

The War Crimes Trial That Never Was: An Inquiry into the War on Terrorism, the Laws of War, and Presidential Accountability

By STUART STREICHLER*

Introduction

WHILE PRESIDENT GEORGE W. Bush was in office, a cottage industry developed calling for his impeachment.¹ Some even made a case for prosecuting him in a court of law.² Many of the criminal offenses the President allegedly committed involved his conduct in the war on terrorism. They ranged from the usual signposts of political scandal, such as obstruction of justice,³ to the most sensational charges imaginable, namely murder.⁴ Not surprisingly, the more outrageous the crime alleged, the more easily the accusations could be dismissed as preposterous.

Even so, revelations about actions taken in the war on terrorism during President Bush's years in office have raised a number of disturbing questions. One of the most significant is whether members of the U.S. armed forces, Central Intelligence Agency ("CIA") agents, security contractors, and others working for the United States commit-

* Adjunct Professor, Seattle University School of Law and Faculty Associate, University of Washington Center for Human Rights, sstreich@uw.edu. J.D., University of Michigan Law School, Ph.D., Johns Hopkins University. The author thanks Jamie Mayerfeld for his comments.

1. See, e.g., DENNIS KUCINICH, *THE 35 ARTICLES OF IMPEACHMENT AND THE CASE FOR PROSECUTING GEORGE W. BUSH* (2008); DAVE LINDORFF & BARBARA OLSHANSKY, *THE CASE FOR IMPEACHMENT: THE LEGAL ARGUMENT FOR REMOVING PRESIDENT GEORGE W. BUSH FROM OFFICE* (2006); *IMPEACH THE PRESIDENT: THE CASE AGAINST BUSH AND CHENEY* (Dennis Loo & Peter Phillips eds., 2006); Elizabeth Holtzman, *The Impeachment of George W. Bush*, *NATION*, Jan. 30, 2006, at 11; John Nichols, *Be Bipartisan: Impeach Bush*, *WASH. MONTHLY*, Dec. 1, 2006, <http://www.washingtonmonthly.com/features/2006/0612.nichols.html>.

2. ELIZABETH DE LA VEGA, *UNITED STATES V. GEORGE W. BUSH ET AL.*, at 11 (2006).

3. KUCINICH, *supra* note 1, at 50.

4. VINCENT BUGLIOSI, *THE PROSECUTION OF GEORGE W. BUSH FOR MURDER*, at ix (2008).

ted war crimes. If so, was this attributable to a “few bad apples,”⁵ or does culpability extend to the highest officials in the Bush Administration, including the President?⁶

Whatever the answer to that last question, it seems unlikely that President Bush will be tried for war crimes. The U.S. Department of Justice will not indict him, let alone subject him to a public trial.⁷ He will not be hauled before an international tribunal.⁸ It is difficult to imagine that courts in other countries could successfully assert jurisdiction over the former American President.⁹ Regardless of the symbolism that attaches to small-town resolutions authorizing city police to arrest President Bush,¹⁰ no one should expect to see him brought before a local magistrate in handcuffs.

Although no trial is forthcoming, it is still possible to explore the issue of presidential accountability and assess the President’s actions under the laws of war. Part I of this Article examines what constitutes a war crime under U.S. law by comparing the legal definition with the popular understanding of that term. Part II explains how, in a political system structured to curb the abuse of power, it could have been possible for the executive to violate the laws of war. Part III then analyzes the case against the President as if it were going to trial. It does not address every technical legal issue that could arise. Instead, the aim is to show generally how a war crimes trial could clarify what happened and resolve outstanding questions of criminal liability. To that end, this last section suggests lines of questioning for the cross-examination of President Bush.

5. *Abu Ghraib, Whitewashed*, N.Y. TIMES, July 24, 2004, <http://www.nytimes.com/2004/07/24/opinion/abu-ghraib-whitewashed.html>.

6. See generally ELAINE SCARRY, *RULE OF LAW, MISRULE OF MEN* 109 (2010) (arguing that President Bush “carried out grave crimes”); MICHAEL HAAS, *GEORGE W. BUSH, WAR CRIMINAL?: THE BUSH ADMINISTRATION’S LIABILITY FOR 269 WAR CRIMES* (2009) (arguing that President Bush should be tried for war crimes); MICHAEL RATNER, *THE TRIAL OF DONALD RUMSFELD: A PROSECUTION BY BOOK* (2008) (arguing that President Bush would be a coconspirator in any criminal prosecution of Donald Rumsfeld).

7. Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL’Y 271, 284–89 (2010).

8. Scott Horton, *Justice after Bush: Prosecuting an Outlaw Administration*, HARPER’S MAG., Dec. 2008, <http://www.harpers.org/archive/2008/12/0082303>.

9. *Contra* Stephanie Nebehey, *Bush’s Swiss Visit Off after Complaints on Torture*, REUTERS (Feb. 5, 2011, 11:49 AM EST), <http://www.reuters.com/article/2011/02/05/us-bush-torture-idUSTRE7141CU20110205>.

10. SCARRY, *supra* note 6, at 115, 117.

I. The Laws of War

To accuse an American president of criminal activity is serious enough; to brand the nation's leader a war criminal will strike many as extreme. This is partly attributable to the popular conception of war crimes. Ask someone today to list war crimes of recent history and he or she may think of ethnic cleansing in Bosnia¹¹ or genocide in Rwanda.¹² Mass murder and genocide—crimes against humanity and atrocities committed on a large scale—have become the hallmarks of war crimes.¹³ War criminals, moreover, are seen as bad actors without any redeeming virtue: Nazi Germany's SS, jihadi terrorists, and cut-throat paramilitary forces. Added to that is an implicit understanding of where war crimes occur. These atrocities unfold, so the thinking goes, in countries ruled by authoritarian regimes or third-world countries plagued by seemingly endless civil wars.

This popular conception of war crimes—what they are, who commits them, and where they take place—is not entirely wrong.¹⁴ The large-scale atrocities that occurred in the former Yugoslavia, Rwanda, and elsewhere were war crimes. The persons responsible were war criminals. There is more to war crimes, however, than this popular understanding suggests.

Neither international law nor domestic law restrictively defines war crimes as large-scale atrocities only.¹⁵ The legal definition of war crimes is broader than that. In the traditional view, war crimes are

11. Jacques Semelin, *Analysis of a Mass Crime: Ethnic Cleansing in the Former Yugoslavia, 1991–1999*, in *THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE* 353, 353–70 (Robert Gellately & Ben Kiernan eds., 2003).

12. Robert Melson, *Modern Genocide in Rwanda: Ideology, Revolution, War and Mass Murder in an African State*, in *THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE*, *supra* note 11, at 325, 325–38.

13. Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 1, 12 (Timothy L.H. McCormack & Gerry J. Simpson, eds., 1997); Bugliosi, *supra* note 4, at 269–70 nn.85–86.

14. Some war crimes can be classified as crimes against humanity. Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 *FOREIGN AFF.* Summer 1993, at 122, 130.

15. The word “atrocities” has its origins in Roman military law, but “[i]t no longer occupies any place within the formal language of international military law.” MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR* 45 (1999). *See also* Stephen R. Ratner, *War Crimes, Categories of*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 420, 420 (Roy Gutman et al. eds., 2d ed. rev. 2007) (noting that “international law draws lines that do not in all ways match our sense of the most awful behavior”); David J. Scheffer, *The Future of Atrocity Law*, 25 *SUFFOLK TRANSNAT’L L. REV.* 389, 399 (2002) (noting that crimes of significant magnitude tend to have the greatest interest in the international community).

simply described as violations of the laws and customs of war,¹⁶ and “every violation of the law of war is a war crime.”¹⁷ The laws and customs of war proscribe a wide range of conduct. Many of the rules governing warfare can be traced well back in history.¹⁸ The ancient Greeks frowned upon the use of poisoned weapons.¹⁹ The prohibition against perfidy (deceptively using the flag of surrender, for example) has roots in the age of chivalry.²⁰ The denial of quarter has long elicited special concern.²¹ Certainly, acts like these may turn out to be large-scale atrocities in the popular understanding of that term, but that is not the standard by which war crimes are classified under law.

Although unwritten customs and usages have played a key role in the development of the law of war,²² today many of the rules governing armed conflict can be readily located in written instruments such as treaties and statutes. The Geneva Conventions are among the most important. Adopted in 1949, the Conventions were ratified by the U.S. Senate several years later and have the status as supreme law of the land in the United States.²³

Instead of using the phrase “war crimes,” the Geneva Conventions developed a regime of “grave breaches,” as they were called.²⁴

16. Convention Respecting the Laws and Customs of War on Land Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention IV]; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 284 [hereinafter IMT Charter].

17. U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 178 (1956) [hereinafter FIELD MANUAL].

18. Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES, *supra* note 13, at 32, 32–43.

19. L. C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 21, 142 (2d ed. 2000). *Cf.* Hague Convention IV, *supra* note 16, art. 23(a) (forbidding “poison or poisoned weapons”).

20. GREEN, *supra* note 19, at 127 *Cf.* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 37, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“It is prohibited to kill, injure or capture an adversary by resort to perfidy.”).

21. GREEN, *supra* note 19, at 127. *Cf.* Protocol I, *supra* note 20, art. 40 (“It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”).

22. GREEN, *supra* note 19, at 30.

23. U.S. CONST. art. VI, § 2; *Hamdan v. Rumsfeld*, 548 U.S. 557, 642 (2006) (Kennedy, J., concurring).

24. The drafters purposefully avoided employing the phrase “war crimes.” STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 87 (3d ed. 2009) [hereinafter RATNER ET AL., ACCOUNTABILITY]. Whether other violations of the Geneva Conventions can qualify as war crimes is a subject of debate. *Id.* at 88. Protocol I to the Geneva Conventions (adopted in 1977) pro-

These include the following: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”²⁵ The Geneva Conventions make it a grave breach to compel prisoners of war or protected civilians to “serve in the forces of the hostile Power.” Also, “wilfully depriving” them of the “rights of fair and regular trial prescribed in this Convention” qualifies as a grave breach.²⁶ In the case of protected civilians, additional grave breaches include “unlawful deportation or transfer or unlawful confinement” along with “taking of hostages.”²⁷ The Conventions require signatory states to prosecute persons who have committed grave breaches or extradite them to other countries for prosecution.²⁸ Although the Geneva Conventions do not specify punishments for grave breaches, they do require states to enact legislation providing “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.”²⁹

The War Crimes Act, originally enacted in 1996, serves that purpose in the United States. This legislation covers the acts of any U.S. citizen, whether or not they are members of the armed forces.³⁰ The Act applies to conduct “inside or outside the United States.”³¹ It de-

vides that “grave breaches . . . shall be regarded as war crimes.” Protocol I, *supra* note 20, art. 85. For various reasons, the United States Senate has not ratified Protocol I.

25. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

26. Geneva Convention III, *supra* note 25, art. 130; Geneva Convention IV, *supra* note 25, art. 147.

27. Geneva Convention IV, *supra* note 25, art. 147.

28. Geneva Convention I, *supra* note 25, art. 49; Geneva Convention II, *supra* note 25, art. 50; Geneva Convention III, *supra* note 25, art. 129; Geneva Convention IV, *supra* note 25, art. 146.

29. Geneva Convention I, *supra* note 25, art. 49; Geneva Convention II, *supra* note 25, art. 50; Geneva Convention III, *supra* note 25, art. 129; Geneva Convention IV, *supra* note 25, art. 146.

30. 18 U.S.C. § 2441(b) (2006). *See also* 8 U.S.C. §1101(a)(22) (2006) (defining “national of the United States” as someone who is a U.S. citizen or owes permanent allegiance to the U.S.).

31. 18 U.S.C. § 2441(a).

finer war crimes in accordance with the grave breaches provisions of the Geneva Conventions: “any conduct” which the Conventions identify as a grave breach is a war crime under U.S. law.³²

In fact, the War Crimes Act goes beyond the Conventions’ requirements by referencing Common Article 3 in its statutory definition of war crimes.³³ Common Article 3, so called because it appears in each of the four Geneva Conventions, sets out rules to protect persons not actively participating in hostilities. This includes soldiers or sailors who “lay down their arms” and all those “placed hors de combat by sickness, wounds, detention, or any other cause.”³⁴ Among other things, Common Article 3 prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”³⁵ The Geneva Conventions do not use the term “grave breaches” in connection with Common Article 3, but Congress did when it defined war crimes in the War Crimes Act.³⁶ This statutory provision has had significant implications in the war on terrorism.

A few months after the terrorist attacks of September 11, 2001 (hereinafter referred to as “9/11”), the Bush Administration decided that the Geneva Conventions did not protect members of Al Qaeda.³⁷ Administration officials were particularly concerned with Common Article 3’s prohibition of “outrages upon personal dignity, in particular, humiliating and degrading treatment.”³⁸ Several years passed before the question of whether the Geneva Conventions applied to

32. *Id.* § 2441(c).

33. *Id.* § 2441(c)(3).

34. Geneva Convention I, *supra* note 25, art. 3; Geneva Convention II, *supra* note 25, art. 3; Geneva Convention III, *supra* note 25, art. 3; Geneva Convention IV, *supra* note 25, art. 3.

35. Geneva Convention I, *supra* note 25, art. 3; Geneva Convention II, *supra* note 25, art. 3; Geneva Convention III, *supra* note 25, art. 3; Geneva Convention IV, *supra* note 25, art. 3.

36. 18 U.S.C. § 2441(c)(3). *See also* Geneva Convention I, *supra* note 25, art. 3; Geneva Convention II, *supra* note 25, art. 3; Geneva Convention III, *supra* note 25, art. 3; Geneva Convention IV, *supra* note 25, art. 3 (listing acts prohibited “at any time and in any place whatsoever”).

37. Memorandum from President George W. Bush to Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> [hereinafter Memorandum from President].

38. Adam Liptak, *Interrogation Methods Rejected by Military Win Bush’s Support*, N.Y. TIMES, Sept. 8, 2006, <http://www.nytimes.com/2006/09/08/washington/08legal.html> (internal quotations omitted).

the war on terrorism came before the Supreme Court, which ruled that Common Article 3 applied to the conflict with Al Qaeda.³⁹ In response to that ruling, Congress amended the War Crimes Act.⁴⁰ Previously, the Act labeled “any violation” of Common Article 3 a war crime.⁴¹ The amendment, drafted by the Bush Administration,⁴² restricted Common Article 3 violations that could be considered war crimes under U.S. law to those Congress specifically identified as grave breaches of Common Article 3. The War Crimes Act, as amended, omitted “outrages upon personal dignity.”⁴³

Yet the revised legislation identified several other offenses as grave breaches of Common Article 3. The resulting statutory list included acts of torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.⁴⁴ If courts decided that this statutory amendment did not apply retroactively, Common Article 3’s general prohibition against “violence to life and person” would also apply through the War Crimes Act.

The War Crimes Act also incorporates some parts of the Law of the Hague, which regulates the means and methods of warfare. As a result, the Act criminalizes the use of particular weapons, like poison.⁴⁵ It renders certain methods of warfare (e.g., perfidy and no quarter) illegal.⁴⁶ The War Crimes Act also protects civilians and persons *hors de combat* by reference to the Law of the Hague’s provisions prohibiting killing or wounding enemies who have surrendered,⁴⁷ using arms calculated to cause unnecessary suffering,⁴⁸ or attacking undefended towns or buildings. The Law of the Hague also requires armed forces to take all necessary steps to spare hospitals and religious buildings from bombardment unless they are used at that time

39. Hamdan v. Rumsfeld, 548 U.S. 557, 628–31 (2006).

40. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2633–35 (2006) (codified as amended at 18 U.S.C. § 2441 (2006)).

41. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 105-118, 111 Stat. 2386, 2436 (1997) (codified as amended at 18 U.S.C. § 2441 (2006)).

42. Liptak, *supra* note 38; CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 309–11 (2007).

43. 18 U.S.C. § 2441 (2006).

44. *Id.* § 2441(d).

45. *Id.* § 2441(c)(2); Hague Convention IV, *supra* note 16, art. 23(a).

46. 18 U.S.C. § 2441(c)(2); Hague Convention IV, *supra* note 16, art. 23(d), 23(f).

47. 18 U.S.C. § 2441(c)(2); Hague Convention IV, *supra* note 16, art. 23(c).

48. 18 U.S.C. § 2441(c)(2); Hague Convention IV, *supra* note 16, art. 23(e).

for military purposes.⁴⁹ Failure to do so is also a federal criminal offense under the War Crimes Act.⁵⁰

In short, Congress left in place a range of acts that constitute war crimes under U.S. law. The statutory language does not limit war crimes to large-scale atrocities. It may be argued, however, that the law should be applied to reflect popular understanding and that federal prosecutors should confine their enforcement of the War Crimes Act to large-scale atrocities. This suggestion is open to question.

Requiring a sizable number of victims—as the term “*large scale*” implies⁵¹—is contrary to the plain language of the statute. The War Crimes Act does not impose any such quantitative requirement. Even one victim may suffice under this legislation, which repeatedly describes the number of victims as “one or more.”⁵² For instance, the legislation defines murder to include the “act of a person who intentionally kills . . . one or more persons taking no active part in the hostilities.”⁵³

Besides, classifying war crimes strictly by the numbers risks leaving out acts that constitute crimes of war under practically anyone’s definition. Consider a well-publicized incident from the 1980s. El Salvador national guardsmen raped and murdered four American churchwomen during that country’s civil war.⁵⁴ Who would contend that, simply because the number of victims did not pass some arbitrary threshold, the national guardsmen did not commit war crimes?

It may be suggested that the reason this incident was considered a war crime, despite the small number of victims, was that it was an atrocity and perceived as such. Yet using the word “atrocity” creates additional difficulties. When that becomes the baseline to determine what constitutes a war crime, that loaded term appears to engender a specious form of reasoning by analogy. The standard for defining war crimes today is taken, at least implicitly, from the worst atrocities of the past. Consider a statement made by Harvard Law School Professor Charles Fried: “If you cannot see the difference between Hitler and Dick Cheney, between Stalin and Donald Rumsfeld, between Mao and

49. 18 U.S.C. § 2441(c)(2); Hague Convention IV, *supra* note 16, art. 27.

50. The last category of war crimes under the War Crimes Act concerns the use of mines and booby-traps. 18 U.S.C. §2441(c)(4).

51. See RATNER ET AL., ACCOUNTABILITY, *supra* note 24, at 60 (noting that crimes against humanity, when defined as “against any civilian population,” implies large-scale).

52. 18 U.S.C. § 2441(d).

53. *Id.* § 2441(d)(1)(D).

54. *Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002).

Alberto Gonzales, there may be no point in our talking.”⁵⁵ On that basis, Fried dismissed the idea of prosecuting Bush Administration officials.⁵⁶ Hitler, Stalin, and Mao set a high bar. When it comes to crimes against humanity and crimes of war, the twentieth century was the scene of previously unimaginable horrors. As with the emphasis on “large scale,” casting about for “atrocities” equivalent to actions taken by the most ruthless totalitarian regimes would exempt from criminal liability conduct that is condemned by the public as well as the law.

The argument to this point—that the definition of war crimes is not limited to large-scale atrocities—should not be taken to imply that the conduct in question during the war on terrorism amounted to nothing more than minor offenses and mere technical violations of the law. Putting aside for the moment the question of the President’s responsibility, a cursory review of the treatment of prisoners in Iraq, Afghanistan, Guantánamo, and CIA black sites suggests otherwise. At least 100 persons died in U.S. custody.⁵⁷ Military investigators classified over one-quarter of these as homicides.⁵⁸ One of those killed was a twenty-two-year-old Afghan taxi driver named Dilawar, whom interrogators believed to be “almost certainly innocent” of any part in a rocket attack for which he was arrested.⁵⁹ While Dilawar was shackled, soldiers struck him in his legs so often that a coroner likened his fatal injuries to those sustained by someone run over by a bus.⁶⁰ There were reports of inmates threatened with execution.⁶¹ One prisoner was compelled to watch the mock execution of his fourteen-year-old

55. Charles Fried, Op-Ed., *History’s Verdict*, N.Y. TIMES, Jan. 11, 2009, <http://www.nytimes.com/2009/01/11/opinion/11fried.html>.

56. *Id.*

57. *US Detainee Death Toll ‘Hits 108,’* BBC NEWS (Mar. 16, 2005), <http://news.bbc.co.uk/2/hi/americas/4738008.stm>.

58. Douglas Jehl & Eric Schmitt, *U.S. Military Says 26 Inmate Deaths May Be Homicide*, N.Y. TIMES, Mar. 16, 2005, <http://www.nytimes.com/2005/03/16/politics/16abuse.html?sq=U.S.>

59. Tim Golden, *Years After 2 Afghans Died, Abuse Case Falter*, N.Y. TIMES, Feb. 13, 2006, <http://www.nytimes.com/2006/02/13/national/13bagram.html>. In Iraq, military intelligence officers of the Coalition estimated that 70–90% of persons taken into custody were arrested by mistake. INT’L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PERSONS PROTECTED BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION § 1 (2004) [hereinafter ICRC REPORT].

60. Golden, *supra* note 59, at 1.

61. CIA INSPECTOR GENERAL, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003), at 70–72 (2004) [hereinafter CIA IG SPECIAL REVIEW] (noting that “the debriefer had staged a mock execution”).

son.⁶² A high-value detainee, Khalid Sheikh Mohammed, was waterboarded 183 times in one month.⁶³ More widespread were accounts of detainees who were slapped, punched, kicked, choked, kept naked for weeks, and slammed into walls (a technique called “walling”).⁶⁴ Some prisoners were beaten with pistols and rifle butts.⁶⁵ Shackling prisoners in stressed positions for lengthy periods of time was a common technique.⁶⁶ In a detention center known as the Black Room, run by Special Operations Task Force 6-26, posted signs read: “No Blood, No Foul.” A Defense Department official explained its meaning: “if you don’t make them bleed, they can’t prosecute for it.”⁶⁷

That the record on the treatment of prisoners can be legitimately framed as one of possible war crimes is bolstered by the conclusions reached by high-ranking military officers. The Department of Defense assigned Major General Antonio M. Taguba the task of compiling an official report on Abu Ghraib.⁶⁸ He subsequently stated that “there is no longer any doubt” that the Bush Administration “committed war crimes.”⁶⁹ In 2007, the Bush Administration appointed Susan J. Crawford as the convening authority for military commissions.⁷⁰ She had

62. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 399 (2005).

63. CIA IG SPECIAL REVIEW, *supra* note 61, at 90.

64. ICRC REPORT, *supra* note 59, § 3.1; Neil A. Lewis & David Johnston, *New F.B.I. Files Described Abuse of Iraq Inmates*, N.Y. TIMES, Dec. 21, 2004, <http://www.nytimes.com/2004/12/21/politics/21abuse.html>.

65. ICRC REPORT, *supra* note 59, § 3.4; Eric Schmitt & Carolyn Marshall, *In Secret Unit’s ‘Black Room,’ a Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2009, <http://www.nytimes.com/2006/03/19/international/middleeast/19abuse.html>.

66. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Central Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee, at 13 (May 10, 2005), *available at* <http://www.fas.org/irp/agency/doj/olc/techniques.pdf> [hereinafter Techniques Memorandum]; *City on the Hill or Prison on the Bay? Part III: Guantanamo—The Role of the FBI: Hearing Before the Subcomm. on Int’l Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 13 (2008) (statement of Glenn Fine, Inspector Gen., U.S. Dep’t of Justice).

67. Schmitt & Marshall, *supra* note 65 (internal quotations omitted).

68. See ANTONIO M. TAGUBA, AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004).

69. Warren Strobel, *General Who Probed Abu Ghraib Says Bush Officials Committed War Crimes*, McCLATCHY (June 18, 2008), <http://www.mcclatchydc.com/2008/06/18/41514/general-who-probed-abu-ghraib.html> (internal quotations omitted).

70. Bob Woodward, *Detainee Tortured, Says U.S. Official: Trial Overseer Cites ‘Abusive’ Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

previously served as the General Counsel of the Army under President Reagan.⁷¹ Crawford found in her official capacity that “we tortured” Mohammed al-Qahtani, and she accordingly declined to refer his case for prosecution. It is also of some consequence that the Federal Bureau of Investigation, the agency charged with investigating “any violation of Federal criminal law involving Government officers and employees,”⁷² withdrew its agents from enhanced interrogations.⁷³

II. An Unchecked Presidency

Even if the popular conception of war crimes as large-scale atrocities can be set aside, there is another major reason why many Americans would balk at any proposal to try a U.S. president for war crimes. Crimes of war and crimes against humanity are usually associated with authoritarian regimes and military dictatorships or places torn by civil war where there is no effective government. This is indeed a common thread in the most notorious cases in which heads of state have been indicted for international crimes.⁷⁴ The case is different for democracies, so the thinking goes, especially the United States.

The idea that no American president would ever commit war crimes—really an assertion that “it cannot happen here”—might seem presumptuous. Yet this idea cannot be easily dismissed in a political system designed by its founders to check the abuse of power. They sought to subordinate the government to a higher law—the “supreme law of the land,” in the words of the Constitution.⁷⁵ Wary of relying on the character of individuals in office, the Constitution’s framers divided the powers of government.⁷⁶ In theory, any president inclined to violate the laws of war would find Congress and an independent judiciary standing in the way. In a transparent policymaking environment, the president’s actions should be subject to the scrutiny of a free press and, ultimately, the people. With all that, the idea that it

71. *Id.*

72. 28 U.S.C. § 535(a) (2006).

73. The International Committee of the Red Cross found that the techniques used by the CIA in interrogating suspects “constituted torture.” INT’L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY 26 (2007).

74. CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 52–60 (1st ed. 2003).

75. U.S. CONST. art. VI, § 2.

76. *See, e.g.*, THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., Yale University Press 2009) (describing the distribution of governmental powers as a remedy for the defects of human nature).

cannot happen here can be reframed as a question: How could any president get away with committing war crimes?

Within the Bush administration, the stage was set for violating the laws of war by an inflated notion of the president's powers as commander-in-chief. The prevailing view in the Bush White House was that the wartime president's powers could override *all* checks and balances.⁷⁷ The Office of Legal Counsel ("OLC"), a previously little-known entity in the Department of Justice, became the vehicle for putting that position into effect.⁷⁸ Operating as an adjunct to the U.S. Attorney General,⁷⁹ the OLC is responsible for interpreting the law for the executive branch.⁸⁰ Its legal opinions are regarded as binding on all other executive departments, agencies, and personnel, subject to the president's authority.⁸¹ During the early years of the Bush presidency, the OLC's opinions on the war on terrorism were shaped to a considerable degree by a small ad hoc group of like-minded administration lawyers who called themselves the "war council."⁸² This group included Alberto R. Gonzales (then-White House Counsel), David Addington (serving then as Counsel to the Vice President), Timothy E. Flanigan (White House Deputy Counsel), William J. Haynes II (General Counsel of the Defense Department), and John Yoo (Deputy Assistant Attorney General of the OLC).⁸³ They seemed ready to give legal approval to anything the White House sought to do in the war on terrorism.

Two weeks after 9/11, Yoo issued a memorandum on the President's war powers, which laid the foundation for all that followed.

77. Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 3, 7–16 (2006).

78. See generally HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009) (examining the legal advice given to the Bush administration in the war on terror).

79. 28 U.S.C. §§ 511–13 (2000).

80. 28 C.F.R. § 0.25(a) (2007).

81. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Attorneys of the Office, Re: Best Practices for OLC Opinions, at 1 (May 16, 2005), available at <http://www.justice.gov/olc/best-practices-memo.pdf>; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577 (2007).

82. Tom Lasseter, *Day 4: Easing of Laws that Led to Detainee Abuse Hatched in Secret*, MCCLATCHY (Oct. 6, 2009), <http://www.mcclatchydc.com/2008/06/18/38886/day-4-easing-of-laws-that-led.html>.

83. *Id.* Speaking of the Bush administration's lawyers generally, Jack Goldsmith, who headed the OLC from 2003 to 2004, stated: "[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11." JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129–30 (2007).

This memorandum stated that “in the exercise of his plenary power to use military force, the President’s decisions are for him alone and are unreviewable.”⁸⁴ The OLC subsequently espoused the following positions:

- the President has “unrestricted discretion” to unilaterally suspend the Geneva Conventions and other treaties ratified by the U.S. Senate;⁸⁵
- the President can “suspend or terminate” the Convention Against Torture;⁸⁶
- the President is “free to override” customary international law “at his discretion”;⁸⁷
- Congress cannot “interfere” with the President’s authority to detain U.S. citizens he designates as enemy combatants;⁸⁸
- the President has “plenary” authority and “full discretion” to transfer to other countries those individuals he identifies as terrorists, if they were captured outside of the United States;⁸⁹
- the Fourth Amendment does not apply to domestic military operations designed to deter and prevent terrorist attacks;⁹⁰

84. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Timothy Flanigan, Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, at n.32 (Sept. 25, 2001) [hereinafter Constitutional Authority Memorandum], *available at* <http://www.justice.gov/olc/warpowers925.htm>.

85. Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, at 13 (Jan. 22, 2002), *available at* <http://www.torturingdemocracy.org/documents/20020122.pdf>.

86. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, at 47 (Mar. 14, 2003) [hereinafter Military Interrogation Memorandum], *available at* <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf>.

87. *Id.* at 2.

88. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Daniel J. Bryant, Assistant Att’y Gen., U.S. Dep’t of Justice, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens, at 1 (June 27, 2002), *available at* <http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf>.

89. Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations, at 1 (Mar. 13, 2002), *available at* <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020313.pdf>.

90. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice, to

- Congress cannot “regulate” the President’s decisions on the methods used to interrogate captured combatants;⁹¹
- enforcing the Anti-Torture Act “would represent an unconstitutional infringement of the President’s authority to conduct war”;⁹²
- the Anti-Torture Act does not apply to Guantánamo;⁹³ and
- the War Crimes Act does not apply to the interrogation of Taliban or Al Qaeda detainees.⁹⁴

The overall theme is hard to miss: the war on terrorism freed President Bush from legal constraints embodied in congressional acts, treaty obligations, and constitutional provisions.⁹⁵ Of particular significance, the OLC repeatedly issued opinions on the laws of war. As the treatment of detainees emerged as a major issue, the OLC offered legal interpretations that enabled the administration to devise detention practices seemingly in conflict with the Geneva Conventions, the War Crimes Act, and other laws prohibiting torture (e.g., the Convention Against Torture and the Anti-Torture Act).⁹⁶ Regarding the War Crimes Act, the OLC emphasized that its “binding” interpretation foreclosed prosecutions of U.S. personnel for actions taken against members of the Taliban and Al Qaeda.⁹⁷

Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States 34 (Oct. 23, 2001) [hereinafter Military Force Memorandum], *available at* <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011023.pdf>. *Cf.* Memorandum for the files from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities (Oct. 6, 2008) (superseding Military Force Memorandum), *available at* <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20081006.pdf>.

91. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 35 (Aug. 1, 2002) [hereinafter Standards of Conduct for Interrogation Memorandum], *available at* <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>. *Cf.* Memorandum from Daniel Levin, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Dep. Att’y Gen., U.S. Dep’t of Justice, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004) (superseding Standards of Conduct for Interrogation Memorandum), *available at* <http://www.justice.gov/olc/18usc23402340a2.htm>.

92. Standards of Conduct for Interrogation Memorandum, *supra* note 91, at 2.

93. Military Interrogation Memorandum, *supra* note 86, at 35.

94. *Id.* at 32.

95. According to the OLC’s way of thinking, the president’s actions were lawful because the Constitution had vested the commander-in-chief with superior authority in wartime. Constitutional Authority Memorandum, *supra* note 84.

96. *See supra* notes 85–89, 91–94 and accompanying text.

97. Military Interrogation Memorandum, *supra* note 86, at 34.

With these confidential legal opinions in hand, the President could sidestep U.S. law, and, in several cases, no one outside the executive branch would know.⁹⁸ That is why some observers describe these OLC opinions as secret laws promulgated within the executive branch.⁹⁹ There may be reasons to keep some opinions confidential for a period of time,¹⁰⁰ but when the OLC secretly countermands public laws duly enacted by Congress and signed into law by previous presidents, the consequences can be profound. To take one example, armed with OLC interpretations of the law, President Bush authorized warrantless wiretaps of Americans' international telephone conversations and emails. This contravened the requirements of the Foreign Intelligence Surveillance Act, a statute that had been in place for over a quarter-century.¹⁰¹ The surveillance program was kept secret for four years, until *The New York Times* reported its existence in December 2005.¹⁰²

While this was going on within the administration, the other branches of government were less effective in checking the President than the Constitution's framers might have imagined. Arguably, Congress as an institution was better equipped than the judiciary to call the public's attention to the administration's actions. Yet legislative oversight was limited during the Bush years.¹⁰³ Dominated by Republicans for much of President Bush's tenure, Congress mostly refrained

98. SAVAGE, *supra* note 42, at 149. Obviously, some OLC opinions have come to light through leaks (including the so-called torture memo), press reports, and FOIA requests. Some were not known until the Obama administration released them. Others remain secret.

99. *Secret Law and the Threat to Democratic and Accountable Government, Before the Subcomm. on the Constitution of S. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Dawn E. Johnsen) [hereinafter Statement of Dawn E. Johnsen]; Glenn Greenwald, *The Newly Released Secret Laws of the Bush Administration*, SALON.COM (Mar. 3, 2009, 05:31 ET), http://www.salon.com/news/opinion/glenn_greenwald/2009/03/03/yoo.

100. There may be legitimate concerns about the immediate and total disclosure of every OLC opinion (e.g., exposing covert intelligence agents or stifling internal deliberations within the executive branch in moments of crisis). Johnsen, *supra* note 81, at 1597. These concerns can be alleviated by redacting information that could jeopardize national security or delaying the release of memoranda. Statement of Dawn E. Johnsen, *supra* note 99, at 2.

101. 50 U.S.C. §§ 1801–29 (2006).

102. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html>. See also Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, <http://www.nytimes.com/2007/10/04/washington/04interrogate.html> (noting the secret endorsement of severe interrogations).

103. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 151–58 (2006).

from conducting in-depth investigations of the executive branch.¹⁰⁴ Key congressional committees avoided holding hearings that might embarrass President Bush. The Senate Intelligence Committee declined to investigate the administration's wiretapping program; the vote was strictly along party lines.¹⁰⁵ Congressional reaction to the Abu Ghraib scandal is telling. No one cared to defend what happened there, but when Senator John Warner (R-Virginia), chairman of the Senate Armed Services Committee, began public hearings looking into Abu Ghraib, some of his Republican colleagues threatened to strip him of his chairmanship.¹⁰⁶ The hearings were then toned down.¹⁰⁷

Surprisingly, perhaps, legislative oversight of the administration's counterterrorism policies did not increase dramatically after Democrats took control following the 2006 election. The party's congressional leadership was concerned that the appearance of partisanship would alienate the public.¹⁰⁸ Some investigations went ahead but with little measurable effect in checking the President. Committees issuing subpoenas to compel administration officials to testify often encountered broad assertions of executive privilege.¹⁰⁹ It is true that the Senate Armed Services Committee, with Senator Carl Levin (D-Michigan) at the helm, conducted an extensive inquiry into the treatment of detainees.¹¹⁰ Its report was revealing, but it was issued two weeks after Barack Obama won the 2008 presidential election, too late to alter Bush Administration policies.¹¹¹

When Congress did enact legislation designed to restrain President Bush's wartime powers, the administration pushed back relentlessly. A striking example involved the McCain Torture Ban, an amendment named for its chief sponsor, Senator John McCain (R-Arizona). The origins of this law, adopted in December 2005, can be

104. *Id.* at 155.

105. SAVAGE, *supra* note 42, at 316.

106. Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES, Nov. 9, 2008, <http://www.nytimes.com/2008/11/09/magazine/09power-t.html> (discussing Republican threats).

107. *Id.*

108. Susan Ferrechio, *Pelosi: Bush Impeachment 'Off the Table'*, N.Y. TIMES, Nov. 8, 2006, http://www.nytimes.com/cq/2006/11/08/cq_1916.html; Bruce Fein, *The Heart of Queens*, SLATE (Aug. 21, 2007, 4:49 PM ET), <http://www.slate.com/id/2172547/>.

109. Carrie Johnson, *Lawmaker Threatens Subpoenas for Aides: Officials Spurn Hearing on Torture*, WASH. POST, Apr. 29, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042802268.html>.

110. S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008) [hereinafter SENATE INQUIRY].

111. *Id.*

traced to the Judiciary Committee's consideration of President Bush's nomination of Alberto Gonzales as Attorney General. In reply to lawmakers' questions, Gonzales disclosed the administration's view that legal prohibitions against torture (e.g., the Convention Against Torture) did not protect noncitizen detainees held outside the United States.¹¹² Senator McCain subsequently introduced an amendment to the 2006 Defense Authorization Bill that reiterated the prohibition against torture and cruel, inhuman, and degrading treatment.¹¹³ His proposed legislation applied to anyone in U.S. custody anywhere.¹¹⁴ The White House threatened a veto.¹¹⁵ The administration tried to negotiate an exemption for CIA agents conducting interrogations overseas.¹¹⁶ Without exempting the CIA,¹¹⁷ lawmakers passed the bill by overwhelming majorities—enough to override a veto (90-9 in the Senate and 308-122 in the House of Representatives).¹¹⁸ The President signed the bill into law, but a few hours later the White House released a so-called signing statement.¹¹⁹ It affirmed the President's power as commander-in-chief to disregard the McCain Torture Ban when he believed it was necessary for national security.¹²⁰

The Bush Administration was just as persistent in its efforts to block the federal judiciary from reviewing its antiterrorism policies. Several important cases concerned the U.S. Naval Base at Guantánamo Bay, Cuba. The administration chose that site as a detention center in the belief that Guantánamo was outside the jurisdiction of the federal courts.¹²¹ The Supreme Court rejected that view, and, in a series of decisions, took the administration to task. In *Rasul v. Bush*, the Court held that the habeas corpus statute gave federal courts jurisdiction to hear claims brought by foreign nationals challenging the legality of their detention at Guantánamo.¹²² In the course of striking down military commissions established by presidential order, the

112. SAVAGE, *supra* note 42, at 213.

113. S. Amend. 1977 to Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, H.R. 2863, 109th Cong. (2005).

114. *Id.*

115. SAVAGE, *supra* note 42, at 221.

116. *Id.* at 222.

117. *Id.* at 222–23.

118. *Id.* at 221–22.

119. *Id.* at 224.

120. *Id.* at 225.

121. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142–43 (2006); SAVAGE, *supra* note 42, at 144–45.

122. *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

Court in *Hamdan v. Rumsfeld* made clear that Common Article 3 applies in the conflict with Al Qaeda and provides minimal standards of protection for detainees at Guantánamo and elsewhere.¹²³ In *Boumediene v. Bush*, the Court ruled that the Constitution guarantees the writ of habeas corpus to aliens held at Guantánamo.¹²⁴

Some of these cases may go down as landmarks in the history of the Supreme Court. As an immediate check on President Bush, though, the Justices were less effective than the rulings themselves suggest.¹²⁵ This was partly due to the nature of the judicial process and the time it took to adjudicate the detainees' cases. The judicial process is deliberate. Judges address issues case by case, often sidestepping questions that are not necessary to decide the case at hand. It can take years for a case to reach the nation's highest court, let alone to obtain a definitive ruling.

The cases involving the detentions at Guantánamo proved to be no exception, notwithstanding the broad policy implications of the Court's decisions. Delay worked to the administration's advantage. By the time the Court decided *Boumediene*, President Bush was in his last year in office. By then, some detainees had been "locked up for six years"¹²⁶ without having the opportunity to contest the legality of their detention in habeas corpus proceedings.¹²⁷ Besides, the Court's decision in *Boumediene* did not free anyone immediately, as the Court remanded the case to the lower federal courts for further proceedings.¹²⁸

The administration contributed to the delay by forcing the Supreme Court to address repeatedly the threshold question of jurisdiction.¹²⁹ *Rasul*, the Court's initial decision on habeas corpus, was based on a statutory interpretation.¹³⁰ This gave the White House the opportunity to convince Congress to revise the statute. Lawmakers obliged with the Detainee Treatment Act of 2005, which deprived the federal courts of jurisdiction over habeas claims filed by Guantánamo detain-

123. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–31 (2006).

124. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

125. BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 105–13 (2008).

126. *Boumediene*, 553 U.S. at 799 (Souter, J., concurring).

127. *Id.* at 732–35.

128. *Id.* at 798.

129. See HOWARD BALL, *BUSH, THE DETAINEES & THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR* 87–186 (2007) (discussing the power dynamic between the Bush Administration and the U.S. Supreme Court).

130. *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

ees.¹³¹ The Court in *Hamdan* decided this Act did not cover pending cases.¹³² Pressed by the administration, Congress came back with the Military Commissions Act, which clearly removed pending detainee cases from the federal courts.¹³³ Only then did the Court reach the constitutional question of habeas corpus in *Boumediene*, which declared that provision of the Military Commissions Act unconstitutional.¹³⁴

In any event, this progression of cases represented only part of the federal judiciary's response to the Bush Administration's actions in the war on terrorism. Overall results were mixed. While the Bush Administration certainly did not win everything it sought, the Court conceded important points that had not been previously established in law. *Hamdi v. Rumsfeld* is a case in point.¹³⁵ On the one hand, the Court ruled that the Due Process Clause protects American citizens captured overseas and held as enemy combatants.¹³⁶ On the other hand, *Hamdi* endorsed the view that the president can designate U.S. citizens as enemy combatants subject to indefinite detention.¹³⁷

In addition, the federal courts mostly left alone important elements of the administration's antiterrorism program, including domestic wiretapping and extraordinary rendition.¹³⁸ It might have been possible to assess the legality of these policies in civil lawsuits filed against the administration. Among the most notable cases were those brought by Maher Arar, a Canadian citizen,¹³⁹ and Khaled el-Masri, a German citizen.¹⁴⁰ Mistakenly linked to terrorist organizations, each was picked up, sent abroad (Arar to Syria and el-Masri to a secret CIA

131. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680.

132. *Hamdan v. Rumsfeld*, 548 U.S. 557, 574–84 (2006).

133. Military Commissions Act of 2006, Pub. L. No. 109-366, §7, 120 Stat. 2600, 2624.

134. *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

135. 542 U.S. 507 (2004).

136. *Id.* at 533–35.

137. *Id.* at 521 (finding that citizen enemy combatants were entitled to access to counsel and the right to appear before a neutral decision maker to determine “the factual basis of the status determination”).

138. The United States has used extraordinary rendition to transfer individuals suspected of terrorism to other countries like Saudi Arabia, Syria, and Jordan for interrogation. The transfers are extrajudicial. See, e.g., Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER (Feb. 14, 2005), http://www.newyorker.com/archive/2005/02/14/050214fa_fact6 (critically analyzing the development of extraordinary rendition).

139. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), cert. denied, 130 S. Ct. 3409 (2010).

140. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

prison), imprisoned for a substantial period of time, and tortured.¹⁴¹ Justice Department lawyers asked judges to dismiss their cases based on the state-secrets privilege.¹⁴² That privilege, originally developed during the Cold War to protect classified information,¹⁴³ became the basis for the government's argument that these cases could not go forward without divulging information that would compromise national security.¹⁴⁴ Federal judges agreed, and these lawsuits, along with others like them, were dismissed.¹⁴⁵

Ultimately, checking presidential excess depends upon a vigilant electorate, but public reaction was muted for several reasons. First, anxiety over security lasted for some time following 9/11. Second, detention practices targeting noncitizens did not directly affect voters. Third, the administration was able to keep major antiterrorism policies secret for years. Additionally, when questionable practices came to light (e.g., warrantless wiretapping and Abu Ghraib), the White House was remarkably effective in neutralizing opposition.¹⁴⁶ In conjunction with a compliant Congress, a Court handicapped by the nature of the judicial process, and secret legal opinions assuring the wartime commander-in-chief that he could ignore the Geneva Conventions and the War Crimes Act, the conditions were ripe for the President to put into effect policies inimical to the most fundamental laws of war.

III. The Case Against the President

The question of whether the President actually committed war crimes remains. One way to answer that question is through a criminal trial. Trials are imperfect, but few institutions in public affairs can give meaning to events like trials can. A well-run trial can make complex cases understandable through the orderly presentation of evidence. Adversarial proceedings in the Anglo-American legal tradition enable observers to weigh one side of the case directly against the other. Plus,

141. *Arar*, 585 F.3d at 565–567; *id.* at 584–88 (Sack, J., concurring in part and dissenting in part); *El-Masri*, 479 F.3d at 300.

142. *El-Masri*, 479 F.3d at 301.

143. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

144. *El-Masri*, 479 F.3d at 301.

145. *Id.* at 300; *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 585 F.3d 559 (2d Cir. 2009) (affirming the dismissal of Arar's complaint without reaching the issue concerning the state secrets privilege).

146. Eric Lichtblau, *Bush Defends Spy Program and Denies Misleading Public*, N.Y. TIMES, Jan. 2, 2006, <http://www.nytimes.com/2006/01/02/politics/02spy.html>.

criminal trials provide a time-honored process to assign responsibility for serious violations of public law.

The prospects of actually holding a war crimes trial of President Bush are remote. Yet thinking through the case as if it were going to trial can lead to a more pointed inquiry. Without examining every issue that could arise at trial, this section uses the idea of an imagined prosecution to analyze the President's criminal liability. Part III.A surveys legal issues that prosecutors would likely address in advance of trial, including the legal grounds for holding the President criminally responsible. Part III.B constructs a hypothetical cross-examination of President Bush as a vehicle to assess his actions under the laws of war.

A. Legal Issues

In the usual case, when there is probable cause to believe a person has committed a federal offense,¹⁴⁷ U.S. Attorneys consider several factors to determine whether prosecution is warranted (e.g., federal law-enforcement priorities, the nature and seriousness of the offense, and deterrent effects of prosecution).¹⁴⁸ Trying the President for war crimes is anything but ordinary. In this case, the decision whether to prosecute may depend in the first instance on what the Constitution has to say.

The Constitution does not specifically discuss war crimes, but it does say that former presidents are "subject to Indictment, Trial, Judgment, and Punishment, according to Law."¹⁴⁹ In *The Federalist No. 69*, Alexander Hamilton stated that presidents, once out of office, are "liable to prosecution and punishment in the ordinary course of law."¹⁵⁰ He further suggested that punishment could entail "forfeiture of life and estate."¹⁵¹ It seems safe to say that Hamilton's statement, contemplating the death penalty for the nation's former leaders, goes too far by today's standards. Yet it does reflect the founders' commitment to

147. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL tit. 9, § 9-27.200 (1997).

148. *Id.* § 9-27.230.

149. U.S. CONST. art. I, § 3, cl. 7. This provision specifically addressed the question whether officials impeached and removed from office were subject to criminal proceedings afterwards. Constitutional scholars continue to debate whether sitting presidents may be indicted and tried in a court of law. Compare Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671 (1999) (arguing that sitting presidents are immune from criminal prosecutions), with Jonathan Turley, "From Pillar to Post": *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049 (2000) (arguing that there is no immunity for sitting presidents).

150. THE FEDERALIST NO. 69, *supra* note 76, at 348 (Alexander Hamilton).

151. THE FEDERALIST NO. 77, *supra* note 76, at 390 (Alexander Hamilton).

the rule of law—the idea that even the highest-ranking public officials are not exempt from ordinary criminal process.

As for what charges to recommend for the grand jury's consideration, torture might appear to be the obvious choice if public commentary is any indication.¹⁵² While the treatment of prisoners may turn out to be the focus of attention, prosecutors have several options to consider. The War Crimes Act applies to combat operations and de facto occupations as well as the treatment of prisoners.¹⁵³ There is something to be said for canvassing all phases of the war on terrorism.¹⁵⁴

Assuming that prosecutors concentrate on the treatment of persons in U.S. custody, the War Crimes Act provides an adequate framework for analysis for the purposes of this Article.¹⁵⁵ The War Crimes Act criminalizes “torture or inhuman treatment” and “wilfully causing

152. Andrew Sullivan, *Dear President Bush*, ATLANTIC, Oct. 2009, <http://www.theatlantic.com/magazine/archive/2009/10/dear-president-bush/7663/>; Horton, *supra* note 8; Nat Hentoff, *History Will Not Absolve Us*, VILLAGE VOICE (N.Y.), Aug. 21, 2007, <http://www.villagevoice.com/2007-08-21/news/history-will-not-absolve-us/>; Jeffrey Rosen, *A Torturous Decision*, N.Y. MAG., May 3, 2009, <http://nymag.com/news/politics/nationalinterest/56439/>.

153. 18 U.S.C. § 2441 (2006).

154. Some might wonder whether President Bush's role in taking the nation to war against Iraq qualifies as a war crime. Technically, that question falls under the heading of crimes against peace (as the crime of aggression) rather than as a violation of the laws of war. That does not diminish its importance. The crime of aggression was the focus of American prosecutors at the Nuremberg trials after World War II and the Tribunal declared it the “supreme international crime.” BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 46 (2003) (internal quotations omitted). In the Nuremberg Charter, it is defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” IMT Charter, *supra* note 16, art. 6(a). Ever since the UN Charter outlawed the use of force (except in self-defense), the crime of aggression has been treated as *jus cogens* under international law. Some commentators express little doubt that the war launched by President Bush was “a flagrant example” of a war of aggression. Richard Falk, *Introduction: On the Responsibility and Accountability of Leaders, Military Personnel, and Citizens in Wartime*, in *CRIMES OF WAR: IRAQ*, at xv, xvi (Richard Falk et al. eds., 2006). Prosecutors would probably approach the crime of aggression with caution, however. Generally speaking, precedent is lacking in international law because of a number of difficult legal questions (e.g., what is the legal definition of aggression, what are the legal grounds for holding individuals liable). RATNER ET AL., *ACCOUNTABILITY*, *supra* note 24, at 137–38. The facts regarding the war against Iraq, particularly Congress's open-ended authorization to use military force there, are bound to complicate a case already fraught with complexities. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 498.

155. The President cannot interpose the statutory defense Congress provided government personnel in the Detainee Treatment Act and the Military Commissions Act because this defense covered government personnel engaged in “specific operational practices” involving detention and interrogation. 42 U.S.C. § 2000dd-1 (2006).

great suffering or serious injury to body or health.”¹⁵⁶ The Act also defines several Common Article 3 violations that may be relevant.¹⁵⁷ These include torture, cruel or inhuman treatment, intentionally causing serious bodily injury, mutilation or maiming, and murder (including unintentional killing in the course of committing any of the other offenses).¹⁵⁸ Without reciting the statutory language for each of these offenses, it will be helpful to note that Congress defined the Common Article 3 offense of torture as

[t]he act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.¹⁵⁹

This definition of torture is considered a “specific intent” offense in which a special motive is one of the elements of the crime itself. The offense of “cruel or inhuman treatment” is similarly defined, but Congress dropped the specific intent requirement (the act need only be “intended to inflict”). The standard for judging the degree of pain and suffering for cruel and inhuman treatment is “serious” rather than “severe.” “[S]erious physical abuse” also qualifies as cruel or inhuman treatment.¹⁶⁰ Finally, if courts decline to give Congress’s amendment of the War Crimes Act retroactive effect, Common Article 3’s general prohibitions against “violence to life and person” and “out-

156. 18 U.S.C. § 2441(c)(1); Geneva Convention I, *supra* note 25, art. 50; Geneva Convention II, *supra* note 25, art. 51; Geneva Convention III, *supra* note 25, art. 130; Geneva Convention IV, *supra* note 25, art. 147.

157. Determining which statutory provisions apply depends on the classification of the persons protected under the Geneva Conventions, but every detainee would be covered by at least one of the statutory provisions of the War Crimes Act. 18 U.S.C. § 2441(c)(1), (c)(3); *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006).

158. 18 U.S.C. § 2441(d).

159. *Id.* § 2441(d)(1)(B). The federal antitorture statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340. Congress enacted this legislation to fulfill obligations under the Convention against Torture, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment for Punishment art. 2, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85, 114 [hereinafter *Convention Against Torture*].

160. 18 U.S.C. § 2441(d)(1)(B). Congress also defined “intentionally causing serious bodily injury” as a Common Article 3 violation: “the act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.” *Id.* § 2441(d)(1)(F).

rages upon personal dignity, in particular, humiliating and degrading treatment” come into play.¹⁶¹

The issue that looms large concerns the legal basis for extending criminal liability to President Bush. No one contends that the President physically committed any of these offenses. Yet, there are several other possibilities for holding the President legally responsible.¹⁶² One is the doctrine of superior responsibility, more widely known as command responsibility. Under the traditional application of this doctrine, a military commander can be held criminally liable for the acts of subordinates.¹⁶³ In recent years, international tribunals have extended this doctrine to civilian superiors.¹⁶⁴ Three points must be established for the doctrine to apply: (1) the existence of a superior-subordinate relationship; (2) the superior knew or should have known of the subordinate’s acts in violation of the laws of war; and (3) the superior failed to prevent or punish those acts.¹⁶⁵

The doctrine of superior responsibility might appear to provide a solid legal basis for holding President Bush accountable.¹⁶⁶ Upon closer inspection, however, several difficulties can be observed. The doctrine’s foundation in U.S. law is uncertain. True, the Supreme Court recognized the doctrine of command responsibility in a case from World War II.¹⁶⁷ That case involved a Japanese general who was tried by a military commission that concluded that he had “wilfully permitted” or “secretly ordered” the commission of war crimes.¹⁶⁸ However, American courts have hardly ever applied the doctrine since then.¹⁶⁹ Furthermore, there is no precedent for applying this doctrine

161. Geneva Convention I, *supra* note 25, art. 3; Geneva Convention II, *supra* note 25, art. 3; Geneva Convention III, *supra* note 25, art. 3; Geneva Convention IV, *supra* note 25, art. 3.

162. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04 (4th ed. 2006) (noting that liability for conspiracy does not require personal commission of the substantive crime); RATNER ET AL., ACCOUNTABILITY, *supra* note 24, at 143 (listing the “different forms of responsibility for the commission of an offense”).

163. ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION 259–60 (2008).

164. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 251 (2001).

165. *Ford v. Garcia*, 281 F.3d 1283, 1288 (11th Cir. 2002).

166. See Matthew D. Campbell, Note, *Bombs over Baghdad: Addressing Criminal Liability of the U.S. President for Acts of War*, 5 WASH. U. GLOB. STUD. L. REV. 235, 248 (2006).

167. *In re Yamashita*, 327 U.S. 1, 16 (1946).

168. See ZAHAR & SLUITER, *supra* note 163, at 508 (internal quotations omitted).

169. *Ford*, 281 F.3d at 1287–93 (reviewing the history of the command responsibility doctrine).

against U.S. officials.¹⁷⁰ So far as international law is concerned, the grounds for applying the doctrine against civilian leaders remain a source of debate, notwithstanding recent developments.¹⁷¹ Prudential considerations may also argue against applying the doctrine of superior responsibility in President Bush's case. As a practical matter, prosecutors in such an extraordinary case will be held to a higher standard than usual. Although there are strong arguments for employing the doctrine of superior responsibility in some instances (particularly with the command structure of military organizations), the doctrine's "should have known" standard may be perceived as inappropriately lowering the bar for finding the President guilty.¹⁷²

Besides the doctrine of superior responsibility, federal prosecutors could consider the concept of joint criminal enterprise that international tribunals have developed in recent years.¹⁷³ Conspiracy is another alternative, tracking the language of the War Crimes Act with regard to Common Article 3 violations. Arguably, a more fruitful approach for extending liability to the President as a principal can be found in the general criminal aiding and abetting statute of the United States Code. The statute, which recognizes various forms of criminal responsibility for acts that other persons physically commit,¹⁷⁴ provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.¹⁷⁵

In short, U.S. law provides prosecutors with a legal framework to link the President to the commission of war crimes. Whether the facts indicate that the President was criminally responsible is another matter. One can detect broad patterns in the conduct of the war on terrorism that point in the direction of the nation's top civilian

170. *Id.* (civil suit against El Salvadoran generals under the Torture Victim Protection Act).

171. ZAHAR & SLUITER, *supra* note 163, at 260. *But see* RATNER ET AL., ACCOUNTABILITY, *supra* note 24, at 146 (noting that "[i]t is today well established that superior responsibility is not confined to military commanders).

172. *See* RATNER ET AL., ACCOUNTABILITY, *supra* note 24, at 147 (reviewing the essential elements of finding superior responsibility).

173. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations, Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75 (2005).

174. 18 U.S.C. § 2 (2006).

175. *Id.*

leadership. The mistreatment of prisoners was not just widespread; it was systemic.¹⁷⁶ Bush administration officials appear to have engaged in a deliberate effort to circumvent professional military lawyers and exploit the OLC's position in the executive branch.¹⁷⁷ But while President Bush liked to tell Americans that he was their commander-in-chief, finding the President criminally responsible depends on what evidence detailing his involvement can be produced at trial.

B. Cross-Examining the President

Trials do not always uncover the truth of disputed events, but they can have defining moments crystallizing what happened and why it was right or wrong. Judging from the popular depiction of trials, nothing serves that purpose as well as the cross-examination of the accused.

This section sets forth a hypothetical cross-examination of President Bush. Its purpose is to highlight the President's role in the development of counterterrorism policies of questionable legality. The inquiry takes President Bush's actions in two areas as a point of departure. Both are matters of public record. One concerns his formal determination in early 2002 on the applicability of the Geneva Conventions in the war on terrorism.¹⁷⁸ The other has to do with the President's approval of waterboarding as an enhanced interrogation technique.¹⁷⁹ The questions are designed to establish a few key points, just as a prosecutor might hope to do in an actual trial.

Of course, no imaginary cross-examination can replicate real-world conditions. If this case went to trial, it is not clear that President Bush would testify. Like any criminal defendant, he would not be required to take the stand.¹⁸⁰ Even if he did, cross-examination would

176. M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION* 55–57, 109–40 (2010) (discussing the spread of harsh interrogation techniques and torture-enabling policies).

177. See, e.g., PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 134 (2008) (noting that "General Counsels and the senior JAG lawyers were bypassed"); JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* 14–15 (2007) (noting that Secretary Rumsfeld ignored the recommendations of "[t]he Judge Advocate Generals of the Armed Services and other military lawyers"); JANE MAYER, *THE DARK SIDE* 229 (2009) (noting that civilian officials "solicited" opinions on interrogation from OLC lawyers to circumvent military lawyers).

178. Memorandum from President, *supra* note 37, at 1–2.

179. See *infra* notes 222–88 and accompanying text. Cross-examination might probe a number of other issues such as President Bush's approval of extraordinary rendition.

180. U.S. CONST. amend. V.

be limited to the scope of the direct examination,¹⁸¹ though courts permit prosecutors some leeway in this.¹⁸² It is also difficult to simulate the give-and-take of cross-examination. Questions beget objections. There is no telling how President Bush would answer questions in court. Moreover, prosecutors would not rely on cross-examining the defendant to make their case. They would assemble evidence they thought necessary to sustain a conviction in their case in chief (with testimony of culpable lower-ranking officials who had been granted immunity, among other things).

In constructing these hypothetical exchanges between the President and prosecutor, a few basic rules were followed. The questions and answers are based upon evidence already in the public domain. The answers are consistent with statements President Bush has made or inferences that may reasonably be drawn from positions his administration had taken. Questions deviate from standard cross-examination techniques when that has seemed useful to make a point concerning the laws of war. Objections that defense counsel might interpose are not noted, though some questions would undoubtedly draw objections. Additionally, as might be expected in an actual trial, the cross-examination does not invariably lead to explicit concessions.

1. The President's Directive on the Geneva Conventions

Q. Mr. President, do you recall issuing a memorandum on February 7, 2002?¹⁸³

A. Yes.

Q. This memorandum contained your orders concerning the treatment of detainees?

A. That's right.

Q. Do you recall the subject title?

A. Yes, I do. It was "Humane Treatment of al Qaeda and Taliban Detainees."¹⁸⁴

Q. In this directive, you said that "none of the provisions of Geneva appl[ied]" in the conflict with Al Qaeda?¹⁸⁵

A. That's correct.

181. FED. R. EVID. 611 (b).

182. ROBERT S. HUNTER, 2 FEDERAL TRIAL HANDBOOK: CRIMINAL § 46:9 (2010).

183. Memorandum from President, *supra* note 37.

184. *Id.* at 1.

185. *Id.*

Q. You determined that Common Article 3 did not apply to Al Qaeda or Taliban detainees?¹⁸⁶

A. Yes.

Q. You also concluded that Taliban and Al Qaeda detainees did not qualify as prisoners of war under the Geneva Conventions?¹⁸⁷

A. That's true.

Q. Now, Mr. President, you said that the Geneva Conventions applied to the conflict with the Taliban in Afghanistan?¹⁸⁸

A. That is correct.

Q. Yet you reserved the right to suspend the Conventions in the conflict in Afghanistan?¹⁸⁹

A. Yes, absolutely.

Q. In fact, there was no need for you to suspend the Geneva Conventions as no detainee was covered anyway?

A. I disagree with that. I did not suspend the Geneva Conventions, and they did apply.

Q. I want to get your reaction to a comment made by Jack Goldsmith. Mr. Goldsmith served as your Assistant Attorney General in charge of the Office of Legal Counsel?

A. Yes, he did.

Q. He described the "bottom line" of your directive in this way: "none of the detainees in the war on terrorism would receive POW [Prisoner of War] status or *any other legal protection under the laws of war.*"¹⁹⁰ Do you agree with that statement?

A. As I said in that memorandum, these groups committed "horrific acts against innocent civilians" that required "new thinking in the law of war."¹⁹¹ The laws of war did not protect them, but our actions were "consistent with the principles of Geneva."¹⁹²

Q. Did you consider the possibility that some detainees might be innocent?

186. *Id.* at 2.

187. *Id.*

188. *Id.*

189. *Id.* at 1-2.

190. GOLDSMITH, *supra* note 83, at 110 (emphasis added).

191. Memorandum from President, *supra* note 37, at 1.

192. *Id.*

A. That was not my primary concern after 9/11, but we did have a “rigorous process” in place for transferring detainees to Guantánamo, for example.¹⁹³

Q. What steps did you take to ensure that persons detained were indeed members of Al Qaeda or Taliban?

A. Well, I remind you that it was a difficult and hostile environment.

2. CIA Exemption

Q. Your directive stated that “[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely”¹⁹⁴

A. That’s right, and without that point, you are misrepresenting my policy.

Q. All soldiers were bound to follow your orders?

A. Yes.

Q. All naval personnel?

A. Yes.

Q. The Marines?

A. Again, yes.

Q. Air Force, should they become involved?

A. Yes.

Q. As you were the commander-in-chief, all members of our armed forces were bound to obey your directive?

A. Of course.

Q. And, as you say in your directive, “our values as a Nation . . . call for us to treat detainees humanely, including those who are not legally entitled to such treatment”¹⁹⁵

A. Yes, that’s what our nation stands for.

Q. One more point on this particular issue, Mr. President. Your directive on humane treatment did not apply to the CIA?¹⁹⁶

A. My directive did not cover the CIA.¹⁹⁷

193. Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006).

194. Memorandum from President, *supra* note 37, at 2.

195. *Id.* at 2.

196. Johnsen, *supra* note 81, at 1571.

197. The policy of exempting the CIA continued throughout the Bush administration. Michael A. Fletcher, *Bush Defends CIA’s Clandestine Prisons*, WASH. POST, Nov. 8, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700637.html>.

Q. You gave the CIA the go-ahead to engage in inhumane treatment of detainees?

A. I would not put it that way. We always wanted to treat detainees according to the law.

Q. You permitted the CIA to treat prisoners cruelly?

A. That's not how I look at it. We were engaged in a global war against a vicious enemy bent on destroying our way of life.¹⁹⁸

Q. You authorized the CIA to engage in degrading treatment of detainees?

A. I think that the word "degrading" is unclear.¹⁹⁹

3. An Exception for Military Necessity

Q. Your directive stated that "a[s] a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva"?²⁰⁰

A. That's correct.

Q. You considered that policy to be an adequate substitute for the Geneva Conventions?

A. Absolutely, that was more protection than Al Qaeda and the Taliban were entitled under the law.²⁰¹

Q. Military necessity determines how detainees are treated?

A. Of course.

Q. In some circumstances, military necessity will require inhumane treatment of detainees?

A. If I needed to take some action for reasons of national security, then that's going to happen.

Q. You, as commander-in-chief, would ultimately determine what was necessary for military purposes?

A. That is right.

Q. No one could review your decision?

A. That is for the commander-in-chief to decide.

Q. You would not hesitate to authorize treatment that you considered inhumane if you believed military necessity required that?

A. I would do what was necessary to defend the country and save the lives of innocent American citizens, yes.

198. Remarks on the War on Terror, *supra* note 193, at 1575.

199. *Id.* at 1574.

200. Memorandum from President, *supra* note 37, at 2.

201. *Id.*

Q. Are you aware, sir, that Common Article 3 requires humane treatment of detainees “in all circumstances”?²⁰²

A. Exactly, that was our concern.

Q. You did not believe that Common Article 3 should apply in all circumstances?

A. We could not let Geneva determine what was necessary to defend our country.

Q. Mr. President, you are familiar with the Army Field Manuals?

A. Yes, of course.

Q. Were you aware that the U.S. Army Field Manual for the Law of Land Warfare adopted in 1956 stated that the “prohibitory effect of the law of war is not minimized by ‘military necessity’”?²⁰³

A. No, but as you just indicated, that’s over fifty-years-old.

Q. Adopted when General Eisenhower was president?

A. We’re dealing with a different kind of war that calls for a “new paradigm,” as I said in my memorandum.

Q. The U.S. Army Field Manual from 1956 goes on to explain why military necessity is not generally a defense for violations of the laws of war. That’s because the laws of war were already “developed and framed with consideration for the concept of military necessity.”²⁰⁴ I take it you would disagree with that statement?

A. Yes, I do. And again, you’re bringing up statements made over a half-century ago.

Q. I’m now showing you the Law of War Handbook prepared by the Judge Advocate General’s School of the U.S. Army, marked as Government Exhibit Number One. Please follow along while I read from page 165. “Military necessity has been argued as a defense to law of war violations and has generally been REJECTED as a defense for acts forbidden by customary and conventional laws of war.”²⁰⁵ Did I read that right?

A. Yes.

Q. The word “rejected” appears in bold type?

A. Yes.

Q. On the first page you can find the date of the handbook?

202. Geneva Convention I, *supra* note 25, art. 3; Geneva Convention II, *supra* note 25, art. 3; Geneva Convention III, *supra* note 25, art. 3; Geneva Convention IV, *supra* note 25, art. 3.

203. FIELD MANUAL, *supra* note 17, para. 3a.

204. *Id.*

205. LAW OF WAR HANDBOOK 165 (Keith E. Puls et al. eds., 2005) (emphasis in original).

A. I see it.

Q. The date is 2005?

A. Yes.

4. Concerns About War Crimes Prosecutions

Q. Mr. President, before you issued the directive on February 7, 2002, were you concerned that you might be prosecuted for committing war crimes?

A. I don't recall having that concern.

Q. Do you recall other officials in your administration expressing concern that they might be prosecuted for war crimes?

A. There may have been some hypothetical discussion.

Q. Your memorandum referred to a "legal opinion rendered by the Attorney General"?²⁰⁶

A. Yes.

Q. John Ashcroft served as your attorney general at that time?

A. Yes.

Q. He provided his legal opinion in a letter addressed to you that was dated February 1, 2002?²⁰⁷

A. I believe so.

Q. His legal opinion discussed options for you to consider concerning the applicability of the Geneva Conventions?²⁰⁸

A. Yes.

Q. He stated in his letter to you that "[t]he War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States"?²⁰⁹

A. That's in his letter.

Q. He noted that there may be "various legal risks of liability, litigation, and criminal prosecution"?²¹⁰

A. Yes.

Q. Mr. Ashcroft raised the prospect of "substantial criminal liability for involved U.S. officials"?²¹¹

206. Memorandum from President, *supra* note 37, at 1.

207. Letter from John Ashcroft, Attorney General, to President George W. Bush (Feb. 1, 2002), available at <http://www.torturingdemocracy.org/documents/20020201.pdf> [hereinafter Letter from John Ashcroft].

208. *Id.* at 1-2.

209. *Id.* at 1.

210. *Id.*

211. *Id.* at 2.

A. Only if courts overreached.

Q. Do you recall that, approximately two weeks before you issued this directive, White House Counsel, Alberto R. Gonzales, prepared a memorandum concerning your decision on the Geneva Conventions?²¹²

A. Well, I don't remember the exact dates, but that seems right.

Q. Mr. President, I am now showing you Government Exhibit Number Two. Do you recognize it?

A. Yes, that's the memorandum my White House Counsel prepared.

Q. This memorandum bears the heading "Memorandum for the President"?²¹³

A. Yes.

Q. The subject line read "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban"?²¹⁴

A. Yes.

Q. Mr. Gonzales stated in the memorandum that a presidential determination that Geneva Convention III on the Treatment of Prisoners of War did not protect the Taliban "[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act"?²¹⁵

A. Yes, but we were concerned, as he said, about prosecutors or independent counsels bringing "unwarranted charges."²¹⁶

Q. Mr. Gonzales explained to you that the War Crimes Act prohibits the commission of war crimes by "U.S. officials"?²¹⁷

A. Yes.

Q. He explained that war crimes under this legislation included any violation of Common Article 3?²¹⁸

A. Yes.

212. Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, Decision Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> [hereinafter Memorandum from Alberto R. Gonzales].

213. *Id.* at 1.

214. *Id.*

215. *Id.* at 2.

216. *Id.*

217. *Id.*

218. *Id.*

Q. He noted that war crimes under this legislation included grave breaches of the Geneva Convention concerning prisoners of war?²¹⁹

A. Yes.

Q. Mr. Gonzales advised you that, by issuing this directive, you could “create a reasonable basis in law” that the War Crimes Act “does not apply”?²²⁰

A. We did not believe it did apply, so yes, my directive defended the people in my administration and the soldiers in the field.²²¹

Q. Your White House Counsel told you that your directive declaring the Geneva Convention to be inapplicable could “provide a solid defense to any future prosecution”?²²²

A. Yes.

5. Waterboarding

Q. Now, sir, you personally approved the use of waterboarding in the interrogation of persons in U.S. custody?²²³

A. I knew my principals met on this subject, and “I approved.”²²⁴

Q. By principals, you are referring to Vice President Dick Cheney, Secretary Of State Colin Powell, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, National Security Advisor Condoleezza Rice, and the CIA Director George Tenet?²²⁵

A. Yes.

Q. You issued a presidential finding in 2002 that authorized the use of waterboarding?²²⁶

A. Yes, I did.

Q. You authorized the waterboarding of Khalid Sheikh Mohammed?

A. Yes.²²⁷

Q. Because he planned 9/11?

219. *Id.*

220. *Id.*

221. Remarks on the War on Terror, *supra* note 193, at 1575.

222. Memorandum from Alberto R. Gonzales, *supra* note 212, at 2.

223. GEORGE W. BUSH, DECISION POINTS 169 (2010).

224. Jan Crawford Greenburg et al., *Bush Aware of Advisers' Interrogation Talks*, ABC NEWS (Apr. 11, 2008), <http://abcnews.go.com/print?id=4635175> (internal quotations omitted).

225. *Id.*

226. Maddy Sauer et al., *History of an Interrogation Technique: Water Boarding*, ABC NEWS (Nov. 29, 2005), <http://abcnews.go.com/WNT/Investigation/story?id=1356870>.

227. Greenburg et al., *supra* note 224.

A. Because he had information vital to stop attacks and save lives. “I think it’s very important for the American people to understand who Khalid Sheikh Mohammed was. He was the person who ordered the suicide attack—I mean, the 9/11 attacks.”²²⁸

Q. You authorized the waterboarding of Abu Zubaydah?

A. “Had I not authorized waterboarding on senior Al Qaeda leaders I would have had to accept a great risk that the country would be attacked.”²²⁹

Q. In fact, when asked about waterboarding Khalid Sheikh Mohammed, your reply was “damn right”?²³⁰

A. That was it. It was “my duty to protect the country from another act of terror.”²³¹

Q. Were you aware that Nazi Germany used waterboarding during World War II?²³²

A. We did it differently. “Medical professionals would be on-site to guarantee that the detainee was not physically or mentally harmed.”²³³

Q. Did you know that Japanese soldiers waterboarded American airmen during World War II?²³⁴

A. We did not use this technique like they did.

Q. Did you know that the Khmer Rouge employed waterboarding?²³⁵

A. I’m sure we did it differently. Our “medical experts assured the CIA that it did no lasting harm.”²³⁶

Q. You did not inquire of anyone about the history of waterboarding?

228. *Id.*

229. BUSH, *supra* note 223, at 169.

230. *Id.* at 170.

231. *Id.*

232. DARIUS REJALI, *TORTURE AND DEMOCRACY* 284 (2007).

233. BUSH, *supra* note 223, at 169.

234. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 477 (2007).

235. See Dana Milbank, *Logic Tortured*, WASH. POST, Nov. 2, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/01/AR2007110102342_pf.html.

236. Stephen Kurczy, *Waterboarding and Other Decision Points in Bush’s War on Terror*, CHRISTIAN SCI. MONITOR (Nov. 9, 2010), <http://www.csmonitor.com/World/Global-Issues/2010/1109/Waterboarding-and-other-Decision-Points-in-Bush-s-war-on-terror/Waterboarding>.

A. No, I didn't have to. "At my direction, the Department of Justice and CIA lawyers conducted a careful legal review [of our interrogation program]."²³⁷

Q. You knew that the U.S. Armed Forces considered waterboarding torture?²³⁸

A. Our lawyers said that it was not torture.²³⁹

Q. You mean the lawyers at the Office of Legal Counsel in the Justice Department?

A. Yes.

Q. Do you recall that interrogation techniques were under consideration at the Pentagon in late 2002?²⁴⁰

A. That sounds right.

Q. Were you aware that the Air Force said that "some of these techniques could be construed as 'torture,' as that crime is defined" in the anti-torture act?²⁴¹

A. I don't recall that statement.

Q. Were you aware that the Marine Corps said several interrogation techniques "arguably violate federal law, and would expose our service members to possible prosecution"?²⁴²

A. I don't recall that.

Q. Did you know the Army said that some techniques "appear to be clear violations of the federal torture statute"?²⁴³

A. I don't believe I heard that.

Q. Would you be interested to know that the Army believed that some interrogation techniques "violate[d] the President's order" of February 7, 2002?²⁴⁴

A. I had not heard that.

Q. You are aware that the Navy's General Counsel considered some of the interrogation techniques "at a minimum cruel and unusual treatment, and, at worst, torture"?²⁴⁵

A. No, I did not know that.

237. BUSH, *supra* note 223, at 169.

238. SENATE INQUIRY, *supra* note 110, at 68.

239. BUSH, *supra* note 223, at 169.

240. SENATE INQUIRY, *supra* note 110, at 65-70.

241. *Id.* at 67 (internal quotations omitted).

242. *Id.* at 68.

243. *Id.* (internal quotations omitted).

244. *Id.* (internal quotations omitted).

245. See MAYER, THE DARK SIDE, *supra* note 177, at 228.

Q. Did you know that the FBI warned of “possible illegality”?²⁴⁶

A. I don’t recall.

Q. Turning to the legal opinions that you did rely on, is it true that the Office of Legal Counsel concluded: “We find that the use of the waterboard constitutes a threat of imminent death”?²⁴⁷

A. I’m not sure they said that.

Q. Mr. President, I am going to read from page fifteen of the Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel. This has already been marked as Government Exhibit Number Three. Please follow along to make sure I read this sentence word for word. “From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at [the] very moment of the procedure due to the uncontrollable physiological sensation he is experiencing.”²⁴⁸ Did I read that right?

A. Yes, but we had safeguards in place, with medical professionals on-site. No one was going to get killed.

Q. That was your view?

A. Yes.

Q. Did it occur to you the prisoner might have a different view?

A. Again, we had safeguards.

Q. If interrogators did not stop applying the water in time, the prisoner would drown?²⁴⁹

A. The interrogators always stopped in time.

Q. You are aware, Mr. President, that the federal anti-torture act refers to the “threat of imminent death”?²⁵⁰

A. Our Justice Department lawyers explained why our waterboarding techniques did not constitute torture.²⁵¹

246. SENATE INQUIRY, *supra* note 110, at 80 (internal quotations omitted).

247. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John Rizzo, Acting Gen. Counsel, Central Intelligence Agency, Interrogation of al Qaeda Operative 15 (Aug. 1, 2002) [hereinafter Al Qaeda Operative Memorandum]. *Cf.* Techniques Memorandum, *supra* note 66, at 45 n.56 (“It is unclear whether a detainee being subjected to the waterboard in fact experiences it as an ‘threat of imminent death.’”).

248. Al Qaeda Operative Memorandum, *supra* note 247, at 15.

249. REJALI, *supra* note 232, at 279.

250. 18 U.S.C. § 2340(2)(c).

251. Al Qaeda Operative Memorandum, *supra* note 247, at 15; Techniques Memorandum, *supra* note 66, at 41–45.

Q. I would like to ask you, then, about the exact procedure used by the CIA when waterboarding prisoners. The prisoner is strapped down on a gurney?²⁵²

A. That's right.

Q. So they cannot move?

A. Yes.

Q. The gurney is tilted 10 to 15 degrees so that the prisoner's head is lower than his feet?²⁵³

A. That sounds right.

Q. The interrogators place a cloth over the prisoner's face?²⁵⁴

A. Yes.

Q. The cloth completely covers his nose and mouth?²⁵⁵

A. Yes.

Q. The cloth can render it impossible for the prisoner to breathe?²⁵⁶

A. For a limited time.

Q. The cloth is saturated?²⁵⁷

A. Yes.

Q. The prisoner's airflow is restricted?²⁵⁸

A. Only temporarily.

Q. The interrogators were trained to pour water just as a prisoner exhales?²⁵⁹

A. These were hardened terrorists.

Q. If the detainee tried to breathe out of the corner of his mouth, interrogators were directed to cup their hands around the detainee's nose and mouth to dam the runoff?²⁶⁰

A. Yes.

Q. Restricting the airflow causes the levels of carbon dioxide to increase in the prisoner's blood?²⁶¹

A. I believe that's possible.

252. Techniques Memorandum, *supra* note 66, at 13.

253. *Id.*

254. *Id.*

255. Al Qaeda Operative Memorandum, *supra* note 247, at 4.

256. Techniques Memorandum, *supra* note 66, at 13.

257. Al Qaeda Operative Memorandum, *supra* note 247, at 4.

258. *Id.*

259. Techniques Memorandum, *supra* note 66, at 13.

260. *Id.*

261. Al Qaeda Operative Memorandum, *supra* note 247, at 4.

Q. That, in turn, stimulates an increased effort to breathe?²⁶²

A. That may be true.

Q. I would like to read from the Office of Legal Counsel memorandum marked as Government Exhibit Number Four. Please follow along to make sure I read this sentence word for word. "This effort plus the cloth produces the perception of 'suffocation and incipient panic,' i.e., the perception of drowning."²⁶³ Did I read that right?

A. Yes.

Q. You say the prisoner's ability to breathe is restricted for a limited time?

A. Right, we had strict limitations in place.

Q. Twenty to forty seconds for each application of water?²⁶⁴

A. Yes.

Q. No more than twelve minutes of waterboarding in twenty-four hours?²⁶⁵

A. That sounds right.

Q. And five days in a thirty-day period?²⁶⁶

A. Yes, I think so.

Q. You are aware that the CIA's Office of Medical Services was not consulted in the initial analysis of medical risks for waterboarding?²⁶⁷

A. Who said that?

Q. The CIA's inspector general. You were not aware of that, I take it?

A. I don't recall that.

Q. Those time limits we discussed were put in place after the CIA waterboarded detainees?

A. I'm not sure about that.

Q. One prisoner, Abu Zubaydah, was waterboarded eighty-three times in one month?²⁶⁸

A. I think that's right.

Q. Khalid Sheikh Mohammed was waterboarded 183 times in one month?²⁶⁹

262. *Id.*

263. *Id.*

264. *Id.*; Techniques Memorandum, *supra* note 66, at 13.

265. Techniques Memorandum, *supra* note 66, at 14.

266. *Id.*

267. *Id.* at 29 n.34.

268. CIA IG SPECIAL REVIEW, *supra* note 61, 90.

269. *Id.* at 91.

A. Yes.

Q. Let's consider the medical risks. Is it true that waterboarding can result in oxygen deprivation, a condition called hypoxia?²⁷⁰

A. You have to ask the doctors that.

Q. Is it true that waterboarding can lead to convulsions, coma, and death?²⁷¹

A. That did not happen with any of the prisoners.

Q. But it was a recognized medical risk for this enhanced interrogation technique, was it not?

A. I believe the risk was minimal.

Q. Waterboarding could accelerate the prisoner's heart rate to dangerous levels, a condition known as tachycardia?²⁷²

A. We made sure the prisoners could withstand this treatment before going ahead with any particular prisoner.

Q. There is a risk that the prisoner might swallow "significant quantities" of water?²⁷³

A. I suppose so.

Q. This can lead to a reduced concentration of sodium in the blood, a condition called hyponatremia?²⁷⁴

A. I have heard of that.

Q. There is a risk of prisoners inhaling water into their lungs?²⁷⁵

A. I'm not sure.

Q. This can lead to pneumonia?²⁷⁶

A. I'm not a doctor.

Q. The risk of taking in too much water and dangerously low sodium levels was so great that the CIA used saline solution instead of plain water?²⁷⁷

A. That's what I mean, when there were risks, the CIA addressed them.

270. Coco Ballantyne, *Does Waterboarding Have Long-term Physical Effects?*, SCI. AM., May 1, 2009.

271. Mark Benjamin, *Waterboarding for Dummies*, SALON.COM (Mar. 9, 2010, 06:01 ET), http://www.salon.com/news/feature/2010/03/09/waterboarding_for_dummies.

272. *U.S. Interrogation Policy and Executive Order 13440: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 1 (2007) (statement of Allen S. Keller, M.D.).

273. Techniques Memorandum, *supra* note 66, at 13.

274. *Id.*

275. *Id.* at 14.

276. *Id.*

277. *Id.* at 13–14.

Q. There was a risk that prisoners could take in to their lungs their own vomit?²⁷⁸

A. We put them on liquid diets to avoid that.²⁷⁹

Q. The CIA doctor on duty was there to perform a tracheotomy on the prisoner in case he suffered spasms of the larynx?²⁸⁰

A. That never happened.

Q. “[E]mergency medical equipment is always present”?²⁸¹

A. That’s what I’m saying—we had safeguards in place.

Q. You would waterboard Khalid Sheikh Mohammed again?

A. To save lives, yes I would. “I didn’t have any problem at all trying to find out what Khalid Sheikh Mohammed knew.”²⁸²

6. Closing Argument

Closing arguments provide lawyers with the opportunity to mold the points established in testimony into a coherent presentation. A prosecutor might sum up the points established in this hypothetical cross-examination like this:

Consider this simple rule: “[p]ersons taking no active part” in hostilities, including those placed in detention, “shall in all circumstances be treated humanely.”²⁸³ This is one of the most fundamental rules of the laws of war. You can find it in Common Article 3 of the Geneva Conventions. This law permits no exceptions. It was crafted so that there would be “no possible loophole.”²⁸⁴

Now ask yourself: Does President Bush agree with this rule? Did he follow that rule when he was commander-in-chief? You might think so if you read the title of the memorandum he issued on February 7, 2002: “Humane Treatment of al Qaeda and Taliban Detainees.” In that memorandum, President Bush stated that “our values as a Nation . . . call for us to treat detainees humanely.”²⁸⁵ But look more closely at the President’s orders and you will see something else going on.

President Bush carved out two broad exceptions to this most basic rule of conduct in warfare. First, when President Bush instructed the U.S. armed forces to “continue to treat detainees humanely,” he exempted the CIA—the executive agency most in

278. *Id.* at 14.

279. *Id.*

280. *Id.*

281. *Id.*

282. Greenburg et al., *supra* note 224.

283. Geneva Convention I, *supra* note 25, art. 3; Geneva Convention II, *supra* note 25, Geneva Convention III, *supra* note 25, art. 3; Geneva Convention IV, *supra* note 25, art. 3.

284. International Committee of the Red Cross, Commentary, Geneva Convention III, *supra* note 25.

285. Memorandum from President, *supra* note 37, at 2.

question. Some may wonder whether this omission was accidental. That is hard to believe. The President's memorandum was an important state paper. It established U.S. policy having global implications. The President sent this memorandum to the highest officials in his administration after a vigorous internal debate. And if you conclude that President Bush deliberately excluded the CIA from his directive, what does that mean? Simple logic tells you the answer. By exempting the CIA from his orders to treat detainees humanely, President Bush contemplated that the CIA would engage in inhumane treatment.

Second, by the terms of the President's directive, he allowed the U.S. armed forces to treat detainees contrary to the principles of the Geneva Conventions, including the principle of humane treatment. This exception was justified by military necessity, according to President Bush. But that's an exception that can swallow the rule. If that exception seems reasonable, remember that the U.S. Army has long held a different view, at least from the time that General Eisenhower was president. No, the Army has not lost sight of its military purpose. The Army recognizes that the Geneva Conventions already gave its soldiers flexibility to do what was necessary to achieve their military objectives.

What effect did President Bush's directive have? Recall what Jack Goldsmith said. He headed the Office of Legal Counsel under President Bush. He was certainly in a position to understand the significance of the President's directive. Mr. Goldsmith described the directive's "bottom line" this way: "none of the detainees in the war on terrorism" had any "legal protection under the laws of war."²⁸⁶ That's crucial, because if you relieve soldiers, CIA agents, and special forces of the legal obligation to abide by the laws of war, as President Bush did, you set the stage for them to violate the laws of war.

Why did President Bush issue this directive? The Secretary of Defense had already issued a similar order to the armed forces, which President Bush reaffirmed in his directive. The evidence reveals the administration's pressing concern. "Involved officials" might be prosecuted for war crimes. We know President Bush's top advisers specifically discussed the War Crimes Act. Could President Bush have been unaware of their concern? Only if he had not read the two-page letter Attorney General Ashcroft sent him the day before the President issued his memorandum—a letter President Bush referenced in his memorandum. Mr. Ashcroft stated the issue plainly: "criminal liability for involved U.S. officials" was "substantial."²⁸⁷ Surely President Bush had not missed the point of the memorandum his White House Counsel Gonzales had prepared a few days earlier. Mr. Gonzales told him that a presidential decision declaring the Geneva Conventions inapplicable could "provide a solid defense to any future prosecution."²⁸⁸

286. GOLDSMITH, *supra* note 83, at 110.

287. Letter from John Ashcroft, *supra* note 207, at 2.

288. Memorandum from Alberto R. Gonzales, *supra* note 212, at 2.

This evidence of what transpired behind the scenes is crucial. It means that President Bush issued his directive on the Geneva Conventions because he knew that the interrogation techniques he had authorized could be considered war crimes.

We have looked at only one of those interrogation techniques—waterboarding. There is no question that the President authorized the waterboarding of detainees. The only question for you to consider is whether waterboarding constitutes a war crime.

President Bush has said that the enhanced interrogation techniques he authorized were “lawful” and “safe.”²⁸⁹ Was waterboarding lawful? The commander-in-chief could easily have called upon professional military lawyers to answer that question. Some receive specialized training in the laws of war. Had the President sought the advice of the JAG Corps in any branch of the armed services, he would have been warned that the practice does not merely violate the laws of war, but amounts to torture. Had the President conducted even the most superficial review of the history of waterboarding (used by Nazi Germany, the Khmer Rouge, and a technique used against American POWs in World War II), he would have had every reason to suspect that waterboarding was cruel and inhuman.

Was waterboarding safe? Can any procedure designed to produce the perception of imminent death be safe? We were told that medical personnel were on hand. They were not there because the procedure was inherently safe. To the contrary—it is a peculiar version of safety with so many serious medical risks: oxygen deprivation, pneumonia, convulsions, swallowing vomit, and emergency tracheotomies. This is exactly the sort of conduct the laws of war were designed to prevent.

Conclusion

In all likelihood, there will be no war crimes trial of President Bush. No doubt that will strike many Americans as proper. Even some of his sternest critics would look upon trying a U.S. president for war crimes as an extreme remedy.²⁹⁰ Various reasons may account for this. Criticizing particular presidents is a favorite American pastime, but when it comes to looking on the presidency as an institution, the public’s regard borders on reverence. War crimes, on the other hand, are often associated with atrocities committed on a scale that defies credulity. No wonder it becomes virtually inconceivable for many Americans to view their elected president as a war criminal.

289. Remarks on the War on Terror, *supra* note 193, at 1571.

290. Marisa Taylor, *Did Bush Officials Commit War Crimes? Maybe, But Trials Aren’t Likely*, *McCLATCHY* (Dec. 20, 2008); Rosen, *supra* note 152 (“even staunch advocates of legal accountability for the Bush administration’s interrogation policy don’t believe that a straight war-crimes approach has a high chance of success”).

Yet to punish war crimes only if they satisfy the amorphous standard of “large-scale atrocities” would grant impunity for a wide range of conduct proscribed by the laws of war. As a matter of legal analysis, it would be more precise to measure the conduct in question against the elements of the criminal offenses as defined by federal law—the War Crimes Act in particular. As a matter of public accountability, it would be useful to consider the basic principles underlying the laws of war that have developed over time.

The laws and customs of war grew out of a basic understanding of the nature of warfare, a desire to lessen its evils, and a conviction that law could regulate force. Great temptations inevitably arise when dealing with a sworn enemy in time of war. Yet it is regarded as a cardinal rule that armed forces cannot avail themselves of any means in the conduct of war. As the Law of the Hague states, “the right of belligerents to adopt means of injuring the enemy is not unlimited.”²⁹¹ Protecting the most vulnerable and defenseless emerged as a paramount concern. Persons entitled to protection included the sick and wounded, civilians, unarmed prisoners of war, and, more broadly, individuals who are not actively participating in hostilities. This included persons held in detention even if they did not qualify as prisoners of war. In their zeal to respond to 9/11, President Bush and his close advisors lost sight of these principles. The American public does not expect the United States, with its professional military forces and democratically elected civilian leaders, to commit war crimes. When the Constitution was adopted, a standing army was regarded as a threat to the vitality of the republic. The Constitution accordingly subordinated the military to civilian leadership by placing the president in command of the Army and Navy.²⁹² The founders can hardly be faulted for failing to foresee the result post-9/11.

During the Bush Administration, the president’s position as commander-in-chief became the all-purpose instrument to override the laws of war. This was the unifying theme behind the OLC’s legal memoranda. The President had “plenary” power. His authority was “unrestricted.” Congress could not “regulate” or “interfere” with his decisions. The President deflects his own responsibility by suggesting that he merely deferred to the advice of his counsel.²⁹³ That does not explain why the White House cut out professional military lawyers, foreign policy experts at the State Department, and others who held

291. Hague Convention IV, *supra* note 16, art. 22.

292. U.S. CONST. art. II, § 2, cl. 1.

293. Remarks on the War on Terror, *supra* note 193, at 1571.

different views.²⁹⁴ In any event, secrecy became the norm. Small groups within the administration developed important counterterrorism policies, especially the so-called War Council (with its direct line of communication between the OLC's Yoo and White House Counsel Gonzalez).²⁹⁵ The result: black sites and ghost prisons, innocent travelers delivered to countries that torture, a precise and a top-secret methodology of interrogation (i.e., sleep deprivation authorized for up to 180 hours and water dousing for water temperatures of forty-one degrees Fahrenheit not to exceed forty minutes without drying and re-warming).²⁹⁶

In theory, the American political system has a number of fail-safe mechanisms to ensure that the executive branch could not violate the laws of war.²⁹⁷ In the end, though, the OLC's powers of prediction proved accurate: the President was able to circumvent U.S. laws and treaties, and Congress and the courts were unable to constrain him from doing so. Congress, for the most part, was not assertive in holding public hearings or pursuing the enforcement of subpoenas to uncover covert practices and inform the public about administration policies on extraordinary rendition, detention, and interrogation. While the Supreme Court challenged the administration's positions, the justices were handicapped by the nature of the judicial process, so far as getting an immediate rollback in the administration's counterterrorism policies was concerned.²⁹⁸

As it appears unlikely that President Bush will be prosecuted for violating the laws of war, perhaps the closest anyone can come to systematically addressing the question of the President's criminal responsibility is to imagine the President on trial. This Article has surveyed some of the legal issues that would arise if such a case actually went to trial. There is no constitutional impediment to prosecuting a former president for war crimes. U.S. law provides several options for prosecution, though the War Crimes Act furnishes a basic legal framework for analysis. One key question concerns the legal grounds for holding the President criminally responsible for acts physically committed by

294. Jeffrey R. Smith & Dan Eggen, *Gonzalez Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, <http://www.washingtonpost.com/ac2/wp-dyn/A48446-2005Jan4?language=printer>; see also *supra* note 177 and accompanying text.

295. See *supra* notes 82–83 and accompanying text.

296. See Techniques Memorandum, *supra* note 66, at 10, 12.

297. See *supra* Part II.

298. Rarely, if ever, had the Supreme Court been engaged in such an ongoing battle over federal court jurisdiction than in the cases coming out of Guantánamo. See *supra* notes 118–35 and accompanying text.

other individuals. Among various alternatives (conspiracy, joint criminal enterprise, superior responsibility), the general federal criminal aiding and abetting statute appears to offer the most practical option.

Through the device of an imagined cross-examination of the President, this Article has presented a limited factual inquiry into President Bush's role in developing counterterrorism policies of questionable legality. His own directive on the Geneva Conventions furnishes important evidence. Entitled "Humane Treatment of al Qaeda and Taliban Detainees," the President's memorandum appears to have been designed to foster the impression of a commitment to humane treatment while he authorized enhanced interrogation techniques that qualified as inhumane treatment.²⁹⁹ The documentary record suggests that President Bush issued this directive not out of humanitarian concern, but rather out of a concern that "involved officials" in his administration faced "substantial" criminal liability.³⁰⁰ The President's approval of waterboarding, given its history and the details of exactly how it was administered by the CIA, suggests that he may have had good reason to fear prosecution.

It is sad to contemplate the prosecution of an American president for war crimes. Yet failing to hold President Bush accountable for violating the laws of war can have serious consequences. From the earliest days of the Revolutionary War, the United States has been committed to a "policy of humanity" in warfare.³⁰¹ Actions taken by the President in the war on terrorism have called that longstanding commitment into question. Without genuine accountability, this may be a transformative moment in the modern development of the laws of war—a moment when the cruel treatment of prisoners became merely tough, inhumane practices became lawful, aberration became precedent, torture became acceptable, binding rules were thrown open to interpretation, and the laws of war began to unravel.

299. Memorandum from President, *supra* note 37.

300. Letter from John Ashcroft, *supra* note 207, at 2.

301. DAVID HACKETT FISCHER, WASHINGTON'S CROSSING 376 (2004).