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INTERNATIONAL CRIMES WITHIN THE WHITE HOUSE

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During his so-called long "war" on "terror," President George W. Bush has authorized and ordered violations of customary and treaty-based international law concerning the detention, transfer, and interrogation of numerous individuals. For example, in a February 7, 2002 memorandum, President Bush expressly authorized the denial of absolute rights and protections contained in the 1949 Geneva Conventions that apply to any person who is detained during an armed conflict.[1] The President's memo denied rights and protections under Geneva law by ordering that humane treatment be provided merely "in a manner consistent with the principles of Geneva" and then only "to the extent appropriate and consistent with military necessity,"[2] despite the fact that: (1) far more than the "principles" of Geneva law apply, (2) it is not "appropriate" to deny treatment required by Geneva law, and (3) it is well-understood that alleged military necessity does not justify the denial of treatment required by Geneva law.[3] Necessarily, the President's memorandum of February 7, 2002, authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions, which are war crimes.

With respect to members of al Qaeda in particular, the White House announced at that time that members of al Qaeda "are not

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1 *See, e.g.*, Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT'L L. 811, 827–28, 854–55 (2005) (including related claims of government lawyers), addressing the Memorandum of President George W. Bush (Feb. 7, 2002) [hereinafter Bush Feb. 7, 2002 memorandum], available in FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (Aug. 2004), Appendix C [hereinafter Final Report 2004], *available at* http://wid.ap.org/documents/iraq/040824finalreport.pdf.

2 *See, e.g.*, Bush Feb. 7, 2002 memorandum, *supra* note 1; Final Report 2004, *supra* note 1, at 33–34; John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 30–31; Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1.

3 *See, e.g.*, Paust, *supra* note 1, at 814–16, 828.

covered by the Geneva Convention" and will continue to be denied Geneva law protections, supposedly because al Qaeda "cannot be considered a state party to the Geneva Convention."[4] As noted soon thereafter, however,

> The White House statement demonstrates remarkable ignorance of the nature and reach of treaties and customary international law. First, any member of al Qaeda who is a national of a state that has ratified the relevant treaties is protected by them. Nearly every state, including Saudi Arabia, is a signatory to these treaties. Second, the 1949 Geneva Conventions are part of customary international law that is universally applicable in times of armed conflict and, as such, protect all human beings according to their terms. Third, common Article 3 [of the Geneva Conventions] provides nonderogable protections and due process guarantees for every human being who is captured and, like common Article 1, assures their application in all circumstances.[5]

With respect to treaties, it was affirmed long ago by Chief Justice Jay that "every citizen is a party to them."[6] This fundamental aspect of treaty law assures that individuals and groups (such as members of al Qaeda) are bound by treaties that have been adhered to by the state of which they are nationals. It is why an array of treaties addressing international crimes such as aircraft hijacking, aircraft sabotage, hostage-taking, forced disappearance, terrorism, genocide, and war crimes are binding on various individ-

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4 *See* Seelye, *supra* note 2. President Bush's memorandum stated that he accepted "the legal conclusion of the Department of Justice" "dated January 22, 2002," and determined "that none of the provisions of Geneva apply to our conflict with al Qaeda . . . because, among other reasons, al Qaeda is not a High Contracting Party." Bush Feb. 7, 2002 memorandum, *supra* note 1, at para. 2(a). The memorandum sent on January 22 was most likely the thirty-seven-page Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), prepared by Jay S. Bybee, Ass't Att'y Gen., *available at* http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf [hereinafter Application of Treaties and Laws to al Qaeda and Taliban Detainees]. *See, e.g.*, *Timeline of Memos on Treatment of Prisoners*, MIAMI HERALD, June 23, 2004, at 15. The Application of Treaties and Laws to al Qaeda and Taliban Detainees was basically a reiteration of the infamous Yoo–Delahunty memorandum of January 9, 2002, addressed in Paust, *supra* note 1, at 830–34. The Application of Treaties and Laws to al Qaeda and Taliban Detainees stated: "We conclude that these treaties do not protect the members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war." Application of Treaties and Laws to al Qaeda and Taliban Detainees at 1; *see also id.* at 9.

5 Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 7–8 n.15 (2001).

6 Henfield's Case, 11 F. Cas. 1099, 1101, No. 6360 (C.C.D. Pa. 1793).

uals and groups that could not and have never "ratified" such treaties. It is also why insurgents are bound by and can be prosecuted for violations of common Article 3 of the Geneva Conventions. The Executive's false claim was necessarily laid to rest by the Supreme Court in *Hamdan v. Rumsfeld*[7] when the Court ruled that "there is at least one provision of the Geneva Conventions that applies here . . . Common Article 3."[8] Justice Kennedy added: "the requirement of the Geneva Conventions . . . [is] a requirement that controls here . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan . . . That provision is Common Article 3 . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law . . . By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses."[9]

Regarding presidential authorizations, it has been reported that "current and former CIA officers . . . [stated that] there is a presidential finding, signed in 2002, by President Bush, Condoleezza Rice and then-Attorney General John Ashcroft approving . . . [unlawful interrogation] techniques, including water boarding."[10] It has also been reported that President Bush authorized the CIA to secretly detain and interrogate persons in a September 17, 2001 directive known as a memorandum of notification and that harsh interrogation tactics were devised in late 2001 and early 2002.[11] Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized as well as another document that contains a Department of Justice legal analysis specifying interrogation methods that the CIA was authorized to use against top al

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7 126 S. Ct. 2749 (2006).

8 *Id.* at 2756–57.

9 *Id.* at 2802 (Kennedy, J., concurring in part).

10 *History of an Interrogation Technique: Water Boarding*, ABC NEWS, Nov. 29, 2005, http://abcnews.go.com/WNT/print?id=1356870. *See also* Jonathan S. Landay, *Cheney: Water Torture is OK, Confirms Method Used on al Qaeda*, THE NEWS & OBSERVER (Raleigh, NC), Oct. 26, 2006, at A4; Paust, *supra* note 1, at 836–37 & n.96 (secret authorization for the CIA), 848 n.138. This paragraph is borrowed from Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 354 (2007) [hereinafter *Above the Law*], and JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007).

11 *See* David Johnson & Douglas Jehl, *At a Secret Interrogation, Dispute Flared over Tactics*, N.Y. TIMES, Sept. 10, 2006, at A1. *See also infra* notes 12–13, 19–31.

Qaeda members.[12] There is no indication that the presidential finding or directive has been withdrawn. In fact, during a speech on September 6, 2006, President Bush admitted that a CIA program has been implemented "to move . . . [high-value] individuals to . . . where they can be held in secret" and interrogated using "tough" forms of treatment and he stated that the CIA program will continue.[13]

The unlawful "tough" interrogation tactics that are an admitted part of the Bush program are war crimes.[14] They are also violations of non-derogable customary and treaty-based human rights law[15] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[16] The transfer of non-prisoners-of-war out of war-related occupied territory in Afghanistan and Iraq during the Bush program was also a war crime. Such transfers are absolutely prohibited under Article 49 of the Geneva Civilian Convention and constitute "grave breaches" of the Convention.[17] Moreover, the refusal to disclose the names or the whereabouts of persons subjected to secret transfer and secret detention is a manifest and serious crime against humanity known as "forced disappearance"—a crime that also involves patent violations of related human rights law, the Convention Against Torture, and the laws of war.[18]

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12 *See, e.g.*, Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, WASH. POST, Nov. 14, 2006, at A29; David Johnston, *CIA Tells of Bush Directive on Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14. *See also* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

13 *See, e.g.*, Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. TIMES, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, BOSTON GLOBE, Sept. 7, 2006, at A1; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*, ATLANTA J. CONST., Sept. 7, 2006, at A1 (adding that the CIA secret detention program "had held about 100 detainees"); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Mark Silva et al., *Bush Confirms Use of CIA Secret Prisons*, CHICAGO TRIB., Sept. 7, 2006, at 1. *See also* Eggen, *supra* note 12; Johnston, *supra* note 12; Paust, *supra* note 1, at 836–37 & n.96.

14 *See generally* Paust, *supra* note 1, at 838–48.

15 *See id.* at 820–23, 845–46. The United Nations Charter mandates that member states take joint and separate action to ensure "universal respect for and observance of human rights." U.N. Charter art. 55(c), 56.

16 1465 U.N.T.S. 85 (Dec. 10, 1984). *See* Paust, *supra* note 1, at 823, 846.

17 *See, e.g.*, Paust, *supra* note 1, at 850–51.

18 Concerning the Bush administration's approval of the secret rendition of persons from Afghanistan, Iraq and elsewhere to other countries in violation of the 1949 Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, customary prohibitions of forced disappearance, and other customary and treaty-based international law, *see, e.g.*, Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 199, 210–11, 213 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W.

John Yoo, a former Deputy Assistant Attorney General, has admitted that "some of the worst possible interrogation methods we've heard of in the press have been reserved for the leaders of al Qaeda that we've captured"[19] and, with remarkable candor and abandonment, "I've defended the administration's legal approach to the treatment of al Qaida suspects and detainees," including the use of torture.[20] More recently, John Yoo has provided an honest, remorseless, and revealing set of admissions concerning inner-cir-

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RES. J. INT'L L. 389, 411–13 (2006); Paust, *supra* note 1, at 836–37 & n.96, 850–51 & nn.147–51; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantánamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1352–56 (2004); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 CASE W. RES. J. INT'L L. 309 (2006); Leila Zerrougui et al., Report, *Situation of Detainees at Guantánamo Bay*, Commission on Human Rights, 62d sess., items 10 and 11 of the provisional agenda, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), at 26–27, paras. 55, 37, 89 ("The practice of rendition of persons to countries where there is a substantial risk of torture . . . amounts to a violation of the principle of non-refoulement and is contrary to Article 3 of the Convention Against Torture and Article 7 of the ICCPR"), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf; Eur. Parl. Ass., resol. 1433, Lawfulness of Detentions by the United States in Guantánamo Bay, paras. 7(vi) ("the unlawful practice of secret detention"), (vii) ("[T]he United States has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and cruel, inhuman or degrading treatment, in violation of the prohibition of *non-refoulement*"), 8(vii), (ix) (Apr. 26, 2005), *available at* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05eres1433.htm; Diane Marie Amann, *The Committee Against Torture Urges an End to Guantánamo Detention*, ASIL Insight (June 8, 2006), *available at* http://www.asil.org/insights/2006/06/insights060608.html; Christine Spolar, *Ex-Spy: CIA, Italians Worked on Abduction; Arrest Warrant Targets 4 Accused Americans*, CHI. TRIB., July 9, 2006, at 10; Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, at A1. *See also Rome Statute of the International Criminal Court*, Article 7(2)(i), U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90, *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf, (forced disappearance is a customary crime against humanity); Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, 92d plen. mtg., U.N. Doc A/RES/47/133, (Dec. 18, 1992), *reprinted in* 32 I.L.M. 903 (1993); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c), cmt. n & R. 1 (1987); Inter-American Convention on Forced Disappearance of Persons, pmbl. & art. II, June 9, 1994, *reprinted in* 33 I.L.M. 1529 (1994).

[19] John Yoo, Remarks on National Public Radio (Dec. 15, 2005). *See also* JOHN YOO, WAR BY OTHER MEANS 190–91 (2006); text *supra* note 13 (Bush admits that "tough" tactics were used against "high-value" detainees held in secret detention by the CIA). This paragraph is borrowed from Paust, *Above the Law*, *supra* note 10, at 357–58.

[20] John Yoo, *President's Power in Times of War*, TRIBUNE–REVIEW (Greensburg, Pa.), Dec. 25, 2005. *See also* Paust, *supra* note 1, at 830–33, 834–35 n.89, 842–43, 856 & n.172, 858, 861–62 & n.198 (discussing the role that Yoo played); David Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34 (the infamous 2002 Bybee torture memorandum was "drafted by Yoo" and a "Yoo memo in March 2003 was even more expansive, authorizing military interrogators . . . to ignore many criminal statutes");

cle decisions of the Bush administration to violate Geneva law. As he discloses, detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[21] Instead of "following the Geneva Conventions," during meetings chaired by White House Counsel Gonzales[22] the inner-circle decided whether such "would yield any benefits or act as a hindrance."[23] They knew that following Geneva law would "interfere with our ability to . . . interrogate,"[24] since "Geneva bars 'any form of coercion.'"[25] For the inner-circle, "[t]his became the central issue,"[26] and following "'Geneva's strict limitations on . . . questioning'" "made no sense."[27] They calculated that "treating the detainees as unlawful combatants would increase flexibility in detention and interrogation"[28] and the question became merely "what interrogation methods fell short of the torture ban and could be used"[29] as "coercive interrogation,"[30]

Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REPORT, May 29, 2006, at 32 (Yoo was a drafter, with Addington and Bybee, of the Bybee torture memorandum).

21 YOO, *supra* note 19, at ix.

22 *See id.* at 30 (in December 2001 and for months thereafter Gonzales chaired the meetings "to develop [such] policy"), which is torture and a war crime. *See infra* notes 43–44 and accompanying text. Concerning the chairing of meetings by Gonzales and his abetment of denials of Geneva law rights and protections, which are violations of the Conventions and war crimes, *see also* Paust, *supra* note 1, at 824–26, 830, 834 n.89, 848 n.138; Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17; Evan Thomas & Michael Hirsh, *The Debate over Torture*, NEWSWEEK, Nov. 21, 2005, at 26; Editorial, WASH. POST, Apr. 26, 2005, at A14 (Gonzales meeting approved simulated drowning).

23 YOO, *supra* note 19, at 35.

24 *Id.* at 39.

25 *Id.*

26 *Id.*

27 *Id.* at 39–40.

28 *Id.* at 43.

29 *Id.* at 171. *See also id.* at ix (by focusing "on what constituted 'torture' under the law . . . our agents [supposedly, but erroneously] would know exactly what was prohibited, and what was not."), 172 ("OLC addressed this question: What is the meaning of 'torture'"). This is an example of manifestly and seriously unprofessional advice, leaving unstated, for example, the ban under several treaties of the United States and customary international law of cruel, inhuman, and degrading treatment. It has led to possible criminal and civil liability here and abroad for CIA personnel and U.S. soldiers. *See, e.g.*, *supra* note 18; *infra* note 45.

30 *See id.* at 172 ("harsh interrogation short of torture"), 177 ("Congress banned torture, but not interrogation techniques short of it . . . coercive interrogation" is permitted), 178 ("[m]ethods that . . . do not cause severe pain or suffering are permitted."), 187 ("American law prohibits torture but not coercive interrogation," such as "using 'excruciating pain'"), 190–91 (coercive interrogation was used), 192 ("coercive interrogation . . . should not be ruled out"), 202 (same).

which includes cruel, inhuman, and degrading treatment.[31] In view of the fact that a "common, unifying approach" was devised to use coercive interrogation tactics and President Bush has admitted that such tactics and secret detention have been used in other countries, it is obvious that coercive interrogation tactics migrated also to Afghanistan and Iraq as part of the common plan.[32] It is also clear, for example, that the Yoo–Delahunty,[33] Gonzales,[34] Ashcroft,[35] Bybee,[36] and Goldsmith[37] memos and letters, the 2003 DOD Working Group Report,[38] and presidential and other authorizations, directives, and findings substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation and that use of authorized coercive interrogation tactics were either known or substantially foreseeable consequences.

Implementation of the common plan apparently occurred first at Guantánamo Bay, Cuba. It is well-known that Secretary of Defense Donald Rumsfeld had expressly authorized patently unlawful interrogation tactics involving the stripping of persons naked, use of dogs, and hooding, among other unlawful tactics, in an action memo on December 2, 2002[39] and in another memo on April 16, 2003,[40] the Secretary adding that if additional interrogation techniques for a particular detainee were required he might approve them upon written request.[41]

CIA Director Porter Goss has admitted that prior Agency techniques for interrogation have been restricted under the McCain Amendment to the 2005 Detainee Treatment Act, which reiterated the prohibition of cruel, inhuman, and degrading treatment.[42]

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31 *Id.* at 200. That such tactics were authorized for use in Iraq, *see, e.g.*, Paust, *supra* note 1, at 843, 847 & n.135, 848–50.

32 *See also* Paust, *Above the Law*, *supra* note 10, at 359; Paust, *supra* note 1, at 846–50.

33 *See* Paust, *supra* note 1, at 830–33.

34 *See id.* at 824–26, 830.

35 *See id.* at 827.

36 *See id.* at 834–36.

37 *See id.* at 850–51.

38 *See id.* at 841.

39 Paust, *supra* note 1, at 840–41.

40 *Id.* at 843–44 & nn.120, 122. *See also* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, *available at* http://www.newyorker.com/images/pdfs/moramemo.pdf (addressing a memorandum from General Counsel of the Navy Alberto J. Mora to Inspector General, Dep't of Navy, Vice Admiral Albert Church, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, July 7, 2004).

41 Paust, *supra* note 1, at 843–44.

42 *See* YOO, *supra* note 19, at 171 (under the Bush policy, "methods . . . short of the torture ban . . . could be used"), 178 (the Bush policy had been that "[m]ethods that . . . do not cause severe pain or suffering are permitted"), 187 ("using 'excruciating

Some CIA personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell' . . . [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'water boarding' . . . [which produces] a terrifying fear of drowning,"[43] each of which is manifestly illegal under the laws of war and human rights law[44] and can result in criminal and civil sanctions for war crimes.[45]

Are the President, the Vice President,[46] the Attorney General, and others within the executive branch above the law? Clearly they are not, despite an arrogant and fundamentally anti-democratic commander-above-the-law policy that seeks an unreviewable power

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pain'" related to "coercive interrogation" not prohibited by the executive), 190–91 (stating "coercive interrogation" was used), 200 ("If the text of the McCain Amendment were to be enforced as is, we could not coercively interrogate."); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1 (stating that there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees'—prisoners removed from Iraq for secret interrogations" in violation of Geneva law and CIA officer and former director of intelligence programs of the National Security Agency, Mary O. McCarthy, has stated that CIA policies authorized treatment she "considered cruel, inhumane or degrading."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, U.S.A. TODAY, June 27, 2004, at A5 (stating that a secret DOJ August 2002 memorandum apparently exists that is more detailed than the 2002 Bybee torture memorandum and it "spelled out specific interrogation methods that the CIA" can use, including "water boarding"); Mayer, *supra* note 40 (the memorandum allows inhumane treatment of persons held by the C.I.A.); Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," a Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 (asserting secret sites in Camp Nama near Baghdad and elsewhere in Iraq were used for harsh interrogation by CIA, military, and others and tactics included use of the cold cell). This paragraph is borrowed from Paust, *Above the Law*, *supra* note 10, at 352.

43 *See, e.g.*, Editorial, *Director for Torture*, WASH. POST, Nov. 23, 2005, at A18. *See also* Paust, *supra* note 1, at 836–37 n.96, 848 n.138; Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10 (there were "some extreme tactics used at those secret [CIA] centers, including 'water boarding'"); Landay, *supra* note 10; Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House, http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html (last visited Aug. 28, 2007).

44 *See, e.g.*, Paust, *supra* note 1, at 836 n.96, 846 ("using cold air to chill"); *In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 910 F. Supp. 1460, 1463 (D. Haw. 1995) ("forms of torture" include "[t]he 'water cure,' where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation" and "[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice," among other interrogation tactics).

45 *See, e.g.*, Paust, *supra* note 1, at 852–54.

46 Concerning the role played by Cheney, *see, e.g.*, *id.* at 837–38 & n.97; Paust, *Above the Law*, *supra* note 10, at 350–52, 396–97, 399 n.142. *See also* Landay, *supra* note 10.

to override any inhibiting domestic or international law.[47] Under the United States Constitution, the President is expressly and unavoidably bound to faithfully execute the law and has been granted no discretion to violate the law.[48] Three sets of numerous and venerable Supreme Court and lower federal court decisions confirm that the President, as Commander in Chief, is not above the law. One consistent and unswerving set of cases reflects the unanimous views of the Founders and Framers that, during war, the President and all persons within the executive branch are bound by the laws of war, whether or not those laws are based in treaties of the United States or customary international law.[49]

A second set of cases provides overwhelming recognition that decisions of the Executive during war concerning the status of persons, their seizure and detention, their rights, their treatment, and the seizure of property are judicially reviewable and that the judiciary, despite provisional characterizations by the executive, will identify, clarify, and apply relevant customary and treaty-based international law.[50] A remarkable Supreme Court case that is found in the first and second set of cases is *The Paquete Habana*.[51] Although the case is too often needlessly misunderstood and misquoted, the Supreme Court denied a claim of the executive concerning the content of a customary law of war and ruled that executive seizures of enemy alien vessels and enemy aliens abroad in time of war in exercise of executive war powers in the theater of war were void because they were in violation of customary international law which is part of the laws of the United States that must be ascertained and applied by the judiciary.[52]

A third set of cases provides recognition that Congress has

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47 *See, e.g.*, Paust, *Above the Law*, *supra* note 10, at 393–99.

48 U.S. CONST. art. II, § 3.

49 *See, e.g.*, Paust, *supra* note 1, at 856–61; Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 839–40 n.53 (2005).

50 *See, e.g.*, Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 517–24 (2003).

51 175 U.S. 677 (1900).

52 *Id.* at 698 ("law of war"), 700, 708, 711, 714. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 172, 174–76, 183–84 n.24, 189–90 n.67 (2d ed. 2003) (demonstrating that it is error to assume that presidential violations of the laws of war are controlling or that the executive can violate customary international law); Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981 (1994). *See also* The Paquete Habana, 189 U.S. 453, 464 (1903). More generally, numerous other cases and uniform views of the founders and framers have affirmed that customary international law is part of the laws of the United States. *See, e.g.*, PAUST, *supra* at 7–11, 38–59 nn.32–73; *see also supra* note 50.

constitutionally-based power to place limits on certain commander in chief powers during war, including limitations on warfare with respect to its extent, objects, operations, methods, persons and things affected, places, and time.[53] More generally, the Supreme Court has also recognized that the President's foreign relations power can "be regulated by treaty or by act of Congress . . . and [if regulated thusly, must] be executed by the executive" in accordance with the treaty or legislative limitations.[54]

During war and threats to national security, it is often the judiciary that has maintained the line between lawful and unlawful exercises of power, a line that the Supreme Court has maintained more recently in *Rasul*,[55] *Hamdi*,[56] and *Hamdan*.[57] For example, in the face of executive claims to unreviewable commander in chief powers, the Supreme Court affirmed in *Hamdi* that courts can "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims"[58] and quoted *Sterling v. Constantin*[59] for its earlier recognition that "'[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.'"[60] *Hamdi* also affirmed that executive claims to unreviewable power or to power subject only to "a heavily circumscribed role for the courts" cannot comport with the proper separation of powers since it "serves only to condense power into a single branch of government," adding "a state of war is not a blank check for the President."[61]

Finally, the President's "dirty war" tactics and autocratic policies have not only created criminal and civil liability, they have also served our enemies and degraded this country, its values, and its influence. As patriots of democratic freedom understand, they

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53 *See, e.g.*, Paust, *Above the Law*, *supra* note 10, at 382–88.

54 Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). *See also* United States v. Curtiss–Wright Export Corp., 299 U.S. 304, 318 (1936) (stating that despite broad presidential foreign affairs powers to speak, listen, negotiate, and so forth, Executive "operations" in foreign "territory must be governed by treaties . . . and the principles of international law."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (dicta in *Curtiss–Wright* concerning presidential foreign affairs power does not suggest that the President "might act contrary to an act of Congress"); PAUST, *supra* note 52, at 478 n.58.

55 Rasul v. Bush, 542 U.S. 466 (2004).

56 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

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

58 *Hamdi*, 542 U.S. at 535.

59 287 U.S. 378 (1932).

60 *Hamdi*, 542 U.S. at 535 (citing *Sterling*, 287 U.S. at 401).

61 *Id.* at 535–36.

threaten our democracy and the rule of law. It is time to end impunity. It is time for a change.