

## **LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS**

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

- CHAPTER 1:** Eliminate Unnecessary Barriers To Legitimate Charitable Work
- CHAPTER 2:** Closing Guantánamo
- CHAPTER 3:** End Illegal Detention, Torture, and Rendition
- CHAPTER 4:** Prosecute Terrorist Suspects in Accordance with the Law
- CHAPTER 5:** Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
- CHAPTER 6:** Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
- CHAPTER 7:** Misuse of Immigration Detention Laws in Counterterrorism Efforts
- CHAPTER 8:** Revising Attorney General Guidelines on FBI Investigations
- CHAPTER 9:** Updating the Law Governing the Privacy of Electronic Communications
- CHAPTER 10:** Fusion Centers and the Expansion of Domestic Intelligence
- CHAPTER 11:** Promoting Government Transparency
- CHAPTER 12:** National Security Letters and Section 215 of the USA PATRIOT Act
- CHAPTER 13:** Reform of the National Security Surveillance Laws and Procedures
- CHAPTER 14:** Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
- CHAPTER 15:** Reforming the State Secrets Privilege
- CHAPTER 16:** Reforming Watch Lists
- CHAPTER 17:** Assertion of Executive Authority in National Security Matters
- CHAPTER 18:** Executive Privilege and Congressional Oversight
- CHAPTER 19:** Signing Statements
- CHAPTER 20:** War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at [www.constitutionproject.org](http://www.constitutionproject.org), and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

## CHAPTER THREE

### End Illegal Detention, Torture, and Rendition

#### I. THE PROBLEM

##### A. Guantanamo and the Rejection of the Uniform Code of Military Justice and the Geneva Conventions

In early 2002, Americans heard for the first time about the hundreds of men being picked up on or near the battlefields of Afghanistan, and only much later, in late 2004, of many others who were rendered to or picked up by U.S. forces from places far from any battlefield - Bosnia, Zambia, and The Gambia - torn from their families, careers, and communities. All of these men were eventually transported to Guantánamo Bay, Cuba, a naval base operated exclusively by the U.S. since 1903, to a place called Camp X-ray.<sup>1</sup>

It was not long after Camp X-Ray first began holding U.S. “war on terror” detainees that the Administration announced that the protections of the laws of war—the Uniform Code of Military Justice and the Geneva Conventions—did not apply to the prisoners being held at Guantanamo. There can be no doubt that the executive decision to disregard not only the Code of Military Justice and the Geneva Conventions but also the constitutional limitations placed on the use of executive power contributed to erasure of the boundaries of lawful and humane conduct.

Petitions for Guantánamo prisoners were filed in the wake of the Supreme Court’s 2004 decision in *Rasul v. Bush*, which held that foreign nationals in U.S. military custody in Guantánamo were entitled to have the lawfulness of their detention reviewed in the U.S. federal courts.<sup>2</sup> In November 2004, District Court

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<sup>1</sup> The United States originally acquired Guantánamo in 1898 when it militarily occupied Cuba during the Spanish-American War. When Cuba became independent in 1903, the U.S. was “granted” a perpetual lease on the land occupied by the Base. The terms of the treaty provided that U.S. “shall exercise complete jurisdiction and control,” while Cuba retains “ultimate sovereignty.” Lease of Lands for Coaling and Naval Stations, February 23, 1903, art. III, T.S. 418 (1903). A subsequent treaty in 1934 continued the terms of the lease agreement signed in 1903 and provided that “[s]o long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits” the arrangement could continue. Treaty Between the United States of America and Cuba Defining Their Relations, art. 3, May 29, 1934, 48 Stat. 1682 (1934).

<sup>2</sup> 542 U.S. 466 (2004). Anticipating the litigation culminating in *Rasul v. Bush*, in December 2001, the Department of Defense asked the Department of Justice for advice concerning the question of whether federal courts would have jurisdiction to hear *habeas* petitions from aliens held at Guantánamo. See Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, DOJ, and John Yoo, Deputy Assistant Attorney General, DOJ, to William J. Haynes II, General Counsel, Department of Defense re: *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba*, (Dec. 28, 2001), in *The Torture*

Judge Kollar-Kotelly ruled that counsel could meet with their clients in Guantánamo.<sup>3</sup> Since that time, attorneys from a wide range of practices, including private firms, universities, and NGOs, have obtained security clearances and traveled to Guantánamo to meet with their clients. During those meetings, habeas counsel learned not only of facts strongly suggesting that the vast majority of the detentions were unlawful, but also disturbing information about the conditions under which prisoners were confined and the treatment to which they were subjected. These attorneys have spoken with the men who have been called the “worst of the worst.”<sup>4</sup> Yet, they are all now firmly convinced that their clients are being held unlawfully and have been subject to treatment that amounts to torture. Indeed, the U.S. military has acknowledged that many of the men at Guantánamo do not belong there. In October, 2004, Brigadier General Martin Lucenti, then-deputy commander of the military task force that runs the detention center at Guantánamo, stated: “[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren’t fighting. They were running.”<sup>5</sup> The Government subsequently sought to downplay General Lucenti’s statement,<sup>6</sup> but his comments have been echoed by an active duty interrogator at Guantánamo, who reportedly stated that “the United States is holding dozens of prisoners at the U.S. Navy Base at Guantánamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a large number of people at Guantánamo who shouldn’t be there.”<sup>7</sup>

## B. The Imprisonment of Innocent Men

The lack of accurate intelligence, the reliance on a policy of sweeping every person into a net of executive detention, and the use of torture techniques during interrogations, resulted in the problem identified by the military: the imprisonment of hundreds of men who are innocent. For nearly two years, Shafiq

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*Papers: The Road to Abu Ghraib* (“The Torture Papers”) 29 (Karen J. Greenberg and Joshua Dratel, eds.) (2005) (concluding federal courts probably would not take jurisdiction but some litigation risk existed).

<sup>3</sup> *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).

<sup>4</sup> For a selection of statements by U.S. officials made in early 2002 about the prisoners in Guantánamo, see David Rose, *Guantánamo: The War on Human Rights* 8 (2004) (quoting Vice-President Dick Cheney: “These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort”); Cheney’s remarks were made on Fox News Sunday, Jan. 27, 2002. An excerpt from the transcript of this show is available at <http://www.foxnews.com/story/0,2933,44082,00.html> (last visited Feb. 9, 2006).

<sup>5</sup> See Mark Huband, *US Officer Predicts Guantánamo Releases*, FIN. TIMES, Oct. 4, 2004

<sup>6</sup> John Mintz, *Value of Detainees Questioned*, WASH. POST, Oct. 6, 2004, at A16, available at [www.washingtonpost.com/wp-dyn/articles/A9626-2004Oct5.html](http://www.washingtonpost.com/wp-dyn/articles/A9626-2004Oct5.html) (last visited Feb. 24, 2006).

<sup>7</sup> Samara Kalk Derby, *How Expert Gets Detainees to Talk*, Capital Times, Aug. 16, 2004, at 1A; see also Eric Saar with Viveca Novak, *Inside the Wire: A Military Intelligence Soldier’s Eyewitness Account of Life at Guantánamo* 149 (2005) (“from what I was seeing in the files. . . detainees with valuable information weren’t the norm. I was amazed that some of the files I was looking at were so thin – sometimes just a mug shot, an ID number from Bagram, and a summary of the detainee’s initial interrogation, which might say that he had maintained he was a farmer, that he denied any connection to terrorism, and claimed to be picked up by the Northern Alliance or the Pakistanis”).

Rasul and Asif Iqbal, along with another friend from Tipton, Ruhel Ahmed, consistently and vehemently denied any involvement in any terrorist activity. However, under extreme duress caused by hundreds of hours of interrogation, long periods of isolation, and physical and psychological abuse, Shafiq, Asif, and Ruhel confessed to having been in a terrorist training camp in Afghanistan, and to have appeared in a videotape with Osama bin Laden in August 2000. Shafiq explained that he had been held in complete isolation for two long periods—many months--when an interrogator showed him the video of bin Laden, and he agreed that he was one of the people in it. "I could not bear another day of isolation, let alone the prospect of another year," he said.<sup>8</sup> The British intelligence agency MI5 undertook an investigation to determine the veracity of the men's Guantanamo confessions. It took the agency less than 24 hours to determine definitively that "the men had been in England when the video was shot, and during the time they were supposed to have been in Al Qaeda training camps."<sup>9</sup>

In March 2002, the Associated Press reported that Afghan intelligence officers began offering rewards for the capture of Al Qaeda fighters the day after they participated in a five-hour meeting with U.S. Special Forces.<sup>10</sup> That day, according to news reports and interviews with a local human rights leader, loudspeaker announcements from buildings and helicopters were made over the Afghan mountains promising "the big prize" to people who turned in Al Qaeda fighters to the military.<sup>11</sup> One such leaflet stated:

*You can receive millions of dollars . . . This is enough to take care of your family, your village, your tribe for the rest of your life – pay for livestock and doctors and school books and housing for all your people.*

Bounty rewards were publicized by radio spots and the circulation of posters and matchbooks with photographs of the hunted in remote villages in countries such as Iraq, Pakistan, and Indonesia.<sup>12</sup> Documents provided to the Associated Press by the Government in June 2005 revealed testimony from dozens of detainees about bounties ranging from \$3000 to \$25,000 that were paid by tribal leaders to Pakistani and Afghan tribesmen who then turned the men in to the American military.<sup>13</sup> The State Department has confirmed the existence of the "U.S. Rewards for Justice" program which it says has paid out more than \$60 million for information leading to the capture of suspected terrorists.<sup>14</sup>

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<sup>8</sup> Bob Herbert, *Stories from the Inside*, N.Y. TIMES, Feb. 7, 2005.

<sup>9</sup> *Id.*

<sup>10</sup> Michelle Faul, *Guantanamo Prisoners Say Arabs, Muslims Sold by Pakistanis to Americans*, A.P., June 9, 2005.

<sup>11</sup> *Id.*; telephone conversation with Najeeb al-Nauimi, former Qatar Justice Minister, and human rights activist.

<sup>12</sup> Saul Hudson, *Zarkawi Bounty May Go Unpaid But Rewards Aid Fight*, Reuters, June 9, 2006.

<sup>13</sup> Michelle Faul, *Guantanamo Prisoners Say Arabs, Muslims Sold by Pakistanis to Americans*, A.P., June 9, 2005.

<sup>14</sup> Saul Hudson, *Zarkawi Bounty May Go Unpaid But Rewards Aid Fight*, Reuters, June 9, 2006.

### C. The Use of Torture and Other Abusive Measures during Interrogation

Both present and former prisoners have made consistent allegations of systematic prisoner abuse at the hands of U.S. military personnel in Guantánamo, allegations which have now been corroborated by public, unclassified sources, including government documents. Specifically, prisoners' allegations of abuse correspond with descriptions of abuse recorded in government documents released through a Freedom of Information Act. Sergeant Eric Saar, a former Guantánamo military intelligence linguist, provides support for the allegations in his book *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo*,<sup>15</sup> and corroboration can also be found in the account *For God and Country: Faith and Patriotism Under Fire* by James Yee, a former Muslim chaplain at Guantánamo who was falsely accused of spying for Al Qaeda.<sup>16</sup> The Government has tried to dismiss prisoner accounts of mistreatment by claiming that they are hardened terrorists, trained to allege torture as part of their indoctrination by Al Qaeda, but these claims have been belied by the continually mounting evidence.<sup>17</sup>

Interrogation techniques approved for use at Guantanamo include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, exposure to extreme temperatures, forced nudity, hooding, and the use of dogs.<sup>18</sup> At least 17 interrogation techniques authorized for use at Guantanamo went far beyond those permitted by the Army Interrogation Manual.<sup>19</sup>

According to records released under the Freedom of Information Act, the Government's treatment of the detainees crossed the line into cruel, inhuman, and degrading treatment and torture. FBI agents who participated in interrogations complained about the "torture techniques" and "extreme interrogation techniques"

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<sup>15</sup> Eric Saar with Viveca Novak, *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo* (2005).

<sup>16</sup> James Yee with Aimee Molloy, *For God and Country: Faith and Patriotism Under Fire* (2005). For a review, see Joseph Lelyveld, *The Strange Case of Chaplain Yee*, *New York Review of Books* (Dec. 15, 2005), available at [www.nybooks.com/articles/18550](http://www.nybooks.com/articles/18550) (last visited Feb. 7, 2006). The formal charges involved the mishandling of classified documents and others involving adultery.

<sup>17</sup> The excerpt from the Al Qaeda training manual posted on the DOJ website does call for torture to be brought to attention of the court if a "brother" is on trial. However, it does not instruct members to make up allegations of torture but appears to assume that torture will occur as a matter of course, perhaps because at the time the manual was written, terrorism suspects were likely to be handed over to Muslim countries where they would be tortured. See Lesson Eighteen, *Al Qaeda Training Manual*, available at [www.fas.org/irp/world/para/manualpart1.html](http://www.fas.org/irp/world/para/manualpart1.html) (last visited Feb. 8, 2006).

<sup>18</sup> See Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), reprinted in *The Torture Papers*, at 340-43 (Karen J. Greenberg and Joshua Dratel, eds.) (2005); Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense (Nov. 27, 2002), reprinted in *The Torture Papers*, supra at 237.

<sup>19</sup> See *id.*; Memorandum from the Secretary of Defense to the Commander, U.S. Southern Command (Apr. 16, 2004), reprinted in *The Torture Papers*, supra at 360-65.

employed at Guantanamo.<sup>20</sup> FBI agents reported, among other incidents: (1) a female interrogator grabbing the genitals of a detainee and bending his thumbs back; (2) a detainee gagged with his head wrapped with duct tape; (3) the use of dogs to intimidate detainees; (4) a detainee left in isolation for three months in a cell constantly flooded with bright light who afterward showed signs of “extreme psychological trauma”; (5) detainees left chained “hand and foot in a fetal position to the floor, with no chair, food, or water,” for periods of 24 hours or more, with the result that the detainees had “urinated or defecated on themselves”; (6) a detainee left in an unventilated interrogation room with no air conditioning with the temperature “probably well over 100 degrees” and the detainee “almost unconscious on the floor, with a pile of hair next to him” because “[h]e had apparently been literally pulling his own hair out throughout the night”; and (7) a detainee left in an interrogation room where “the temperature [was] unbearably hot” and “extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.”<sup>21</sup>

Many in the military have voiced their strong opposition to the policy decisions that have resulted in alleged prisoner abuse. In the words of Major General Jack L. Rives, Deputy Judge Advocate General for the Air Force, “[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral ‘high-road’ in the conduct of our military operations regardless of how others may operate.”<sup>22</sup>

Denying the protections of the Constitution, the Uniform Code of Military Justice (“UCMJ”), the Geneva Conventions,<sup>23</sup> the International Covenant for Civil and Political Rights (“ICCPR”),<sup>24</sup> the United Nations Convention Against Torture (“CAT”), and the American Declaration of the Rights and Duties of Man,<sup>25</sup> to name several among the many other domestic and international obligations binding on the U.S. Government to persons apprehended in the “war on terror”: 1) is unlawful and places U.S. military personnel at risk of prosecution

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<sup>20</sup> Navy officials were so outraged at the “abusive techniques” that they considered pulling the Navy out of Guantanamo detainee operations. Charlie Savage, *Abuse Led Navy to Consider Pulling Cuba Interrogators*, BOSTON GLOBE, Mar. 16, 2005, at A1.

<sup>21</sup> See also Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004.

<sup>22</sup> See, e.g., Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Advocate General, for SAF/GC re: Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. 5, 2003) (on file with author). This memorandum was made public by Senator Lindsey Graham on July 26, 2005.

<sup>23</sup> See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, Aug. 12, 1949, 6 U.S.T. 3316; Protocol Additional to the Geneva Conventions of 12 Aug., 1949, and Relating to the Protection of Victims of Int’l Armed Conflicts, art. 43(2); art. 50, June 8, 1977, 1125 U.N.T.S. 603.

<sup>24</sup> See, e.g., International Covenant on Civil and Political Rights, art. 9, Nov. 22, 1966, 999 U.N.T.S. 171.

<sup>25</sup> O.A.S. Res. XXX, arts. XXV-XXVI, reprinted in 43 Am. J. Int’l L. Supp. 133 (1949) (expressing the obligations of members of the Organization of American States, including the U.S.)

for war crimes such as improperly trying a person unlawfully denied prisoner-of-war status; 2) represents a radical departure from the standards that have guided U.S. military operations for decades and places U.S. service members and civilians detained by enemy forces at greater risk of mistreatment in future armed conflicts; and 3) sends a message to the world that the Geneva Conventions are not binding law, but rather merely policies that can be changed according to each successive government's whim. The idea that the fundamental human rights principles embodied in the Geneva Conventions can be cavalierly disregarded will have a profound impact on future armed conflicts and all people affected by them, including Americans.

#### **D. The CIA's Extraordinary Rendition Program**

Detainees who have allegedly refused to cooperate during interrogations have been transferred or "rendered" to the intelligence forces of the governments in Jordan, Egypt, Syria, Morocco, and an untold number of other countries. These transfers have been undertaken throughout the United State's prosecution of its "war on terror" despite the fact that our own State Department has long documented the history of the intelligence agencies in these countries using torture techniques in the interrogation of prisoners.

In March 2002, *The Washington Post* published an article detailing U.S. involvement in seizing terrorist suspects in third countries and shipping them with few, if any, legal proceedings to third countries, including Pakistan and Egypt.<sup>26</sup> Transfers have also occurred directly from the United States. For example, in October 2002, in the face of strong diplomatic protests by the Canadian government, the U.S. government deported Maher Arar, a Canadian citizen of Syrian descent, to Syria. Mr. Arar was arrested, detained and questioned by INS and FBI officials when transiting through John F. Kennedy Airport, New York, on his way back to Canada from Tunisia where he was visiting with his wife and her family. Mr. Arar was interrogated in New York and then deported to Syria despite the fact that he had left that country fifteen years previously and was traveling on his Canadian passport. Both U.S. Department of State Reports and reports of non-governmental human rights organizations, such as Amnesty International, noted at the time that the use of torture and other inhuman and degrading treatment in Syria was commonplace.<sup>27</sup>

All persons detained by the United States, even those persons rendered by the U.S. to other countries, remain under the ultimate control of the United States. *The Washington Post* article quotes a senior U.S. official discussing interrogations of terrorist suspects rendered to Saudi Arabia as saying that the CIA are "still very

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<sup>26</sup> Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, March 11, 2002; see also, *Scores of Al-Qa'ida Arab Prisoners Reportedly Flown to Egypt, Jordan*, BBC, citing text of a report carried in a Jordanian Newspaper, Al-Majid on April 1, 2002.

<sup>27</sup> See e.g., <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8298.htm>;  
<http://web.amnesty.org/web/ar2002.nsf/mde/syria!Open>

much in control” and that they will often “feed questions to their investigators.”<sup>28</sup>

As the details of the CIA’s Extraordinary Rendition program came to light during 2005 and 2006, government officials from then Attorney General Alberto Gonzales to Secretary of State Condoleezza Rice sought to defend the practice first by declaring that the program’s purpose was not to send detainees “to countries where we believe or we know that they’re going to be tortured”<sup>29</sup> and second, by noting that the United States seeks diplomatic assurances that torture will not be used against the transferred detainee if the country receiving the individual has a long history of state-sponsored torture.<sup>30</sup> Although he acknowledged that the United States cannot control what other countries will do, it is what Attorney General Gonzales *did not say* that is of importance. He did not say that the United States takes any steps to monitor whether receiving countries comply with the assurances that they purportedly give to the United States government. Even more disturbingly, what Gonzales did not say is that the United States sent dossiers with suggested questions along with the detainees it transfers and then waits for the foreign intelligence interrogators to extract the information from their prisoners by whatever method they find most expedient.<sup>31</sup>

Our government is now running one of the largest CIA covert action programs in the country’s history. Known publicly only as “GST,” an abbreviation of a classified code name, this CIA initiative was authorized by President Bush within six days of the September 11 attacks.<sup>32</sup> According to intelligence officials interviewed by Washington Post reporters, the presidential order empowered the CIA and other intelligence agencies to undertake a covert action within the meaning of the National Security Act of 1947 and create the infrastructure for a counterterrorism initiative with that would literally span the globe.<sup>33</sup>

The GST initiative is comprised of many different secret programs, including the Extraordinary Rendition program allowing the CIA to seize terrorism suspects from foreign countries (sometimes with help from foreign intelligence agencies) and transport them to other countries for indefinite preventive detention or interrogation, to create and operate a web of secret prisons abroad, to use interrogation techniques that violate domestic and international law, and to run an

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<sup>28</sup> Dana Priest and Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002.

<sup>29</sup> R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, Wash. Post, Mar. 8, 2005. See also Human Rights Watch, *Still At Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005, <http://hrw.org/reports/2005/eca0405>.

<sup>30</sup> United States Department of State, *Second Periodic Report to the Committee against Torture*, U.N. Doc. CAT/C/48/Add.4 (June 2005), § II ¶30.

<sup>31</sup> Dana Priest and Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002 (quoting senior United States official as stating that after an individual is rendered, the CIA is “still very much in control” and that it often “feed[s] questions to their investigators”).

<sup>32</sup> Dana Priest, *Covert CIA Program Withstands New Furor: Anti-terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005.

<sup>33</sup> *Id.*

aircraft fleet to accomplish these ends.<sup>34</sup> According to published reports, the top secret presidential order even empowered the CIA to hunt down and kill designated persons around the world. This authorization, like the rest of the covert order, is justified by the Bush administration as acting in self-defense and as tacitly endorsed by Congress in the Authorization for the Use of Military Force passed on September 14, 2001.

Over the past seven years, U.S. military detention and interrogation policies have been marked by egregious violations of detainees' fundamental human rights and this country's binding humanitarian law obligations. During this time, these violations have included the use of enhanced interrogation techniques, such as exposure to frigid temperatures, waterboarding, and head-slapping.<sup>35</sup>

Further, to the extent they have been employed by or at the direction of U.S. officials, the use of "enforced disappearances", (the practice of seizing or abducting a person suspected of participating in terrorist activities, detaining him in secret, and refusing to disclose his location to the public or any domestic or international oversight agency) and the operation of the CIA's "extraordinary rendition program", give rise to significant questions as to compliance with U.S. domestic law, customary international law, human rights treaties, and the laws of war. These laws are intended to protect all individuals from arbitrary detention, the denial of the fundamental basics of due process, torture (either direct or resulting from indefinite detention without charge or trial), cruel, inhuman, and degrading treatment, and transfer to another country where the detainee will face a substantial risk of torture or cruel, inhuman, and degrading treatment. To the extent that any practices by U.S. officials or at their direction violate these rights, they must be stopped immediately. Though little information has been publicly disclosed, human rights groups have gathered evidence showing that the United States bears responsibility for the continued enforced disappearance of at least 39 individuals who are still missing as of the date of this report.<sup>36</sup>

Our allies increasingly decline to cooperate in our counterterrorism and counterinsurgency operations because of public sentiment about U.S. detainee treatment policies and practices and the risk of taint from being associated with them. These concerns are exacerbated by reports of secret detentions by U.S. government officials, in particular the CIA. Moreover, the secret detention policies created fertile conditions for the use of questionable interrogation techniques, impair the country's ability to influence the human rights practices of other nations due to the loss of credibility, and endanger the future safety of our own troops. Interrogation experts agree that the use of abusive interrogation

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<sup>34</sup> *Id.*

<sup>35</sup> Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, Washington Post, October 4, 2007.

<sup>36</sup> Reprieve, *Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror,"* <http://www.reprieve.org.uk/documents/OFFTHERECORDFINAL.pdf> .

techniques results in the provision of false and misleading information,<sup>37</sup> the loss of critical intelligence, and that they ultimately constitute a waste of valuable and frequently scarce resources.

## **II. PROPOSED SOLUTIONS**

### **A. Guiding Principles**

1. Complete, consistent, and transparent compliance with U.S. domestic law and international human rights and humanitarian law norms is wholly consistent with our fundamental democratic values and national security objectives. There is no clash between these sets of principles; they work together. By rejecting the use of techniques that provide fodder for our enemies and deter cooperation from our allies, we strengthen our strategic position in the short term, and lay the foundation for the country's renewed commitment to maintaining human dignity and a reinvigorated role in the vanguard of those nations dedicated to ensuring world-wide acceptance of these principles.
2. The U.S. government should teach and demand strict compliance with the absolute ban on torture and other cruel, inhuman, and degrading treatment and enforce one unyielding standard of humane treatment for all detainees in U.S. custody. The standard should incorporate the "Golden Rule", which has long been embraced by the U.S. military: that we will not authorize or use any methods of interrogation that we would find unacceptable if used against American civilians or soldiers.

### **B. Proposed Solutions**

#### **1. Enforce Prohibitions against Torture and Other Cruel, Inhuman and Degrading Treatment**

##### **a. The Executive branch**

- i. Denounce torture and reaffirm our commitment to the absolute prohibition of torture in peacetime and in war.
- ii. Denounce cruel, inhuman, and degrading treatment and reaffirm our commitment to the absolute prohibition of such treatment in peacetime and in war.
- iii. Issue an Executive Order establishing a set of national standards for interrogation to be used by all Defense Department, intelligence, and law enforcement agencies. An Executive Order would be highly compelling evidence that the new President and his Administration has

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<sup>37</sup> See, e.g., Intelligence Science Board, *Educating Information* (Russell Swenson ed. 2006) available at <http://www.fas.org/irp/dni/educing.pdf>.

unequivocally repudiated the recent unlawful policies on detainee treatment.

- iv. Revoke all Executive Orders, policy statements, memoranda, and any other documents or verbal orders authorizing the use of certain techniques on detainees that may be considered cruel, inhuman or degrading treatment, and reaffirm the country's commitment to compliance with the Geneva Conventions, the ICCPR, and the Convention Against Torture.
- v. Review and reform intelligence gathering practices such that no person in U.S. government custody or control is held without charge solely for intelligence-gathering and/or preventive detention purposes.
- vi. Support congressional efforts to prevent torture and cruel, inhuman, and degrading treatment.
- vii. Amend Appendix M of the U.S. Army Field Manual to eliminate the use of isolation, sleep deprivation, and sensory deprivation as interrogation or coercive techniques. Make similar amendments to field manuals of all other branches of the armed forces

**b. The Legislative branch**

- i. Pass legislation delineating a single set of standards governing the interrogation of people held in detention by any U.S. department or agency and providing for severe penalties for violations of these standards. Such legislation might include such items as: requiring the video recording of all civilian intelligence, military, and law enforcement interrogations relating to terrorism investigations and providing for periodic review of such recordings by the Office of the Inspector General of the Justice Department.
- ii. Repeal the Military Commissions Act of 2006 which allows introduction of evidence obtained by coercive interrogation techniques and limits the accountability of individuals responsible for using illegal techniques during interrogation.

**2. Enforce Prohibitions against Transfers to Torture and End the Rendition Program**

**a. The Executive branch**

- i. Denounce and repudiate all Executive branch policies, orders, memoranda, and statements authorizing or condoning the use of inter-state transfers to facilitate the interrogation of people seized by any U.S. agency, held at the request of any U.S. agency, and/or detained by any U.S. agency.

- ii. Revoke all prior Executive branch actions authorizing the CIA's "extraordinary rendition program", and any other agency's use of enforced disappearances or secret detentions.
- iii. Announce the country's commitment to working with the International Committee of the Red Cross (ICRC) to ensure that every detainee held around the world is listed properly as an internee, is permitted to meet with ICRC representatives, to send correspondence to family members through ICRC channels, and to receive humanitarian aid.
- iv. Issue an Executive Order prohibiting the acceptance of "diplomatic assurances" or similar bilateral or multi-lateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial.
- v. Call upon Congress to commence a prompt, thorough, and independent investigation into all allegations involving the torture or abuse of individuals in U.S. custody or effective control during the "war on terror" regardless of where the misconduct has occurred.
- vi. Issue an Executive Order requiring the State Department to assist all detainees eligible for release who cannot be returned to their countries of origin or habitual residence because they would be at risk of grave human rights abuses, with their efforts to resettle in third countries. Ensure that any transfers to third countries are made only with the informed consent of the individuals concerned, and that detainees being transferred are not subjected to any pressures or restrictions that may compel them to choose to resettle in any particular third country.
- vii. Commit the U.S. to providing prompt and adequate reparations, including restitution, rehabilitation, and fair and adequate financial compensation to released "war on terror" detainees for the period spent unlawfully detained and other constitutional and human rights violations that they may have suffered.

**b. The Legislative branch**

- i. Pass legislation outlawing the use of rendition for any and all purposes. Such a law should:
  - 1. prohibit the return or transfer of people to places where they are at risk of torture, ill-treatment or detention without charge or trial;
  - 2. ensure that anyone held in U.S. custody in any part of the world can exercise the right to legal representation and to a fair and transparent legal process;
  - 3. require the disclosure of the location and status of all detention centers in operation from October 1, 2001 to the present, the identities and whereabouts of all detainees held in secret facilities

and their legal status, and permit the ICRC to have full and regular access to all persons detained by the U.S.;

4. immediately cease the practices of incommunicado and secret detention wherever it is being used;
5. authorize the holding of detainees solely in officially and publicly recognized places of detention with access to family, legal counsel, and the courts;
6. release all detainees held in U.S. custody at undisclosed locations unless they are to be charged with internationally cognizable criminal or military offenses and brought to trial promptly and fairly in accordance with relevant constitutional, military, and/or international standards;
7. prohibit the acceptance of “diplomatic assurances” or similar bilateral or multilateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial;
8. ensure that the U.S. does not render or otherwise transfer to the custody of another state anyone suspected or accused of terrorist activities or national security offenses or other crimes unless the transfer is carried out under judicial supervision and in full observance of domestic and/or international due process requirements;
9. ensure that anyone subject to transfer has the right to challenge its legality before an independent tribunal, access to an independent lawyer, and an effective right of appeal;
10. ensure that the U.S. does not receive into custody anyone suspected or accused of national security offenses or terrorist activities unless the transfer is carried out under judicial supervision and in full observance of domestic and/or international due process requirements;
11. ensure that the personal details of each detainee are promptly supplied to the family and lawyer of the detainee and the ICRC;
12. ensure that all detainees have prompt access to legal counsel and to family members, and that counsel and family members are kept informed of the detainee’s whereabouts;
13. ensure that detainees who are not nationals of the detaining country are provided with access to diplomatic or other representatives of their country of nationality or former habitual residence; and
14. ensure that airports and airspace are not used to support and facilitate rendition flights.

- ii. Pass legislation creating an independent commission and authorize it to commence a prompt, thorough, and independent investigation into all allegations that the U.S. hosts or has hosted secret detention facilities, has tortured or abused individuals in U.S. custody or effective control, regardless of where the misconduct has occurred, and make public the results of such investigations. Such a law should authorize the independent commission to:
  - 1. operate completely independently from any agency that is the focus of or implicated in any way in the abuse allegations;
  - 2. have subpoena power and the authority to command the taking of sworn statements;
  - 3. have adequate resources and staff to be able to conduct a far-reaching investigation into events of such great public concern;
  - 4. have the authority to investigate any person in the military and civilian command structure;
  - 5. have the authority to examine the relationships among military forces, the military police, and military intelligence units, and between and among military personnel and the personnel of agencies outside the Defense Department; and
  - 6. have the power to recommend corrective action including the prosecution of individuals who should be held accountable for the abuses committed.
- iii. Create an independent oversight body to investigate complaints of torture and abuse and monitor the conditions and treatment of detainees being held in all U.S. jails, prisons, and detention centers.
- iv. Adopt legislation that creates an effective legal scheme and enforcement agency to hold all individuals, including government officials, members of the armed forces, intelligence personnel, police, prison guards, medical personnel, and private government contractors who authorized, condoned, or committed torture or cruel, inhuman or degrading treatment or punishment accountable for their actions.
- v. Adopt legislation creating a compensation scheme to ensure that the victims of the U.S. Government's unlawful conduct and their families receive restitution, compensation, and rehabilitation services.

### **3. End Enforced Disappearances and Arbitrary Detention, and Abolish Secret Prisons and Hidden CIA Detentions**

#### **a. The Executive branch**

- i. Repudiate and revoke any and all orders authorizing or providing legal justification for secret detentions.

- ii. Issue an Executive Order banning the use of CIA-run secret detention centers and any other agency or department operations that enable the concealment of detentions.
- iii. Direct the heads of the CIA, the Defense Department, the Defense Intelligence Agency, and any other agency or department presently or previously involved in secret detentions to account for every single individual who has been detained by each respective agency regardless of the length of the detention, and to publicly release all detainees' names, the duration and locations of their detention in U.S. custody or in constructive U.S. custody, the asserted bases for their detention, and the dates and circumstances of their releases, transfers, or deaths.
- iv. Issue an Executive Order requiring the Defense Department to provide the names of all persons in U.S. custody or in constructive U.S. custody in all detention facilities around the world to the ICRC and ensure that the Committee has unfettered access to all such prisoners.
- v. Direct all Defense Department, intelligence, and law enforcement agencies to provide the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision.
- vi. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to publicly announce the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision;
- vii. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that records are kept for every person held in U.S. custody or constructive custody documenting the place, time, and the circumstances of the seizure or arrest, and whether access to their home consulate has been afforded, the location and conditions of confinement, any legal process that has been afforded, and their medical status;
- viii. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all detainees held in U.S. custody or in constructive U.S. custody in all detention facilities around the world have regular and ongoing contact with family, counsel, and international inspection agencies;
- ix. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have the right of access to counsel, meaningful judicial review of the legality of their detention and, if their detention is deemed unlawful, the right to seek an order of release;
- x. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all Defense Department, intelligence, and law enforcement agency personnel involved in the

seizure, arrest, or custody of persons are trained to enforce the above policies.<sup>38</sup>

**b. The Legislative branch**

- i. Sign and ratify the Optional Protocol to the Convention against Torture,<sup>39</sup> and the ICCPR Optional Protocol.
- ii. Pass implementing legislation to ensure that the Disappearances Convention and the Optional Protocol to the Convention against Torture create rights that are enforceable by individuals in U.S. courts.
- iii. Hold hearings in the appropriate House and Senate committees to commence an investigation into the unlawful practices used during the Bush Administration, including, among others: enforced disappearances, arbitrary detention, the use of secret prisons, and secret CIA detentions

**III. ALLIES\***

**Bill of Rights Defense Committee (BORDC)**

Chip Pitts, President  
[chip.pitts@att.net](mailto:chip.pitts@att.net)

**Common Cause**

Sarah Dufendach, Vice President for Legislative Affairs  
[www.commoncause.org](http://www.commoncause.org)  
202-736-5709

**Council on American-Islamic Relations (CAIR)**

Corey Saylor, National Legislative Director  
[csaylor@cair.com](mailto:csaylor@cair.com)  
202-384-8857 (c)  
202-488-8787 (w)

**Defending Dissent Foundation**

Sue Udry, Director  
[Sue.udry@defendingdissent.org](mailto:Sue.udry@defendingdissent.org)  
202-549-4225

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<sup>38</sup>See Human Rights News, *UN: 'Disappearances' Treaty a Major Advance, Countries Should Push for Treaty's Worldwide Adoption and Ratification* (2005), <http://hrw.org/english/docs/2005/09/26/global11785.htm> and International Committee of the Red Cross, *Concerning the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments* (2006), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-nations-statement-171006>.

<sup>39</sup> See [www2.ohchr.org/English/bodies/ratification/9\\_b.htm](http://www2.ohchr.org/English/bodies/ratification/9_b.htm), and [www2.ohchr.org/English/bodies/ratification/16.htm](http://www2.ohchr.org/English/bodies/ratification/16.htm).

[www.defendingdissent.org](http://www.defendingdissent.org)

**Essential Information**

John Richard or Robert Weissman  
202-387-8034

**Government Accountability Project**

Jesselyn Radack, Homeland Security Director  
[JesselynR@whistleblower.org](mailto:JesselynR@whistleblower.org)  
202-408-0034 (ext. 107)

**International Justice Network, [www.IJNetwork.org](http://www.IJNetwork.org)**

Tina Monshipour Foster, Executive Director,  
[tina.foster@IJNetwork.org](mailto:tina.foster@IJNetwork.org)  
917-442-9580

**Liberty Coalition**

Michael D. Ostrolenk, Co-Founder/National Director  
[www.libertycoalition.net](http://www.libertycoalition.net)  
[mostrolenk@libertycoalition.net](mailto:mostrolenk@libertycoalition.net)  
301-717-0599

**National Association of Criminal Defense Lawyers (NACDL)**

Michael W. Price  
[michael@nacdl.org](mailto:michael@nacdl.org)  
202-872-8600 (ext. 258)

**National Institute for Military Justice (NIMJ)**

Michelle Lindo McCluer, Director  
202-895-4534  
[mmccluer@wcl.american.edu](mailto:mmccluer@wcl.american.edu)

**National Litigation Project of the Lowenstein International Human Rights Clinic, Yale Law School**

Hope Metcalf  
[hope.metcalf@yale.edu](mailto:hope.metcalf@yale.edu)  
Ramzi Kassem  
[ramzi.kassem@yale.edu](mailto:ramzi.kassem@yale.edu)  
203-432-4800

**OpenTheGovernment.org**

Patrice McDermott  
[pmcdermott@openthegovernment.org](mailto:pmcdermott@openthegovernment.org)  
202-332-6736

**Physicians for Human Rights**

Sara B. Greenberg, JD, MALD  
Advocacy Associate  
sgreenberg(at)phrusa.org  
202-728-5335 ext. 302

**South Asian Americans Leading Together**

Priya Murthy  
[priya@saalt.org](mailto:priya@saalt.org)  
301-270-1855

**Stanford Law School - Mills International Human Rights Clinic**

Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director  
Kathleen Kelly, Clinical Teaching Fellow  
[bj.olshansky@gmail.com](mailto:bj.olshansky@gmail.com)  
650-736-2312

**U.S. Bill of Rights Foundation**

Dane vonBreichenruchardt, President  
[usbor@aol.com](mailto:usbor@aol.com)  
202-546-7079

\* These groups and individuals support the general principles expressed in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposal, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

**IV. COUNTER-ARGUMENTS AND REBUTTAL**

A. *Isn't torture sometimes necessary under certain conditions in order to obtain crucial information regarding terrorist activities, such as in the case of a suspected terrorist with knowledge about a "ticking time bomb"?*

Interrogation experts agree that the use of coercive and abusive interrogation techniques results in provision of false and misleading information.<sup>40</sup> The overwhelming evidence has shown that the use of interrogation techniques amounting to torture or cruel, inhuman or degrading treatment does not lead to better intelligence. In fact, to the contrary, the use of torture can compel detainees to offer information they think their interrogators want to hear in order to get the abuse to cease even if such information is false. Such was true in the case of Ibn al-Shaykh al-Libi, who told U.S. interrogators under the threat of torture that Saddam Hussein was linked to Al Qaeda. This information, which was used in

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<sup>40</sup> See, e.g., Intelligence Science Board, *Educing Information* (Russell Swenson ed.) (2006).  
<http://www.fas.org/irp/dni/educing.pdf>.

part to make the case for the invasion of Iraq, was false. As Mr. Al Libi later stated: “They were killing me, I had to tell them something.”

Furthermore, while the “ticking time bomb” scenario is frequently invoked as the quintessential example of the circumstances under which torture should be permitted (*i.e.* to obtain information regarding an imminent attack in order to save many lives), there is no empirical evidence that anything close to such a scenario ever occurs.

Finally, the use of torture and cruel, inhuman, and degrading treatment in the “war on terror” has engendered hostility toward the United States by many groups and states around the world. By rejecting the use of techniques that fan the fires of hatred and deter cooperation from our allies, we lay the foundation for the country’s renewed commitment to maintaining human dignity and its assumption of a reinvigorated role among the nations dedicated to ensuring world-wide acceptance of these principles.

*B. Why should the U.S. be forced to obey international law?*

Besides the moral obligation that the U.S. has to obey international laws and treaties that it has signed and ratified, it is crucial for political and practical reasons that the country do so. First, not only has the U.S. abided by the provisions of the Geneva Conventions in virtually every single war since the U.S. signed the conventions over a century ago. Second, many of the obligations of the Geneva Conventions and other international treaties are codified in our domestic laws.

Additionally, political and practical reasons make it necessary for the U.S. to follow international norms for the treatment of detainees. Our allies are increasingly declining to cooperate in counterterrorism and counterinsurgency operations because of public sentiment about U.S. detainee treatment policies and practices and the risk of taint from being associated with them. Our national security is compromised by the lack of such cooperation and support.

*C. Why should detainees seized and detained in the “war on terror” be afforded the same due process rights as U.S. citizens?*

We are insisting only that these detainees receive the full rights owed to them under the Due Process Clause (and other protections to which the U.S. is bound), with the understanding that due process may not afford them the same rights as citizens given the nature of their offending conduct, the circumstances of their seizure, their citizenship, or their combatant status. Under the current regime, detainees are held for years without charge or trial and without access to counsel or any neutral tribunal to review the legality of their detention. Such a system is inconsistent with this country’s core democratic values.

## V. RECOMMENDED DOCUMENTS FOR FURTHER INFORMATION

1. Amnesty International, *Cruel and Inhuman: Conditions of Isolation for Detainees at Guantanamo Bay*, April 2, 2007, available at [www.amnesty.org/en/library/asset/AMR51/051/2007/en/dom-AMR510512007en.html](http://www.amnesty.org/en/library/asset/AMR51/051/2007/en/dom-AMR510512007en.html)
2. Declaration of Principles for a Presidential Executive Order on Prisoner Treatment, Torture and Cruelty, Campaign to Ban Torture website, [http://www.campaigntobantorture.org/index.php?option=com\\_content&task=view&id=14&Itemid=43](http://www.campaigntobantorture.org/index.php?option=com_content&task=view&id=14&Itemid=43)
3. Center for National Security Studies and The Brennan Center recommendations, available at [http://judiciary.senate.gov/pdf/08-0o7-16Kate\\_Martin\\_%20Testimony.pdf](http://judiciary.senate.gov/pdf/08-0o7-16Kate_Martin_%20Testimony.pdf)
4. Sarah Mendelson, *Opt Back In to the International System Part I: Counterterrorism*, Center for Strategic and International Studies 3 (2007). available at, [http://www.csis.org/media/csis/pubs/071001\\_mendelson\\_counterterrorism.pdf](http://www.csis.org/media/csis/pubs/071001_mendelson_counterterrorism.pdf)
5. NYU School of Law Center for Human Rights and Global Justice, *On the Record: U.S. Disclosures on Rendition, Secret Detention and Coercive Interrogation* (2008)
6. Center for Strategic and International Studies, *Five Years After 9/11: An Assessment of America's War on Terror* (2006) (Julianne Smith and Thomas Sanderson, Ed.), available at [http://www.csis.org/media/csis/pubs/five\\_years\\_after\\_9-11smallsize.pdf](http://www.csis.org/media/csis/pubs/five_years_after_9-11smallsize.pdf)
7. Human Rights News, UN: 'Disappearances' Treaty a Major Advance, Countries Should Push for Treaty's Worldwide Adoption and Ratification (2005), available at <http://hrw.org/english/docs/2005/09/26/global11785.htm>
8. Testimony of Tom Malinowski, Washington Advocacy Director, Human Rights Watch, before the Senate Foreign Relations Committee on the CIA Secret Detention, Rendition, and Interrogation Program, July 26, 2007, available at <http://www.senate.gov/~foreign/testimony/2007/MalinowskiTestimony070726.pdf>
9. International Committee of the Red Cross, Concerning the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments (2006), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-nations-statement-171006>
10. Paul Pillar in Dana Priest, *Officials Relieved Secret is Shared*, WASH. POST. Sept. 7, 2006, at A17, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090602055\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090602055_pf.html)

11. Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo Bay*, June 2008, available at: <http://hrw.org/english/docs/2008/06/04/usint19024.htm>
12. Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, April 2008, available at <http://www.hrw.org/reports/2008/jordan0408/jordan0408web.pdf>.
13. Human Rights Watch, *Ghost Prisoner: Two Years in Secret CIA Detention*, Feb. 2007, available at <http://hrw.org/reports/2007/us0207/us0207web.pdf>.
14. Human Rights Watch, *Why Am I Still Here? The 2007 Renditions and the Fate of Those Still Missing*, October 2008, available at: <http://hrw.org/reports/2008/eastafrica1008/>
15. Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama <http://hrw.org/reports/2008/us1108/>
16. Center for Constitutional Rights, *Ending Arbitrary Detention, Torture and Extraordinary Rendition*, available at <http://www.ccrjustice.org/100Days>
17. *Report on FBI Interrogations Omits Lindh Case of Torture*, Op-Ed, PHIL. INQUIRER, June 2, 2008, at A15, available at [http://www.philly.com/inquirer/opinion/20080602\\_Report\\_on\\_FBI\\_interrogations\\_omits\\_the\\_Lindh\\_case\\_of\\_torture.html](http://www.philly.com/inquirer/opinion/20080602_Report_on_FBI_interrogations_omits_the_Lindh_case_of_torture.html)
18. *The Al-Marri Decision: A Victory for One Man, and for a Principle, But One With Limited or Nonexistent Political Consequence*, FINDLAW (June 18, 2007), available at [http://writ.news.findlaw.com/commentary/20070618\\_radack.html](http://writ.news.findlaw.com/commentary/20070618_radack.html)
19. Complaint, *Doe v. Rumsfeld*, 1:08-cv-01902-CKK (D.D.C. 2008)
20. *The Government's Opportunistic Use of the "Enemy Combatant" Label: How This Category Is Being Used as a Prosecution Tactic*, CNN.COM (Oct. 15, 2004) available at <http://www.cnn.com/2004/LAW/10/15/radack.enemy.combatant/index.html>
21. *United States Citizens Detained as "Enemy Combatants": The Right to Counsel as a Matter of Ethics*, 12 WM. & MARY BILL RTS. J. 221 (2003), available at [http://2009transition.org/liberty-security/administrator/index2.php?option=com\\_docman&section=documents&task=download&bid=5](http://2009transition.org/liberty-security/administrator/index2.php?option=com_docman&section=documents&task=download&bid=5)
22. Catherine Powell, *Human Rights at Home: A Domestic Blueprint for the Next Administration* (October 2008), available at <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>
23. Deborah N. Pearlstein, *National Intelligence and the Rule of Law* (2008), available at <http://www.acslaw.org/files/National-Intelligence-Rule-Law.pdf>
24. Devon Chaffee, *Rehabilitating the U.S. Ban on Torture: A Call for Transparent Treatment Policy*, available at <http://www.acslaw.org/files/Chaffee%20FINAL.pdf>

## APPENDIX

### Annotated Glossary of Executive, Legislative, & Judicial Actions Relating to Detention and Interrogation \*

Authors: Stanford International Human Rights Clinic

\*Note: This document was created by Stanford's International Human Rights Clinic and was not reviewed by the allies who signed on to the corresponding chapters in this index.

#### I. EXECUTIVE ACTIONS

Since September 11, 2001, President George W. Bush has issued a series of executive orders and presidential directives to the United States military and the defense, intelligence, and law enforcement agencies. With the force of law, President Bush instructed the Executive branch's military and civilian agents to seize and detain thousands of people around the world in the U.S. prosecution of its "Global War on Terror." The Department of Defense and the Department of Homeland Security, as well as intelligence agencies in turn issued regulations to implement the President's directives down the chain of command. As a consequence, many individuals in military, agency, or contractor custody, have been subjected to indefinite executive detention and coercive and abusive interrogation techniques that in many cases meet the international definition of torture. Moreover, the U.S. holds these "war on terror" detainees for many months or years without charge, trial, or access to any neutral tribunal, in violation of U.S. and international law. In signing statements accompanying post-9/11 legislation, President Bush repeatedly asserted that his constitutional authority to "supervise the unitary Executive Branch" justified conducting a "Global War on Terror" without congressional or judicial oversight.

At a minimum, the next administration must revoke all Executive orders, policy directives, and memoranda that authorize the use of cruel, inhuman or degrading treatment or torture as part of the interrogation of "war on terror" detainees. The next president should also repudiate all prior Executive branch actions authorizing extraordinary renditions conducted by the Central Intelligence Agency, Defense Intelligence Agency, Special Forces, or any other defense, intelligence or law enforcement agencies as well as any agency's practice of placing individuals in secret detention. Finally, in reviewing and reforming the United States' intelligence-gathering programs, the next president must support Congress's efforts to prevent the illegal and immoral abuse of detainees and to compensate wrongfully imprisoned detainees for the abuse they suffered at the hands of the U.S. military or its agents or contractors.

## A. EXECUTIVE ORDERS

### *Classified Executive Order on CIA Secret Detention Program (September 17, 2001)*<sup>1</sup>

This Executive Order authorized the Central Intelligence Agency (CIA) to create and operate a satellite secret detention and interrogation program using torture and cruel, inhuman or degrading treatment, enforced disappearances, and the transfer of detainees to countries that are known to use torture as part of the Executive's prosecution of the "war on terror".

### *Executive Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (November 13, 2001)*<sup>2</sup>

In this Executive Order, issued two weeks after the passage of the USA PATRIOT Act, the President vested authority over the detention and trial of all individuals seized during the course of the "war on terror" in the Secretary of Defense. The Order applies to anyone who is or who harbors a member of Al Qaeda or any individual who "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy." The Order states that individuals who fall within this category will be tried, "when tried," by military commissions in which it would be "impracticable" to apply the principles of law and the rules of evidence that govern criminal trials in U.S. civil courts.

In a January 22, 2002, message to the Joint Chiefs of Staff, Secretary of Defense Donald Rumsfeld stated that detainees who are suspected members of Al Qaeda or the Taliban do not qualify for prisoner of war (POW) status or any of the applicable protections of the Third Geneva Convention of August 12, 1949 (Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316).<sup>3</sup>

In July 2004, the Defense Department issued regulations to implement the President's Order of November 13, 2001. These regulations established the Combatant Status Review Tribunals<sup>4</sup> (CSRTs) and the Administrative Review Boards<sup>5</sup> (ARBs) for foreign nationals held as "enemy combatants" at Guantánamo.

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<sup>1</sup> See, Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, New Yorker, Aug. 13, 2007.

<sup>2</sup> 66 Federal Register 57833 (November 16, 2001); available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.

<sup>3</sup> Secretary of Defense Donald Rumsfeld, *Message to Joint Chiefs of Staff*, (Jan. 22, 2002), <http://news.findlaw.com/hdocs/docs/dod/12202mem.pdf>.

<sup>4</sup> 32 CFR Subtitle A, Chapter I, Subchapter B, "Military Commissions."

<sup>5</sup> Paul Wolfowitz, *Memo from Deputy Secretary of Defense to Secretary of the Navy re: Order Establishing Combatant Status Review Tribunals* (July 7, 2004), <http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf>; Memo from Secretary of the Navy for Distribution, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba* (July 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>; Memo from Deputy Secretary of Defense to

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that the military commission trial system established pursuant to the November 13 Military Order violated U.S. military law and international humanitarian law. Congress subsequently passed the Military Commissions Act of 2006, Pub. L. 109-366, to remedy these deficiencies.

***Classified Executive Order, Authorizing Worldwide Al Qaeda Raids (spring 2004)***<sup>6</sup>

According to the New York Times, a 2004 Executive Order identifies 15 to 20 countries, including Syria, Pakistan, Yemen, Saudi Arabia and other Persian Gulf states, where Al Qaeda militants were believed to be operating or to have sought sanctuary and authorizes U.S. military raids in those countries. The Pentagon has exercised this authority frequently, dispatching commandos to countries including Pakistan and Somalia.

***Executive Order 13425 on the Trial of Alien Unlawful Enemy Combatants by Military Commission (February 14, 2007)***<sup>7</sup>

Superseding the Executive Order of November 13, 2001, this Order establishes a new military commission trial system to try “alien unlawful enemy combatants.” “Unlawful enemy combatants,” as defined in the Military Commissions Act, includes civilians who “purposefully and materially” support hostilities against the U.S. even if they took no part in the hostilities or were seized far from any the battlefield.

Detainees held at the U.S. air base prison in Bagram, Afghanistan are processed through Unlawful Enemy Combatant Review Boards (UECRBs). The UECRBs do not include neutral judges, a recorder, or a JAG legal advisor. Detainees are not provided with an interpreter or a personal representative. Since April 2008, detainees may attend only the initial screening and may address the Board only at this time. There is no provision to advise detainees of the Government’s evidence or to allow detainees to call their own witnesses or present their own evidence. There is no specific standard of proof and no review or appeal outside of the Defense Department.

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Secretaries of the Military Departments, Chairman of the Joint Chiefs, Under Secretary of Defense for Policy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (July 14, 2004), <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>; Memo from the Deputy Secretary of Defense to Secretaries of the Military Departments, Chairman of the Joint Chiefs, Under Secretary of Defense for Policy, *Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (July 14, 2006), <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

<sup>6</sup>Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda*, The New York Times, November 9, 2008, [http://www.nytimes.com/2008/11/10/washington/10military.html?pagewanted=2&\\_r=1&ei=5070&adxnml=1&emc=eta1&adxnmlx=1226354881-G5zY71FaArZTAZbp%20Lz4yQ](http://www.nytimes.com/2008/11/10/washington/10military.html?pagewanted=2&_r=1&ei=5070&adxnml=1&emc=eta1&adxnmlx=1226354881-G5zY71FaArZTAZbp%20Lz4yQ).

<sup>7</sup> 72 Fed. Reg. 7737 (February 20, 2007); available at <http://edocket.access.gpo.gov/2007/pdf/07-780.pdf>.

*Executive Order 13440 on the Interpretation of the Geneva Conventions  
Common Article 3 as Applied to a Program of Detention and Interrogation  
Operated by the Central Intelligence Agency (July 20, 2007)*<sup>8</sup>

The Order states that detention and interrogation programs approved by the Director of the CIA must comply with Common Article 3 of the Geneva Conventions, as defined according to provisions of the Military Commissions Act and interpreted by the President. The MCA defines “cruel, inhuman, or degrading treatment or punishment” according to the U.S. constitutional “shocks the conscience” standard by which U.S. courts determine whether law enforcement conduct violates the Fifth, Eighth, or Fourteenth Amendments. The U.S. “shocks the conscience” standard is much vaguer and more difficult to enforce in court than the international prohibition set forth in Common Article 3.

## **B. PRESIDENTIAL DIRECTIVES**

### *National Security Presidential Directives (NSPD)*

#### **NSPD-9 on Defeating the Terrorist Threat to the United States (October 25, 2001)**

NSPD-9 calls on the Secretary of Defense to plan for military options "against Taliban targets in Afghanistan, including leadership, command-control, air and air defense, ground forces, and logistics."<sup>9</sup> The NSPD also calls for plans "against al Qaeda and associated terrorist facilities in Afghanistan, including leadership, command-control-communications, training, and logistics facilities."

In testimony before the 9/11 Commission on March 23, 2004, Secretary of Defense Rumsfeld described the objectives of NSPD-9: “To use all elements of national power, including intelligence, to eliminate the al Qaeda network and the sanctuaries for such and related terrorist networks.”<sup>10</sup> According to the Defense Secretary’s testimony, the Directive was presented for decision by principals on September 4, 2001 (7 days before September 11<sup>th</sup>) and signed by the President, with minor changes, on October 25, 2001.

**NSPD-26 CLASSIFIED on Intelligence Priorities** creates a dynamic process for articulating and reviewing intelligence priorities. Directives from the Director of the CIA have since established a National Intelligence Priorities Framework, which is a mechanism that translates U.S. foreign intelligence objectives and priorities

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<sup>8</sup> 72 FR 40707 (July 24, 2007); <http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf>.

<sup>9</sup> According to a White House press release dated April 1, 2004, this classified document was the first major substantive national security decision directive issued by the current administration. <http://www.whitehouse.gov/news/releases/2004/04/20040401-4.html#16>.

<sup>10</sup> [http://www.fas.org/irp/congress/2004\\_hr/rumsfeld\\_statement.pdf](http://www.fas.org/irp/congress/2004_hr/rumsfeld_statement.pdf).

approved by the National Security Council into specific guidance and resource allocations for the Intelligence Community.<sup>11</sup>

**NSPD-46 CLASSIFIED on U.S. Strategy and Policy in the War on Terror (March 6, 2006)** ordered the development of a National Implementation Plan (NIP) to synchronize all aspects of the use of national power and influence, monitor planning and development, and provide recommendations to the National Security Council and the Homeland Security Council. The Directive also ordered the development of Department-Specific Supporting Plans that articulate the approach of each agency and department in supporting the NIP.<sup>12</sup>

### *Homeland Security Presidential Directives (HSPD)*

#### **HSPD-2 on Combating Terrorism through Immigration Policies (October 29, 2001)<sup>13</sup>**

This Directive set forth the President's demand for an aggressive U.S. policy "to prevent aliens who engage in or support terrorist activity from entering the United States and to detain, prosecute, or deport any such aliens who are within the United States." HSPD-2 authorized the Attorney General to create a Foreign Terrorist Tracking Task Force (Task Force) to accomplish this mission, to be staffed by personnel from the Departments of State, the Immigration and Nationalization Service (INS), the Federal Bureau of Investigation, the Secret Service, the Customs Service, and the intelligence and military services.

#### **HSPD-6 on the Integration and Use of Screening Information to Protect Against Terrorism (September, 16 2003)<sup>14</sup>**

In this Directive, the President ordered federal agencies and departments to cooperatively develop information and screening systems designed to deter, detect, and deport "suspected terrorists." "Suspected terrorists" are defined as "individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism."

The Directive defines any information pertaining to "suspected terrorists" as "Terrorist information" that must be used in "Federal, State, local, territorial, tribal, foreign-government, and private-sector screening processes." Moreover, according to HSPD-6, in addition to law enforcement and immigration officials, the U.S. military and intelligence community are entitled to full access to the "Terrorist information" in U.S. agencies' collective databases.

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<sup>11</sup> George Tenet, *Written Statement for the Record of the Director of Central Intelligence before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004),

[http://www.au.af.mil/au/awc/awcgate/cia/tenet\\_testimony\\_03242004.htm](http://www.au.af.mil/au/awc/awcgate/cia/tenet_testimony_03242004.htm).

<sup>12</sup> Unclassified briefing from Brigadier General Mark O. Schissler, USAF, Deputy Director for the War on Terrorism, The Joint Staff; [http://www.dtic.mil/ndia/2006psa\\_psts/schiss.pdf](http://www.dtic.mil/ndia/2006psa_psts/schiss.pdf).

<sup>13</sup> <http://www.fas.org/irp/offdocs/nspd/hspd-2.htm>.

<sup>14</sup> <http://www.fas.org/irp/offdocs/nspd/hspd-6.html>.

## **HSPD-11 on Comprehensive Terrorist-Related Screening Procedures (August 27, 2004)<sup>15</sup>**

This Directive was designed to “build[] on HSPD-6” to allow the U.S. to “more effectively ... detect and interdict ... ‘suspected terrorists.’” As in HSPD-6, “suspected terrorists” are defined as “individuals known or reasonably suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.”

The Directive calls for a “coordinated and comprehensive approach to terrorist-related screening” and expressly states that U.S. intelligence and counterintelligence programs are entitled to cooperation from officials in immigration, law enforcement, and border protection to support “homeland security ... at home and abroad.”

### **C. SIGNING STATEMENTS**

*President Bush’s Statement on Signing the Authorization for Use of Military Force, Pub. L. 107-40 (September 18, 2001)<sup>16</sup>* proclaimed the intent to defend the U.S. preemptively and with force in a war to be fought both on the home front and across the globe. The U.S.’s enemy in this war included “those who plan, authorize, commit, or aid terrorist attacks against the United States and its interests – including those who harbor terrorists.”

*President Bush’s Statement on Signing the Congressional Resolution to Authorize the Use of United States Armed Forces against Iraq, Pub. L. 107-243 (October 16, 2002)<sup>17</sup>* articulated the Executive Branch’s “long-standing position[] ... on ... the President’s constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests” and that Congress’s support was not required.

*President Bush’s Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 (December 17, 2004)<sup>18</sup>* signaled the President’s intent to interpret this Act consistent with (1) the President’s constitutional authority to conduct foreign relations and his Commander-in-Chief power over the Armed Forces, and (2) the President’s constitutional role as supervisor of the “unitary executive branch, which encompasses the authority to conduct intelligence operations.” The President also re-stated his position on his authority to withhold any information relating to his Executive duties, including “information bearing on national security.”

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<sup>15</sup> <http://www.fas.org/irp/offdocs/nspd/hspd-11.html>.

<sup>16</sup> 37 Weekly Compilation of Presidential Documents 1834 (September 24, 2001); <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html>.

<sup>17</sup> 38 WCPD 1779 (October 21, 2002); <http://www.whitehouse.gov/news/releases/2002/10/20021016-11.html>.

<sup>18</sup> 40 WCPD 2993 (December 27, 2004); <http://www.whitehouse.gov/news/releases/2004/12/20041217-15.html>.

*President Bush's Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. 109-148 (December 30, 2005)*<sup>19</sup>

This signing statement addressed, in part, the Detainee Treatment Act (DTA) of 2005, Pub. L. 109-48. The President stated that “[t]he executive branch shall construe ... the [DTA] ... in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.”

The President also stated that the Executive branch would construe the DTA to preclude federal courts from exercising jurisdiction over “any existing or future action, including applications for writs of habeas corpus.” The Supreme Court in *Hamdan v. Rumsfeld*, *supra*, held that this provision did not apply to cases pending when the DTA was enacted. Congress responded to this decision with passage of the Military Commissions Act 2006 which stripped U.S. courts of jurisdiction over habeas actions by detained aliens determined to be enemy combatants or “awaiting such determinations” and over “any other action against the United States ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of a detained alien determined to be an enemy combatant “since September 11, 2001.” The Supreme Court in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), invalidated the MCA’s jurisdiction-stripping provision, but only as relating to habeas corpus cases thought on behalf of Guantánamo detainees.

## **II. MEMORANDA**

### **A. September 25, 2001 Memorandum**

1. Re: Memorandum Opinion for the Deputy Counsel to the President
  - i. To: Timothy Flanigan, Deputy Counsel to the President
  - ii. From: John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel

### **B. December 28, 2001 Memorandum**

1. Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba
  - i. To: William J. Haynes II, General Counsel, Department of Defense
  - ii. From: Patrick F. Philbin, Deputy Assistant Attorney General and John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel

### **C. January 9, 2002 Memorandum**

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<sup>19</sup> <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

1. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees
  - i. To: William J. Haynes II, General counsel, Department of Defense
  - ii. From: John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel and Robert J. Delahunty, Special counsel, U.S. Department of Justice

**D. January 19, 2002 Memorandum**

1. Re: Status of Taliban and al Qaeda
  - i. To: Chairman of the Joint Chiefs of Staff
  - ii. From: Donald Rumsfeld, Secretary of Defense

**E. January 22, 2002 Memorandum**

1. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees
  - i. To: Alberto R. Gonzales, Counsel to the President, and William J. Haynes, General Counsel, Department of Defense
  - ii. From: Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice

**F. January 25, 2002 Memorandum**

1. Re: Decision Regarding the Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban
  - i. To: President Bush
  - ii. From: Alberto R. Gonzales, Counsel to the President

**G. January 26, 2002 Memorandum**

1. Re: Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan
  - i. To: Counsel to the President and the Assistant to the President for National Security Affairs
  - ii. From: Colin L. Powell, Secretary of State

**H. February 1, 2002 Memorandum**

1. Re: Justice Department's position on why the Geneva Conventions do not apply to al Qaeda and Taliban detainees

- i. To: President Bush
- ii. From: John Ashcroft, Attorney General of the U.S.

**I. February 2, 2002 Memorandum**

- 1. Re: Comments on Your Paper on the Geneva Convention
  - i. To: Counsel to the President
  - ii. From: William H. Taft IV, Legal Advisor, U.S. Department of State

**J. February 7, 2002 Memorandum**

- 1. Re: Humane Treatment of al Qaeda and Taliban Detainees
  - i. To: The Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of CIA, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff
  - ii. From: George W. Bush, President of the U.S.

**K. February 7, 2002 Memorandum**

- 1. Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949
  - i. To: Alberto R. Gonzales, Counsel to the President
  - ii. From: Jay B. Bybee, Assistant Attorney General, U.S. Department of Justice

**L. February 26, 2002 Memorandum**

- 1. Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan
  - i. William J. Hanyes II, General Counsel, Department of Defense
  - ii. From: Jay s. Bybee, Assistant Attorney General, U.S. Department of Justice

**M. August 1, 2002 Memorandum**

- 1. Re: Standards of Conduct for Interrogations under 18 U.S.C. § 2340-2340A
  - i. To: Alberto R. Gonzales, Counsel to the President

- ii. From: Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice

**N. August 1, 2002 Memorandum**

- 1. Re: Letter regarding “the views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives”
  - i. To: Alberto R Gonzales, Counsel to the President
  - ii. From: John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel

*(The following three memos (#s 15, 16, & 17) are cover letters to the requests for approval of Counter-Resistance Strategies, which follow #s 18, & 19.)*

**O. October 25, 2002 Memorandum**

- 1. Re: Counter-Resistance Techniques
  - i. To: Chairman of the Joint Chiefs of Staff
  - ii. From: General James T. Hill, Department of Defense, U.S. Southern Command, Miami, FL

**P. October 11, 2002 Memorandum**

- 1. Re: Counter-Resistance Strategies
  - i. To: General James T. Hill, Commander U.S. Southern Command
  - ii. From: Maj. Gen. Michael Dunlavey, Department of Defense, JTF 170, Guantanamo Bay, Cuba

**Q. October 11, 2002 Memorandum**

- 1. Re: Legal Review of Aggressive Interrogation Techniques
  - i. To: General James t. Hill, Commander, Joint Task Force 170
  - ii. From: Diane Beaver, Staff Judge Advocate, Department of Defense, JTF 170, Guantanamo Bay, Cuba

**R. October 11, 2002 Memorandum**

- 1. Re: Request for Approval of Counter-Resistance Strategies
  - i. To: General James T. Hill, Commander, Joint Task Force 170

- ii. From: Jerald Phifer, Director, J2, Department of Defense, JTF 170, Guantanamo Bay, Cuba

**S. October 11, 2002 Memorandum**

- 1. Re: Legal Brief on Proposed Counter-Resistance Strategies
  - i. To: General James t. Hill, Commander, Joint Task Force 170
  - ii. From: Diane Beaver, Staff Judge Advocate, Department of Defense, JTF 170, Guantanamo Bay, Cuba

**T. November 27, 2002 Memorandum**

- 1. Re: Counter-Resistance Techniques
  - i. To: Donald Rumsfeld, Secretary of Defense
  - ii. From: William J. Haynes II, General Counsel, Department of Defense

**U. January 15, 2003 Memorandum**

- 1. Re: Detainee Interrogations
  - i. To: General Counsel of the Department of Defense
  - ii. From: Donald Rumsfeld, Secretary of Defense

**V. January 15, 2003 Memorandum**

- 1. Re: Counter-Resistance Techniques
  - i. To: Commander U.S. Southern Command
  - ii. From: Donald Rumsfeld, Secretary of Defense

**W. January 17, 2003 Memorandum**

- 1. Re: Working Group to Assess (Interrogation Issues)
  - i. To: General Counsel of the Department of the Air Force
  - ii. From: William J. Haynes II, General Counsel, Department of Defense

**X. March 6, 2003 Memorandum**

- 1. Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations

- i. Classified by: Donald Rumsfeld, Secretary of Defense

**Y. April 4, 2003 Memorandum**

- 1. Re: Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations
  - i. Classified by: Donald Rumsfeld, Secretary of Defense

**Z. April 16, 2003 Memorandum**

- 1. Re: Counter-Resistance Techniques in the War on Terrorism
  - i. To: James T. Hill, Commander U.S. Southern Command
  - ii. From: Donald Rumsfeld, Secretary of Defense

**AA. March 19, 2004 Memorandum**

- 1. Re: Draft opinion concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies in occupied Iraq
  - i. To: William H. Taft IV, General Counsel, Department of State, William J. Haynes II, General Counsel, Department of Defense; John Bellinger, Legal Adviser for National Security; Scott Muller, General Counsel, Central Intelligence Agency
  - ii. Distributed to: Alberto R. Gonzales, Counsel to the President
  - iii. From: Jack Goldsmith III, Assistant Attorney General, Department of Justice, Office of Legal Counsel

**BB. March 22, 2005 Memorandum**

- 1. Re: Summarized Witness Statement of Major General Geoffrey D. Miller, former Interrogation Control Element chief at Guantanamo, stating that predecessor “arranged for SERE instructors to teach their techniques to the interrogators at GTMO.”

**CC. March 31, 2005 Memorandum**

- 1. Re: JTF GITMO “SERE” Interrogation SOP DTD 10 Dec 02, witness statement in which Maj. Gen. Geoffrey Miller states that military psychologists at Guantanamo “were trained through SERE.”

**DD. June 9, 2005 Memorandum**

1. Final report of Lt. Gen. Randall Schmidt and Brig. Gen. John Furlow, investigation into FBI allegations of detainee abuse at Guantanamo Bay, Cuba detention facility.

### **III. LEGISLATIVE ACTIONS**

#### **A. EXISTING LEGISLATION**

##### **1. *War Crimes Act of 1996 (“WCA”), Public Law No. 104-92***

- i. The War Crimes Act of 1996 was passed with overwhelming majorities by the United States Congress and signed into law by President Bill Clinton.<sup>20</sup> The law defines a war crime to include a "grave breach of the Geneva Conventions", specifically noting that "grave breach" should have the meaning defined in any convention (related to the laws of war) to which the U.S. is a party. The definition of "grave breach" in some of the Geneva Conventions have text that extend additional protections, but all the Conventions share the following text in common: "... committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health." The law applies if either the victim or the perpetrator is a national of the United States or a member of the U.S. armed forces. The penalty may be life imprisonment or death. The death penalty is only invoked if the conduct resulted in the death of one or more victims.

##### **2. *Authorization for the Use of Military Force (“AUMF”), Public Law No. 107-40***

- i. Signed into law: September 18, 2001
- ii. Description: This act authorizes the President to use all necessary and appropriate force against those nations, organizations, or people he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 so as to prevent any future acts of international terrorism against the United States by such nations, organizations, or people.

##### **3. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT ACT”) Act of 2001, Public Law No. 107-56***

- i. Signed into law: October 26, 2001

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<sup>20</sup> <http://www.presidency.ucsb.edu/ws/index.php?pid=53212>

- ii. Description: The Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial and other records; eases restrictions on foreign intelligence gathering within the United States; expands the Secretary of the Treasury's authority to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the Act's expanded law enforcement powers can be applied.
4. ***Detainee Treatment Act of 2005 ("DTA"), Public Law No. 109-48***
- i. Signed into law: December 30, 2005
  - ii. Description: The Detainee Treatment Act of 2005 is part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863). It prohibits the "cruel, inhuman, or degrading treatment or punishment" of detainees and provides for "uniform standards" for interrogation. The Act also stripped the federal courts of jurisdiction over detainees' habeas petitions filed to challenge the legality of their detention, stating that "no court, justice or judge shall have jurisdiction to hear or consider" applications on behalf of Guantanamo detainees.
5. ***Military Commissions Act of 2006, Public Law No. 109-366***
- i. Signed into law: October 17, 2006
  - ii. Description: Drafted in the wake of the Supreme Court's decisions in *Hamdan v. Rumsfeld*, the Military Commissions Act's ("MCA") stated purpose was "[t]o authorize trial by military commission for violations of the law of war, and for other purposes." This legislation gives the president authorization to set up military commissions to try enemy combatants, and sets limits for their interrogation and prosecution based on Common Article 3 of the Geneva Conventions. Defendants may not invoke the Geneva Conventions as a source of rights and cannot prevent the use of hearsay evidence from entering the court.
6. ***USA Patriot Act Improvement and Reauthorization Act of 2005, S. 1389, H.R. 3199***
- i. Signed into law: April 26, 2006
  - ii. This Act reauthorizes expiring provisions of the USA PATRIOT Act, adds dozens of additional safeguards to protect Americans' privacy and civil liberties, and strengthens port security.

7. ***The National Defense Authorization Act for Fiscal Year 2008, Pub. Law No. 110-181***

- i. Signed into law: January 28, 2008
- ii. This Act states that the U.S. government should encourage the detainees' host nations as well as the international community to assist the Defense Department's efforts to repatriate detainees whom the Administrative Review Board orders released. The Act also mandates that the Defense Secretary report to the House and Senate defense committees his plans for the detainees remaining at Guantanamo. In addition, the Defense Secretary is required to inform the committees of the number of detainees the Department would release or transfer as well as the number of detainees the Department would not charge but nevertheless would continue to detain.

#### **IV. JUDICIAL ACTIONS**

The below section provides a list of key impact litigation challenging human rights violations arising out of counterterrorism measures. It focuses on litigation challenging: (1) prolonged arbitrary detention of persons in military custody; and (2) rendition, torture, and enforced disappearances. This section does not however discuss impact litigation challenging other civil liberty abuses arising out of counterterrorism measures including: (1) Post-9/11 Detention practices affecting immigrants in the U.S.; (2) Illegal domestic wiretapping and surveillance; and (3) Discrimination (including profiling) based on race, religion, ethnicity or ideology.

##### **A. CASES RELEVANT TO THE INCIDENCES OF DETENTION & TORTURE**

1. ***Brown v. Mississippi, 297 U.S. 278 (1936)***
  - i. In *Brown v. Mississippi*, the United States Supreme Court ruled unanimously that a defendant's confession(s) that is extracted through police violence (including torture) could not be used as evidence and violates the Due Process Clause.
2. ***Watts v. Indiana, 338 U.S. 49 (1949)***
  - i. *Watts* was arrested on suspicion of assault and murder. The police him in a bare room with no furniture and questioned him on and off for six straight days. Eventually he confessed, and was later found guilty of, murder. In *Watts v. Indiana*, the United States Supreme Court found that the confession was inadmissible because it was not voluntary. Noting that the American legal system is an accusatorial system, rather than an

inquisitorial system, the Court found that the Due Process Clause of the 14<sup>th</sup> Amendment bars police procedure that "violates our basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure."

3. ***Spano v. New York*, 360 U.S. 315 (1959)**

- i. *Spano v. New York* represents the Supreme Court's movement away from the subjective "voluntariness" standard for determining whether the police violated due process standards when eliciting confessions, and towards the modern rule articulated in *Miranda v. Arizona*.

4. ***Wright v. McMann*, 387 F.2d 519 (2nd Cir. 1967)**

- i. The Second Circuit Court of Appeals held that allegations, that the prisoner was denuded and exposed to bitter cold in solitary confinement cell for substantial period of time, that he was deprived of basic elements of hygiene such as soap and toilet paper, and that his cell was filthy, without adequate heat, and virtually barren would, if established, constitute cruel and unusual punishment in violation of Eighth Amendment.

5. ***Ketch v. Gillman*, 488 F.2d 1136 (8th Cir. 1973)**

- i. Mental institution inmates brought an action to enjoin the forcible injection of drugs. The United States District Court for the Southern District of Iowa, Central Division, William C. Stuart, J., dismissed the complaint, and the inmates appealed. The Court of Appeals held that the administration of a drug to induce vomiting to non-consenting mental institution inmates on the basis of alleged violations of behavioral rules constituted cruel and unusual punishment.

6. ***O'Brien v. Moriarity*, 489 F.2d 941 (1st Cir. 1974)**

- i. Inmates of a prison's isolated maximum-security facility brought suit seeking a restoration of the facility's open cell policy—which was discontinued following a prison disturbance. The Court of Appeals held that (1) the District Court was not at liberty, after holding an evidentiary hearing, to dispose of the case on the pleadings alone, (2) conditions of confinement of plaintiffs were not so severe as to be per se impermissible, where plaintiffs apparently received the same food as others, had no complaint as to heat, sanitation, lighting or bedding, were allowed out of their cells for an hour daily, and where one of them admitted to having television and some visitation privileges and (3) decision of prison authorities, made at a time of extreme unrest and supported by other considerations, not to permit the fifteen inmates, who occupied individual cells in the prison's isolated maximum security facility, to roam around at once could not be said to be so unreasonable

as to be impermissible, notwithstanding the fact that the disturbance which precipitated the change in the open cell policy did not involve those fifteen inmates.

**7. *Estelle v. Gamble*, 429 U.S. 97 (1976)**

- i. In *Estelle v. Gamble*, the United States Supreme Court held that in order to state a cognizable claim for a violation of Eighth Amendment rights, a prisoner must allege acts or omissions sufficiently harmful to show “deliberate indifference” to serious medical needs, and that medical malpractice did not rise to the level of “cruel and unusual punishment” simply because the victim was a prisoner.

**8. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003)**

- i. Petitioner, by his next friend, filed a habeas petition challenging his detention as an “enemy combatant” at a naval base located in Cuba. The United States District Court for the Central District of California, 262 F.Supp.2d 1064, dismissed for lack of jurisdiction, and petitioner appealed. The Court of Appeals, Judge Reinhardt, Circuit Judge, held that: (1) habeas jurisdiction existed over the petition filed on behalf of “enemy combatant” detained on naval base located in Cuba but under the territorial jurisdiction of the United States pursuant to a lease granting the United States complete jurisdiction and control over the property; (2) for habeas purposes, the naval base located in Cuba was part of the United States pursuant to lease granting the United States complete jurisdiction and control over the property; and (3) although he was not physically present in the district, the District Court for the Central District of California had personal jurisdiction over the Secretary of Defense.

**9. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)**

- i. In *Hamdi v. Rumsfeld*, the U.S. Supreme Court reversed the dismissal of a habeas corpus petition brought on behalf of Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an “illegal enemy combatant”. The Court recognized the power of the Government to detain unlawful combatants, but ruled that detainees who are U.S. citizens must have the ability to challenge their detention before an impartial judge.

**10. *Rasul v. Bush*, 124 S. Ct. 2686 (2004)**

- i. *Rasul v. Bush* established that the U.S. court system had the authority to decide whether foreign nationals held in Guantánamo Bay were wrongfully imprisoned under the federal habeas statute, 28 U.S.C. §2241. The 6-3 ruling reversed the courts below which had held that the

Judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals held in Guantánamo Bay.

**11. *Khouzam v. Ashcroft*, 361 F.3d 161 (2nd Cir. 2004)**

- i. Alien petitioned for review of two final orders of the Board of Immigration Appeals denying him relief from deportation. The Court of Appeals held that: (1) there were serious reasons to believe that asylum applicant committed the murder in Egypt for which he was wanted, and therefore he was not entitled to review of the denial of his asylum and withholding of removal claims; and (2) alien was entitled to relief from removal under United Nations Convention Against Torture (CAT) since he would, more likely than not, be tortured if he was deported to Egypt.

**12. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004)**

- i. The U.S. Supreme Court unanimously ruled that the Alien Tort Statute (“ATS”) was intended to give courts jurisdiction over traditional law of nations cases—those involving ambassadors, for example, or piracy. Because Alvarez-Machain's claim did not fall into one of these traditional categories, it was not permitted by the ATS.

**13. *O.K. v. Bush*, 377 F. Supp.2d 102 (D.D.C. 2005)**

- i. Habeas petitioner, a Canadian detainee at being held in Guantánamo Bay, filed dual motions for a preliminary injunction barring the Government from subjecting him to torture or interrogation and for a preliminary injunction ordering the Government to provide his counsel and the court with thirty days' notice prior to transferring him to a foreign country. The District Court held that: (1) detainee was not entitled to a preliminary injunction against his interrogation, torture or other cruel or degrading treatment; and (2) detainee was not entitled to a preliminary injunction requiring thirty days' notice of his transfer to a foreign state.

**14. *In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85 (D.D.C. 2007)**

- i. Alien detainees alleging torture by United States military personnel sued military and civilian supervisors, seeking monetary damages. The District Court held that: (1) detainees lacked Fifth Amendment right to be free of torture; (2) detainees lacked any Eighth Amendment rights; (3) there was no *Bivens* right of action; (4) defendants had qualified immunity; (5) Government would be substituted for individual defendants under the Westfall Act; (6) neither the Alien Tort Statute nor the Geneva Convention Relative to the Protection of Civilian Persons in

Time of War (Geneva Convention IV) provided a basis for the suit; (7) claims against United States, as the party substituted in for personnel allegedly performing torture, would be dismissed due to failure to exhaust administrative remedies; (8) there was no private right of action under Geneva IV; and (9) court would not enter declaratory judgment.

**15. *Rasul v. Myers*, 2008 WL 108731 (D.C. Cir. 2008)**

- i. Former detainees held in Guantánamo Bay sued the Secretary of Defense and commanding officers, alleging they were tortured. Detainees asserted claims under the Alien Torture Statute, under the Geneva Conventions, and under the Religious Freedom Restoration Act (RFRA), and also asserted Fifth and Eighth Amendment claims under a *Bivens* cause of action. The Court of Appeals held that: (1) acts of torture allegedly committed against aliens detained in Guantánamo Bay were “within the scope of employment” of military personnel allegedly committing such acts, for purpose of deciding whether the United States should be substituted as defendant; (2) aliens detained at military base in Guantanamo Bay as aliens without property or presence in the United States, lacked any constitutional rights and could not assert *Bivens* claims against military personnel for alleged due process violations and cruel and unusual punishment inflicted upon them; and (3) term “persons,” as used in RFRA to generally prohibit the government from substantially burdening a “person's exercise of religion,” did not extend to non-resident aliens.

**16. *Arar v. Ashcroft*, 532 F.3d 157 (2nd Cir. 2008)**

- i. Plaintiff, a dual citizen of Syria and Canada, brought an action against United States and various government officials under the Torture Victim Protection Act (TVPA) and the Fifth Amendment, alleging that after being detained and mistreated, he was removed to Syria so that he could be interrogated under torture by Syrian authorities. The Court of Appeals held that: (1) Court had jurisdiction over government officials pursuant to New York long-arm statute; (2) complaint failed to state a claim for a violation of TVPA; and (3) Court would refrain from providing a new and freestanding *Bivens* remedy.

**17. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008)**

- i. In this consolidated case testing the Government’s authority under the Military Commissions Act of 2006 to deny “enemy combatants” the right to habeas corpus, the Supreme Court ruled that foreign nationals held at Guantanamo Bay have a right to pursue habeas challenges to their detention. The Court, split 5-4 with Justice Kennedy writing the majority opinion, ruled that Congress had not validly taken away habeas

rights because it must do so only as the Constitution allows—when the country faces internal rebellion or invasion. The Court also declared that detainees do not have to go through the special review process Congress created in the Detainee Treatment Act of 2005 and later amended by the MCA because that process did not constitute an “adequate and effective substitute” for the constitutional right to habeas corpus. The Court refused to accept the Bush Administration’s argument that the review process included sufficient legal protection to make it an adequate replacement. Congress, the Court concluded, unconstitutionally suspended the writ in enacting section 7 of the MCA.

**18. *Munaf v. Geren*, 128 S.Ct. 2207 (2008)**

- i. The Supreme Court decided unanimously that U.S. citizens held by U.S. military forces in Iraq have a right to file habeas cases, because the writ extends to reach them. However, the Court also ruled that federal judges do not have the authority to bar the transfer of those detainees to Iraqi authorities to face prosecution for crimes they may have committed in Iraq in violation of Iraqi law.