

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:

Charities, Foundations, and National Security

CHAPTER 1: Eliminate Unnecessary Barriers to Legitimate Charitable Work

Detention, Interrogation, and Trials of Suspected Terrorists

CHAPTER 2: Closing Guantánamo

CHAPTER 3: End Illegal Detention, Torture, and Rendition

CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law

Immigration and National Security

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

Secrecy, Surveillance, and Privacy

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

Separation of Powers and Executive Authority

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, 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.

APPENDIX

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

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*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.

• 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.

EXECUTIVE ORDERS

Classified Executive Order on CIA Secret Detention Program (September 17, 2001)¹

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)²

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).³

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 Tribunals⁴ (CSRTs) and the Administrative Review Boards⁵ (ARBs) for foreign nationals held as "enemy combatants" at Guantánamo.

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

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

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

⁴ 32 CFR Subtitle A, Chapter I, Subchapter B, "Military Commissions."

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)⁶

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)⁷

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

⁵ 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 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>.

⁶Eric 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&adxnll=1&emc=eta1&adxnllx=1226354881-G5zY71FaArZTAZbp%20Lz4yQ.

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

witnesses or present their own evidence. There is no specific standard of proof and no review or appeal outside of the Defense Department.

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)⁸

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.

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."⁹ 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.”¹⁰ According to the Defense Secretary’s testimony, the Directive was presented for decision by principals on September 4, 2001 (7 days before September 11th) 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 approved by

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

⁹ 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>.

¹⁰ http://www.fas.org/irp/congress/2004_hr/rumsfeld_statement.pdf.

the National Security Council into specific guidance and resource allocations for the Intelligence Community.¹¹

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.¹²

Homeland Security Presidential Directives (HSPD)

HSPD-2 on Combating Terrorism through Immigration Policies (October 29, 2001)¹³

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)¹⁴

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.

¹¹ 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.

¹² 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.

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

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

HSPD-11 on Comprehensive Terrorist-Related Screening Procedures (August 27, 2004)¹⁵

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.”

SIGNING STATEMENTS

President Bush’s Statement on Signing the Authorization for Use of Military Force, Pub. L. 107-40 (September 18, 2001)¹⁶ 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)¹⁷ 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)¹⁸ 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.”

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

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

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

¹⁸ 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)*¹⁹

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.

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

• MEMORANDA •

I. September 25, 2001 Memorandum

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

II. December 28, 2001 Memorandum

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

III. January 9, 2002 Memorandum

- A. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees
 - 1. To: William J. Haynes II, General counsel, Department of Defense
 - 2. 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

IV. January 19, 2002 Memorandum

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

V. January 22, 2002 Memorandum

- A. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees

1. To: Alberto r. Gonzales, Counsel to the President, and William J. Haynes, General Counsel, Department of Defense
2. From: Jay s. Bybee, Assistant Attorney General, U.S. Department of Justice

VI. January 25, 2002 Memorandum

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

VII. January 26, 2002 Memorandum

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

VIII. February 1, 2002 Memorandum

- A. Re: Justice Department's position on why the Geneva Conventions do not apply to al Qaeda and Taliban detainees
 1. To: President Bush
 2. From: John Ashcroft, Attorney General of the U.S.

IX. February 2, 2002 Memorandum

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

X. February 7, 2002 Memorandum

- A. Re: Humane Treatment of al Qaeda and Taliban Detainees
 1. 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

2. From: George W. Bush, President of the U.S.

XI. February 7, 2002 Memorandum

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

XII. February 26, 2002 Memorandum

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

XIII. August 1, 2002 Memorandum

- A. Re: Standards of Conduct for Interrogations under 18 U.S.C. § 2340-2340A
 1. To: Alberto R. Gonzales, Counsel to the President
 2. From: Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice

XIV. August 1, 2002 Memorandum

- A. 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”
 1. To: Alberto R Gonzales, Counsel to the President
 2. 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.)

XV. October 25, 2002 Memorandum

A. Re: Counter-Resistance Techniques

1. To: Chairman of the Joint Chiefs of Staff
2. From: General James T. Hill, Department of Defense, U.S. Southern Command, Miami, FL

XVI. October 11, 2002 Memorandum

A. Re: Counter-Resistance Strategies

1. To: General James T. Hill, Commander U.S. Southern Command
2. From: Maj. Gen. Michael Dunlavey, Department of Defense, JTF 170, Guantanamo Bay, Cuba

XVII. October 11, 2002 Memorandum

A. Re: Legal Review of Aggressive Interrogation Techniques

1. To: General James t. Hill, Commander, Joint Task Force 170
2. From: Diane Beaver, Staff Judge Advocate, Department of Defense, JTF 170, Guantanamo Bay, Cuba

XVIII. October 11, 2002 Memorandum

A. Re: Request for Approval of Counter-Resistance Strategies

1. To: General James T. Hill, Commander, Joint Task Force 170
2. From: Jerald Phifer, Director, J2, Department of Defense, JTF 170, Guantanamo Bay, Cuba

XIX. October 11, 2002 Memorandum

A. Re: Legal Brief on Proposed Counter-Resistance Strategies

1. To: General James t. Hill, Commander, Joint Task Force 170
2. From: Diane Beaver, Staff Judge Advocate, Department of Defense, JTF 170, Guantanamo Bay, Cuba

XX. November 27, 2002 Memorandum

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

XXI. January 15, 2003 Memorandum

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

XXII. January 15, 2003 Memorandum

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

XXIII. January 17, 2003 Memorandum

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

XXIV. March 6, 2003 Memorandum

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

XXV. April 4, 2003 Memorandum

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

XXVI. April 16, 2003 Memorandum

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

XXVII. March 19, 2004 Memorandum

- A. Re: Draft opinion concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies in occupied Iraq
 - 1. 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
 - 2. Distributed to: Alberto R. Gonzales, Counsel to the President
 - 3. From: Jack Goldsmith III, Assistant Attorney General, Department of Justice, Office of Legal Counsel

XXVIII. March 22, 2005 Memorandum

- A. 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.”

XXIX. March 31, 2005 Memorandum

- A. 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.”

XXX. June 9, 2005 Memorandum

- A. 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.

• LEGISLATIVE ACTIONS •

I. EXISTING LEGISLATION

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

1. The War Crimes Act of 1996 was passed with overwhelming majorities by the United States Congress and signed into law by President Bill Clinton.²⁰ 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.

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

1. Signed into law: September 18, 2001
2. 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.

C. *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*

1. Signed into law: October 26, 2001

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

2. 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.

D. *Detainee Treatment Act of 2005 ("DTA"), Public Law. No. 109-48*

1. Signed into law: December 30, 2005
2. 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.

E. *Military Commissions Act of 2006, Public Law No. 109-366*

1. Signed into law: October 17, 2006
2. 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.

F. *USA Patriot Act Improvement and Reauthorization Act of 2005, S. 1389, H.R. 3199*

1. Signed into law: April 26, 2006

2. 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.

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

1. Signed into law: January 28, 2008
2. 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.

• 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.

I. CASES RELEVANT TO THE INCIDENCES OF DETENTION & TORTURE

A. *Brown v. Mississippi*, 297 U.S. 278 (1936)

1. 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.

B. *Watts v. Indiana*, 338 U.S. 49 (1949)

1. Watts was arrested on suspicion of assault and murder. The police held 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 14th 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."

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

1. *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*.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. *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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.

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

1. 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.