted upon Plaintiffs were devised, approved, and implemented by Defendant Rumsfeld and other Defendants in the military chain of command. These techniques were intended as interrogation techniques to be used on detainees.

142. It is well-established that the use of force in interrogation is prohibited by domestic and international law. The United States Army strictly prohibits the use of such techniques and advises its interrogators that their use may lead to criminal prosecution. Army Field Manual 34-52, Ch. 1, "Intelligence Interrogation," provides:

Prohibition Against Use of Force

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind **is prohibited by law** and is neither authorized nor condoned by the US Government.... The psychological techniques and principles outlined should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, mental torture, or any other form of mental coercion to include drugs. These techniques and principles are intended to serve as guides in obtaining the willing cooperation of a source. The absence of threats in interrogation is intentional, as their enforcement and use normally constitute **violations of international law and may result in prosecution**. (Emphasis supplied).

143. Further, according to Field Manual 34- 52, ch. 1: "Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear."

144. Army Field Manual 27-10, "The Law of Land Warfare," summarizes the domestic and international legal rules applicable to the conduct of war. Field Manual 27-10 recognizes the following sources of the law of war:

The law of war is derived from two principal sources:

- a. *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.
- b. *Custom*. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

Id. at Ch. 1, § 1.

145. In spite of the prohibitions on the use of force, threats, and abuse in the Army Field Manual, and its clear acknowledgement that their use violates international and domestic law, Defendant Rumsfeld approved techniques that were in violation of those prohibitions and thus knowingly violated the rights of Plaintiffs.

146. In a press release dated June 22, 2004, Defendant Rumsfeld admitted that beginning December 2, 2002, he personally authorized the use of interrogation techniques that are not permitted under FM 34-52. Further, in the press release, Defendant Rumsfeld admits that he personally was consulted when certain of the techniques were to be utilized.

147. The techniques practiced on Plaintiffs - including beatings, "short shackling," sleep deprivation, injections of unknown substances, subjection to cold or heat, hooding, stress positions, isolation, forced shaving, disruption of religious practices, forced nakedness, intimidation with vicious dogs and threats - were known to and approved by Defendant Rumsfeld and others in the military chain of command.

148. Article 3 common to all four Geneva Conventions requires that all persons in the hands of an opposing force, regardless of their legal status, be afforded certain minimum standards of treatment: Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment.

149. The Third Geneva Convention of 1949, Art. 130, bars the "willful killing, torture or inhuman treatment ... willfully causing great suffering or serious injury to body or health" of any prisoner of war.

150. In February 2002, the White House issued a press release, which advised:

The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles

of the Third Geneva Convention of 1949.

The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the alQaeda detainees. Al-Qaeda is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

151. On information and belief, Defendant Rumsfeld and all Defendants were aware of this statement of the President. Moreover, Defendant Rumsfeld knew that this statement of policy was a departure from the previous policy of the United States that the laws of war, including the Geneva Conventions, were always to be honored. Defendant Rumsfeld knew that the Department of State and the uniformed services took the generally recognized position that the Geneva Conventions could not be abrogated or ignored.

152. However, Defendant Rumsfeld and others deliberated failed to implement the Presidential Directive in any event. Defendant Rumsfeld and other Defendants in the chain of command had no good faith basis for believing that Plaintiffs were members of or affiliated with Al Qaeda in any way. Indeed, the policy as announced was incoherent in that Defendant Rumsfeld and the other defendants had no way of knowing who was and who was not a member of Al Qaeda or the Taliban and Defendants took no steps to implement any reliable fact-finding process which might ascertain who was and who was not a member of Al Qaeda or the Taliban, including in particular a "competent tribunal" as mandated by the Third Geneva Convention, Art. 5, U.S. military regulations and long standing practice of the U.S. armed forces.

153. Defendant Rumsfeld and all Defendants were aware that torture and other mistreatment perpetrated under color of law violates domestic and international law at.

154. Defendant Rumsfeld and all Defendants were aware that Plaintiffs were tortured and otherwise mistreated or knew they would be tortured and otherwise mistreated while in military custody in Afghanistan and at Guantanamo.

155. Defendant Rumsfeld and all Defendants took no steps to prevent the infliction of torture and other mistreatment to which Plaintiffs were subjected.

156. Defendant Rumsfeld and all Defendants authorized and encouraged the infliction of torture and other mistreatment against Plaintiffs.

157. Defendant Rumsfeld and all Defendants were aware that prolonged arbitrary detention violates customary international law.

158. Defendant Rumsfeld and all Defendants authorized and condoned the prolonged arbitrary detention of Plaintiffs.

Count I

ALIEN TORT STATUTE

Prolonged Arbitrary Detention

159. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

160. As stated by the Supreme Court of the United States, the allegations contained herein "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Rasul v. Bush*, 124 S. Ct. 2686, 2698, n.15 (2004) (citation omitted) (Plaintiffs Rihel Ahmed and Asif Iqbal were also Plaintiffs in that case).

161. Plaintiffs Rasul, Iqbal and Ahmed were unarmed and were detained in a prison camp operated by non-U.S. forces and Plaintiff Al-Harith had been detained and mistreated by the Taliban as a suspected British spy and was trapped in a war zone when Defendants took physical custody of their persons. Plaintiffs never engaged in combat, carried arms, or participated in terrorist activity or conspired with any terrorist person or organization. Defendants could have had no good-faith reason to believe that they had done so.

162. The Plaintiffs were detained under the exclusive custody and control of Defendants for *over two years* without due process, access to counsel or family, or a single charge of wrongdoing being levied against them.

163. The acts described herein constitute prolonged arbitrary detention in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting prolonged arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

164. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention of Plaintiffs.

165. Defendant's unlawful conduct deprived Plaintiffs of their freedom, of contact with their families, friends and communities. As a result, Plaintiffs suffered severe psychological abuse and injuries.

166. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count II

ALIEN TORT STATUTE

Torture

167. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

168. The acts described herein were inflicted deliberately and intentionally for purposes which included, among others, punishing the Plaintiffs or intimidating them. The alleged acts did not serve any legitimate intelligence-gathering or other government purpose. Instead, they were perpetrated to coerce, punish, and intimidate the Plaintiffs. In any event, torture is not permitted as a legitimate government function under any circumstances.

169. The acts described herein constitute torture in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting torture as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

170. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered acquiesced, confirmed, ratified and or/conspired together in bringing about the torture and other physical and psychological abuse of Plaintiffs as described above.

171. Plaintiffs suffered severe, immediate and continuing physical and psychological abuse as a result of the acts alleged herein. Plaintiffs continue to suffer profound physical and psychological trauma from the acts alleged herein.

172. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count III

ALIEN TORT STATUTE

Cruel, Inhuman or Degrading Treatment

173. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

174. The acts described herein had the intent and the effect of grossly humiliating and debasing the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance.

175. These acts included inter alia repeated severe beatings; the withholding of food, water, and necessary medical care; sleep deprivation; lack of basic hygiene; intentional exposure to extremes of heat and cold and the elements; continuous isolation for a period of months; forced injections; sexual humiliation; intimidation with unmuzzled dogs; deprivation of the rights to practice their religion and death threats.

176. The acts described herein constitute cruel, inhuman or degrading treatment in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhuman or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

177. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the cruel, inhuman or degrading treatment of Plaintiffs as described above.

178. Plaintiffs suffered severe immediate physical and psychological abuse as a result of the acts alleged herein. Plaintiffs continue to suffer profound physical and psychological trauma from the acts alleged herein.

179. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count IV

VIOLATION OF THE GENEVA CONVENTIONS

180. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if

fully set forth herein.

181. As detailed herein, Plaintiffs were held arbitrarily, tortured and otherwise mistreated during their detention in violation of specific protections of the Third and Fourth Geneva Conventions including but not limited to Article 3 common to all four Geneva Conventions.

182. Violations of the Geneva Conventions are direct treaty violations as well as violations of customary international law.

183. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention, torture, abuse and mistreatment of Plaintiffs as described above.

184. As a result of Defendants' violations of the Geneva Conventions, Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count V.

CLAIMS UNDER THE CONSTITUTION OF THE UNITED STATES

Violation of the Eighth Amendment

185. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

186. Defendants' actions alleged herein against imprisoned Plaintiffs violated the Eighth Amendment to the United States Constitution. Over the course of an arbitrary and baseless incarceration for more than two years, Defendants inflicted cruel and unusual punishment on Plaintiffs. Despite never having been tried by any tribunal, Plaintiffs and other detainees were repeatedly denounced as guilty of terrorist acts by Defendant Rumsfeld, President Bush, Vice President Cheney and others. The acts of cruel, inhuman or degrading unusual punishment were imposed based on this arbitrary and impermissible declaration of guilt.

187. Defendants were acting under color of law of the United States at all times pertinent to the allegations set forth above.

188. The Plaintiffs suffered severe physical and mental injuries as a result of Defendants' violations of the Eighth Amendment. They have also suffered present and future economic damage.

189. The actions of Defendants are actionable under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971).

190. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention, physical and psychological torture and abuse, and other mistreatment of Plaintiffs as described above.

191. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count VI**CLAIMS UNDER THE CONSTITUTION OF THE UNITED STATES****Violation of the Fifth Amendment**

192. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

193. Defendants' actions alleged herein against Plaintiffs violated the Fifth Amendment to the United States Constitution.

194. The arbitrary and baseless detention of Plaintiffs for more than two years constituted a clear deprivation of their liberty without due process, in direct violation of their Fifth Amendment rights.

195. The cruel, inhuman or degrading, and unusual conditions of Plaintiffs' incarceration clearly violated their substantive rights to due process. See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

196. Defendants' refusal to permit Plaintiffs to consult with counsel or to have access to neutral tribunals to challenge the fact and conditions of their confinement constituted violations of Plaintiffs' procedural rights to due process.

197. The abusive conditions of Plaintiffs' incarceration served no legitimate government purpose.

198. Defendants were acting under the color of the law of the United States at all times pertinent to the allegations set forth above.

199. The Plaintiffs suffered severe physical and mental injuries as a result of Defendants' violations of the Fifth Amendment. They have also suffered present and future economic damage.

200. The actions of Defendants are actionable under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971).

201. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention, physical and psychological torture and abuse and other mistreatment of Plaintiffs as described above.

202. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count VII**CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT**

203. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

204. Defendants' actions alleged herein inhibited and constrained religiously motivated conduct central to

Plaintiffs' religious beliefs.

205. Defendants' actions imposed a substantial burden on Plaintiffs' abilities to exercise and express their religious beliefs.

206. Defendants regularly and systematically engaged in practices specifically aimed at disrupting Plaintiffs' religious practices. These acts included throwing a copy of the Koran in a toilet bucket, prohibiting prayer, deliberately interrupting prayers, playing loud rock music to interrupt prayers, withholding the Koran without reason or as punishment, forcing prisoners to pray with exposed genital areas, withholding prayer mats and confining Plaintiffs under conditions where it was impossible or infeasible for them to exercise their religious rights.

207. Defendants were acting under the color of the law of the United States at all times pertinent to the allegations set forth above.

208. The Plaintiffs suffered damages as a direct and proximate result of Defendants' violations of the Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb et seq.

209. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the denial, disruption and interference with Plaintiffs' religious practices and beliefs as described above.

210. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

WHEREFORE Plaintiffs each demand judgment against Defendants jointly and severally, including compensatory damages in the amount of \$10,000,000 each (Ten Million Dollars), punitive damages, the costs of this action, including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper.

Dated: October 27, 2004

END OF DOCUMENT

For Opinion See 563 F.3d 527 , 2009 WL 395238 , 512 F.3d 644

United States Court of Appeals,
District of Columbia Circuit.
Shafiq RASUL, et al., Appellants,
v.
Donald H. RUMSFELD, et al., Appellees.
No. 06-5209.
January 8, 2007.

Appeal from the United States District Court For the District of Columbia, C.A. No. 1:04CV01864 (RMU) The Honorable Ricardo M. Urbina, District Judge

Brief of Appellants

Michael Ratner, Jennifer M. Green, Shayana Kadidal, Center For Constitutional Rights, 666 Broadway, 7th Floor, New York, NY 10012, Telephone: 212-614-6439, Facsimile: 212-614-6499, Eric L. Lewis (#39627), A. Katherine Toomey (#46678), Sarah L. Knapp (#49711), Elizabeth A. Wilson^[FN*], Baach Robinson & Lewis PLLC, 1201 F Street N.W., Suite 500, Washington, D.C. 20004, Telephone: 202-833-8900, Facsimile: 202-466-5738, Attorneys for Appellants.

FN*Admission Pending

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES ...	i
TABLE OF AUTHORITIES ...	vi
GLOSSARY ...	ix
JURISDICTIONAL STATEMENT ...	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW ...	2
STATEMENT OF THE CASE ...	3
STATEMENT OF FACTS ...	4
INTRODUCTION ...	4
FACTUAL ALLEGATIONS ...	6
SUMMARY OF ARGUMENT ...	10

ARGUMENT ... 13

I. STANDARD OF REVIEW ... 13

II. THE DISTRICT COURT ERRED BY SUBSTITUTING THE UNITED STATES FOR THE INDIVIDUAL DEFENDANTS UNDER THE WESTFALL ACT ... 13

A. Application of the Westfall Act ... 15

B. The District Court Improperly Denied Discovery ... 16

1. The District Court Applied the Incorrect Legal Standard in Denying Plaintiffs Discovery ... 17

2. Plaintiffs Met their Burden of Setting Forth a Material Issue Meriting Discovery ... 17

C. The District Court Erred in Dismissing this Action as a Matter of Law ... 19

1. At No Time Was Defendants' Conduct Authorized ... 21

2. Defendants' Conduct in Ordering Torture Was Not Incidental to Authorized Conduct ... 24

D. The District Court Erred in Dismissing Plaintiffs' International Law Claims, Because the Entire Civil Action Against Defendants Falls within the Exception to the Westfall Act ... 28

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED PLAINTIFFS' CLAIM UNDER THE GENEVA CONVENTIONS ... 32

A. The Geneva Conventions Guarantee Rights to Individuals ... 33

B. The Relevant Provisions of the Geneva Conventions Are Self-Executing ... 34

IV. THE DISTRICT COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY ... 35

A. The District Court Incorrectly Analyzed Defendants Claim of Qualified Immunity ... 36

B. A Reasonable Person in the Defendants' Position Would Have Been Fairly on Notice that Torturing Plaintiff's Was Illegal and Unconstitutional ... 38

1. Torture Indisputably Implicates Established Constitutional Norms ... 38

2. Fundamental Constitutional Rights Are Clearly Recognized as Applying Beyond our Borders ... 39

3. Defendants' Own Actions Demonstrate that They Were Aware that Their Conduct Was Wrongful and Unconstitutional ... 42

CONCLUSION ... 44

TABLE OF AUTHORITIES

FEDERAL CASES

- In re Aircrash Disaster Near Roselawn Indiana*, 96 F.3d 932 (7th Cir. 1996) ... 30
- Anderson v. Creighton*, 483 U.S. 635 (1987) ... 37
- Austin v. Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998) ... 39
- Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) ... 39
- Brown v. Mississippi*, 297 U.S. 278 (1932) ... 41-42
- Butz v. Economou*, 438 U.S. 478 (1978) ... 44
- Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002) ... 44
- Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18 (2d Cir. 1988) ... 33
- Commissioner v. Jean*, 496 U.S. 154 (1990) ... 30
- Conley v. Gibson*, 355 U.S. 41 (1957) ... 13
- Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) ... 30
- Crockett v. Abraham*, 284 F.3d 131 (D.C. Cir. 2002) ... 19
- Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976) ... 33
- District Certified TV Serv. v. Neary*, 350 F.2d 998 (D.C. Cir. 1965) ... 19
- Dorr v. U.S.*, 195 U.S. 138 (1904) ... 39
- Dowries v. Bidwell*, 182 U.S. 244 (1901) ... 39
- Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) ... 44
- In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) ... 13, 23
- In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995) ... 23, 39
- In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992) ... 23
- Evicci v. Baker*, 190 F. Supp. 2d 233 (D. Mass. 2002) ... 39
- Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005) ... 29
- FSLIC v. Mackie*, 962 F.2d 1144 (5th Cir. 1992) ... 30
- [FN*] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) ... 13, 22-23
- Finley v. United States*, 490 U.S. 546 (1989) ... 12, 29

Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), overruled in part on other grounds, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) ... 34

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) ... 39

In re Guantdnamo Detainee Cases, 355 F. Supp. 2d 443 (D.C. 2005) ... 40

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) ... 16, 19

Haddon v. United States, 68 F.3d 1420 (D.C. Cir. 1995) ... 20

[FN*] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) ... 32-33

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) ... 3, 11-12, 32

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ... 37

Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000), rev'd on other grounds sub nom, *Christopher v. Harbury*, 536 U.S. 403 (2002) ... 40

Harlow v. Fitzgerald, 457 U.S. 800 (1982) ... 36, 42

Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949) ... 39

[FN*] *Hope v. Pelzer*, 536 U.S. 736 (2002) ... 37-39, 43

INS v. St. Cyr, 533 U.S. 289 (2001) ... 33

Johnson v. Eisentrager, 339 U.S. 763 (1950) ... 41

Johnson v. Newburgh Enlarged Sch. District, 239 F.3d 246 (2d Cir. 2001) ... 44

Kimbrow v. Velten, 30 F.3d 1501 (D.C. Cir. 1994) ... 15

Kugel v. United States, 947 F.2d 1504 (D.C. Cir. 1991) ... 13

Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) ... 33

Lidas, Inc. v. United States, 238 F.3d 1076 (9th Cir. 2001) ... 35

Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976) ... 25-26

[FN*] *Majano v. United States*, 469 F.3d 138 (D.C. Cir. 2006) ... 16, 20, 27

Malley v. Briggs, 475 U.S. 335 (1986) ... 37, 42

McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992) ... 37, 44

McIntyre v. United States, 336 F. Supp. 2d 87 (D. Mass. 2004) ... 42

Medellin v. Dretke, 544 U.S. 660 (2005) ... 34

Merritt v. Hawk, 153 F. Supp. 2d 1216 (D. Colo. 2001) ... 39

Montecatini Edison SPA v. Ziegler, 486 F.2d 1279 (D.C. Cir. 1973) ... 32

Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974) ... 39

Nolan v. Boeing Co., 919 F.2d 1058 (5th Cir. 1990) ... 30

Nuru v. Gonzalez, 404 F.3d 1207 (9th Cir. 2005) ... 23

Pharmacia Corp. v. Clayton Chemical Acquis. L.L.C., 382 F. Supp. 2d 1079 (S.D. Ill. 2005) ... 30

Polk v. District of Columbia, 121 F. Supp. 2d 56 (D.D.C. 2000) ... 42

Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977) ... 40

[FN*] *Rasul v. Bush*, 542 U.S. 466 (2004) ... 11-12, 36, 40-41

Rasul v. Rumsfeld, 542 U.S. 507 (2004) ... 37

Rubin v. United States, 449 U.S. 424 (1981) ... 31

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ... 23, 31, 38

[FN*] *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003) ... 15, 17-18, 20

In re Surinam Airways Holdings Co., 974 F.2d 1255 (11th Cir. 1992) ... 30

Telegraph-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) ... 25

The Nuremberg Decision, 6 F.R.D. 69 (1947) ... 22

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) ... 32

United States v. America Trucking Co., 310 U.S. 534 (1940) ... 31

United States v. Dickey, 20 C.M.R. 486 (Army Bd. Rev. 1956) ... 43

United States v. Finch, 22 C.M.R. 698 (Navy Bd. Rev. 1956) ... 43

[FN*] *United States v. Lanier*, 520 U.S. 259 (1997) ... 37, 44

United States v. Lee, 25 M.J. 703 (Ct. Mil. Rev. 1987) ... 43

United States v. Lee, 906 F.2d 117 (4th Cir. 1990) ... 40

United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) ... 34-35

United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975) ... 40

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) ... 41-42

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) ... 13-14, 23

Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) ... 9

STATE CASES

Boykin v. District Of Columbia, 484 A.2d 560 (D.C. 1984) ... 21, 27

Brown v. Argenbright Sec., 782 A.2d 752 (D.C. 2001) ... 16

Mayer v. Buchanan, 50 A.2d 595 (D.C. 1946) ... 22

Moseley v. Second New St. Paul Baptist Church, 534 A.2d 346 (D.C. 1987) ... 27

Murphy v. Army Distaff Foundation, 458 A.2d 61 (D.C. 1983) ... 19

Penn Central Transport v. Reddick, 398 A.2d 27 (D.C. 1979) ... 27

Weinberg v. Johnson, 518 A.2d 985 (D.C. 1986) ... 25-26

STATUTES & RULES

10 U.S.C. § 893 (Article 93, UCMJ) ... 13, 43

18 U.S.C. § 7 ... 40

28 U.S.C. § 1291 ... 1

28 U.S.C. § 1331 ... 1

28 U.S.C. § 1350 (Alien Tort Claims Act) ... 1

28 U.S.C. § 1441 ... 30

28 U.S.C. § 2671-80 (Federal Tort Claims Act) ... 15, 19, 28

28 U.S.C. § 2679 (Westfall Act) ... 2, 10, 15, 19, 28

42 U.S.C. § 2000(b)(b) (RFRA) ... 1

Pub. L. No. 109-366, 120 Stat. 2600 (The Military Commission Act of 2006) ... 33

Fed. R. Civ. P. 54(b) ... 1

TREATIES

Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ... 3, 34

Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ... 3, 34

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), *U.S. Ratification* 1994 ... 8, 13

MISCELLANEOUS

Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1127-28 (1992) ... 35

Oscar M. Uhler *et. al.*, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 ... 33

Installation of Slot Machines on U.S. Naval Base, Guantánamo Bay, 6 Op. Off. Legal Counsel 236 (1982) ... 40

Restatement (Second) of Agency § 7 ... 22

Restatement (Second) of Agency § 228 ... 20-21

Restatement (Second) of Agency § 229 ... 20, 24

Restatement (Second) of Agency § 231 ... 21

H.R. Rep. No. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949 ... 31

* Cases on which Appellants chiefly rely

JURISDICTIONAL STATEMENT

Plaintiffs^[FN1] complaint asserted claims under international law, the Geneva Conventions, the Constitution, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000(b)(b). Federal jurisdiction was proper below pursuant to 28 U.S.C. § 1331 and the Alien Tort Claims Act, 28 U.S.C. § 1350.

FN1. For ease of reference, and in light of the cross appeal in this case, appellants use the terms "plaintiffs" and "defendants" to refer to the parties below, regardless of their posture as appellant or appellee in this Court.

The district court issued three decisions relevant to this Court's jurisdiction. On February 6, 2006, the district court granted defendants' motion to dismiss Counts I-VI of the complaint (claims under international law, the Geneva Conventions and the Constitution), while reserving its decision on Count VII of the complaint (violation of RFRA). On May 8, 2006, the district court denied defendants' motion to dismiss the RFRA count. On July 3, 2006, defendants filed a timely notice of interlocutory appeal on the RFRA claim.

Plaintiffs filed an unopposed motion pursuant to Fed. R. Civ. P. 54(b) to certify the district court's decision of February 6, 2006, for immediate appeal. The district court granted this motion on July 10, 2006, and entered final judgment as to Counts I-VI of the complaint on July 20, 2006. On July 25, 2006, plaintiffs filed a timely notice of appeal. This Court's jurisdiction is accordingly proper pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In determining whether defendants, the former Secretary of Defense and high-ranking U.S. military officers in

the chain of command, are entitled to immunity under the Westfall Act, 28 U.S.C. § 2679(b)(1), did the district court err when it ruled, as a matter of law and without allowing discovery, that:

- a. Defendants acted within the scope of their employment when they devised a program of torture, prolonged arbitrary detention, cruel and abusive treatment, and religious persecution of plaintiffs, innocent alien non-combatants detained at Guantánamo;
 - b. Torture (and other abusive conduct) was "a foreseeable consequence of the military's detention of suspected enemy combatants" and "incidental to [defendants'] roles [as] military officials" and thus within the scope of defendants' employment;
 - c. Torture (and other abusive conduct) was within the scope of defendants' employment notwithstanding that it is contrary to the announced policy of the President and the official position of the State Department that torture by the U.S. military is prohibited, expressly outside the scope of any military personnel's authority, and forbidden by military regulations governing defendants' duties?
2. Did the district court err in ruling that the provision of the Westfall Act precluding immunity where "a *civil action* against [the] employee ... is brought for a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2)(A) (emphasis added), applies only to the specific constitutional claim and not to the entire "civil action" as the statute expressly provides?
 3. Did the district court err when, on authority of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), it rejected plaintiffs' claim that defendants' acts of torture violated rights secured to them under the Geneva Conventions, in light of the Supreme Court's subsequent reversal of that decision?
 4. Did the district court err in ruling that defendants are entitled to qualified immunity on grounds that no reasonably competent public official should be expected to know that a program of torture, prolonged arbitrary detention, cruel and abusive treatment, and religious persecution against alien non-combatants detained at Guantánamo violated the Constitution?

STATEMENT OF THE CASE

This action is brought by four British citizens who allege they were detained and tortured at the United States Naval Base at Guantánamo Bay Naval Station, Cuba ("Guantánamo") from early 2002 until early-2004. They were subsequently released and have never been charged with any crime. They have never been determined to be "enemy combatants."

Defendants are former Secretary of Defense Donald Rumsfeld and high-ranking military officers in charge of plaintiffs' incarceration and treatment at Guantánamo. The complaint asserts seven causes of action premised on violation of *jus cogens* norms of international law, The Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva POW Convention") and The Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Geneva Convention on Civilian Detainees"), the Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000(b)(b).

Defendants moved to dismiss the complaint on a number of grounds, including that they are entitled to absolute immunity under The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in relevant part at 28 U.S.C. § 2679) (the "Westfall Act"), with respect to the international law and Geneva Convention claims, and to qualified immunity with respect to the constitutional claims. The district court dismissed these claims as barred by the doctrines of absolute and qualified immunity. This appeal challenges the dismissal, and in particular the district court's determinations that:

- a. defendants were acting within the scope of their employment in torturing plaintiffs, because such conduct was

- a "foreseeable consequence" of plaintiffs' detention, and defendants were therefore entitled to absolute immunity under the Westfall Act; and
- b. defendants were entitled to qualified immunity for their conduct in designing and implementing a deliberate plan to detain and torture plaintiffs because this conduct did not violate clearly established law.

Appellants respectfully submit that these decisions are in error and should be reversed.

STATEMENT OF FACTS

INTRODUCTION

This is a case about torture. Whatever euphemisms are applied, whatever abstractions are invoked, plaintiffs were tortured at the behest and direction of these defendants. For more than two years during their detention at Guantánamo, plaintiffs were stripped, short-shackled for hours in painful stress positions, deprived of sleep, isolated for days in total darkness, deliberately subjected to extremes of heat and cold, threatened with unmuzzled dogs, injected with foreign substances, deprived of contact with their families, deprived of medical care, kept in filthy cages with no access to exercise or sanitation, subjected to repeated body cavity searches, and harassed and humiliated as they attempted to practice their religion. *E.g.*, App. at 13-14, 32-34, 35-38, 39-45 (Compl. ¶¶ 4-6, 67-78, 83-97, 104-07, 111, 117, 124, 127, 130, 134). These practices are familiar to despots and dictators all over the world.

This torture was not the act of a rogue guard or interrogator. Defendants designed and approved a plan to detain and torture plaintiffs and hundreds of others like them - a plan, memorialized through written instructions, that was systematically implemented to degrade and debase plaintiffs on a daily basis for more than two years. *E.g.*, App. at 15-18, 48, 49-50 (Compl. ¶¶ 8-12, 146, 152). Defendants conceived and implemented their torture program in violation of their oaths of office, the express policy statements of the President, applicable military regulations, U.S. and international law, the Constitution, and any pretense of honor or morality. App. at 15-18, 46-50 (Compl. ¶¶ 8-12, 141-158). Initially, the Defense Department dismissed allegations of torture as "terrorist misinformation." After the sickening details were made public, defendants argued to the district court that ordering these acts was within the course of their duties as U.S. cabinet and military officers and that they could not have known that the acts were wrongful.

But defendants' knowing violation of the universal norm against torture was not a foreseeable part of their duties and it was not undertaken with the kind of good faith ignorance protected by qualified immunity. The applicable principles here are simple, well-recognized, and timeless:

- i) It is *always* wrong to authorize or administer torture; torture is *never* a legitimate tool in the interest of national security or foreign policy;
- ii) It is *never* within the scope of a government employee's duties to torture people, as the President's official statement that torture is against the policy of the United States confirms. The district court's decision that torture is incidental to the official duties of U.S. cabinet and military officers and reasonably foreseeable flies in the face of our law, undermines its moral underpinnings, and directly contradicts the holdings of U.S. courts, which have uniformly refused to allow foreign leaders to invoke doctrines of immunity to insulate themselves against liability for their own acts of torture; and
- iii) There is no more fixed star in the firmament of the law of nations than the prohibition against torture, and, accordingly, the defendants could not have been in any doubt that ordering torture violated clearly established rights. Defendants' failed attempts to circumvent their obligations and create a lawless enclave where they could

abuse people with impunity are indicative of their knowledge that they were violating plaintiffs' fundamental rights.

FACTUAL ALLEGATIONS

Plaintiffs are British citizens who were detained and tortured at Guantánamo for more than two years before they were released without charges and flown home to England in March 2004. App. at 13-14 (Compl. ¶¶ 4-5). Plaintiffs never received any military training or took up arms against the United States. Plaintiffs have never been members of any terrorist group. App. at 12 (Compl. ¶ 1).

Shafiq Rasul, Asif Iqbal, and Ruhel Ahmed are boyhood friends from the working class town of Tipton in the West Midlands of England. App. at 24 (Compl. ¶ 31). They were born and raised in the United Kingdom. At the time of their detention, they were 24, 20, and 19 years old respectively. App. at 24 (Compl. ¶¶ 32-34). Asif went to Pakistan in September 2001 to marry a young woman from his family's village. Ruhel joined him to be his best man. Shafiq was in Pakistan about to begin a computer science course. After the bombing began in Afghanistan, these young men, who had traveled to Afghanistan to provide humanitarian assistance, tried to return to Pakistan, but found the border closed. App. at 25 (Compl. ¶ 35). They were captured by General Rashid Dostum, an Afghan warlord temporarily allied with the United States. General Dostum was widely reported to have delivered prisoners to the U.S. military on a per-head bounty basis. App. at 25-26 (Compl. ¶¶ 37-38). The U.S. military took custody of Asif, Ruhel, and Shafiq without any conceivable good faith basis for concluding that they had been engaged in activities hostile to the United States. App. at 25-26 (Compl. ¶ 38).

Jamal Al-Harith was also born and raised in England. He is a web designer in Manchester. Jamal arrived in Pakistan on October 2, 2001, to participate in a long-planned religious retreat. When he was advised to leave the country because of animosity toward British nationals, he booked passage on a truck headed to Turkey, from which he planned to fly home to England. The truck was hijacked at gunpoint by Afghans. When identified as a foreigner, Jamal was forcibly brought to Afghanistan and handed over to the Taliban. Jamal was accused of being a British spy, held in isolation, and beaten repeatedly by Taliban guards. When the Taliban fled under U.S. advances, Jamal was freed. The British Embassy's plans to evacuate him were preempted when U.S. Special Forces arrived at the prison and took Jamal into custody. App. at 12-13, 31 (Compl. ¶¶ 3, 63).

All four men were first held in U.S. custody in Afghanistan and later transported, under appalling conditions, to Guantánamo, where they were imprisoned and systematically tortured without charge or hearing for more than two years. App. at 13-14 (Compl. ¶ 4). The horrific treatment visited upon these young men and others has now been widely reported in the media and confirmed by internal U.S. documents. During the Spring of 2004, plaintiffs were flown to England and released. They were never charged with any crime and never found to be enemy combatants. App. at 13-14, 46 (Compl. ¶¶ 4-5, 137).

These innocent young men were tortured pursuant to directives from defendant Rumsfeld which were implemented through the military chain of command. On December 2, 2002, defendant Rumsfeld approved a memorandum condoning numerous illegal interrogation methods, including putting detainees in stress positions for up to four hours; forcing detainees to strip naked; intimidating detainees with dogs; interrogating them for 20 hours at a time; forcing them to wear hoods; shaving their heads and beards; keeping them in total darkness and silence; and using what was euphemistically called "mild, non-injurious physical contact." As defendant Rumsfeld knew, these and other methods were in violation of the Constitution, federal statutory law, the Geneva Conventions, and customary international law as reflected in, *inter alia*, The United Nations Convention Against Tor-

ture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), *U.S. ratification* 1994, Ex. 1 ("UN Torture Convention").

After authorizing the acts of torture and other mistreatment inflicted upon plaintiffs, defendant Rumsfeld commissioned a "Working Group Report" dated March 6, 2003, to address "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations." This report details the requirements of international and domestic law governing interrogations, including the Geneva Conventions; the UN Torture Convention; customary international law; and numerous sections of the U.S. Criminal Code. The report attempts to identify putative "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." Working Group Report at 3 (emphasis in original). App. at 16-17 (Compl. ¶ 10). The report thus acknowledges that the techniques in use were *prima facie* unlawful.

The report then makes a transparent, *post hoc*, attempt to create arguments under which the facially criminal acts already perpetrated by these defendants could somehow be justified. It asserts that the President as Commander-in-Chief has plenary authority to order torture, a proposition that ignores settled legal doctrine from King John at Runnymede to *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). App. at 16-17 (Compl. ¶ 10). It next tries to apply common law doctrines of self-defense and necessity, asserting the legally nonsensical proposition that the United States has the right to torture in order to defend itself or because it is necessary to do so. Ignoring the Nuremberg cases, the report wrongly suggests that persons who torture may be able to defend against criminal charges by claiming that they were following orders. Finally, the report asserts that the detainees have no constitutional rights because the Constitution does not apply to persons held at Guantánamo. However, the report acknowledges that U.S. criminal laws *do* apply to Guantánamo and that the United States is bound by the UN Torture Convention to the extent that conduct barred by that Convention would also be prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution.^[FN2] App. at 16-17 (Compl. ¶ 10). These documents can only be seen as a shameful nadir for American law, a cynical attempt to manipulate legal language to justify the inherently unjustifiable.

FN2. On June 22, 2004, the conclusions of this report and other memoranda attempting to justify torture were explicitly repudiated by President Bush. App. at 16-17 (Compl. ¶ 10).

In April 2003, following receipt of the Working Group Report, defendant Rumsfeld issued a new set of recommended interrogation techniques. These recommendations recognized that certain of the approved techniques, including the use of intimidation, removal of religious items, threats, and isolation, violated the Geneva Conventions and customary international law. The recommendations officially withdrew approval for certain unlawful actions, including hooding, forced nakedness, shaving, stress positions, use of dogs, and "mild, non-injurious physical contact." Nevertheless, these illegal practices continued to be employed against plaintiffs and other detainees at Guantánamo. App. at 17 (Compl. ¶ 11).

In sum, the complaint alleges that defendants' conduct reflects a conscious and calculated awareness that the torture, violence, and degradation that they ordered and implemented at Guantánamo were illegal. Defendants' after-the-fact legal contortions to create an Orwellian legal façade manifests their knowledge that they were acting illegally and in violation of clearly established legal and human rights. App. at 18 (Compl. ¶ 12).

SUMMARY OF ARGUMENT

Plaintiffs' complaint asserts that the conduct of former Secretary of Defense Rumsfeld and senior officers in the chain of command in implementing and approving their detention and torture violated customary international

law, the Geneva Conventions and the Constitution. The district court dismissed the international law claims on the ground that, as a matter of law, defendants were acting within the scope of their employment and are therefore immune from suit pursuant to the Westfall Act, 28 U.S.C. § 2679(b)(1). The district court dismissed the Geneva Convention claims based on this Court's since-overruled decision in *Hamdan v Rumsfeld*, 415 F.3d 33 (D.C. Cir 2005). With respect to the constitutional claims, the district court found that defendants had qualified immunity because they could not have been on notice of plaintiffs' having a clearly established legal right not to be tortured until the Supreme Court decided *Rasul v. Bush*, 542 U.S. 466 (2004), which was after plaintiffs' release from Guantánamo. In sum, the district court has found that defendants are immune from being held accountable for manifestly heinous criminal conduct that has dishonored our nation and undermined the rule of law. Each of the district court's rulings is clearly erroneous and should be reversed.

With respect to the international law claims, the district court ignored binding precedent holding that the issue of whether an employee's activity is within the scope of his employment is a quintessential question of fact for the trier of fact. The district court erred both in refusing to permit discovery on this issue and by deciding it as a matter of law. Under settled law, plaintiffs were entitled to discovery based on the allegations of the complaint and their submission of unequivocal statements by the United States that torture is illegal under military, statutory, international and constitutional law and can never be within a public official's scope of employment. In any event, the district court's determination as a matter of law that torture was within the scope of employment is contrary to the Restatement approach followed in the District of Columbia, requiring consideration of, *inter alia*, whether conduct purportedly incident to the scope of employment is "seriously criminal," as the conduct alleged in this case undoubtedly is.

Even if the conduct at issue were arguably within the scope of employment, this does not support dismissal as a matter of law. The Westfall Act contains an exception to immunity for a "civil action against an employee of the Government... which is brought for a violation of the Constitution of the United States." (emphasis added). The district court wrongly applied the Supreme Court's legislatively overruled holding in *Finley v. United States*, 490 U.S. 546 (1989) to find that this exception was not meant to apply to the entire civil action but only to plaintiffs' constitutional claims. The district court's holding was erroneous because *Finley* is inapposite, and its reasoning is inapplicable to the Westfall Act. The term "civil action" in the Westfall Act embodies Congress' purpose of excluding from general immunity egregious conduct that rises to the level of a constitutional violation. The district court should have looked to numerous analogous cases in which courts have construed "civil action" in accordance with its plain meaning, *i.e.*, the entire case.

The district court based its dismissal of plaintiffs' Geneva Convention claim on this Court's holding in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir 2005), that the Conventions did not provide a private right of action. But the Supreme Court overruled *Hamdan* and permitted the petitioner to invoke rights secured to him by the Conventions. This conclusion is consistent with accepted rules of treaty interpretation and this Court should recognize a private right of action under the Geneva Convention.

Finally, the district court's grant of qualified immunity as a matter of law is similarly erroneous. While the district court accepts that the conduct alleged is manifestly unlawful, it found that defendants lacked notice that they were violating plaintiffs' rights because their right not to be tortured was not "clearly established" until the Supreme Court decided *Rasul v. Bush*, 542 U.S. 466 (2004). The district court's analysis is inconsistent with qualified immunity jurisprudence, which makes clear that qualified immunity is not available for egregious and consciously illegal conduct, even when there is no case law directly on point holding that the conduct is unconstitutional. Torturing detainees violates fundamental rights and stains the integrity of the government. Defend-

ants cannot reasonably claim that they believed that they were acting within the constraints of the Constitution.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's decision to dismiss a complaint *de novo*. See *Kugel v. United States*, 947 F.2d 1504, 1505 (D.C. Cir. 1991). The Court must construe the complaint in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal should be affirmed only if plaintiffs can prove no set of facts under which they are entitled to relief. *Id.*

II. THE DISTRICT COURT ERRED BY SUBSTITUTING THE UNITED STATES FOR THE INDIVIDUAL DEFENDANTS UNDER THE WESTFALL ACT.

Plaintiffs' complaint alleges that the highest officials of the U.S. military deliberately formulated, approved and implemented a policy of torture consisting of acts that so shock the conscience they are universally condemned, including by the Constitution, U.S. criminal statutes, Article 93 of the UCMJ, *codified at* 10 U.S.C. § 893 ("Article 93"), Army Regulation 190-8, the Army Field Manual, the Geneva Conventions, and the UN Torture Convention. Defendants' conduct was not only illegal but was wholly unauthorized by U.S. law, by any directive from the President as Commander In Chief or by any other U.S. authority. App. at 46-50 (Compl. ¶¶ 140-42, 148-58); App. at 73, 78 (Compl. ¶¶ 3-4, ¶ 58). That torture is never authorized and, indeed, cannot be authorized by a sovereign, is a settled proposition of international law, which has long been recognized in the United States. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995). It necessarily applies to the conduct of U.S. officials as well as the conduct of foreign despots.

Nevertheless, the district court expressly rejected what it termed "vague analogies" to the standards against which our courts have consistently measured the conduct of foreign tyrants when they have sought immunity from actions charging similar acts of torture. App. at 96 n.7. Instead, the district court determined that U.S. officials could claim immunity if their conduct occurred within the scope of their employment under state law standards of *respondeat superior*. *Id.* On that basis, the district court concluded that defendants are immune pursuant to the Westfall Act. In making this determination, the district court expressly held as a matter of law that torture of detainees was both "a foreseeable consequence of the military's detention of suspected enemy combatants" and "incidental to [defendants'] roles [as] military officials." This holding is not only abhorrent, it is clearly erroneous.

As an initial matter, while state law principles governing scope of employment are germane to the analysis, there are important caveats that the district court simply ignored. The liberal construction of the doctrine of *respondeat superior* adopted in modern law is designed to broaden the resources available to compensate tort victims by making employers liable for their employees' misconduct in circumstances where the employees themselves may have few assets. In the Westfall context, a different set of policies apply. While the statute in most circumstances also broadens the available resources for compensation by making the United States liable, it does something that common law *respondeat superior* does not: immunize the wrongdoing employee. State *respondeat superior* law is thus an imperfect parallel that can, particularly under such extreme circumstances, lead to perverse results.

Moreover, even as a straightforward application of *respondeat superior*, the district court's analysis fails. First,

the district court failed to apply the proper standard under the Restatement in determining whether defendants' conduct was within the scope of their employment. Second, the scope of employment question is one for the trier of fact on a full evidentiary record. It was therefore error to refuse to allow plaintiffs to take discovery on this point.

A. Application of the Westfall Act

The Westfall Act permits the United States to substitute itself as a defendant in actions brought against federal officers for negligent and wrongful acts and omissions undertaken within the scope of their employment. 28 U.S.C. § 2679(b)-(d). As a result, the individual defendants are absolutely immune from personal liability, and the exclusive remedy becomes an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 ("FTCA"). The Westfall Act, however, does not provide immunity for civil actions alleging constitutional torts or violations of federal statutes. 28 U.S.C. § 2679(b)(2). Thus, for Westfall immunity to apply: i) defendants must have been acting within the scope of their employment; and ii) the actions complained of must be ordinary acts or omissions, not rising to the level of constitutional or express statutory violations.

When a federal officer is sued, the Attorney General may certify that the officer was acting within the scope of employment. 28 U.S.C. § 2679(d). The Attorney General's certification is not entitled to any "particular evidentiary weight." *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003) (quoting *Kimbrow v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994)). The Supreme Court has recognized that the Attorney General may "feel a strong tug" to supply a certification, in cases like this one, where the conduct falls within one of the exceptions to the FTCA, leaving both the United States and the individual officers immune from suit. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427-28 (1995). The submission of a certification simply shifts to the plaintiff the obligation to come forward with specific facts rebutting the certification and ordinarily "the plaintiff cannot discharge this burden without some opportunity for discovery." *Id.* Although this Court initially indicated that disputed issues of fact concerning scope of employment could be resolved by the court after an evidentiary hearing, *id.*, more recently it has mandated that disputed issues of fact concerning scope of employment, like all other disputed factual issues, be decided by the trier of fact at trial. *Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006).

B. The District Court Improperly Denied Discovery.

The district court's decision that defendants' conduct in ordering and supervising torture and other cruel and degrading treatment was within the scope of their employment was error on two grounds. First, whether a defendant is acting within the scope of his or her employment is an issue of fact. *E.g.*, *Brown v. Argenbright Sec.*, 782 A.2d 752, 757 (D.C. 2001). Even in the Westfall context, a disputed factual issue such as scope of employment cannot be determined on a motion to dismiss. *Majano*, 469 F. 3d at 140-41. Second, even assuming that this is one of the rare cases in which there are no factual disputes and the court could decide the issue as a matter of law, the court below misapplied the law in reaching its result.

Plaintiffs' complaint asserted that defendants' conduct was unauthorized and beyond the scope of their employment. Plaintiffs proffered earlier official statements of the United States which expressly contradicted the certification in this case that torture could be within the scope of a U.S. official's duties. Plaintiffs proffered later official statements that torture of detainees at Guantánamo was unauthorized and contrary to U.S. policy. Despite these submissions, which clearly raise a material dispute of fact concerning whether defendants' acts were within the scope of their employment, the court below denied plaintiffs discovery, holding that plaintiffs had failed "to meet their burden of proving that the individual defendants acted outside the scope of their employment." App.

at 103. But it is not plaintiffs' burden to "prove" that defendants acted outside the scope of employment on a motion to dismiss.

1. The District Court Applied the Incorrect Legal Standard in Denying Plaintiffs Discovery.

This Court's decision in *Stokes* makes clear that plaintiffs have a right to discovery. A complaint cannot be dismissed without discovery if its allegations taken as true and read liberally raise a "material dispute" concerning whether the defendants were acting in the scope of their employment. *Stokes*, 327 F.3d at 1215. In *Stokes*, this Court expressly rejected the argument, which the district court erroneously accepted below, App. at 103, that plaintiffs were required to prove at the motion to dismiss stage that the individual defendants acted outside the scope of their employment. *Stokes*, 327 F.3d at 1215. Indeed, pursuant to *Stokes*, plaintiffs are not required even "to allege the existence of evidence [they] might obtain through discovery." *Id.* at 1216. Plaintiffs' complaint need only allege facts that, taken as true, would rebut the certification submitted by defendants. *Id.* Because the court below erred by requiring the plaintiffs to submit "proof" concerning the scope of defendants' employment at an impermissibly early stage of the proceeding, the decision must be reversed and remanded.

2. Plaintiffs Met their Burden of Setting Forth a Material Issue Meriting Discovery.

Plaintiffs have easily met the modest burden imposed by *Stokes*. For instance, plaintiffs' complaint alleges that the defendants conceived and implemented a program to torture detainees. Plaintiffs alleged that the program was illegal under the UCMJ and applicable military regulations, the Constitution, federal criminal law and customary international law. The complaint also asserted that the conduct was wholly unauthorized. In their Opposition to Defendants' Motion to Dismiss, plaintiffs identified specific relevant facts requiring discovery, including whether the use of torture, extreme force, cruel and degrading treatment, and prolonged arbitrary detention are commonly permitted by U.S. officials^[FN3] and whether it was foreseeable that senior government officials would order torture at Guantánamo despite presidential prohibitions. Opp. at 16-18. This Court has previously held that, even where it is questionable whether the allegations of the complaint are sufficient to raise a question of fact, plaintiffs are entitled to discovery if they can identify specific information that would be available through discovery that they would submit in support of their complaint. *Id.* at 1215. Plaintiffs' Opposition brief did just that.

FN3. This might, for example, be evidenced by training manuals, policies or protocols governing use of force in interrogations and detentions, and complaints by detained persons or prisoners concerning use of torture.

In addition to the allegations of the complaint, plaintiffs submitted supplemental material to the court below which evidenced a material dispute of fact. Plaintiffs filed a previous statement by the United States that expressly contradicted the Attorney General's certification. In 1999, the U.S. State Department made its first report to the United Nations Committee Against Torture. U.S. Department of State, Initial Report of the United States of America to the U.N. Committee Against Torture ("State Department Report"). In the State Department Report, the United States condemned torture in any and all circumstances, and acknowledged that:

- the prohibition on torture applies to the U.S. military;
- torture "cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer;" and
- "a commanding officer who orders such punishment would be acting *outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm.*" App. at 67, 69

(emphasis added). Such a prior inconsistent statement, standing alone, is sufficient to raise a material issue of fact precluding judgment as a matter of law. *See, e.g., Crockett v. Abraham*, 284 F.3d 131, 133 (D.C. Cir. 2002).

The district court relegated the State Department Report to a footnote, concluding that "state law, not State Department representations to the United Nations, governs the scope of employment determination." App. at 93 n.5. While plaintiffs do not dispute the relevance of state law to the scope of employment issue, they respectfully submit that the district court's statement is a *non sequitur*. An employer's direct admissions concerning the scope of employment are clearly relevant under state law. *See Murphy v. Army Distaff Found.*, 458 A.2d 61, 63 (D.C. 1983) (holding that conflicting statements regarding employee's duties precluded decision concerning scope of employment as matter of law); *Dist. Certified TV Serv. v. Neary*, 350 F.2d 998, 999 (D.C. Cir. 1965) (admitting testimony from employer that employee was disobeying instructions at time of accident). And the Westfall Act focuses particular attention on an employer's representation by expressly requiring certification. 28 U.S.C. § 2679(d). This requirement appears nowhere in state law. Given the relevance of the United States' representations concerning scope of employment, under both state law and the provisions of the Westfall Act, and in light of the Supreme Court's warning that courts should be cautious about accepting certifications at face value, *Lamagno*, 515 U.S. at 427-30, the district court's refusal to consider evidence contradicting the United States' certification was reversible error.

C. The District Court Erred in Dismissing this Action as a Matter of Law.

In deciding, as a matter of law, that defendants' conduct was within the scope of their employment, the district court improperly limited the factors it considered, and so reached an erroneous conclusion. State law governs whether a defendant is acting within the scope of his or her employment. *Majano*, 469 F.3d at 141. The district court considered the scope of employment under the law of the District of Columbia, which follows the Restatement (Second) of Agency. App. at 92; *Stokes*, 327 F.3d at 1215. Under the Restatement, conduct is within the scope of employment if it is authorized or "incidental to" authorized conduct. Restatement (Second) of Agency § 228; *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995) (quoting Restatement (Second) of Agency § 229).

The Restatement sets forth four general factors relevant to the scope of a defendant's employment: a) whether the conduct at issue is "of the kind" the defendant is generally employed to perform; b) whether the conduct occurred within the authorized time and space of defendant's employment; c) whether the defendant's intent was, at least in part, to serve the purposes of his employer; and d) in case of force, whether the use of force was "not unexpected" by the employer. Restatement (Second) of Agency § 228; *Haddon*, 68 F.3d at 1423-24. The general factors are supplemented by additional guidelines in other sections of the Restatement. Where, as here, the defendants' conduct was not authorized, *see* App. at 46-50, (Compl. ¶¶ 140-42, 148-58), the Restatement lists additional factors to be considered to determine whether the conduct was, nonetheless, incidental to authorized conduct. Restatement (Second) of Agency § 229. Consciously criminal or intentionally tortious acts may be potentially within the scope of employment, but

[t]he fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but *serious crimes are not only unexpected but in general are in nature different from what servants in a lawful occupation are expected to do.*

Restatement (Second) of Agency § 231, cmt. a (emphasis added). *See also Boykin v. Dist. Of Columbia*, 484 A.2d 560, 563 (D.C. 1984) (citing § 245 of the Restatement (Second) of Agency).

The district court limited its consideration to the four factors listed in the Restatement (Second) of Agency § 228 and failed to consider the factors listed in § 229 or the guidance of § 231. Applying solely the § 228 factors, the district court held that defendants were acting within the scope of their employment because: a) defendants' design and implementation of a program of torture and other violations of international law were somehow authorized or incidental to authorized conduct; b) defendants' conduct occurred within the time and place of their employment; c) defendants' conduct was motivated by a desire, however misguided, to advance the cause of their employer, the United States; and d) defendants' conduct was foreseeable. The district court erred in holding that defendants' conduct was at any time authorized, because this determination is flatly contradicted by the express allegations of the complaint and by undisputed facts. The district court further erred in determining that defendants' conduct was incidental to authorized conduct purportedly because torture, as a specific instrument of government policy, was "foreseeable." Finally, the district court failed to consider other factors made relevant by the Restatement, and further failed to recognize that those factors required discovery.

1. At No Time Was Defendants' Conduct Authorized.

The district court held that defendants' conduct was initially authorized because they "acted pursuant to directives contained in a December 2, 2002 memorandum from defendant Rumsfeld." App. at 93. Because the complaint alleged that this memorandum was withdrawn by defendant Rumsfeld in April 2003, the district court concluded that "the crux of the dispute here is whether the defendants' actions after April 2003 were incidental to the conduct authorized." App. at 94 (internal citation omitted). In effect, the court determined that defendant Rumsfeld authorized his own conduct ordering torture, and that the authorization somehow further applied to all other defendants. The district court misreads the complaint and is wrong as a matter of law.

An agent cannot authorize his own conduct. Restatement (Second) of Agency § 7; *Mayer v. Buchanan*, 50 A.2d 595, 598 (D.C. 1946). Moreover, the complaint expressly alleges that the defendants' conduct was never authorized. *See* App. at 46-47 (Compl. ¶ 142) (quoting Army Field Manual that "[t]he use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government."). In addition, the complaint expressly alleges that the President, the Commander-in-Chief of all defendants, did not authorize the torture and degradation that defendants inflicted on plaintiffs. App. at 48 (Compl. ¶ 146). Indeed, the President has expressly rejected any suggestion that he ever authorized or condoned torture. App. at 16-17 (Compl. ¶ 10); *id.* at 78, (Compl. ¶ 58). Finally, the district court ignored that, as a matter of law, defendants could never be authorized or properly ordered to commit war crimes such as torture. *The Nuremberg Decision*, 6 F.R.D. 69, 110 (1947) ("he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law."); *id.* at 154.

U.S. courts have recognized for more than 25 years that no sovereign has the power to authorize torture. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit rejected the defendant's attempts to invoke sovereign and act of state immunity for acts of torture and murder, stating "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." *Id.* at 881. The *Filartiga* Court held that, as a matter of law, acts of torture and murder exceeded that foreign leader's authority. *Id.* at 889. *Filartiga* has recently been cited with approval by the Supreme Court. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 738 n. 29 (2004).

The Ninth Circuit followed the Second Circuit's reasoning in cases against Ferdinand Marcos and senior members of his government for arbitrary and prolonged detention, torture, and cruel and degrading treatment very similar to the allegations of this complaint. *See, e.g., In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 497-98 & n. 10 (9th Cir. 1992); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). In considering Marcos's claims of immunity, the Ninth Circuit concluded that "acts of torture, execution, and disappearance were clearly acts outside of his authority as President.... Marcos's acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state." *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994). *See also Nuru v. Gonzalez*, 404 F.3d 1207, 1222-23 (9th Cir. 2005) (torture violates *jus cogens* norms and can never be authorized by a government); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175-76 (D. Mass. 1995) (Guatemala's Minister of Defense was not acting within scope of his official duties when he ordered and directed campaign of kidnapping, torture, and execution).

While the district court denigrates plaintiffs' reliance on these cases as "vague analogies" to the acts of "foreign tyrants," App. at 96 n.7, there is nothing vague about the proposition for which these cases stand or their relevance here. Torture can *never* be authorized as a legitimate act of any government - including the United States. Contrary to the district court's determination, defendant Rumsfeld's December 2002 memorandum is evidence of his complicity in torture but it is certainly not official authorization for it. At the very least, whether this conduct was authorized is a question of fact. By failing to permit discovery and deferring decision of this issue to trial, the district court committed reversible error.

2. Defendants' Conduct in Ordering Torture Was Not Incidental to Authorized Conduct

The district court further erred in determining that, if not authorized, defendants' conduct was at least "incidental" to authorized conduct. While the court examined garden-variety agency cases, it reached its determination without ever considering the factors most germane to the matter as outlined in Restatement (Second) of Agency § 229 and other relevant provisions that specifically consider whether intentional torts and consciously criminal conduct can be within the scope of employment. Not surprisingly, there are no District of Columbia cases that consider whether establishing a program to inflict torture could fall within an employee's authorized employment or be "incidental" to it. And there are no cases that consider such conduct in circumstances where a ruling that the conduct falls within the scope of employment would confer immunity on the employee and insulate him from civil liability. Especially in these extraordinary circumstances, where run-of-the-mill scope of employment cases decided under local law provide so little guidance, the district court had an obligation to broaden its consideration of the issue and to examine all available authority and the policies underlying that authority. Its failure to do so was error.

Restatement § 229 supplies guidance on this point. It requires the court to consider ten factors in determining whether a defendant's conduct, although unauthorized, is nevertheless incidental to authorized conduct. Factors pertinent here include:

- 1) Whether the unauthorized conduct is of the sort commonly done by persons in defendant's circumstances;
- 2) The extent of departure from the normal method of accomplishing an authorized result; and
- 3) Whether or not the unauthorized act is seriously criminal.

Restatement (Second) of Agency § 229.

As alleged in the complaint, defendants designed and implemented a program to torture, to detain persons indef-

initely without charges or trial, and to use cruel and degrading tactics in an attempt to obtain information. These allegations, taken as true, support plaintiffs' assertion that the conduct at issue is "seriously criminal." See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J. concurring) (identifying the torturer, the pirate and the slave trader as '*hostis humani generis*' - the enemy of all mankind," quoting *Filartiga*, 630 F.2d at 890). Indeed, defendants' own working group report concedes as much. App. at 16-17 (Compl. ¶ 10). Under both § 229 and § 231 of the Restatement, the intentionally criminal nature of defendants' acts strongly militates against such acts being within the scope of employment. Use of torture, prolonged arbitrary detention, and cruel and degrading treatment, which the United States has long condemned, are also a substantial departure from the government's "normal method" of detaining and interrogating persons of interest. Moreover, as plaintiffs argued below, many of the Restatement factors - such as whether the conduct is commonly performed by persons in defendants' circumstances and whether their employer had reason to expect that defendants would order and implement a plan of torture - could not be fully considered without first allowing discovery. Each of these factors, had the court considered them, would have precluded its holding, as a matter of law, that defendants' conduct was within the scope of their employment.

Instead of examining such factors, the district court relied on its reading of two cases - *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976), and *Weinberg v. Johnson*, 518 A.2d 985 (D.C. 1986) - for the proposition that "practically any conduct [falls] within the scope of, or incidental to, that authorized by their employer so long as the action has some nexus to the action authorized." App. at 94. *Weinberg* and *Lyon* stand for no such proposition. The two cases simply recognize two sets of circumstances - both radically different from the one presented here - in which isolated acts of violence by an employee were deemed to be questions for the jury, not issues of law. Neither case supports the district court's ruling here.

Even a cursory examination of these two cases demonstrates how far afield they are from the instant action. In *Weinberg*, the plaintiff, a customer in a laundromat, was shot by an employee in a dispute that arose over whether the employee had removed plaintiffs' shirts from the washer. At the first trial, the court directed a verdict in favor of the employer, holding as a matter of law that the employee's acts in shooting the plaintiff were outside the scope of his employment. 518 A.2d at 986-87. The D.C. Court of Appeals reversed, holding that a reasonable jury could determine that the shooting was within the scope of employment and that the plaintiff was entitled to have a jury consider the question. *Id.* After a second trial, the defendant-employer asserted again that the issue should be decided as a matter of law. Again the D.C. of Appeals held that the issue was properly one for the jury. *Id.*

This Court came to a similar conclusion in *Lyon v. Carey*. In *Lyon*, the defendant was a deliveryman who got into an altercation with a customer whom he assaulted and then raped. As in *Weinberg*, the trial court determined that the rape/assault could not, as a matter of law, be within defendant's scope of employment. *Lyon*, 533 F.2d at 650-51. On appeal, this Court disagreed, holding that the question was one of fact and that a reasonable jury could find that the conduct was within the defendant's employment. *Id.*

Despite the obvious limitations of *Weinberg* and *Lyon*, and their transparent attempt not to deprive victims of compensation, the court below suggested that they compel the result it reached. The district court stated: If the doctrine of *respondeat superior* is panoptic enough to link sexual assault with a furniture deliveryman's employment because of the likely friction that may arise between deliverymen and customer, it must also include torture and inhumane treatment wrought upon captives by their captors. Stated differently, if "altercations" and "violence" are foreseeable consequences of a furniture deliveryman's employment, then torture is a foreseeable consequence of the military's detention of suspected enemy combatants.

App. at 95. The court's analysis is without logical basis. The fact that an intentional tort *may* be found by a reasonable jury to be within the scope of employment does not compel such a result in every intentional tort case. To the contrary, in other cases applying D.C. law, specific intentional torts have been determined as a matter of law *not* to have been committed within the scope of employment. *E.g.*, *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346 (D.C. 1987); *Boykin*, 484 A.2d at 562-63; *Penn Central Transp. v. Reddick*, 398 A.2d 27 (D.C. 1979). If anything, the cases relied on by the district court suggest that courts should be chary of deciding scope of employment as a matter of law, an approach that this Court has recently strongly endorsed. *See Majano*, 469 F.3d at 140-41.

The district court's reliance on *Weinberg* and *Lyon* was misplaced for another, even more fundamental reason. Both involved altercations between employees and customers. Both turn on the degree to which the defendant's conduct was connected to his work responsibilities. If the case at bar arose from a rogue soldier beating an individual detainee, these cases might be on point. But the case at bar bears no factual resemblance to this garden-variety type of lawsuit, and therefore the precedential value of such cases is quite limited.

The issue presented with respect to defendants here, which was in no way presented in *Lyon* and *Weinberg*, is whether a deliberate decision by the Secretary of Defense and senior military officers to use torture and cruel and degrading treatment as an instrument of policy, in radical departure from authorized techniques for detention and interrogation, and contrary to federal law, military law, and international law, should be deemed to be within the scope of employment for federal officers. The fact that a D.C. jury might be permitted to view it as "foreseeable" that a guard might get into a dispute with a prisoner resulting in violence and injury or even that a rogue interrogator might decide on his own to inflict torture on a particular detainee, in no way suggests that the court is entitled to prejudge the question of whether a jury would find it foreseeable that the Secretary of Defense and senior military officers would deliberately commit crimes under the UCMJ, federal law, and international law. Yet this is the result the district court reached here by its simplistic application of *Lyon* and *Weinberg*. The district court's finding, as a matter of law, that torture was within the scope of employment was reversible error.

D. The District Court Erred In Dismissing Plaintiffs' International Law Claims, Because The Entire Civil Action Against Defendants Falls Within The Exception To The Westfall Act.

The Westfall Act states expressly that the exclusive remedy provision of the FTCA (substituting the United States and immunizing individual defendants) "does not extend or apply to a *civil action* against an employee of the Government ... which is brought for a violation of the Constitution." 28 U.S.C. § 2679(b)(2) (emphasis added). Plaintiffs argued below that their constitutional claims, and accordingly their entire "civil action," fall within this exception. The district court rejected plaintiffs' argument, holding that only the specific constitutional claims fall within the exception. The district court therefore substituted the United States as defendant for the international law and the Geneva Convention claims, immunizing defendants. Because the district court's decision is belied by the plain language of the statute, as well as Congressional intent in enacting it, this Court should reverse.

In rejecting plaintiffs' argument that the exclusive remedy provisions of the Westfall Act do not apply to plaintiffs' entire "civil action" when a constitutional or statutory tort is asserted, the district court relied on *Finley v. United States*, 490 U.S. 546 (1989). *Finley*, however, has been overturned by statute, and, in any event, is not applicable here.

In *Finley*, the Supreme Court decided that the language “civil action on claims against the United States” as used in the FTCA did not grant federal courts jurisdiction to hear claims against parties other than the United States where such claims do not raise federal questions. The district court quoted *Finley* for the proposition that a 1948 change in the language of the FTCA from “claims against the United States” to “civil actions on claims against the United States” does not permit “the assertion of jurisdiction over any ‘civil action,’ so long as that action includes a claim against the United States.” App. at 100-01; *Finley*, 490 U.S. at 554.

Finley is not controlling here. First, the Supreme Court's holding in *Finley* has been legislatively overturned. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611, 2619-20 (2005). In abrogating *Finley*, Congress indicated that the term “civil action,” as used in the FTCA, should be read to refer to the entire civil action and not just to particular claims. This determination is consistent with long-standing policies against claim-splitting. Second, *Finley's* reasoning is inapplicable here. The Court's reasoning in *Finley* was significantly influenced by the fact that the change in language was the result of a 1948 recodification of the Judicial Code. The Court was, accordingly, bound by precedent to read such language narrowly, presuming that no change in policy was intended, in the absence of evidence of Congressional intent. *Finley*, 490 U.S. at 554. In contrast to the FTCA language interpreted in *Finley*, the Westfall Act is not a mere recodification of an existing statute. This Court should therefore give “civil action” its plain meaning, consistent with the use of the term “civil action” in the Federal Rules themselves and in numerous other statutes. See, e.g., *Commissioner v. Jean*, 496 U.S. 154, 161-62 (1990) (“civil action” in Equal Access to Justice Act required that attorneys' fees be assessed on case as an “inclusive whole, rather than as atomized line-items”); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990) (28 U.S.C. § 1441 permitting removal of any “civil action” involving foreign sovereign permits removal of entire proceeding); *In re Surinam Airways Holdings Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992) (same); *In re Aircrash Disaster Near Roselawn Indiana*, 96 F.3d 932, 942-43 (7th Cir. 1996) (same); *FSLIC v. Mackie*, 962 F.2d 1144, 1147-50 (5th Cir. 1992) (interpreting “civil action, suit or proceeding” in FIRREA to mean entire action); *Pharmacia Corp. v. Clayton Chem. Acquis. L.L.C.*, 382 F.Supp. 2d 1079, 1087 (S.D. Ill. 2005) (interpreting “civil action” in CERCLA to mean “entire civil proceeding, including all component claims and cases within that proceeding”).

The structure of the FTCA and the Westfall Act make clear that, with respect to these particular statutes, Congress was cognizant of the differences between an individual “claim” and a “civil action,” which is more naturally read as comprising a group of claims. Section 2680 of the FTCA, which lists the exceptions to the FTCA generally, is instructive in this respect. Section 2680 exclusively uses the term “claim” in defining the scope of the exceptions to the FTCA's waiver of sovereign immunity. In contrast, Congress' decision to use the broader term “civil action” in connection with exceptions to the Westfall Act reflects its intent that the exceptions to the Westfall Act encompass the entire civil action and not merely a particular claim as would be the case under the exceptions listed in § 2680. In interpreting a statute, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). “When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa*, 542 U.S. at 712 n. 9 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06 at 194 (6th rev. ed. 2000)). Where the words of the statute are unambiguous, no further judicial inquiry is necessary or permitted. *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Although the district court characterized its interpretation as “consistent with Congress' intent to provide immunity for common-law torts,” the district court ignored a key limitation on that immunity. Congress did not intend to provide immunity for “egregious misconduct.”^[FN4] Indeed, Congress expressly stated, “[i]f an employ-

ee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.” H.R. Rep. No. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949. *See also Sosa*, 542 U.S. at 707 n.4 (FTCA intended to apply to “garden variety torts”).

FN4. In interpreting federal statutes, courts must always strive to realize the intent of Congress. *United States v. Am. Trucking Co.*, 310 U.S. 534, 542 (1940). If the “plain meaning” of words, especially taken in isolation and out of context, would lead to “absurd or futile results,” or even “an unreasonable one ‘plainly at variance with the policy of the legislation as a whole,’ ” courts should look beyond the words to the purpose of the act. *Id.* at 543.

This distinction, between egregious misconduct - which Congress did not intend to immunize - and mere negligence or poor judgment - which it did - is embodied in the statutory and constitutional exceptions to the absolute immunity granted by the Westfall Act. In short, in enacting the Westfall Act, Congress focused on the seriousness of the defendant's misconduct rather than on specific claims or causes of action that a plaintiff might bring. If a defendant's conduct rises to the level of a constitutional or statutory violation, then immunity is not available. The cause of action arises from the core conduct and the parsing of a single nucleus of operative facts into specific claims does not affect the analysis of whether or not Congress intended the conduct to be immunized.

The district court's reading of the Westfall Act exceptions would lead to anomalous and illogical results. Officials would be immune from some claims arising out a particular nucleus of operative facts, and not for others, depending on the nature of the particular claims asserted within a single cause of action. The district court's reading of the exceptions also violates general public policy in favor of judicial economy and against claim-splitting. It has long been recognized that the adjudication in a single proceeding of all claims arising out of a single “common nucleus of operative fact” is favored. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966); *Montecatini Edison SPA v. Ziegler*, 486 F.2d 1279, 1287 (D.C. Cir. 1973). In these circumstances, the Westfall Act should not be interpreted to foster piecemeal and inefficient adjudication.

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED PLAINTIFFS' CLAIM UNDER THE GENEVA CONVENTIONS.

In a footnote and without analysis, the district court dismissed plaintiffs' claim that torture and mistreatment violated their rights under the Geneva Conventions on the basis that “the D.C. Circuit has ruled that the Geneva Conventions do not incorporate a private right to enforce [their] provisions in court.” App. at 90 n.4 (citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005)). *Hamdan*, which was decided after the briefing was completed below, has since been reversed by the Supreme Court. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). While not specifically deciding to what extent the Geneva Conventions confer private rights of action, the Supreme Court characterized the reasoning of the Circuit's *Hamdan* decision, which rejected the petition on, *inter alia*, the ground that a private right of action is not available under the Geneva Conventions, as not “persuasive.” *Id.* at 2793. The Supreme Court then considered the petition and allowed Hamdan to assert rights under the Geneva Conventions. *Id.* at 2793-94.^[FN5]

FN5. The Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in relevant part as 10 U.S.C. § 949) (“MCA”) does not preclude plaintiffs' private action to enforce the Geneva Conventions. Although Section 5(a) of the MCA prohibits use of the Conventions as “a source of rights” by private parties, this provision, in stark contrast to several other provisions of the MCA, does

not contain an effective date or retroactivity provision. Consequently, the MCA does not affect this action, which was pending at the time of its passage. See *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (noting deeply rooted “presumption against retroactive legislation”); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (statute does not affect pending claims “absent a clear indication that Congress intended such a result”).

An individual has enforceable rights under a treaty if a private right of action is provided expressly or by implication. *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988). A private right of action exists where the treaty: (1) prescribes a rule by which the rights of the private citizen or subject may be determined, and (2) is self-executing. *Diggs v. Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976). The Geneva Conventions meet these requirements. In *Hamdan*, the Supreme Court concluded that the Geneva Conventions are judicially enforceable and considered the Conventions as a source of rights enforceable by individuals. The Court strongly suggested that the Conventions provide a private cause of action. *Hamdan*, 126 S. Ct. at 2793-94 & nn. 57-58 (citing authorities for proposition that Conventions are enforceable by individuals). Against this backdrop, the district court's summary dismissal of the plaintiffs' Geneva Conventions claim was error.

A. The Geneva Conventions Guarantee Rights to Individuals.

The Geneva Conventions were written “first and foremost to protect individuals, and not to serve state interest.” Oscar M. Uhler *et. al.*, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). By interpreting and enforcing rights secured to the petitioner by the Geneva Conventions in *Hamdan*, the Supreme Court has rejected this Court's earlier view that the Conventions give rights only to other signatories and not individuals. Both the Geneva POW Convention and the Geneva Convention on Civilian Detainees expressly provide that detained persons “may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.” Geneva POW Convention, Article 7; Geneva Convention on Civilian Detainees, Article 8 (emphasis added). This formulation confirms that rights under the Conventions are secured to individuals. If the intention were otherwise, that rights are secured only to the nation-state signatories, this non-waiver provision would be meaningless, because individuals would have no rights to “renounce.” In addition, the Conventions contain provisions requiring that prisoners be given notice of their protections, which strongly suggests that the Conventions guarantee rights to individuals. Geneva POW Convention Art 41. See *Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J. dissenting) (notice provision in Vienna Convention on Consular Relations indicative that treaty secures rights to individuals). As one district court has stated in reference to the Geneva POW Convention:

[I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of [the Geneva POW Convention] is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations.

United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992).

B. The Relevant Provisions of the Geneva Conventions Are Self-Executing.

A treaty is considered self-executing when it is effective upon ratification and no additional legislation is necessary to accomplish the purposes of the treaty. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (self-executing treaty “operates of itself without the aid of any legislative provision”), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). A treaty may “contain both self-executing and non-

self-executing provisions.” *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); *Noriega*, 808 F. Supp. at 797-98.

There can be little doubt that the relevant provisions of the Geneva POW Convention and the Geneva Convention on Civilian Detainees are self-executing. These Conventions prohibit any signatory from torturing detained persons; from committing outrages upon their persons or treating them with brutality; from exposing them to cruel and degrading treatment; from using physical or mental coercion or torture in order to secure information from them; and from interfering with their religious practices. In ratifying these treaties, the United States assumed the specific obligation to comply with these prohibitions and to do so for the express benefit of individual detainees. No further legislation was required. This is the very definition of “self-executing.” See Restatement (Third) of the Foreign Relations Law of the United States § 111, Rpt.’s Note 5 (1987) (“obligations not to act, or to act only subject to limitations, are generally self executing”); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1127-28 (1992).

Given that the relevant provisions of the Geneva Conventions are both self-executing and guarantee rights to individuals, the district court erred in dismissing plaintiffs’ Convention-based claims.

IV. THE DISTRICT COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The district court dismissed plaintiffs’ constitutional claims (Counts V-VI of the complaint) based on a finding that defendants enjoyed qualified immunity when they designed and implemented a policy of torture. The court found that plaintiffs’ right not to be tortured was not clearly established. As a result, the district court held that defendants are entitled to immunity.

Defendants’ conduct was grossly illegal; they knew it; and they were seeking a legal loophole to avoid responsibility. Their contention that they should be immune from suit because they thought that detainees at Guantánamo had no constitutional rights and could be tortured without accountability is an anathema and should be rejected. The doctrine of qualified immunity was never intended to provide a license for knowing and deliberate misconduct which defendants tried, but failed, to shield from accountability.

Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Here, it is beyond cavil that defendants’ conduct violated plaintiffs’ constitutional rights - torture, prolonged arbitrary detention, and cruel and degrading treatment violate the bedrock legal norms of any civilized society. *Rasul*, 542 U.S. at 484 n. 15. There is also no question that any reasonable and competent public official would have been on notice that such conduct was not only illegal but that it violated fundamental constitutional constraints on governmental power. Indeed, the complaint specifically refers to defendants’ memoranda acknowledging the fact that the conduct was illegal. App. at 15-18 (Compl. ¶¶ 9-12).

A. The District Court Incorrectly Analyzed Defendants’ Claim of Qualified Immunity.

It is axiomatic that qualified immunity is not absolute - it only immunizes persons who act without knowledge that their conduct violates protected rights. Although the qualified immunity standard “gives ample room for mistaken judgments,” it does not protect “the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Similarly, it does not shield officers from liability for conduct “so

egregious" that any reasonable person would know it was illegal without guidance from courts. *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992).

The district court rested its decision that plaintiffs' constitutional rights were not well established on its conclusion that the Supreme Court's decisions in *Rasul v. Rumsfeld*, 542 U.S. 507 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) were the first to deal "precisely with the facts and basic concerns presented here" and constituted "the first indication that detainees may be afforded a degree of constitutional protection." App. at 112-13. This is not accurate, but, in any event, qualified immunity does not turn on locating a prior case deciding identical facts and concerns; rather it involves an assessment of "objective reasonableness." The Supreme Court has stated empathically that qualified immunity can be denied although "the very action in question has not previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A plaintiff does not need to identify legal precedent arising from "materially similar" facts to the case at bar. *Hope v. Pelzer*, 536 U.S. 736, 739 (2002). As the Supreme Court observed in *United States v. Lanier*, "the easiest cases don't even arise. There has never been a ... section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. 259, 271 (1997) (internal citations omitted).

For a right to be clearly established, it is enough that "the contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "[T]he salient question ... is whether the state of the law [at the relevant time] gave [the officials] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741 (emphasis added). As is clear from *Hope* and *Lanier*, the "fair warning" standard is inherently a commonsense, good faith standard, not a legalistic inquiry into whether fundamental legal requirements can be evaded. Thus, the Supreme Court held in *Hope* that "the obvious cruelty inherent" in the use of the hitching post, and treatment "antithetical to human dignity" under circumstances that were both "degrading and dangerous," were sufficient to trigger notice. *Id.* at 745-46. The fact that the specific practice had never been addressed by the courts did not afford the defendants in *Hope* an escape into qualified immunity. No less so here.

B. A Reasonable Person in the Defendants' Position Would Have Been Fairly on Notice that Torturing Plaintiffs was Illegal and Unconstitutional.

Even without the benefit of *Rasul* and *Hamdi*, defendants had ample warning that their conduct was illegal and unconstitutional. At the time that plaintiffs were under defendants' complete control, torture undeniably violated U.S. law. Indeed, torture violates the core norms of every civilized country. It was also clearly established that fundamental rights, such as the right to be free from torture, are guaranteed to aliens resident not only in the United States proper but in all territories under U.S. control. Finally, defendants' own regulations, their solicitation of legal opinions seeking a means to evade those regulations, and their actions in knowing dereliction of their own regulations make clear that they were fully aware of the wrongful character of their conduct. In these circumstances, the district court should have found that defendants were duly on notice of plaintiffs' rights.

1. Torture Indisputably Implicates Established Constitutional Norms.

The prohibition on torture is universally accepted. *See Sosa*, 542 U.S. at 762 (Breyer, J. concurring) (torture is included among the subset of conduct "universally condemned" under international law); *Filartiga*, 630 F.2d at 883-84. Virtually all of the specific acts alleged in the complaint have been held to be illegal and violative of the Fifth and/or Eighth Amendment by a wide variety of judicial decisions. *See, e.g., Hope*, 536 U.S. at 737-38

(shackling in painful positions, exposure to sun, deprivation of water and access to toilet facilities); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1248 (M.D. Ala. 1998) (shackling in painful positions, severe chafing of handcuffs); *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (forced nakedness, isolation in darkness, deliberate exposure to cold, withholding hygienic items, withholding food, shackling in painful positions); *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1223 (D. Colo. 2001) (beating while shackled); *Evicci v. Baker*, 190 F. Supp. 2d 233, 238-39 (D. Mass. 2002) (same); *Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (beating while shackled and blindfolded, exposure to extreme cold, forced nakedness, solitary confinement); *Nelson v. Heyne*, 491 F.2d 352, 357 (7th Cir. 1974) (forced use of tranquilizing drugs); *Harper v. Wall*, 85 F. Supp. 783, 785-86 (D.N.J. 1949) (attacks with dogs). Consequently, there can be no question that defendants were on notice that their conduct violated established constitutional norms.

2. Fundamental Constitutional Rights Are Clearly Recognized as Applying Beyond our Borders.

The Supreme Court and this Circuit have long held that fundamental rights such as the ones at issue here are applicable beyond U.S. borders. For example, in the "*Insular Cases*," the Supreme Court consistently found that fundamental constitutional rights apply to people in territories under U.S. control regardless of their citizenship. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (disclaiming "any intention to hold that the inhabitants of these territories are subject to an unrestrained power ... upon the theory that they have no rights"); *Dorr v. U.S.*, 195 U.S. 138, 148-49 (1904) (trial by jury is not one of the fundamental rights which applies outside the U.S.); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) (in U.S. territories "it is locality that is determinative of the application of the Constitution ... and not the status of the people who live in it"). See also *In re Guantánamo Detainee Cases*, 355 F.Supp. 2d 443, 454-56 (D.C. 2005) (summarizing and discussing the *Insular* line of cases). This Court has also found that the due process clause of the Fifth Amendment, the clause at issue here, restricts U.S. governmental conduct in Micronesia, even though the United States is not the "technical" sovereign. *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977). More recently, it has noted that "inhabitants of non-state territories controlled by the United States - such as unincorporated territories or occupation zones after war - are entitled to certain 'fundamental rights.'" *Harbury v. Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000), *rev'd on other grounds sub nom, Christopher v. Harbury*, 536 U.S. 403 (2002).

It cannot be realistically argued that Guantánamo is not controlled by the United States. The U.S. government occupies this territory under an indefinite lease that grants it "complete jurisdiction and control." *Rasul*, 542 U.S. at 480. Thus, the United States lacks only titular sovereignty over this area. U.S. law is the only law that applies at Guantánamo. Guantánamo falls within the special maritime and territorial jurisdiction of the United States; therefore, U.S. criminal law applies there, including the panoply of constitutional rights that go along with criminal prosecution. 18 U.S.C. § 7; *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990), *United States v. Rogers*, 388 F. Supp. 298, 301-02 (E.D. Va. 1975) (Fourth Amendment applies to criminal cases arising out of conduct of civilians at Guantánamo). More than 25 years ago, the Justice Department's Office of Legal Counsel concluded that the base comes within the ambit of federal legislation. Installation of Slot Machs. on U.S. Naval Base, Guantánamo Bay, 6 Op. Off. Legal Counsel 236 (1982). Consequently, defendants were fairly on notice that U.S. law, including the fundamental protections secured under the Constitution, governed their conduct at Guantánamo.

In ruling otherwise, the district court relied primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) ("*Verdugo*"), but these cases are not dispositive here. *Eisentrager* involved a petition for a writ of *habeas corpus* brought by convicted enemy prisoners of war imprisoned in Germany. As the Supreme Court held, the prisoners in *Eisentrager* had been convicted of war

crimes, which put them in a substantially different posture than plaintiffs, who are innocent civilians. *Rasul*, 542 U.S. at 476. Regardless of the plaintiffs' status, however, there is nothing in *Eisentrager* that suggests that it is constitutionally permissible for the U.S. military to torture prisoners in their custody, wherever those prisoners may be held. The prohibition on torture, as a fundamental right, was well-established by the time *Eisentrager* was decided. See *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1932) (torture "inconsistent with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions"). In addition, *Eisentrager* arose in another sovereign country with its own laws, not an area within the territorial and maritime jurisdiction of the United States. Defendants could not have reasonably relied on *Eisentrager* as giving them cover for their mistreatment of plaintiffs and the other Guantánamo detainees.

The district court's reliance on *Verdugo-Urquidez* is equally inapt. *Verdugo* involved the trial of an alleged Mexican drug lord. The question presented was whether the United States could use evidence gathered from a search of the defendant's apartment in Mexico, where no warrant for the search was obtained in advance. The Supreme Court held that the evidence could be used because the Fourth Amendment did not restrict the United States from participating in a search of property in Mexico. It is difficult to see how the defendants could have relied on the holding in *Verdugo*, which was expressly limited to the question of the Fourth Amendment's applicability to a search in a foreign sovereign nation, to justify their arbitrary detention and torture of the plaintiffs at Guantánamo. The plaintiffs' detention at Guantánamo involved neither the Fourth Amendment, nor the pre-trial procedures and sovereignty of another country. And, contrary to the district court's holding, *Verdugo* supports plaintiffs' argument that defendants' conduct at Guantánamo was unconstitutional. The Supreme Court in *Verdugo-Urquidez*, 494 U.S. at 268-69 (citing cases). Since at least 1932, it has been established that torture "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Brown*, 297 U.S. at 285-86.

3. Defendants' Own Actions Demonstrate that They Were Aware that Their Conduct Was Wrongful and Unconstitutional.

Good faith is at the heart of qualified immunity. The Supreme Court often uses the terms "qualified immunity" and "good faith immunity" interchangeably. See, e.g., *Harlow*, 457 U.S. at 815. It is intended to protect from individual liability the defendant who "makes a mistake in judgment" or "fails to anticipate subsequent legal developments." *Polk v. Dist. of Columbia*, 121 F. Supp. 2d 56, 71 (D.D.C. 2000). It is not intended to protect defendants who engage in deliberately unlawful conduct, *Malley*, 475 U.S. at 341; *McIntyre v. United States*, 336 F. Supp. 2d 87, 123-26 (D. Mass. 2004), or "active deception." *Polk*, 121 F. Supp. 2d at 71. Although the Supreme Court applies an objective test for good faith in this context, it has noted that "[b]y defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819. Yet a license for lawless conduct is precisely what defendants sought and were granted by the court below.

Like the state court judge who committed sexual assault in *United States v. Lanier*, defendants here assert that it is unfair to subject them to liability because the unconstitutionality of their conduct was not clear. Judge Lanier argued that he was not on notice that the Constitution was implicated in his criminal conduct - sexual assault of five women - even though he was presumably aware that state criminal statutes prohibited such conduct. Similarly, defendants here assert that, although they were clearly aware that torture violated every known legal stand-

ard, they were not on notice that the Constitution would be implicated because of the location of their egregious criminal conduct. Like the Court in *Lanier*, this Court should reject defendants' attempt to take refuge in a legal loophole to avoid the consequences of their manifestly illegal conduct. Defendants could have been in no doubt about the unlawfulness of their acts.

As in *Hope*, defendants were knowingly violating their own regulations. Such knowing violations preclude reliance on qualified immunity. *Hope*, 536 U.S. at 743-44. And like the prison guards in *Hope*, defendants here had much more than a "single warning." *Hope*, 536 U.S. at 740-41. Defendants' conduct violated virtually every law of which they could have been aware - federal criminal law, the UCMJ, military regulations, the Army Field Manual, and international law. Cruelty, oppression and maltreatment of prisoners is a violation of Article 93 and of Army Reg. 190-8 and military courts have long held that these protections extend to nonmilitary persons subject to the control of military personnel. *United States v. Dickey*, 20 C.M.R. 486, 488-89 (Army Bd. Rev. 1956). Abuse and torture of prisoners have repeatedly been found unlawful. *Dickey*, 20 C.M.R. at 488-89; *United States v. Lee*, 25 M.J. 703, 704-05 (Ct. Mil. Rev. 1987); *United States v. Finch*, 22 C.M.R. 698, 700-01 (Navy Bd. Rev. 1956). Plaintiffs submit that, whether there was a constitutional case directly on point or not, defendants' "warning" was more than "fair." As the Supreme Court has held, "it is not unfair to hold liable the official who knows or should know that he is acting outside the law." *Butz v. Economou*, 438 U.S. 478, 506 (1978)

Defendants plainly selected Guantánamo as plaintiffs' detention facility in a calculated effort to avoid accountability for conduct that had long been held unconstitutional when it occurred in U.S. prisons. But Guantánamo is not a Hobbesian enclave where defendants could violate clear prohibitions on their conduct imposed by statute and regulations, and then point to a purported constitutional void as a basis for immunity. *Lanier and Hope* preclude such a cynical use of qualified immunity. As many courts have held, granting qualified immunity in a circumstance in which the unlawfulness of defendants' conduct was clear but in which there was no constitutional case directly on point would pervert the very purpose of qualified immunity, immunizing the most egregious conduct because it was so far beyond the pale that no court had been required to address it. See, e.g., *Lanier*, 520 U.S. at 271-72; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1061 (9th Cir. 2003); *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 253 (2d Cir. 2001); *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992). The district court's dismissal of the plaintiffs' constitutional claims on qualified immunity grounds must be reversed.

CONCLUSION

WHEREFORE, for the reasons stated herein, plaintiffs-appellants request that the order of the district court be reversed and this matter be remanded for further proceedings.

Shafiq RASUL, et al., Appellants, v. Donald H. RUMSFELD, et al., Appellees.
2007 WL 106499 (C.A.D.C.) (Appellate Brief)

END OF DOCUMENT