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LAWYERS COMMITTEE FOR HUMAN RIGHTS

**GETTING TO GROUND TRUTH:
INVESTIGATING U.S. ABUSES
IN THE “WAR ON TERROR”**

SEPTEMBER 2004

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For the past quarter century, Human Rights First (the new name of Lawyers Committee for Human Rights) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

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September 2004

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I. INTRODUCTION

I can assure you that no stone will be left unturned to make sure that justice is done and to make sure that nothing like this ever happens again.

Secretary of State Colin Powell
Remarks at the United Nations
May 4, 2004

The graphic images of torture and other abuse by U.S. forces that emerged from Iraq last spring have prompted increased attention, both in the United States and around the world, to U.S. detention and interrogation operations in the “war on terror.” When the photos from Abu Ghraib prison came to light, senior U.S. officials were outspoken and unanimous in condemning the behavior they revealed. And both Congress and the executive branch pledged to conduct thorough investigations into what happened, why, and how to ensure that such abuses never happen again.

Just over four months later, U.S. authorities have indeed launched more than 300 official investigations – criminal, military, and administrative in nature – into U.S. practices since September 2001 in detaining and interrogating foreign nationals.¹ The investigations have been

¹ This number is Human Rights First’s estimated tally of all completed and ongoing investigations into matters relating to abuses in Iraq, Afghanistan, and Guantanamo Bay. Sources for this information include: INT’L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT BY COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION, February 2004; Maj. Gen. Antonio Taguba, AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, February 2004 [hereinafter TAGUBA REPORT]; REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND FOLLOW-UP TO THE WORLD CONFERENCE ON HUMAN RIGHTS, THE PRESENT SITUATION OF HUMAN RIGHTS IN IRAQ, June 9, 2004; DEP’T OF THE ARMY, THE INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION, July 21, 2004 [hereinafter DAIG REPORT]; Lt. Gen. Anthony R. Jones and Maj. Gen. George R. Fay, AR 15-6 INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, August 25, 2004; FINAL REPORT OF THE INDEP. PANEL TO REVIEW DOD DETENTION OPERATIONS, August 2004 [hereinafter SCHLESINGER REPORT]; Dep’t of Interior Inspector Gen. Memorandum, Review of 12 Procurements Placed Under Gen. Servs. Admin. Fed. Supply Schedules 70 and 871 by the Nat’l Bus. Center (Assignment No. W-EV-OSS-0075-2004), July 16, 2004, available at <http://www.oig.doi.gov/> (accessed on Sept. 6, 2004); Dep’t of Defense Background Briefing on Investigations at Abu Ghraib, Aug. 25, 2004, available at <http://www.defense.gov/transcripts/2004/tr20040825-1222.html> (accessed on Sept. 3, 2004); Dep’t of Defense Global War on Terror Detention Operations Review Briefing to Congressional Staff, Aug. 24, 2004 (on file with Human Rights First); Thomas Ricks, *Abuse Inquiry Cites 26 Soldiers; 2 Deaths in Afghanistan Led to Army Probe*, WASH. POST, Sept. 1, 2004, at A1; Douglas Jehl and David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10; Ellen McCarthy, *Interior Dept. Inquiry Faults Procurement*, WASH. POST, July 17, 2004, at E03; David Phinney, *Firm’s Work at Guantanamo Prison Under Review*, FederalTimes.com, July 19, 2004, at <http://federaltimes.com/index.php?S=260835> (accessed Sept. 5, 2004); *ISOO Will Investigate Secrecy of Torture Report*, SECRECY NEWS (FAS), May 7, 2004, at <http://www.fas.org/sgp/news/secrecy/2004/05/050704.html> (accessed on Sept. 4, 2004); *Detainee Begged for Death*, CBSNews.com, June 25, 2004, at <http://www.cbsnews.com/stories/2004/06/30/iraq/main626834.shtml> (accessed on Sept. 6, 2004); Tom Bowman, *Army*

aimed both at addressing individual instances of wrongdoing, and at inquiring into whether systemic failures contributed to the torture and abuse of U.S.-held detainees.

Among other things, these inquiries have revealed a problem far greater in scope than that reflected in the pictures of a handful of U.S. soldiers torturing detainees at Abu Ghraib. Since the fall of 2001, there have been approximately 300 alleged instances of torture or other abuse by U.S. troops in Afghanistan, Iraq, and at the U.S. detention facility at Guantanamo Bay, Cuba.² To date, about half of these have been investigated by the military, which thus far has verified 66 cases of detainee abuse by U.S. forces (three in Afghanistan, eight at Guantanamo, and 55 in Iraq).³ There are still nearly 30 pending investigations into detainee deaths in U.S. custody; the military has determined thus far that five of these were the result of torture or other abuse.⁴ (Many more than 30 detainees have died in U.S. custody, but the military reports the additional deaths were the result of natural causes or enemy attacks.⁵)

Human Rights First has welcomed the investigations both completed and still underway into the circumstances surrounding the abuses that occurred during U.S. detention and interrogation. Even so, months after the Abu Ghraib photos were published – and nearly two years after the first abuse-related deaths in U.S. custody in the “war on terror” – we are still not in a position to say that we know how to ensure that such abuses never happen again.⁶ As evidence of the scope of the problem has increased, so has the need for a comprehensive, independent investigation into U.S. detention and interrogation operations in the “war on terror” – an investigation neither organized nor conducted by an agency that itself is the focus of the abuse allegations.

Each one of the major investigations to date, as discussed in this report, has suffered from both structural and particular failings that have prevented either full identification of the widespread abuses, or meaningful recommendations to address them. For example, the scope of the investigative reports by Lt. Gen. Anthony Jones, and Maj. Gens. Antonio Taguba and George Fay, were circumscribed narrowly. Maj. Gen. Taguba’s report looked only at the role of U.S. military police at Abu Ghraib. Maj. Gen. Fay’s report looked only at the role of military intelligence forces at that facility. And Lt. Gen. Jones was tasked only with looking at “organizations or personnel”

Report Points to Training Flaws at Prison, BALTIMORE SUN, May 4, 2004, at 12A. Human Rights First has submitted 13 Freedom of Information Act (FOIA) requests for information and records concerning various investigations into government agency and military abuses in Iraq, Afghanistan, and Guantanamo Bay. To date, the government has produced no documents in response. The CIA determined that it would not provide any records relating to investigations by the CIA Inspector General of the deaths of detainees in Iraq and Afghanistan in 2003. FOIA letters are on file with Human Rights First.

² SCHLESINGER REPORT, at 5.

³ *Id.* at 12-13.

⁴ *Id.*

⁵ *Id.*

⁶ Eric Schmitt and David Rohde, *About 2 Dozen G.I.'s to Face Trial or Other Punishment in Deaths of 2 Afghan Prisoners*, N.Y. TIMES, Sept. 2, 2004, at A8 (reporting first charges to be brought in connection with the deaths of two prisoners at a U.S. detention center in Afghanistan in December 2002).

involved in events at Abu Ghraib “higher than the 205th Military Intelligence Brigade chain of command.”⁷

These investigators also have been limited by their respective places in the chain of command, by the nature of the inquiry (Army investigations like those of Taguba and Fay generally do not require sworn statements or provide subpoena power), and by their institutional inability to inquire beyond the four walls of the military itself. Yet each of their accounts has suggested that a critical part of what went wrong at Abu Ghraib and elsewhere was the *relationship* – and failures in command structure – between military intelligence and police operations, and between military personnel and personnel from other agencies outside the Department of Defense.

The two broader military investigations conducted to date – one by the Army Inspector General, and one by a panel led by former Secretary of Defense James R. Schlesinger – suffer from structural constraints of their own. They also were limited to the role of military forces in detention and interrogation; indeed, both reports expressed frustration with their inability to inquire into the role, and relationship with the Army, of other U.S. actors, including the Central Intelligence Agency (CIA).⁸ The Inspector General’s report in particular was designed to be, in its terms, “a functional analysis” of Army operations, “not an investigation of any specific incidents or units.”⁹ And the Schlesinger panel’s report, written without the benefit of subpoena power and lacking a single internal citation or footnote, suffers badly from an absence of real independence – the panel having been handpicked by the current Secretary of Defense.

In addition to flaws inherent in their design, some or all of the investigations suffer from particular flaws, which are surveyed in this report. These include failures to investigate all relevant agencies and personnel; cumulative reporting (increasing the risk that errors and omissions may be perpetuated in successive reports); contradictory conclusions; questionable use of security classification to withhold information; failures to address senior military and civilian command responsibility; and, perhaps above all, the absence of any clear plan for corrective action.

The time has come to do better. Establishment of an independent body with broad investigative authority, like the just-concluded September 11 Commission, has become a standard way for the U.S. government to try to get at the truth underlying an event of great public significance and concern. This is in part recognition of the practical reality that conducting a far-reaching investigation into a complex series of events requires considerable time and attention. With dedicated time and resources, a commission with a strong full-time staff can be empowered to study not just what happened, but *why* it happened. It can recommend corrective action. And it can help secure the accountability of those responsible.

Equally important, an independent commission is *independent*. As a group of distinguished, retired military officers recently wrote in a letter to President Bush urging the creation of such a

⁷ INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE, LT. GEN. ANTHONY R. JONES, August 2004, at 9 [hereinafter JONES REPORT].

⁸ SCHLESINGER REPORT, *supra*, note 1, at 6; DAIG REPORT, *supra*, note 1, at i.

⁹ DAIG REPORT, at i.

commission: “Americans have never thought it wise or fair for one branch of government to police itself.” Such a commission need not be constrained by hierarchies internal to the organization it is reviewing, or the limits of departmental or institutional divisions of labor. It is able to operate with a level of objectivity that those closer to events and institutions cannot achieve. Critically, it can be designed to avoid either the reality or appearance of partiality or institutional protection.

For these reasons, and those set forth in the report that follows, we urge the creation of a comprehensive, independent commission to investigate and report on U.S. detention and interrogation practices in the “war on terror.” The commission should be charged with investigating the full range of actors involved. It should describe what happened and why. And it should chart a course for speedy correction and certain accountability – so that the American people, and our friends and allies around the world, can truly be assured that these abuses will never happen again.

Michael Posner and Deborah Pearlstein
September 8, 2004

II. THE INVESTIGATIONS TO DATE

Each of us has had a strong interest in getting the facts out to the American people. We want you to know the facts. I want you to have all the documentation and the data you require.

Secretary of Defense Donald H. Rumsfeld
Testimony to the Senate and House Armed Services Committees
May 7, 2004

Of the hundreds of inquiries launched so far into torture and other forms of abuse in U.S. custody, the majority are investigations aimed at assessing wrongdoing by particular individuals. This category thus includes, for example, the military justice prosecutions of seven low-ranking members of the 800th Military Police Brigade at Abu Ghraib – many of whom appeared in the photos that were so widely publicized.¹⁰ It also includes charges recently brought against four Navy special forces personnel for abusing an Iraqi detainee who later died at Abu Ghraib.¹¹ It includes criminal investigations opened by the Justice Department into the actions of civilian personnel at U.S. detention facilities.¹² And it will include the case investigations of some two dozen soldiers who Army criminal investigators say will face criminal or administrative punishment related to the deaths of two U.S.-held prisoners in Afghanistan in December 2002.¹³

These individual investigations – whether through the military justice system or through civilian federal prosecution – are essential both to ensure that those responsible for wrongdoing are held accountable, and to ensure that U.S. military and civilian personnel still working in detention and interrogation operations understand the limits of lawful conduct. Because proper handling of serious and complex crimes becomes more difficult with the passage of time – as witnesses become harder to track down and evidence trails grow cold – it is essential that these cases move forward promptly. It is thus a significant failure that it has taken almost two years for individual charges to be brought following the homicides of two detainees at the U.S. Air Force Base in Bagram, Afghanistan. The bulk of public attention, however, has appropriately focused on the broader assessments and reports undertaken by the Pentagon itself. According to the Defense Department, it had launched

¹⁰ Daniel Williams, *Second Soldier To Plead Guilty To Prison Abuse*, WASH. POST, Aug. 24, 2004, at A1.

¹¹ Eric Schmitt, *4 Navy Commandos Are Charged With Abuse*, N.Y. TIMES, Sept. 4, 2004, at A6, available at <http://www.nytimes.com/2004/09/04/international/middleeast/04abuse.html#>.

¹² See, e.g., Brian Ross, *More Photos Surface*, ABCNews.com, May 19, 2004, at http://abcnews.go.com/sections/wnt/Investigation/abu_ghraib_photos_040519.html.

¹³ Eric Schmitt and David Rohde, *About 2 Dozen G.I.'s to Face Trial or Other Punishment in Deaths of 2 Afghan Prisoners*, N.Y. TIMES, Sept. 2, 2004, at A8, available at <http://www.nytimes.com/2004/09/02/politics/02abuse.html>.

more than 50 investigations, reviews, inspections and assessments (in addition to more than 220 criminal investigations) as of August 13, 2004.¹⁴ Most significant among these are the following:

- Maj. Gen. Geoffrey Miller, Assessment of DOD Counterterrorism Interrogation and Detention Operations in Iraq, September 5, 2003. (Marked Secret.)
- Maj. Gen. Donald J. Ryder, Army Provost Marshal General Report on Detention and Corrections Operations in Iraq, November 5, 2003. (Marked Official Use Only.)
- Maj. Gen. Antonio Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, February 2004. (Marked Secret.)
- Maj. Gen. George Fay, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, August 25, 2004. (Marked Unclassified, with sections redacted.)
- Lt. Gen. Anthony R. Jones, Article 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade, August 25, 2004. (Marked Unclassified.)
- Lt. Gen. Paul T. Mikolashek, Department of the Army Detainee Operations Inspection, July 21, 2004. (Unmarked, unclassified.)
- Former Secretary of Defense James R. Schlesinger, Final Report of the Independent Panel to Review DOD Detention Operations, August 2004. (Unmarked, unclassified.)
- Vice Adm. Albert T. Church, Navy Inspector General, forthcoming report to review U.S. global detention operations.
- Brig. Gen. Richard P. Formica, Commander III Corps Artillery, forthcoming report on allegations of abuse by special operations forces in Iraq.
- Brig. Gen. Charles H. Jacoby, forthcoming report on U.S.-run detention facilities in Afghanistan.

The reports released publicly so far have been rich in some kinds of information, appropriately crediting some individuals for performing admirably, and at the same time documenting abusive practices resulting in death, drowning, physical beatings, numerous instances of isolation with sensory deprivation, forced nudity and humiliation, using dogs to frighten detainees, and near suffocation.¹⁵

¹⁴ Dep't of Defense Global War on Terror Detention Operations Review Briefing to Congressional Staff, Aug. 24, 2004 (on file with Human Rights First).

¹⁵ TAGUBA REPORT, *supra*, note 1, at 16-17; SCHLESINGER REPORT, *supra*, note 1, at 13; DAIG REPORT, *supra*, note 1, at 19-20; Maj. Gen. George R. Fay, AR 15-6 INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, August 2004, at 68-95, 109 [hereinafter FAY REPORT].

In addition to these dozens of disturbing instances of abuse, the reports have included the following significant findings.

Flawed and Confusing Policy and Practice

“[P]re-war planning [did] not include[] planning for detainee operations” in Iraq.¹⁶ Senior leaders, including officers in the Central Command, the Chairman of the Joint Chiefs of Staff, and the Office of the Secretary of Defense, also did not plan for a major insurgency in Iraq or chart an alternative operation.¹⁷ Military personnel responsible for detention operations were burdened by additional tasking with assignments for the Coalition Provisional Authority, work neither anticipated nor planned.¹⁸ These missteps by senior leaders led to the conditions at Abu Ghraib, conditions that included policing a detainee population of 7,000 with just 92 military police, a 75:1 ratio.¹⁹

The executive branch has introduced myriad new detainee classification terms resulting in confused and inconsistent treatment of detainees. Established military doctrine acknowledges four categories of detainees: Enemy Prisoner of War, Retained Personnel, Civilian Internee, and Other Detainee. The operations in Iraq and Afghanistan have greatly expanded the status of detainees to include: Enemy Combatants, Under-privileged Enemy Combatant, Security Internee, Criminal Detainee, Person Under U.S. Forces Control, and Low Level Enemy Combatant.²⁰ Applicability of the Geneva Conventions has varied with these new classifications and opened the door to divergence from both military regulations and international law.²¹

President Bush’s policy of treating al Qaeda and Taliban detainees “consistent with the principles of Geneva,” rather than according to the terms of the Conventions themselves, was “vague and lacking.”²² Interrogation techniques employed in Iraq and Afghanistan were based on policies drafted for al Qaeda and Taliban held at Guantanamo Bay, to whom the President had determined the Geneva Conventions inapplicable based on this “vague” determination.²³

A great variety of interrogation techniques deviating from military doctrine proliferated after September 11, 2001, with policies in different theatres of operation, and agencies and military units

¹⁶ JONES REPORT, *supra* note 7, at 24.

¹⁷ SCHLESINGER REPORT, *supra*, note 1, at 83.

¹⁸ SCHLESINGER REPORT, *supra*, note 1, at 54; JONES REPORT, *supra* note 7, at 8-10.

¹⁹ SCHLESINGER REPORT, *supra*, note 1, at 47, 54, 60.

²⁰ DAIG REPORT, *supra*, note 1, at 44-47; FAY REPORT, *supra*, note 15, at 11-12.

²¹ Brig. Gen. Karpinski stated in September 2003 that the classification “security detainee” was created in response to Secretary Rumsfeld’s order to categorize detainees, and that a security detainee had fewer rights than an enemy prisoner of war. See *U.S. Holding 4,000 ‘Extra’ Detainees*, AGENCE FRANCE-PRESSE, Sept. 16, 2003, at <http://www.dawn.com/2003/09/17/int6.htm> (accessed September 3, 2004); see also DoD News Briefing – Secretary of Defense Donald Rumsfeld and Gen. Peter Pace, Vice-Chairman, Joint Chiefs of Staff, Sept. 16, 2003, *available at* <http://www.defenselink.mil/transcripts/2003/tr20030916-secdef0682.html> (accessed September 3, 2004).

²² SCHLESINGER REPORT, *supra*, note 1, at 81.

²³ DAIG REPORT, *supra*, note 1, at 39-40; SCHLESINGER REPORT, *supra*, note 1, at 14; 33-38; JONES REPORT, *supra* note 7, at 14-15.

often contradicting one another, causing serious confusion for troops on the ground.²⁴ Standards for interrogating prisoners were in a state of constant flux, with officials including Secretary Donald Rumsfeld and Lt. Gen. Ricardo Sanchez authorizing techniques viewed as impermissible by both military manuals and international law.²⁵ Many interrogators were not trained in these additional techniques and operated in units without the proper command policy in effect. Units were often unaware of the applicable interrogation standards and policies.²⁶

The CIA conducted interrogations under rules different from the military. CIA personnel conducted interrogations at military facilities with and without military personnel present, weakening accountability at the facilities and confusing military members about applicable Geneva Convention standards.²⁷

Interrogation facilities lacked formal control processes and oversight mechanisms, such as routine inspections or electronic monitoring.²⁸ No judge advocates were observed as dedicated to interrogation operations.²⁹

Inadequate Detention Facilities and System for Detainee Classification

No central agency existed, as required by military policy, to account for data on the detainees held by the U.S. military.³⁰ It is unclear whether such an agency has now been created and made operational.

The military did not provide the International Committee of the Red Cross (ICRC) with adequate access to detainees nor did it respond to ICRC complaints regarding detainee treatment.³¹ In particular, military personnel, in at least one instance at the direction of Secretary of Defense Rumsfeld, kept prisoners (“ghost detainees”) hidden from the ICRC inspectors.³²

Only 25% of U.S. detention facilities posted copies of the Geneva Conventions in the detainees’ language as is required by law. No facility in Afghanistan posted the Geneva Conventions in a locally known language.³³

The Army Inspector General estimated that up to 80% of those held for security or intelligence reasons were potentially eligible for release upon proper review of their cases.³⁴

²⁴ FAY REPORT, *supra*, note 15, at 16, 21-30, 42-44; SCHLESINGER REPORT, *supra*, note 1, at 14, 33-38; JONES REPORT, *supra*, note 7, at 14-15.

²⁵ SCHLESINGER REPORT, *supra*, note 1, at 14; 33-38; JONES REPORT, *supra* note 7, at 14-15.

²⁶ DAIG REPORT, *supra*, note 1, at 38.

²⁷ FAY REPORT, *supra*, note 15, at 118-119; SCHLESINGER REPORT, *supra*, note 1, at 70.

²⁸ DAIG REPORT, *supra*, note 1, at 19.

²⁹ DAIG REPORT, *supra*, note 1, at 15.

³⁰ DAIG REPORT, *supra*, note 1, at 56-58.

³¹ SCHLESINGER REPORT, *supra*, note 1, at 87; FAY REPORT, *supra*, note 15, at 7.

³² SCHLESINGER REPORT, *supra*, note 1, at 87; FAY REPORT, *supra*, note 15, at 9, 44, 53, 119.

³³ DAIG REPORT, *supra*, note 1, at 15.

³⁴ SCHLESINGER REPORT, *supra*, note 1, at 61.

The investigations found that military personnel held detainees anywhere from three to 15 times longer than military doctrine permits.³⁵

Inadequate Military Training

Eighty-seven percent of units questioned by the Army Inspector General stated that the Professional Military Education common core does not provide instruction on conducting detainee operations.³⁶

Noncommissioned officers told the Army Inspector General they received little detention operations training, and that their situational training exercises did not involve classification of detainees or processing detainees. Instruction on Geneva Convention protections was also found lacking.³⁷

Military police reservists stated that the law of war training provided in the United States did not differentiate between different classifications of detainees causing confusion about the appropriate level of treatment. Most reservists stated they were not even told of their military police mission until after deployment.³⁸

Problematic Use of Civilian Contractors

Insufficient numbers of interrogators and interpreters led to the insertion of inadequately trained military and civilian contract interrogators and interpreters, many of whom received no formal training in U.S. military doctrine or interrogation techniques.³⁹

The military was “unprepared for the arrival of contract interrogators and had no training to fall back on in the management, control, and discipline of these personnel.”⁴⁰

Civilian contract employees participated in or failed to report abuse of prisoners. It is unclear whether these contractors will be held criminally liable for their actions.⁴¹

General Services Administration and Department of Interior Inspector General investigations determined that a lack of oversight of procurement officials led to improper contracting. This failure resulted in contracts with companies that had earmarked funds for engineering and technology but instead provided military interrogators in Iraq and at Guantanamo Bay.⁴²

³⁵ SCHLESINGER REPORT, *supra*, note 1, at 57-58; DAIG REPORT, *supra*, note 1, at 28-29.

³⁶ DAIG REPORT, *supra*, note 1, at 81.

³⁷ *Id.*

³⁸ DAIG REPORT, *supra*, note 1, at 83-84.

³⁹ DAIG REPORT, *supra*, note 1, at vi, 87-89; SCHLESINGER REPORT, *supra*, note 1, at 69; FAY REPORT, *supra*, note 15, at 47-52.

⁴⁰ FAY REPORT, *supra*, note 15, at 19.

⁴¹ FAY REPORT, *supra*, note 15, at 131-135; TAGUBA REPORT, *supra*, note 1, at 48.

⁴² FAY REPORT, *supra*, note 15, at 17-52; Dep’t of Interior Inspector Gen. Memorandum, Review of 12 Procurements Placed Under Gen. Servs. Admin. Fed. Supply Schedules 70 and 871 by the Nat’l Bus. Center (Assignment No. W-EV-OSS-0075-2004), July 16, 2004, available at <http://www.oig.doi.gov/> (accessed on September 6, 2004); Ellen McCarthy, *Interior Dept. Inquiry Faults Procurement*, WASH. POST, July 17, 2004, at E03; David Phinney, *Firm’s Work*

at Guantanamo Prison Under Review, FederalTimes.com, July 19, 2004, at <http://federaltimes.com/index.php?S=260835> (accessed Sept. 5, 2004).

III. THE GAPS THAT REMAIN

Based on this inspection . . . we were unable to identify system failures that resulted in incidents of abuse.

Detainee Operations Inspection of the U.S. Army Inspector General
July 21, 2004

[L]eader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred.

Maj. Gen. George R. Fay
Investigation of Abu Ghraib Detention Facility and 205th Military Intelligence Brigade
August 25, 2004

The investigations described above, while helpful, suffer from flaws in both design and execution that leave important gaps in our understanding of why U.S. detention and interrogation operations led to so many instances of torture and abuse. To be effective both in addressing human rights violations and in assessing operational performance, a comprehensive investigation must provide a full accounting of what happened and why, chart a clear course for corrective action, and assess who should be held accountable for criminal wrongdoing or administrative failures. None of the investigations to date meet all of these criteria. Specifically, the investigations to date suffer from:

- narrowly circumscribed investigative charges;
- a failure to investigate all relevant agencies and personnel;
- cumulative reporting;
- contradictory conclusions;
- questionable use of classified label to withhold information;
- a failure to address senior military and civilian command responsibility;
- a failure to provide a game plan for corrective action.

This chapter reviews those failings.

Narrowly Circumscribed Investigative Charges

Of the major Pentagon investigations described above, almost all have been site and even brigade-specific. Since 2003, reports by Maj. Gens. Ryder, Miller, Taguba, and Fay, and Lt. Gen. Jones have focused exclusively on the detention facility at Abu Ghraib in Iraq. Maj. Gen. Taguba's report was limited to the operations of the Army's 800th Military Police Brigade; Maj. Gen. Fay's was limited to the operations of the 205th Military Intelligence Brigade. A forthcoming report by Brig. Gen. Formica will look exclusively at allegations of detainee abuse by special operations forces. A

forthcoming report by Brig. Gen. Jacoby will examine detainee operations and facilities in Afghanistan.

While close examination of individual facilities and operational units is important, investigative missions that impose narrow or artificial constraints on the scope of an inquiry prevent investigators from pursuing leads as they emerge. Of the investigations targeted at Abu Ghraib, none has been able to look fully at the *interaction* of military police and military intelligence, or the relationship between these Army units and personnel from the CIA, civilian contractors, special operations forces, and other agents in the field. Accordingly, most have, in some form, recommended further study or review.

Thus, for example, Maj. Gen. Fay recommends at the conclusion of his report that the Army review the use of contract interrogators.⁴³ A review of contract interrogators ideally would have been part of the work of the multiple investigative and assessment teams who have already visited and interviewed personnel working at detention and interrogation sites. Likewise, while recognizing the problem of “ghost detainees” at Abu Ghraib – detainees who were accepted “from other agencies and services” without accounting or screening – Lt. Gen. Jones reports that the number of ghost detainees held at Abu Ghraib “cannot be determined.”⁴⁴ Pursuing reviews in sequence, and one agency at a time, prolongs the time it takes to get a full picture of the truth. And inquiries that focus narrowly on the role of one group make it easier to point the finger at another group, whose role is uncertain but is in any case “beyond the scope” of the current study.

Only three of the Pentagon investigations – two already concluded, one still underway – purport to be “comprehensive” in nature.⁴⁵ But none is “comprehensive” in the sense that it provides a full accounting of what happened and why, charts a clear course for corrective action, and recommends measures for accountability. For example, the July 2004 report of the Army Inspector General does indeed look at detention and interrogation procedures in operations in both Iraq and Afghanistan. But it excluded operations at Guantanamo Bay (a detention facility created out of and closely linked to detention operations in Afghanistan). It also did not inspect CIA operations or those of Defense Department Human Intelligence Services. (Indeed, the report itself is internally contradictory on just what it did investigate, reporting on one page that it had inspected 26 sites, stating the number as 25 on a later page, and indicating 23 sites visited in the appendix listing inspection locations.⁴⁶)

More important, the Inspector General was charged not with investigating past abuses, but with conducting a “functional analysis” of relevant operations, policies, and practices to “identify any

⁴³ FAY REPORT, *supra*, note 15, at 116.

⁴⁴ JONES REPORT, *supra* note 7, at 22.

⁴⁵ DAIG REPORT, *supra* note 1, at i (describing its work as a “comprehensive review”); Eric Schmitt, *Lack of Oversight Reportedly Blamed for Iraq Abuses*, N.Y. TIMES, Aug. 24, 2004, at A1 (quoting senior Defense Department official describing Schlesinger panel report as “very comprehensive”); Christine Spolar and Stephen J. Hedges, *Navy to Probe How Army Runs Detention Sites: Rumsfeld Orders Investigations in Iraq, Afghanistan*, CHI. TRIB., June 9, 2004, at C1 (quoting Secretary of Defense Rumsfeld spokesman Bryan Whitman stating of a forthcoming report by Vice Adm. Albert T. Church on U.S. global detention operations: “I don’t think there’s any question that all the lines of inquiry are being conducted in a very thorough, comprehensive manner.”).

⁴⁶ DAIG REPORT, *supra*, note 1, at i, 1, app. C.

capability and systemic shortfalls” in conducting detention and interrogation.⁴⁷ Put differently, the Inspector General was studying whether policy changes needed to be adopted, not whether existing policies played any role in past abuses. This is an important charge, but it is not one designed to get to the bottom of what abuses have occurred and why.

The Schlesinger panel report, issued in August 2004, reviewing Defense Department detention operations was similarly constrained. While this panel – unlike all of the other investigations listed above – was able to interview key civilian leadership in the Defense Department, “[i]ssues of personal accountability” were expressly excluded from its purview.⁴⁸ The panel “did not have full access to information involving the role of the Central Intelligence Agency in detention operations,” an area the panel identified as in need of further review.⁴⁹ And the panel did not investigate any individual case of abuse, or indeed conduct any original research beyond the high-level interviews, but relied instead on “various completed and on-going reports covering the causes for the abuse” (that is, the panel reviewed the other reports listed above).⁵⁰

A final Pentagon report, set to be released this month, may prove to be unconstrained by these limitations. In June 2004, Defense Secretary Rumsfeld directed Vice Adm. Albert Church to expand an investigation he had begun into the treatment of detainees at Guantanamo Bay, Cuba, and in Charleston, South Carolina, to include detention and interrogation operations in Iraq and Afghanistan as well. According to the Pentagon, the forthcoming Church report is to “fill the gaps and seams” in policy, doctrine, force structure, and command relationships left by the other “comprehensive” investigations already completed.⁵¹ While we remain concerned that the Church report, like any self-examination, will lack the objectivity and independence essential to an effective investigation, we look forward to its release.

Failure to Investigate All Relevant Agencies and Personnel

Closely related to the limitations on the investigative charges these officers have been given, Pentagon investigations to date either have not been able, or simply have not, explored the full range of agencies, actors, documents, or other sources of information necessarily implicated by the widespread incidence of abuse. Some of this is due to the scoping issue, described above. The reasons for other omissions are not immediately apparent.

Troops. A number of reports indicate that investigators may have failed to contact – or failed to inquire after – individual soldiers and officials who were in a position to witness events at Abu Ghraib first hand. For example, Ken Davis, a reservist Army Sergeant described to the press, senior officers, and members of Congress witnessing several brutal scenes of abuse at Abu Ghraib. In particular, Davis identified four intelligence officers in one of the October 2003 photos taken at Abu

⁴⁷*Id.* at i.

⁴⁸ SCHLESINGER REPORT, *supra*, note 1, at app. B (Memorandum from Secretary of Defense Donald H. Rumsfeld to the Honorable James R. Schlesinger, et al. re: Independent Panel to Review DOD Detention Operations (May 12, 2004)).

⁴⁹*Id.* at 6.

⁵⁰*Id.* at 25.

⁵¹ Dep’t of Defense Background Briefing on Investigations at Abu Ghraib, Aug. 25, 2004, *available at* <http://www.defense.gov/transcripts/2004/tr20040825-1222.html> (accessed on Sept. 3, 2004).

Ghraib. But Davis says no one from the Fay or Jones teams spoke with him for the report.⁵² Sgt. Samuel Provance, who served at Abu Ghraib, was interviewed, but was told by his commanders in May that his security clearance was being pulled for disobeying orders to remain quiet about events there after Provance spoke to ABC News about the alleged abuse at the prison.⁵³ Provance told ABC that he was concerned the military was covering up the extent of the abuse at Abu Ghraib.⁵⁴ Finally, one non-commissioned officer has told Human Rights First that Fay investigators also never spoke to the soldiers who comprised a key Abu Ghraib security detail, soldiers who escorted detainees to interrogation booths and often watched the interrogations take place.

Other Agencies and Actors. Most of the reports make reference on multiple occasions to the involvement of other agencies or actors in the detention and interrogation operations that are the subject of their investigation. But no investigation to date has explored the involvement or even interviewed many of the Army and non-Army actors involved, including not only military intelligence and military police brigades, but also special operations forces, officials from the CIA and other participants in Joint Task Force 121 (responsible for locating former government members in Iraq), members of the Iraqi Survey Group (tasked with seeking out so-called “weapons of mass destruction” in Iraq), civilian contractors, JAG officers, medical personnel, Justice and Defense Department officials, and any White House officials involved in advising detention and interrogation leadership on operational limitations under the law.⁵⁵

These gaps are most visible in reporting on the issue of “ghost detainees.” Beginning with the Taguba Report last March, all of the major Pentagon investigations have recognized that various U.S. detention facilities have “routinely held persons brought to them by Other Government Agencies (OGAs) without accounting for them, knowing their identities, or even the reason for their detention.”⁵⁶ “Ghost detainees” were additionally kept hidden from visiting monitors of the International Committee of the Red Cross (ICRC), in a practice Maj. Gen. Taguba called “deceptive, contrary to Army Doctrine, and in violation of international law.”⁵⁷

While universally recognizing the problem – indeed, the Jones Report describes the ghost detainee practice as “well known” among military intelligence and police at Abu Ghraib – none of the investigations thus far have been able to determine “the audit trail of personnel responsible for capturing, medically screening, safeguarding and properly interrogating” these individuals.⁵⁸ At the Pentagon press conference releasing the Fay and Jones reports, its authors made clear that they were

⁵² Elizabeth Williamson, *Witness to Abuse Trying to Be Heard*, WASH. POST, Aug. 20, 2004, at A12.

⁵³ Rick Scavetta, *GI Flagged for Public Comments About His Abu Ghraib Experience*, May 28, 2004 at <http://www.estripes.com/article.asp?section=104&article=21598&archive=true> (accessed on Sept. 7, 2004).

⁵⁴ *Id.*

⁵⁵ Such organizations, agencies, or individuals are referred to in passing in one or more of the reports, including for example, TAGUBA REPORT, *supra*, note 1, at 8 (citing Maj. Gen. Geoffrey Miller, ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ (Sept. 5, 2003)); FAY REPORT, *supra*, note 15, at 52, 75.

⁵⁶ TAGUBA REPORT, *supra*, note 1, at 26; *see also* JONES REPORT, *supra*, note 7, at 22; FAY REPORT, *supra*, note 15, at 9, 44-45, 53, 11; DAIG REPORT, *supra*, note 1, at 56-57.

⁵⁷ TAGUBA REPORT, *supra*, note 1, at 27.

⁵⁸ JONES REPORT, *supra*, note 7, at 22.

unable to address the ghost detainee issue fully because it was beyond the scope of their investigation.⁵⁹

The investigators' insistence that a deeper understanding of the ghost detainee problem was beyond the scope of their charges is correct. But it is also the case that some minimal additional examination of senior Defense Department officials' roles would have shed some further light on the problem. The Inspector General's report points to the Defense Department's failure to deploy in Afghanistan or Iraq any "consolidated, comprehensive, and accurate database for detainee accountability," a function required to be performed by Defense Department directive adopted in compliance with U.S. Geneva Convention obligations.⁶⁰ According to this directive, the Undersecretary of Defense for Policy (a position currently held by Douglas Feith) has "primary staff responsibility" for overseeing detainee programs.⁶¹ The Fay report does not inquire into his role. Likewise, the Pentagon itself has acknowledged that Defense Secretary Donald Rumsfeld personally ordered at least one detainee kept from the ICRC.⁶² Apart from a passing reference to this incident in the Schlesinger report,⁶³ the Secretary's role in this practice is not addressed in any of the major reports.

Doctors. The Fay report, among others, finds that "medical personnel *may* have been aware of detainee abuse at Abu Ghraib and failed to report it."⁶⁴ Indeed, a study published days before the Fay report in the respected medical journal *The Lancet* found that "a physician and a psychiatrist helped design, approve and monitor interrogations at Abu Ghraib" that were "psychologically and physically coercive."⁶⁵ And the independent group Physicians for Human Rights has recommended interviews with health personnel at Guantanamo, Abu Ghraib, Afghanistan and elsewhere, to assess the role of physicians before or after interrogations.⁶⁶ But the Fay report itself, having identified a possible problem, investigated no further, noting that the "scope of this report was [military intelligence] personnel involvement." Fay thus recommended launching a separate inquiry into "whether medical personnel were aware of detainee abuse and failed to properly document and report the abuse."⁶⁷

⁵⁹ Josh White, *Abuse Report Widens Scope of Culpability*, WASH. POST, Aug. 26, 2004, at A1.

⁶⁰ DAIG REPORT, *supra*, note 1, at 56-57.

⁶¹ See Dep't of Defense Directive No. 2310.1, DoD Enemy POW Detainee Program, ¶ 4.1.1, Aug. 18, 1998, at www.dtic.mil/whs/directives/corres/pdf2/d23101p.pdf (accessed on Sept. 7, 2004).

⁶² *Rumsfeld Ordered Prisoner Hidden*, CBSNews.com, June 14, 2004, at <http://www.cbsnews.com/stories/2004/06/17/iraq/main624411.shtml> (accessed on Sept. 7, 2004).

⁶³ SCHLESINGER REPORT, *supra*, note 1, at 87 (noting that "the Panel has not been able to ascertain the number of ghost detainees in the overall detainee population.").

⁶⁴ FAY REPORT, *supra*, note 15, at 136 (emphasis added).

⁶⁵ Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, THE LANCET, Aug. 21, 2004, available at http://www.thelancet.com/journal/vol364/iss9435/full/llan.364.9435.review_and_opinion.30574.1 (accessed on Sept. 7, 2004).

⁶⁶ See Letter from Physicians for Human Rights to James R. Schlesinger, Chair of the Independent Panel to Review Department of Defense Detention Operations (August 6, 2004) available at <http://www.phrusa.org/research/torture/letter08062004.html> (accessed on Sept. 7, 2004).

⁶⁷ FAY REPORT, *supra*, note 15, at 136.

Lawyers. None of the investigations to date make more than passing mention of the role of JAG officers and civilian legal advisors in reviewing, rejecting, or approving detention and interrogation policies and techniques that may have been inconsistent with existing U.S. legal obligations. For example, the Fay report indicates that various staff judge advocates produced a set of interrogation rules – based on approaches use at Guantanamo Bay and approved in an April 16, 2003 memo from the Secretary of Defense – that included the use of dogs, stress positions, and other unlawful techniques.⁶⁸ These rules, for a period, were guidance military intelligence officials relied on in conducting interrogations at Abu Ghraib.⁶⁹

Although much of this section of the Fay report is redacted as classified (an issue discussed further below), military lawyers in Iraq and in Washington, D.C. appeared to have played a central role in the adoption of policies in Iraq that were confusing and illegal. Indeed, information redacted from this section of the Fay report covers the period of time in the spring of 2003 when top military and civilian lawyers at the Pentagon were writing memos arguing that interrogation techniques advocated by senior civilians at the Defense Department and by the commander of the military detention center at Guantanamo Bay, would contravene longstanding military practice and be subject to abuse.⁷⁰ Yet the Fay report makes no recommendations concerning the actions of legal advisors, and none of the investigations appear to have interviewed senior military or civilian lawyers who played a role in crafting (or criticizing) these detention and interrogation policies.

While additional reports may be produced – Fay has recommended the Army “review” the role of civilian contractors,⁷¹ Schlesinger has recommended further study of the role of the CIA,⁷² and a separate report is underway on the role of detainee operations in Afghanistan⁷³ – it is critical that *one*

⁶⁸ FAY REPORT, *supra*, note 15, at 25; *see also* Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, arts. 3, 13, 14, 17, 27, 87, 89, and 130 [hereinafter Third Geneva Convention], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (accessed on Sept. 7, 2004); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, 75 U.N.T.S. 287, arts. 3, 5, 27, 31, 32, 33, and 147 [hereinafter Fourth Geneva Convention], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5> (accessed on Sept. 7, 2004).

⁶⁹ FAY REPORT, *supra*, note 15, at 25. The Army Inspector General’s report also points to interrogation techniques approved for use at Guantanamo Bay and by the Secretary of Defense following review by a Working Group on Detainee Interrogations in the Global War on Terror in March and April 2003. DAIG REPORT, *supra*, note 1, at 39-40. The Working Group concluded that these “officially approved” policies and practices “generally met legal obligations under U.S. law, treaty obligations, and policy, if executed carefully, by trained soldiers, under the full range of safeguards.” *Id.* at 39. The Inspector General’s report does not make the connection between that conclusion about the “general” legality of official policies and its later findings that soldiers were not adequately trained and did not operate under the full range of safeguards. *See id.* at 27, 36, 38, 81-83, 89.

⁷⁰ R. Jeffrey Smith, *Lawyer for State Dept. Disputed Detainee Memo*, WASH. POST, June 24, 2004, at A7. Senior Pentagon lawyers of this view included chief Navy civilian lawyer Alberto J. Mora, Air Force Maj. Gen. Jack L. Rives, Marine Brig. Gen. Kevin M. Sandkuhler, Army Maj. Gen. Thomas J. Romig, and lawyers in the office of the Joint Chiefs of Staff. *Id.*

⁷¹ FAY REPORT, *supra*, note 15, at 116.

⁷² *See* SCHLESINGER REPORT, *supra*, note 1, at 6.

⁷³ Brig. Gen. Charles Jacoby is conducting a “top-to-bottom review of ... the entire detainee set of operations done from 19 May to 24 June” in Afghanistan. U.S. Dep’t of Defense News Transcript, Background Briefing on Investigations on Abu Ghraib, Aug. 25, 2004 (quoting a “Senior Army Official”), available at <http://www.defense.gov/transcripts/2004/tr20040825-1222.html> (accessed on Sept. 7, 2004).

outside investigator look at the *interaction* between these agencies in the field, both to understand what really happened, and to prevent the temptation every organization naturally feels to shift blame from one set of actors to another.

Detainees. Detainees and former detainees are the most obvious and direct sources of information for investigations into instances of abuse. Looking to these individuals as sources of information is of course extremely difficult. Former detainees are likely to be afraid of or hostile to U.S. officials seeking to learn the scope of any wrongdoing.⁷⁴ As time passes, these individuals – many of whom were not identified or accounted for while in U.S. detention – become harder to find. And the credibility of their accusations – as with any witness statement – must be evaluated against other testimony and available evidence. Despite the complexities in these circumstances, evidence from firsthand witnesses is fundamental to any investigation. Yet of the major investigations so far, only Fay conducted direct interviews of detainees; Fay reports conducting three such interviews in the course of his investigation.⁷⁵ Taguba investigators do not appear to have met with any detainees directly, but did review multiple sworn statements by detainees. Neither the Inspector General’s report nor the Schlesinger panel report reflect the review of any detainee interviews or statements.

Cumulative Reporting

A feature common to all of the reports is the cumulative nature of the research they reflect. Each successive investigation has been initiated with a review of the findings of previous investigators.⁷⁶ Of itself, this practice need not be cause for concern. On the contrary, prior investigations can be important sources of information, both so current investigators can learn facts already uncovered, and so they can identify gaps left open by their predecessors.

However, some of the investigations rely on prior investigative findings *to the exclusion of* necessary original research or investigation – a practice that presents a high risk of perpetuating any errors or omissions made by previous investigators. Perhaps the worst example of this is the Schlesinger panel report. In part, this failing is a function, again, of its specific charge – namely, to review other “completed and pending” investigations by the Department of Defense.⁷⁷ Likewise,

⁷⁴ See, e.g., Brig. Gen. Mark Kimmitt, *quoted in* Dep’t of Defense News Transcript, Coalition Provisional Authority Briefing, May 10, 2004 (“The evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency. . . .”), *available at* <http://www.defenselink.mil/transcripts/2004/tr20040510-0742.html> (accessed on June 14, 2004); PHYSICIANS FOR HUMAN RIGHTS, PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS, June 2002 (noting that detention can “induce fear, isolation and hopelessness”), *available at* http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/dr2-sum.html (accessed on Sept. 7, 2004).

⁷⁵ FAY REPORT, *supra*, note 15, at 6.

⁷⁶ The Taguba Report, for example, begins with a review of the findings of Miller and Ryder reports on Abu Ghraib that had already been conducted. TAGUBA REPORT, *supra*, note 1, at 8-12; see also EXECUTIVE SUMMARY, INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, at 1; JONES REPORT, *supra*, note 7, at 19; FAY REPORT, *supra*, note 15, at 57-64.

⁷⁷ SCHLESINGER REPORT, *supra*, note 1, at app. B (Memorandum from Secretary of Defense Donald H. Rumsfeld to the Honorable James R. Schlesinger, et al. re: Independent Panel to Review DOD Detention Operations, (May 12, 2004)).

while this panel was able to interview key civilian leadership in the Defense Department, “[i]ssues of personal accountability” were expressly excluded from its purview.⁷⁸

Fundamentally, however, the Schlesinger report is not an inquiry into “DOD Detention Operations,” as it is named, offering “answers to the questions of how this happened, and more importantly, who let it happen.”⁷⁹ Rather, it is an investigation of *other investigations* of Defense Department detention operations. The report contains no footnotes or internal citations to evidence or statements attributed to any individual. It is characterized frequently by conclusory policy analysis (“With the events of September 11, 2001, the President, the Congress, and the American people recognized we were at war with a different kind of enemy.”),⁸⁰ not factual reporting. And while such review reports can offer useful insights, they should not be mistaken for a “comprehensive investigation” of any underlying facts, circumstances, or policies. The Schlesinger report is best understood as a memorandum of policy recommendations written at the request of the Secretary of Defense, not as an investigation of actual events.

Contradictory Conclusions

Particularly striking across the reports – all issued within months of one another – are contradictions among them, ranging from factual variations to fundamental disagreements on key conclusions. The fact of disagreement may be natural and healthy; or it may reflect inadequacies or errors by one investigation or another. Either way, the scope of abuse in U.S. detention and interrogation is such that unresolved conflicts such as these should not be permitted to stand. Consider, for example, the varying findings on even these few basic questions.

Had soldiers been adequately trained to understand their obligation under all circumstances to treat detainees humanely and in accordance the law of war? The Inspector General answered this question in the affirmative, finding that soldiers “do understand their duty to treat detainees humanely and in accordance with the laws of land warfare.”⁸¹ Maj. Gen. Fay, however, reached just the opposite conclusion: “Soldiers on the ground are confused about how they apply the Geneva Conventions and whether they have a duty to report violations of the conventions.”⁸²

Did systemic failures contribute to torture and other forms of abuse in U.S. custody? As noted above, the Inspector General again concluded that he was “unable to identify system failures that resulted in incidents of abuse.”⁸³ Again finding to the contrary, Maj. Gen. Fay reported that “leader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred.”⁸⁴

⁷⁸*Id.*

⁷⁹ U.S. Dep’t of Defense News Transcript, Press Conference with Members of the Independent Panel to Review Department of Defense Detention Operations, Aug. 24, 2004 (statement of panel member Tillie Fowler).

⁸⁰ SCHLESINGER REPORT, *supra*, note 1, at 6.

⁸¹ DAIG REPORT, *supra*, note 1, at Foreword.

⁸² FAY REPORT, *supra*, note 15, at 19.

⁸³ DAIG REPORT, *supra*, note 1, at Foreword.

⁸⁴ FAY REPORT, *supra*, note 15, at 8.

Does command responsibility for the abuses at Abu Ghraib rest with leaders in Iraq or can it be attributed to command actions and omissions in Washington, D.C.? Maj. Gen. Miller believed that abuses at Abu Ghraib were caused by “a small number of leadership and small number of soldiers who violated regulations and procedures and committed criminal acts.”⁸⁵ The Army Inspector General to some extent agreed: “These incidents of abuse resulted from the failures of individuals to follow known standards of discipline . . . and, in some cases, the failures of a few leaders to enforce those standards of discipline.”⁸⁶ Yet the Schlesinger panel reached essentially the opposite conclusion: “The abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.”⁸⁷

Questionable Use of Classification to Withhold Information

The Federation of American Scientists, among others, raised serious questions as to whether the Taguba report and other key executive branch documents have been properly designated “classified.”⁸⁸ Section 1.7 of Executive Order 12958, as amended (EO 13292), states: “In no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization or agency.”

Questions of unnecessary classification are particularly acute with respect to the Fay report on the activities of the 205th Military Intelligence Brigade. The unclassified version of the report includes substantial redactions from pages 21 through 30, the section of the report discussing “intelligence and interrogation policy development.” Among the excerpts included in the unclassified version of the report are passages describing the role of the Secretary of Defense in reviewing and approving certain interrogation techniques and procedures. The section appears to trace – with significant gaps due to redaction – the development of U.S. interrogation policies from Afghanistan to Guantanamo to Iraq beginning in 2002. The unclassified report later states that while no documentation was found showing that Lt. Gen. Ricardo S. Sanchez, the former top commander in Iraq, approved the use of dogs in interrogations, certain “[l]eaders in key positions failed properly to supervise the interrogation operations at Abu Ghraib and failed to understand the dynamics created at Abu Ghraib.”⁸⁹

Classified information from the redacted sections subsequently published in the *New York Times* and *Washington Post* – specifically describing a September 14, 2003 cable from Lt. Gen. Sanchez outlining his plans for more aggressive interrogation techniques including the use of dogs – calls this relatively exculpatory public account into question. The *Times* reported that “[c]lassified parts of the report by three Army generals on the abuses at Abu Ghraib prison say Lt. Gen. Ricardo S.

⁸⁵ Maj. Gen. Geoffrey D. Miller, *quoted in* Jackie Spinner, *Abu Ghraib Policy Defended*, WASH. POST, Aug. 17, 2004.

⁸⁶ DAIG REPORT, *supra*, note 1, at Foreward.

⁸⁷ SCHLESINGER REPORT, *supra*, note 1, at 5.

⁸⁸ See Letter to J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration, from Steven Aftergood, Director, Project on Government Secrecy, Federation of American Scientists (May 6, 2004), available at <http://www.fas.org/sgp/news/2004/05/sa050604.pdf> (accessed on Sept. 7, 2004).

⁸⁹ FAY REPORT, *supra*, note 15, at 7.

Sanchez, the former top commander in Iraq, approved the use in Iraq of some severe interrogation practices intended to be limited to captives held in Guantánamo Bay, Cuba, and Afghanistan.”⁹⁰

Failure to Investigate Senior Military and Civilian Command Responsibility

The single greatest failing of the reports to date has been the inadequacy of investigation into the specific role played by senior military and civilian commanders.

Under U.S. and international law, both military and civilian leaders may be held responsible for acts committed by their subordinates rising to the level of war crimes, such as torture or other inhumane treatment, when the commander knew or should have known about the acts, yet failed to take reasonable steps to punish or prevent them.⁹¹ The United States followed this doctrine of command responsibility in World War II, when a U.S. military tribunal convicted Japanese General Tomoyuki Yamashita for war crimes committed by his troops. The U.S. Supreme Court upheld his conviction on the grounds that Yamashita should have known that “the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result” in war crimes.⁹² The U.S. Army manual today incorporates this standard.⁹³ This rule does not apply to hold leaders responsible for random and individual acts of their subordinates. But it does apply to hold leaders responsible for failing to recognize and resolve systemic illegalities within their control.

Only two inquiries interviewed military or civilian officials above the brigade level: Jones and Schlesinger. The Jones inquiry, tasked with investigating whether “organizations or personnel higher than the 205th Military Intelligence Brigade chain of command,” or individuals outside its chain of command, were involved in detainee abuse at Abu Ghraib, reports conducting all of two interviews.⁹⁴ It is true that both Lt. Gen. Sanchez, Commander of Combined Joint Task Force-7 in Iraq, and his senior intelligence officer, Maj. Gen. Barbara Fast, were “personnel higher” than the brigade level. But the military intelligence chain of command comprises other individuals, including General John Abizaid, Commander of U.S. Central Command and Lt. Gen. Lance L. Smith, Deputy Commander of Central Command. More important, the chain of command and individuals all of the reports and congressional testimony have revealed to be directly involved in military intelligence decision-making include, at a minimum, Maj. Gen. Miller, Lt. Gen. Boykin, Undersecretary of Defense for Policy Douglas Feith, Undersecretary of Defense for Intelligence

⁹⁰ Douglas Jehl and Eric Schmitt, *Report Faults General in Prison Abuse*, N.Y. TIMES, Aug. 27, 2004, at A1.

⁹¹ See *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286-93 (11th Cir. 2002); see also THE LAW OF LAND WARFARE, ¶ 499 (1956) (defining “war crime” as any violation of the law of war). Under the Federal War Crimes Act, 18 U.S.C. § 2441, “war crimes” are defined to include, generally, “grave breaches” of the 1949 Geneva Conventions, violations of Common Article 3 to the Geneva Conventions, and certain violations of the 1907 Hague Convention IV. “Grave breaches” of the Geneva Conventions include, among other things “torture or inhuman treatment...willfully causing great suffering or serious injury to body or health.” Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147. Likewise, 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.” Third Geneva Convention, art. 3(1); Fourth Geneva Convention, Art. 3(1).

⁹² *In re Yamashita*, 327 U.S. 1, 15 (1946).

⁹³ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 501 (1956).

⁹⁴ JONES REPORT, *supra*, note 7, at 3.

Stephen A. Cambone, and Defense Secretary Donald Rumsfeld. Jones provides no explanation for why his investigation, so narrowly tasked to begin with, included such a limited survey of command officials.

Schlesinger, in contrast, reports having interviewed all of these officials (with the exception of Lt. Gen. Smith) during June and July 2004. The transcripts (redacted or otherwise) of these interviews are not included in the appendix of the public report, nor are the remarks of any of these individuals referenced in the course of the report. The report makes the very important finding that “commanding officers and their staffs at various levels failed in their duties,” that “such failures contributed directly or indirectly to detainee abuse,” and that “[m]ilitary and civilian leaders at the Department of Defense share this burden of responsibility.”⁹⁵ Despite this general finding, the report names no civilian official who “shares” responsibility, and recommends or endorses action against only four leaders: Brig. Gen. Janis L. Karpinski, Commander of the 800th Military Police Brigade; Col. Thomas L. Pappas, Commander of the 205th Military Intelligence Brigade; Lt. Col. Jerry L. Phillabaum, Commander of the 320th Military Police Battalion; Lt. Col. Steven L. Jordan, Director, Joint Interrogation and Debriefing Center at Abu Ghraib.⁹⁶

Schlesinger’s finding of “no evidence that organizations above the 800th MP Brigade or the 205th MI Brigade-level were directly involved in the incidents at Abu Ghraib”⁹⁷ is incomplete – leaving open the question of “indirect” involvement, or involvement with abuse at other facilities. More significant, the finding is not credible in light of evidence documented by the reports Schlesinger reviewed and broadly available to the public in the months before the report’s release. For example, the Schlesinger report recognizes that “Secretary Rumsfeld publicly declared he directed one detainee be held secretly at the request of the Director of Central Intelligence.”⁹⁸ This practice occurred at Abu Ghraib and is a violation of U.S. and international law.⁹⁹ Similarly, the White House released a series of memoranda and a slide indicating certain interrogation techniques that had been authorized for use by the Secretary of Defense. These included “removal of clothing” and “using detainees’ individual phobias (such as fear of dogs) to induce stress.”¹⁰⁰ These techniques

⁹⁵ SCHLESINGER REPORT, at 43.

⁹⁶ *Id.* at 43-46.

⁹⁷ *Id.* at 43.

⁹⁸ *Id.* at 87.

⁹⁹ TAGUBA REPORT, *supra*, note 1, at 27; Third Geneva Convention arts. 3, 13, 14, 17, 27, 87, 89, 13; Fourth Geneva Convention, arts. 3, 5, 27, 31, 32, 33, 147.

¹⁰⁰ Memorandum from Lt. Col. James Phifer to Maj. Gen. Michael Dunlavey, Commander at Guantanamo for Approval on Interrogation Techniques (October 2002), *available at* http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf (accessed on Sept. 7, 2004); Memorandum from William J. Haynes II, General Counsel, Dep’t of Defense to Secretary of Defense Donald Rumsfeld (November 2002), *available at* http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf (accessed on Sept. 7, 2004) (seeking and obtaining approval for Category I and II interrogation techniques).

are also barred by both international and domestic laws.¹⁰¹ Yet Secretary Rumsfeld was aware that these techniques were used on at least one detainee.¹⁰²

Finally, all of the reports find Defense Department policies promulgated during the relevant period to varying degrees, “vague and lacking,”¹⁰³ “inconsistent,” and “confusing.”¹⁰⁴ This is certainly true. But it is unlikely that serious harm would have resulted from soldiers confused between two or three equally *lawful* policies. The “confusion” over interrogation policies contributed to abuse because some of the policies at various times authorized conduct that *was not lawful*.¹⁰⁵ Under these circumstances, civilian command responsibility seems apparent.

Failure to Present Game Plan for Corrective Action

One of the principal functions of any of these investigations must be to recommend any corrective action necessary. To be effective, recommendations must not only include suggestions for change that respond directly to its findings of error, but also identify a plan for implementation – who is responsible for carrying the recommendation forward, when the recommended action must be taken, and how to verify that recommended changes have been made.

While all of the major reports discussed here include recommendations for further action, almost all suffer from a failure to make these recommendations concrete. The Fay report, for example, is effective in identifying some individuals whose commanding officers should consider appropriate action or punishment. But recommendations accompanying larger policy problems suffer from inappropriate generality. For instance, Fay makes the very serious charge that “[s]electing Abu Ghraib as a detention facility placed soldiers and detainees at an unnecessary force protection risk. . . , [and] resulted in the deaths and wounding of both coalition forces and detainees.”¹⁰⁶ But its recommendations are largely hortatory (aimed at no specific agency or individual): “[p]rotect detainees in accordance with Geneva Convention IV by providing adequate force protection.”¹⁰⁷ Whose responsibility is force protection currently? And how should decisions about detainee location be made differently?

The Inspector General’s report is admirably clear in finding that the Army Staff Director should be responsible for assigning staff to implement the report’s recommendations.¹⁰⁸ And each recommendation is targeted at an identified agency or individual (e.g. “Commanders,” “TRADOC,”

¹⁰¹ See Third Geneva Convention arts. 3, 13, 14, 17, 27, 87, 89, 13; Fourth Geneva Convention, arts. 3, 5, 27, 31, 32, 33, 147; 18 USC § 2441 (criminalizing grave breaches of the Geneva Conventions).

¹⁰² See Secretary of Defense Rumsfeld Interview with David Frost (BBC), June 27, 2004, *available at* <http://www.defenselink.mil/transcripts/2004/tr20040713-secdef1001.html> (accessed on Sept. 6, 2004); Tim Golden and Don Van Natta Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, June 21, 2004, A1.

¹⁰³ SCHLESINGER REPORT, *supra*, note 1, at 81.

¹⁰⁴ JONES REPORT, *supra*, note 7, at 15.

¹⁰⁵ See FAY REPORT, *supra*, note 15, at 21-30. The use of dogs to intimidate detainees, forced nudity, and prolonged solitary confinement violates the United States’ international and domestic legal obligations. See Third Geneva Convention arts. 3, 13, 14, 17, 27, 87, 89, 13; Fourth Geneva Convention, arts. 3, 5, 27, 31, 32, 33, 147.

¹⁰⁶ FAY REPORT, *supra*, note 15, at 111.

¹⁰⁷ *Id.*

¹⁰⁸ DAIG REPORT, *supra*, note 1, at 93.

“CJTF-7,” etc.).¹⁰⁹ But its recommendations are substantively inconsistent with its findings on the facts. For example, the Inspector General reports that “[o]nly 25% (4 of 16) facilities inspected maintained copies of the Geneva Conventions in the detainees’ language. No facilities in Afghanistan complied with this Geneva requirement, while only 4 facilities in Iraq were compliant.”¹¹⁰ But the report does not then recommend, for example, that commanders obtain and provide translated copies of the detainees’ rights. Instead, it recommends that “[c]ommanders continue to stress the importance of humane treatment of detainees and continue to supervise and train Soldiers on their responsibility to treat detainees humanely and their responsibility to report abuse.”¹¹¹

More important, it remains unclear to what extent, if at all, the dozens of recommendations produced by these reports will be followed. On certain critical issues, it appears no action has yet been taken. For example, the reports dating back to February 2004 identify as a problem the U.S. practice of holding “ghost detainees” – detainees kept off official records and hidden from Red Cross observers.¹¹² Despite Maj. Gen. Taguba’s finding nearly six months ago that the practice was “deceptive, contrary to Army Doctrine, and in violation of international law,”¹¹³ it remains unclear at best whether the Red Cross has yet been afforded access to all detainees in U.S. custody. On the contrary, it appears the Red Cross has not yet been afforded such access.¹¹⁴

A similar example is found on the issue of civilian contract linguists and interrogators. The Inspector General's report, the Fay report, and the Schlesinger report all recognize that there are significant problems arising from the use of such contract employees.¹¹⁵ The Schlesinger report in particular notes that “[o]versight of contractor personnel and activities was not sufficient to ensure intelligence operations fell within the law and the authorized chain of command.”¹¹⁶ The Fay report puts it more plainly: “The contracting system failed to ensure that properly trained and vetted linguist and interrogator personnel were hired to support operations at Abu Ghraib.”¹¹⁷

Yet despite this conclusion – and the apparent continuing presence of contractors in U.S. detention facilities overseas – none of the reports recommends a moratorium on the use of such contract employees until reforms can be implemented. Instead, the Schlesinger report states, without explanation, that “some use of contractors in detention operations must continue into the foreseeable future,” and suggests contracts going forward include training requirements and be written in clearer terms.¹¹⁸ The Fay report recommends that the Army review (evidently, beyond the reviews already completed) the use of contract interrogators, and then consider implementing standards and training

¹⁰⁹ *Id.* at 93-97.

¹¹⁰ *Id.* at 15.

¹¹¹ *Id.*

¹¹² TAGUBA REPORT, *supra*, note 1, at 26-27; *see also* JONES REPORT, *supra*, note 7, at 22; FAY REPORT, *supra*, note 15, at 9, 44-45, 53, 118; DAIG REPORT, *supra*, note 1, at 56-57.

¹¹³ TAGUBA REPORT, *supra*, note 1, at 27.

¹¹⁴ *Red Cross Fears U.S. Officials Are Holding Terror Suspects in Secret Locations Worldwide*, ASSOCIATED PRESS, at <http://www.able2know.com/forums/about28807.html> (accessed on Sept. 7, 2004).

¹¹⁵ SCHLESINGER REPORT, *supra*, note 1, at 69; DAIG REPORT, *supra*, note 1, at 87; FAY REPORT, *supra*, note 15, at 116.

¹¹⁶ SCHLESINGER REPORT, *supra*, note 1, at 69.

¹¹⁷ FAY REPORT, *supra*, note 15, at 116.

¹¹⁸ SCHLESINGER REPORT, *supra*, note 1, at 90.

requirements.¹¹⁹ The Inspector General agrees, suggesting that civilian interrogators receive formal training in current military interrogation policy and doctrine.¹²⁰ These recommendations all make some sense. But there is no indication that protections such as these or of any kind have yet been put in place in the field to address the problem that exists.

¹¹⁹ FAY REPORT, *supra*, note 15, at 116.

¹²⁰ DAIG REPORT, *supra*, note 1, at 89.

IV. A WAY FORWARD

We came into this process with strong opinions about what would work. All of us have had to pause, reflect, and sometimes change our minds as we studied these problems and considered the views of others. We hope our report will encourage our fellow citizens to study, reflect – and act.

Thomas H. Kean and Lee H. Hamilton

Final Report of the National Commission on Terrorist Attacks Upon the United States

In light of the many hours and pages devoted to investigating the torture and abuse committed by U.S. military personnel, it is perhaps stunning to conclude that the United States is today still at risk of becoming embroiled in another scandal involving its treatment of detainees. Yet that is where we are. Because none of the investigations to date has been able to provide a comprehensive picture – across government agencies and up and down the chain of command – we have failed to get to “ground truth” about the scope of the abuses that took place, why they happened, and most important, how to chart a course for corrective action to ensure they will not happen again.

Indeed, while we now know much more than we did four months ago when the graphic photographs of torture and other abuse at Abu Ghraib first emerged, we are no closer to ground truth on many of the most important questions than we were then. Most of the investigative reports have found is that confusion about U.S. policy governing interrogation techniques and compliance with the Geneva Conventions contributed to an atmosphere of permissiveness and ambiguity that facilitated abuse. This confusion still reigns.

Which memoranda, and which parts of memoranda, produced by administration lawyers in the Pentagon, the White House, and the Department of Justice – arguing that the Geneva Conventions do not apply to U.S.-held prisoners, and construing torture to require pain equivalent to “organ failure” – are still operative? Do the Geneva Conventions apply to all those captured in Iraq? Is it U.S. policy to deny the International Red Cross access to some subset of prisoners it is detaining? Which interrogation techniques are permitted in which locations? Is the Army Field Manual on Intelligence Interrogation from 1992 current policy?

Definitive, lawful answers to these questions are essential to ensure the future effectiveness and integrity of U.S. military and intelligence operations. None of the investigations so far has answered them.

Perhaps the most important conclusion to be drawn from the investigations to date is that the current piecemeal approach will not get us where we need to go in order to expunge what both President Bush and Deputy Secretary of State Richard Armitage have called a “stain” on America’s honor and soul.¹²¹ There is only one way to accomplish that: an independent investigative body with expert staff, subpoena power, and the power to take testimony under oath, charged with determining all the facts and circumstances, and the scope and nature of abuses committed in U.S. detention and

¹²¹ See Interview by Maxine McKew, Australian Broadcasting Corporation's Lateline, of Richard L. Armitage, Deputy Secretary of State, in Washington, D.C. (June 9, 2004), available at <http://www.state.gov/s/d/rm/33460.htm>.

interrogation. Such a body must determine why these abuses happened, and how U.S. policy can be corrected to ensure they do not recur.

In order to overcome the gaps and deficiencies of recently completed and ongoing investigations, such a body must satisfy the following requirements:

- It must be bi-partisan and led by recognized experts in military and intelligence operations, as well as U.S., international human rights, and humanitarian law.
- It must be fundamentally independent of the executive branch, with commission members selected jointly by appropriate congressional and executive officials.
- It must have unlimited access to classified information from all relevant agencies and all levels of authority, civilian and military.
- It must have the power to take testimony under oath and to subpoena witnesses.
- It must have the authority to offer whistleblower protection to anyone with relevant knowledge who may fear retribution for testifying truthfully.
- It must establish the facts independent of any other investigation.
- It should as far as possible, within the constraints of identified national security interests, be open to the public.

Some will argue that there has already been enough time and energy spent investigating the misconduct and policy failures that led to the torture and deaths of prisoners in U.S. custody, and that further attention to these matters distracts us from the challenge of securing the peace in Iraq and fighting the global war on terror. This argument is dangerously short-sighted. The abuses committed by U.S. personnel, and U.S. policy that investigations to date suggest created the breeding ground for those abuses, has engendered deep resentment towards the United States in the region and around the world, undermining U.S. interests. Without a full understanding and accounting of what went wrong, the risk of abusive conduct – and the profound risks that would pose to U.S. interests – remains. In light of what we now know, failure to conduct an independent investigation into these issues, and to identify corrective action, would be a gross dereliction of duty.